

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

TRANSCENDENCE TRANSIT II, INC.;

TRANSCENDENCE TRANSIT, INC.;

Case 29-CA-182049

PATRIARCH PARTNERS, LLC AND

**PATRIARCH PARTNERS AGENCY SERVICES;
Single Employers or Joint Employers**

And

**LOCAL 1181-1061, AMALGAMATED TRANSIT
UNION, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Dated at Brooklyn, New York
this 30th day of October 2019

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I. STATEMENT OF THE CASE

A. Procedural History

On September 28, 2018, and December 19, 2018, the Region issued a Complaint (GC Exh. 1(G)) and Amended Complaint (GC Exh. 1 (J)), respectively, in Case No. 29-CA-182049, alleging that the Respondents Transcendence Transit II, Inc. (“Transcendence II”); Transcendence Transit, Inc. (“Transcendence”); Patriarch Partners, LLC (“Patriarch”); Patriarch Partners Agency Services, LLC (“PPAS”) (collectively “Respondents”) as joint and/or single employer and successor employers to TransCare NY, Inc. (“TransCare NY”), the predecessor employer of the bargaining unit, violated Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”) by failing to give Local 1181-1061, Amalgamated Transit Union, AFL-CIO (“the Union”) notice and opportunity to bargain over the effects of Respondents’ decision to cease operations on February 26, 2016. On September 4, 2019, Chief Administrative Law Judge Kenneth Chu (“ALJ Chu” or “the ALJ”) issued his decision recommending the dismissal of the complaint in its entirety. In recommending dismissal, ALJ Chu relied upon erroneous factual and legal conclusions as to single employer status and successorship, including the ALJ’s finding that Respondent Transcendence II never operated. Counsel for the General Counsel (“CGC”) asserts that those conclusions are unsupported by the record evidence and Board precedent. Accordingly, the ALJ’s decision should be overruled.

B. The Parties

1. Predecessor TransCare NY’s Paratransit Operations

The Amended Complaint alleges that TransCare NY preceded the Respondents as the employer to the employees effected by Respondent’s unfair labor practices. Under New York City Transit Authority Contract Number 07H9751T (“the paratransit contract”), TransCare NY provided Access-A-Ride Paratransit transportation services to disabled passengers for the New York City

Transit Authority (“MTA”). (Joint Exh. 7). TransCare NY’s principal office was located at 5811 Foster Avenue, Brooklyn, New York, at the intersection of Foster Avenue and Bank Street (“Bank Street facility”). (Tr. 60). TransCare NY was a subsidiary of TransCare. (Tr. 268). At all relevant times until February 24, Lynn Tilton was the director of TransCare and TransCare NY (Tr. 267). Tilton testified that as director, she made board decisions but was not involved in the day-to-day operations of the TransCare companies. (Tr. 268).

TransCare NY employed drivers who were responsible for transporting passengers with disabilities to and from destinations within New York City, (Tr. 17-18, 63, 80), driving vehicles owned by the MTA. (Tr. 138, 403). Three paratransit drivers, Shunda Watson, Karen Dockery and Mariane Insogno, testified at the hearing. (See Tr. 17-102). The paratransit drivers along with dispatchers, office personnel and supervisors worked out of the Bank Street facility. (Tr. 19, 56). Witness Alejandrina Cleary worked at the Bank Street facility as a scheduler. (Tr. 46).

2. The Union was the Exclusive Collective Bargaining Representative of TransCare NY’s Paratransit Drivers

TransCare NY’s drivers were represented by the Union. After a representation election conducted by the NLRB, on March 2, 2011, the NLRB certified the Union as the exclusive collective bargaining representative of certain employees of TransCare NY. (GC Exh. 20). Once certified, the Union commenced collective bargaining negotiations TransCare NY. (Tr. 212). As a result of those negotiations, the Union and TransCare NY entered into a collective bargaining agreement effective from April 1, 2012 through March 31, 2015. (GC Exh. 21). The bargaining unit described therein included all “Regular Full-Time/Part-Time Drivers employed in the [TransCare NY’s] ParaTransit Division headquartered at 800 Bank Street, Brooklyn, New York, excluding supervisors, office clerical employees and all other employees employed by the Employer.” (GC Exh. 21). The Union and TransCare NY extended the April 1, 2012 collective bargaining agreement, with some modifications, by a Memorandum of Agreement for a three-year term ending March 31, 2018. (GC

Exh. 22).

Union Delegate Anthony Cordiello, who was one of two Union officials assigned to represent the bargaining unit employees, testified at the hearing. (Tr. 211). Cordiello primarily dealt with TransCare NY's Vice President Thomas Fuchs regarding labor issues. (Tr. 215).

3. Respondents Patriarch Partners, LLC and Patriarch Partners Agency Services' Relationship to TransCare NY

Respondents Patriarch Partners, LLC and Patriarch Partners Agency Services' had common ownership and management with TransCare NY. At all material times, Tilton, the director of TransCare, has been the owner and sole manager of Patriarch Partners, LLC ("Patriarch"). Tilton characterized Patriarch as "an investment firm whose businesspeople and lawyers make decisions on investments, manage those investments, and monetize those investments." (Tr. 257). She testified that the employees of Patriarch advise her in her role as director and as owner of certain "portfolio companies." (Tr. 257). Tilton testified that she owns the "Portfolio companies" through investment funds that she also owns and through her personal money, and whose lenders are the investment funds owned by Tilton. (Tr. 265, 326). TransCare Corp. and TransCare NY were portfolio companies owned by Tilton. (Tr. 379). The ALJ correctly decided that Respondent Patriarch is an Employer within the meaning of Sections 2(2), (6), and (7) of the Act. (ALJD 2:15)

At all material times, Tilton has also been the owner and sole manager of Respondent PPAS. (Tr. 266, GC Exh. 1(N) Amended Answer). Tilton characterized Respondent PPAS as "an agent bank for the lending groups, providing loans to certain of the portfolio companies." (Tr. 264). Respondent PPAS does not employ any employees and Tilton has delegated the authority to perform Respondent PPAS's functions to certain employees of Patriarch Partners. (Tr. 265-67, 329). One of the functions of Respondent PPAS is to collect principal and interest payments from the portfolio companies and distribute them to the lender group. (Tr. 265-66). Respondent PPAS was the administrative agent for lenders that loaned money to TransCare and related entities including

TransCare NY, pursuant to an August 4, 2003 Credit Agreement (“TransCare Credit Agreement”). (Joint Exh. 5). These lenders including, ZOHAR CDO 2003-1, Limited; ZOHAR II 2005-1, Limited; ZOHAR III, Limited; and ARK Investment Partners II, L.P. (collectively “Lenders”) were controlled by Tilton. (Joint Exh. 5, Tr. 308). TransCare also had a revolving loan with Wells Fargo, which it used to pay certain operating expenses. (Tr. 382). Contrary to the ALJ’s finding (ALJD 5:6-7), Respondent PPAS was not an agent for Wells Fargo related to the Wells Fargo loan to TransCare or for any other transaction relevant to this proceeding. Respondent PPAS was only an agent for lending groups controlled by Tilton. (Joint Exhs. 5, 6; GC Exh. 12) .

4. Tilton and Patriarch’s Plan to Restructure TransCare and Create Respondents Transcendence and Transcendence II

Tilton and representative of Respondent Patriarch created Respondents Transcendence and Transcendence II part of their plan to resolve TransCare’s financial instability. In 2015 and 2016 TransCare suffered liquidity issues. (Tr. 269). Tilton testified that these liquidity issues were due to Wells Fargo reducing the amount of its asset-based loan to TransCare. (Tr. 269). In response to these issues, in early 2016,¹ Tilton and members of her Patriarch staff developed a restructuring plan to save certain businesses of TransCare and wind down certain other businesses based on an assessment of which business entities could be made profitable. (Tr. 270). Tilton testified in her October 29, 2018 deposition in the TransCare bankruptcy proceeding that the paratransit division created the most positive cash flow of the TransCare entities and that this positive cash flow kept the rest of the company alive. (GC. Exh. 34 p. 154-55).

Tilton testified that in February, Respondent Patriarch’s fifty employees, including Randy Jones, Head of Talent Acquisition; Michael Greenberg, a credit analyst; John Pothin, Head of Human Resources; and Brian Stephen, Director of Corporate Legal worked around the clock to effectuate the TransCare restructuring plan (Tr. 263). Jean-Luc Pelisse also worked on the TransCare restructuring

¹ All dates are in 2016, unless otherwise noted.

as a consultant to Patriarch Partners Management Group, another company owned by Tilton. (Tr. 261). TransCare's Vice President of Performance Improvement Glen Youngblood worked with Tilton and the Patriarch team on the restructuring. (Tr. 162, 166). Youngblood helped the Patriarch team to understand how TransCare's businesses ran and provided data to the Patriarch team which they used to determine profitability. (Tr. 167-68).

As of the week of February 22, Tilton and her Patriarch employees had determined to save three of the TransCare business operations - the New York City Paratransit operations, the Hudson Valley ambulance business and the Pittsburg ambulance business. In order for the operations of these businesses to continue and to save the jobs of approximately 700 of the 1200 TransCare employees,² the plan called for these businesses, and certain assets required to run the businesses, to be acquired by two newly formed companies, one for the paratransit operations and one for the ambulance businesses. (Tr. 271, 275). These three businesses were referred to as "New Co." by Patriarch employees (Tr. 448). The restructuring plan included the new companies hiring all TransCare NY's paratransit employees. Tilton and her Patriarch team planned for the TransCare businesses not being acquired by the new companies to wind down over a period of 60 to 90 days in order to satisfy certain payables and avoid an abrupt shutdown of important services, such as ambulance service in New York City. (Tr. 386).

In February, Patriarch employees took steps to lay the ground work for the new companies to take over the paratransit and select ambulance operations. On February 10, at Tilton's direction, the employees of Patriarch incorporated two new entities, Respondent Transcendence and Respondent Transcendence II. (Tr. 381-82; Joint Exhs. 3 and 4). As sole director of both new corporate entities,

² The ALJ inaccurately recounted Tilton's testimony stating that Tilton testified that she could preserve at least 700 of 1200 jobs at TransCare NY if the MTA contract was assigned to Transcendence II. (ALJD 6:24-25). However, Tilton's testimony was that she could save 700 jobs through the whole restructuring plan, including the Hudson Valley and Pittsburg ambulance businesses. (Tr. 271, 275). The total number of paratransit employees who were hired by Transcendence II was 390. (See GC 17).

Tilton testified, she planned to put up \$15 million of her personal funds as initial financing for these companies. (Tr. 275, 331; GC Exh. 1(N) Amended Answer). Tilton created Respondent Transcendence II, a wholly owned subsidiary of Respondent Transcendence, to hold the paratransit contract with the MTA and to employ the paratransit employees. (Tr. 277, 285). Tilton created Respondent Transcendence to operate the Hudson Valley and Pittsburg ambulance businesses. (Tr. 188). Tilton also bound the necessary insurance policies for the planned acquisition of assets and the operation of the paratransit and ambulance businesses to be acquired by Respondents Transcendence and Transcendence II. (Tr. 282). PPAS paid for the insurance policies. (Tr. 323).

The paratransit contract was a valuable asset that provided positive cash flow to the TransCare companies. (GC Exh. 34, p. 154-55). Tilton testified that the success of the newly created Transcendence and Transcendence II hinged on the MTA's approval of the assignment of the paratransit contract pursuant to Article 204 of the paratransit contract (Tr. 420), which provides:

ARTICLE 204 CONSENT OF AUTHORITY REQUIRED FOR
SUBCONTRACTING, SUBLETTING OR ASSIGNMENT
[TransCare NY] shall not subcontract, assign, transfer, convey, sublet
or otherwise dispose of this Contract or its right, title or interest in or
to the same or any part thereof **without prior written consent of the**
[MTA]. A violation of this provision shall be deemed to be a material
breach of the Contract.

(Joint Exh. 7, D-001528 (emphasis added)).

In order to facilitate the MTA's consent to Patriarch's transfer of the paratransit contract, Patriarch representatives, including consultant Pelissier, were in contact with the MTA while Patriarch was developing its restructuring plan. (Tr. 276, 416). Patriarch's representatives set up the new companies to comply with the MTA's parameters in order to try to eliminate any barriers to the MTA rapidly approving the transfer of the paratransit contract to Transcendence II. For example, the Patriarch finance department set up separate bank accounts for Respondents Transcendence and Transcendence II. (Tr. 278). Respondent Transcendence II had a separate bank account in order to

comply with the MTA's request that the paratransit revenues be separate from the other business entities. (Tr. 279). It was important to the MTA that the paratransit revenues were segregated because the MTA owned the vehicles used for the paratransit operations and they paid for the maintenance of those vehicles. The segregation was essential for the MTA to monitor that these funds were only being used for its vehicles. (Tr. 422). In her October 29, 2018 deposition, Tilton testified that the TransCare restructuring plan was predicated on the transfer of the paratransit contract and that Respondent Patriarch would not have moved forward with the restructuring plan if the MTA had not agreed to Respondent Transcendence II taking over the paratransit contract. (GC Exh. 35, p. 306).

As part of their set-up efforts, Tilton and her Patriarch employees also notified TransCare and TransCare NY managers about the restructuring plan and offered them employment with the newly formed Transcendence and Transcendence II. TransCare's Vice President of Performance Improvement Glen Youngblood was offered the position of President of Respondents Transcendence and Transcendence II. (Tr. 171, 284). Youngblood testified that he discussed this position with Lynn Tilton, Patriarch Attorney Brian Stephen and Patriarch recruiter Randy Jones and accepted the responsibilities of the position for the transition from TransCare to Transcendence. (Tr. 171). On February 15, Tilton authorized Youngblood to establish bank accounts and to use the accounts. (GC Exh. 19). On February 24, at the direction of Attorney Stephen, Youngblood signed bank documents and an assignment agreement as president of Respondents Transcendence and Transcendence II. (Tr. 193-94, Joint Exh. 8). Tilton testified that TransCare Vice President of Transit Services Thomas Fuchs had accepted an offer to transfer his employment from TransCare NY to Respondent Transcendence II and continue running the paratransit business line subject to the completion of the acquisition of the assets by Transcendence.³ (Tr. 284, 307).

³ As will be discussed below, Fuchs received confirmation of his offer of employment with Respondent Transcendence II on February 24. (GC Exh. 18).

C. Contrary to the ALJ's Findings, Respondents Foreclosed Upon and Transferred TransCare NY Assets Including the Paratransit Contract and Computer Servers

On February 23, negotiations between Tilton and Wells Fargo broke down over a dispute about funding the TransCare entities' payroll owed to employees that week. (Tr. 387). Tilton's plan to restructure TransCare relied on a commitment by Wells Fargo to fund the wind down, however instead Wells Fargo cut off its funds. (Tr. 341). Since Wells Fargo was not going to meet its commitment, TransCare could not operate and Tilton was forced to have TransCare and the related companies file for Chapter 7 bankruptcy, rather than winding down as previously planned. (Tr. 335). However, before the bankruptcy petition was filed, Tilton, through Respondent PPAS, took measures to secure the assets necessary to continue operating the three businesses that she and her team identified as profitable. As soon as Tilton was able to bind the workmen's comp and auto insurance needed for Respondents Transcendence and Transcendence II to operate, she initiated the foreclosure of the TransCare assets related to the paratransit and ambulances businesses that Respondents Transcendence and Transcendence II to begin operations. (GC Ex. 34 p. 284-85). Tilton testified that it was PPAS that paid for the workmen's compensation insurance for Respondents Transcendence and Transcendence II.

In the very early hours of February 24, Respondent PPAS, on behalf of the Lenders, invoked the terms of the TransCare Credit Agreement to effectuate a foreclosure of certain TransCare assets. (Tr. 335-36, 425). Respondent PPAS issued a Notice of Default and Acceleration on loans issued to TransCare, TransCare NY and other related entities. (Joint Exh. 6, D-000654-57). The Notice of Default was issued concurrently with a Notice of Acceptance of Collateral in Partial Satisfaction of Obligation. (Joint Exh. 6, D-000649-53). The Notice of Acceptance of Collateral identifies certain property as the "subject collateral" to be transferred from the TransCare entities to Respondent PPAS, as the agent for the lenders, in satisfaction of \$10,000,000 of TransCare's obligations to the lenders. (Joint Exh. 6, D-000649-53). Contract No. 07H9751I, the paratransit contract between the

MTA and TransCare NY, is identified as part of the subject collateral accepted in satisfaction of the debt. (Joint Exh. 6, D-000653). TransCare's personal property including computer servers are also identified as collateral subject to the foreclosure, however the Notice of Acceptance of Collateral does not identify any specific servers. (Joint Exh. 6, D-000653). Respondent Transcendence then purchased the property identified as the subject collateral in the Notice of Acceptance of Collateral, including the paratransit contract and TransCare's computer servers. (GC Exh. 12). As a result of this purchase, all rights, title and interest in the foreclosed assets, including the paratransit contract, were transferred to Respondent Transcendence. (GC Exh. 12). Glen Youngblood signed the Bill of Sale on behalf of Respondent Transcendence at the direction of an attorney or manager of Respondent Patriarch. (Tr. 181-82).

D. TransCare and TransCare NY filed for Bankruptcy on February 24

Late in the day on February 24, at Tilton's direction, TransCare New York and other TransCare companies filed for Chapter 7 bankruptcy, providing for liquidation of the companies rather than reorganization. (GC Exh. 8; Tr. 110-12, 335). Salvatore LaMonica was appointed trustee for the TransCare companies. LaMonica has practiced bankruptcy law for approximately 30 years and was appointed to the Southern District of New York bankruptcy panel in 2009 and had served as a trustee approximately 1500 times as of the date of his testimony. (Tr. 113). He testified that a trustee's job is to act as an independent fiduciary for the benefit of all creditors, to marshal assets, liquidate them and create a fund of money for distribution to creditors. (Tr. 114)

Lamonica testified that on February 25, he attended a meeting at the office of the law firm Curtis Mallet, the attorneys that filed the bankruptcy on behalf of the TransCare entities, for the purpose of learning about the debtors' businesses. (Tr. 115-16). This meeting was also attended by two of LaMonica's colleagues, two Curtis Mallet attorneys on behalf of the debtors, a representative of Wells Fargo and Attorney Randy Creswell on behalf of Respondent PPAS. (Tr. 116, 123).

Lamonica testified, without contradiction, that during this meeting, Respondent PPAS Attorney

Creswell announced that the assets of the paratransit business, the Hudson Valley business and the Pittsburg business had been foreclosed upon by Respondent PPAS and that those assets were not property that belonged to TransCare when it filed for bankruptcy. (Tr. 118). Creswell further stated that Respondent PPAS had formed a new entity that was operating these three businesses. (Tr. 118-19). The bankruptcy petitioner's attorney and the Wells Fargo attorney agreed Creswell's statement that his client was running the paratransit operations pursuant to a strict foreclosure. (Tr. 139).

LaMonica testified that he was relieved to learn that he did not have to deal with the paratransit operations. (Tr. 119).⁴ There was no further discussion about the possibility of the Trustee continuing the paratransit business because, based on Creswell's assertion, LaMonica believed that Respondent PPAS had taken and was running the paratransit business. (Tr. 141).

Contrary to this undisputed record evidence, including testimony by Respondents' witnesses and bankruptcy court filings, showing that Creswell represented Respondent PPAS (Tr. 399, 410, GC Exh. 10), ALJ Chu found that Creswell did not speak on behalf of Respondents and incorrectly failed to attribute Creswell's admissions that Respondents were running the paratransit operations to Respondents. (ALJD 15:22-23). Without any support in the record, the ALJ speculatively and erroneously concluded that Creswell's admissions that Respondents were running the paratransit operations statements in the February 25 meeting were "an overstatement" and "a clumsy attempt to get LaMonica's approval to allow for the voluntarily termination of the [paratransit] contract." (ALJD 15:24-26). However, there is no record evidence suggesting that at the time of Creswell's February 25 statement, he or anyone else had asked the Trustee to terminate the MTA contract.

⁴ TransCare NY's New York City ambulance business was also discussed at this meeting. LaMonica testified that none of the creditors would agree to fund payroll for this business and therefore he decided not to continue the operations of the business. The same day he made arrangements with the Fire Department to replace the TransCare ambulances and told the TransCare manager in charge of the business to call the ambulance drivers back to their Hamilton Avenue base. (Tr. 123-24). To avoid confusion, any hearing testimony or evidence referring to ambulances, as opposed to paratransit, most likely refers to this other part of the TransCare business that was separated from the paratransit operations in the lead up to the bankruptcy.

Respondents did not call Creswell to refute or explain his admissions on behalf of Respondents.

Creswell's admissions that Respondents took over the paratransit operations immediately following the foreclosure is material evidence that the ALJ should have regarded with substantial weight when considering whether Transcendence II took over and operated the paratransit business, instead, the ALJ improperly disregarded this probative piece of evidence.

E. Contrary to the ALJ's Findings, Respondents Notified to the Union and the Paratransit Employees that Respondent Transcendence II was the New Employer of the Bargaining Unit Employees

1. Paratransit Manager Fuchs notified Union Delegate Cordiello that the bargaining unit employees were being transferred to a new employer and that none of their terms and conditions of employment would change.

Union Delegate Cordiello testified that in early 2016, he had learned from Paratransit Manager Fuchs that TransCare was having financial difficulties, including difficulty making payroll. (Tr. 215-16). Cordiello testified that during a phone conversation on February 24, Fuchs told Cordiello that the paratransit business was being "carved out" and that it would continue operating under a newly created company called Transcendence. (Tr. 217). Fuchs explained that the paratransit portion of the company was moving to a new company so that they could keep the business afloat and keep the contract with the MTA. (Tr. 219). Cordiello testified that Fuchs gave assurances that Transcendence would provide the paratransit drivers with the same medical benefits and all other benefits that they had under the collective bargaining agreement between the Union and TransCare. Fuchs told Cordiello that none of the drivers' terms or conditions or work would change under the new company. Cordiello testified that Fuchs further advised that the drivers would keep their same wage period, same medical plan, and holidays. (Tr. 218). Cordiello's testimony regarding his conversations with Fuchs is undisputed in the record.

Shortly after this phone conversation, Fuchs sent an email to Cordiello which included an attached document entitled "TransCare Employee Announcement – 2.23.2016." (Tr. 219, GC Exh.

23). In the email, Fuchs stated that the attachment had been sent out to all employees. (GC Exh. 23). The Announcement not only notified its employees that TransCare had begun a restructuring process and created Respondent Transcendence II as the paratransit entity, but clearly and unambiguously represented that employees' jobs, pay and benefits would not change, stating:

During this restructuring evaluation, the MTA required that we set up a separate entity to segregate the paratransit business form TransCare's ambulance businesses, including separate bank accounts and financial records. We are pleased to say that we have accomplished setting up and capitalizing the separated paratransit entity which will now be called Transcendence Transit II, Inc. **This changes nothing for our transit employees except that their employment is being transferred to this new entity – same jobs, same compensation, same benefits.** You will receive a new employment letter from your manager within the next 24 hours reflecting this change. It is our hope that this change and new capitalization will encourage the MTA to rapidly return routes to us that were recently curtailed.

(GC Exh. 23 (emphasis added)). Cordiello called Thomas Charles, head of the MTA paratransit division, to verify that the paratransit operations were being transferred to Respondent Transcendence II. Charles confirmed that the transfer was happening. (Tr. 220). Contrary to the ALJ's finding, Cordiello did *not* testify that during their February 24 conversation, Fuchs stated that "the job offers had not yet transferred to Transcendence II." (ALJD 17:3; see Cordiello testimony Tr. 217-20).

2. On February 24, Respondents notified the bargaining unit employees of the transfer of their employment to Transcendence II.

Respondents notified the paratransit employees of the restructuring on February 24. W. Randall Jones, Managing Director of Respondent Patriarch, drafted the TransCare Employee Announcement to be sent to the "New Co.," i.e. Transcendence and Transcendence II, employees and a different announcement be distributed to the employees of the TransCare entities that were shutting down pursuant to the Chapter 7 filings (referred to as "old co.>"). (Tr. 447-49, GC Exh. 13). Without

any evidentiary support whatsoever, the ALJ found that Respondent Patriarch witnesses Jones and Stephen “credibly” testified that the announcement regarding employees’ jobs being transferred to a new company was only a draft and that the distribution to the para-transit drivers was a “leakage,” rather than a deliberate action taken at the direction of the Patriarch representatives. (ALJD 16:18-24). However, the testimony of neither Stephen nor Jones supports this ALJ’s finding. In fact, Stephen did not testify at all about the announcement to the employees and there is no record evidence that suggests that Stephen was involved in drafting or approving the employee announcement (Tr. 454-55).

While Jones testified at length about his role in drafting the announcement, the ALJ’s conclusion that the announcement was a draft or was leaked is inconsistent with Jones’s testimony as well as all related record evidence. Jones testified that he worked on the drafting of the notice on February 23 and 24. (Tr. 448). He also testified that he did not know if anyone distributed the announcement to the employees (Tr. 448). He testified that when he sent the announcement to Youngblood at 11:22 am on February 24, he was seeking Youngblood’s input on the document however, he later admitted that his email does not indicate that Youngblood should provide any feedback, but rather that “we should get the employee mailings out as soon as possible.” (Tr. 456; GC Exh. 13). Jones admitted that the subject line of the email characterized the announcement as “final” despite the title of the document still including the word “draft” and the previous day’s date (Tr. 456). Jones also admitted that before he sent the announcement to Youngblood, it had been approved by Respondent Patriarch’s attorneys and Tilton. (Tr. 447, 453, 458). Jones did not deny directing Fuchs to distribute the announcement to the paratransit employees by email at 12:47 on February 24. (GC Exh. 29). Finally, the employee witnesses mutually confirmed that the TransCare Employee Announcement was distributed to paratransit drivers from the desk in the push-out/cash-

out area at the Bank Street facility with the word draft removed.⁵ (Tr. 22-23, 81; GC Exh. 2). The announcement Fuchs sent to Union representative Cordiello is the same version as the one distributed to the paratransit drivers.

At the same time that Jones directed the TransCare Employee Announcement to go out to “New Co.” employees, he directed a different announcement be distributed to the employees of the TransCare entities that were shutting down pursuant to the Chapter 7 filings (aka “old co.”). (GC Exh. 13). Unlike the notice to the New Co. employees, the announcement to the Old Co. employees informed them that the operations associated with these businesses would “discontinue starting today” and that they should continue to work until they hear from the Trustee. (GC Exh. 13). Youngblood testified that he sent both the old co. and new co. the emails by blast email to lists that he had culled together. (Tr. 185).

3. Contrary to the ALJ’s findings, Respondent Patriarch directed President Youngblood and Manager Fuchs to distribute the transfer of employment letter to the employees of Respondents Transcendence and Transcendence II, including the paratransit drivers.

Again, without any evidentiary support, the ALJ concluded that the employment transfer letters that Patriarch’s Managing Director of Human Resources Platform John Pothin instructed Youngblood and Fuchs to distribute to employees were drafts that were not given to or acknowledged by any employees. (ALJD 16: 27-28). Respondents did not call Pothin to testify. In his February 24 email, Pothin’s instructed Youngblood and Fuchs to “get the newco employees a transfer letter” and attached the employment transfer letter template addressed to employees of Respondent Transcendence and Respondent Transcendence II. Nothing about the email or its attachments establishes or even suggests that the transfer letters are drafts or that Youngblood and

⁵ Employee witnesses Watson and Insogno testified that they received the TransCare Employee Announcement on February 23. While it was dated February 23, the evidence shows that Respondent actually distributed it to the paratransit employees on February 24. (See GC Exh. 29). (Tr. 447; GC Exh. 29). The witnesses likely relied on the incorrect date printed on the document title, which was reasonable given the amount of time that has elapsed.

Fuchs should wait to distribute the transfer letters to employees. (GC Exh. 17).

The only testimony in the record regarding the transfer of employment letters is by President of Respondents Transcendence and Transcendence II, Glen Youngblood. Youngblood testified that he finalized the transfer letters by generating 390 letters that each included an employee's name as the recipient of the letter and his signature on behalf of the Transcendence companies. (Tr. 199; GC Exh. 18). Youngblood testified that he gave these letters confirming the transfer of the employees' employment to TransCare employees who worked in the corporate office and had them sign the letters to acknowledge receipt and their transfer of their employment to Respondent Transcendence as of February 24. Youngblood further testified that he sent letters to Fuchs, so that Fuchs could follow Pothin's instructions to have each of the paratransit employees sign the letters. (Tr. 199-200). One of the letters Youngblood sent to Fuchs notified Fuchs that his employment had been transferred to Transcendence II, this letter confirmed the employment offer he received from Respondent Patriarch's representatives during Respondent Patriarch's planning of the TransCare restructure. (GC Exh. 18).

Contrary to the ALJ's finding that the transfer letters were never given to or acknowledged by any employees, the record evidence conclusively establishes that Scheduler Cleary received and acknowledged a transfer letter. Cleary testified that upon returning from her vacation on February 26 (Tr. 46), an upper level manager⁶ gave her a letter to sign with the subject line, "Transfer of Employment Relationship." (Tr. 47; GC Exh. 3). The letter, dated February 24 and addressed to Cleary, stated that effective February 24, her employment relationship has been transferred from TransCare to Respondent Transcendence II, that she will continue to have the same job duties and responsibilities as well as the same compensation and benefits, and finally that her continued employment will serve as acknowledgement of the transfer. (GC Exh. 3). Cleary signed the letter, as

⁶ Cleary did not recall who gave her this letter but testified that Paulette Grimes the Assistant Operations Manager usually distributed documents to employees. (Tr. 57).

she had been instructed to do. (Tr. 47; GC Exh. 3).

The “Transfer of Employment Relationship” letter is on Respondent Transcendence II letterhead and is signed by Glen Youngblood, President. (GC Exh. 3). It looks exactly like the ten sample attachments (examples of the 390 identical attachments) to the email Youngblood sent Fuchs aside from a correction to the year of the transfer effective date. (GC Exh. 18). The versions of the letter distributed by Pothin and Youngblood state that the effective date of the transfer was February 24, 2014, however the letter to Cleary states that the effective date was February 24, 2016. Respondents’ correction of the year without modifying the day of the month from February 24 to February 26—the date Cleary received and executed the letter upon her return from vacation—clearly establishes that Respondent intended the transfers of employment to be effective on February 24—the date that the paratransit employees were notified of the change—and not the date that the employees received and acknowledged the transfer letter.

Cleary’s acknowledged transfer letter shows that the ALJ’s finding that Respondents did not distribute the transfer letters and that no employees signed transfer letters is wrong. The ALJ relies on the fact that no bargaining unit employees testified that they received a transfer letter to conclude that they were never hired by Respondent Transcendence II,⁷ however, whether or not employees signed letters acknowledging their transfers is not at all dispositive of whether Respondents transferred their employment. These letters are just one piece of evidence among many other pieces

⁷ The ALJ speculated that the transfer letters were not distributed to the paratransit driver because the transfer letters were drafted in anticipation of a future offer of employment, however, Pothin’s February 24 email instructing Transcendence and Transcendence II President Young blood and Transcendence Manager Fuchs to distribute the letters to the employees refutes the ALJ’s theory. The more likely reason that the transfer letter were not immediately distributed to paratransit drivers is the administrative difficulties of collecting acknowledgments from almost 400 employees who the majority of their days out of the office driving.

of evidence showing that Respondents transferred the paratransit drivers to Transcendence II on February 24.⁸

F. Contrary to the ALJ's Findings, Paratransit Operations Continued Unchanged Under Respondent Transcendence II after the Foreclosure⁹

The ALJ found that there was no substantial continuity of operations after Respondent Transcendence II took over the paratransit operations based on his conclusion that Transcendence II never operated. (ALJD 14:28). However, the record evidence establishes that Transcendence II continued the paratransit operation and that its employees worked. In that regard, the evidence, ignored by the ALJ, shows that after Respondent PPAS's foreclosure on the paratransit contract along with other TransCare assets and Respondent Transcendence's purchase of those assets, Transcendence II continued the paratransit operations in unchanged form. After the employees received the February 24 Announcement notifying them that their employment had been transferred, they continued to work and that their jobs remained the same. It is undisputed that the paratransit operations continued in unchanged form from February 24 through February 26. The employee witnesses offered undisputed, mutually corroborative testimony that on February 24, 25 and 26, they continued to report to work, they continued to go to the push-out room for their work assignments, they had the same coworkers and the same managers, they performed their regular job duties: providing transportation services to disabled New York City residents. (Tr. 26-27, 41, 73-74, 83).

G. Respondent Patriarch's Efforts to Secure MTA Approval of the Assignment of the Paratransit Contract on Behalf of Respondent Transcendence II

The ALJ incorrectly found that Respondents could not have operated the paratransit business

⁸ This record evidence includes the February 24 Employee Announcement, Stephen's February 25 admission to the MTA that Transcendence hired all of the paratransit employees (discussed *infra*) and Tilton's promise to pay Transcendence II employees for wages owed to them by TransCare NY.

⁹ The ALJ mischaracterized Counsel for the General Counsel's position regarding when Respondents began operating the paratransit business. (ALJD 13:37-40). Counsel for the General Counsel has consistently maintained that Respondents began operating on about February 24 after the foreclosure, not after the bankruptcy petition was filed. (GC Exh 1 (J)¶18, GC Brief to ALJ p. 19-20, 41-42).

without the MTA's prior approval to transfer the contract. In addition to substituting his own speculation to reach that conclusion, the Judge's conclusion is contrary to undisputed testimony by Respondents' witness Stephen. Stephen testified that he believed that on February 24, 25 and 26, the paratransit contract was a foreclosed asset and that the paratransit contract was transferred to Respondent Transcendence II. (Tr. 437). Stephen testified that he was advised by counsel that Respondent PPAS *could* effectuate the foreclosure on the paratransit contract and seek the MTA's consent for the assignment *after* the transfer of the asset. (Tr. 437).

Stephen testified that after the February 24 foreclosure, there was a push by the entire firm to save as much of the company as they could. This required "all hands-on deck" because Tilton decided that she wanted to have a deal in place with the MTA approving the assignment of the paratransit contract to Respondent Transcendence II by Friday February 26. (393, 397, 422-23). As part of this effort, Stephen was responsible for negotiating the terms of the assignment of the paratransit with the MTA, (Tr. 397), and Randy Jones was responsible for helping with employee communications. (Tr. 445-46).

The ALJ failed to consider Respondents' written admission that Respondent Transcendence II hired the paratransit employees. Respondent Patriarch Attorney Stephen testified that at the direction of Respondent PPAS attorney Creswell, and in an effort to get the MTA to agree to the assignment of the paratransit contract, he wrote an email to MTA Attorney Diane Morgenroth and MTA Paratransit Representative Thomas Charles at 8:49 pm on February 25 to provide the MTA with requested information about the foreclosure. (Tr. 399). Stephen's email to the MTA representatives describes the foreclosure and explains that Respondent Transcendence II was created as an independent entity in order to segregate all MTA-related revenue from the additional operations of Respondent Transcendence, based on concerns previously raised by the MTA regarding TransCare NY's structure and that it has all insurance necessary to operate. (GC Exh. 26). Stephen goes on to assure the MTA that "[a]ll of the 390 drivers and other TransCare employees necessary for

Transcendence Transit II to continue to provide service under the [paratransit] Agreement *were transferred* to Transcendence Transit II at the time of the foreclosure *and are now employees of Transcendence Transit II.*” (GC Exh. 26 (emphasis added)). Stephen also explained that “TransCare filed for bankruptcy protection under Chapter 7 of the U.S. Bankruptcy Code on the evening of February 24th and **after** the foreclosure. The bankruptcy trustee does not have the power and authority to unwind the foreclosure – nor has he expressed any misgivings or concerns about the foreclosure. . . . The bankruptcy of TransCare has no impact on Transcendence Transit II’s ability to provide uninterrupted service to the MTA in accordance with the terms of the [paratransit] Agreement.” (GC Exh. 26 (emphasis original)).

At the hearing, Stephen contradicted his representation to the MTA that all paratransit employees were already transferred to Respondent Transcendence II, this time stating that he did not believe that the employees were transferred at the time he sent the email and that he had lied to the MTA in an effort to ensure the success of Respondent Transcendence. (Tr. 401). The ALJ erred by failing to reconcile Stephen’s admission that Respondent Transcendence hired the 390 paratransit employees with his conclusion that Transcendence II never hired the bargaining unit employees.¹⁰

The ALJ found that Transcendence II could not have operated the paratransit business unless it was under contract with the MTA. (ALJD 15:39-40). However, the only party that would enforce such a requirement is the MTA itself. Stephen’s February 25 letter makes it clear the MTA agreement and the employees providing services under that agreement have been transferred to Transcendence II for the purpose of providing uninterrupted service to the MTA. This notification does not prompt the MTA to stop sending routes to Transcendence II and Stephen testified, that no MTA representatives ever raised any objection to his representation that Respondent Transcendence II was providing paratransit services under the MTA ‘s contract with TransCare NY, even though the

¹⁰ The ALJ did not credit Stephen’s repudiation of his admission. The Board should not credit Stephen’s self-serving repudiation that is contrary to the preponderance of the record evidence.

MTA's prior approval is contemplated by the paratransit contract. (Tr. 424). Instead the MTA continued to try to negotiate with Patriarch representatives to come to an agreement on terms for a contract with Transcendence II to provide paratransit services. The MTA was willing to have these negotiations until Patriarch shut down the MTA's offer to enter into an interim agreement on Friday evening. (Tr. 349-50).

H. Respondents' February 25 Attempt to take Possession of a Computer Server

In finding that Respondent Transcendence II never operated, the ALJ further relied upon an erroneous conclusion that it could not operate without a server that Trustee LaMonica refused to release to Youngblood, which is entirely unsupported by the record. Contrary to the ALJ's finding, there is absolutely no record evidence that Trustee LaMonica refused to release the server or that the absence of the server prevented Respondent Transcendence II from operating. Rather, the testimony shows that Respondents were informed that the Trustee needed to first establish if the server had designated a TransCare asset. Moreover, Transcendence II operated its routes all day on February 24, 25 and 26 without the benefit of the server.

More specifically, the ALJ "credited" the testimony of LaMonica that LaMonica would not release the server (ALJD 14: 41-43). However, LaMonica did not provide any such testimony. Instead, the record evidence shows that Youngblood spoke to LaMonica's lawyer, Gary Herbst late at night on February 25 and into the early hours of February 26, regarding Respondent Transcendence taking possession of an AS400 server, along with other hardware and software (R. Exh. 1). Herbst did not refuse to release the server, but rather told Youngblood that it would not be appropriate to remove a TransCare server until the Trustee determined a course of action. (R. Exh. 1). Herbst advised Youngblood that he and Trustee LaMonica would be at the MetroTech office of TransCare the following morning to work out the issues facing the company. (R. Exh. 1). Youngblood reported this interaction with Herbst, including the Trustee's availability the following day, and Youngblood's failure to relocate the servers to Respondent Patriarch employees Brian

Stephen, Jean Luc Pelissier, Randy Jones and John Pothin (R. Exh. 1). There is no evidence in the record that any representative of Respondents met with the Trustee or his representatives on February 26 regarding the server or that any representative of Respondents made any additional attempts to secure the server. Moreover, there is no other evidence in the record supporting any refusal by the Trustee to permit the server's transfer.

Respondents' claim that Trustee LaMonica and his attorney Herbst interfered with the transfer of assets subject to the foreclosure, however, LaMonica and Herbst had no way to know what property had been subject to the PPAS foreclosure on February 25. LaMonica testified that, while Respondent PPAS's Attorney Creswell had notified him that Respondent PPAS had executed a foreclosure during the February 25 meeting, Creswell did not provide LaMonica with the foreclosure document. LaMonica testified, without contradiction, that he first received Respondent PPAS's February 24 Notice of Acceptance of Collateral (Joint Exh. 6) during the discovery related to an adversary proceeding in bankruptcy, therefore, he would not have had the document or know which assets had been foreclosed upon on the evening of February 25. (Tr. 481). LaMonica also testified that in the late hours of February 25, the day he was appointed as the TransCare Trustee, he did not know whether or not the server had been designated property of the TransCare estate. (Tr. 481). Whether he knew or did not know the details of the foreclosure on February 25, the record evidence shows that he did not refuse to release the server on February 25 and that he never had an opportunity to refuse to release it on any later date because Respondents never asked for it again.

The ALJ found that the server was necessary for Transcendence II to begin operating the paratransit business, however, the record evidence shows that Transcendence II was not prevented from operating the paratransit business February 24 through February 26 because it did not have possession of the server.¹¹ Brian Stephen testified that the AS400 server was used to schedule the

¹¹ The record evidence suggests that the server was not located at the Bank Street facility when employees of TransCare NY used it for paratransit operations, therefore it is safe to assume that they were remotely accessing it

paratransit trips. (Tr. 404). Tilton and Stephen testified that Respondent Transcendence II would not be able to schedule trips and therefore not be able to operate without this server (Tr. 338-39, 404). Respondents claimed that by preventing Youngblood from removing the server, the Trustee defied the foreclosure and prevented them from continuing the paratransit operations. However, the record evidence shows that Respondent Transcendence's employees' trips were still scheduled for February 24, 25 and 26, and the weekend routes were not cancelled until that evening when the MTA learned of Transcendence's imminent shut down. (Tr. 68). These undisputed facts show that either the server was not required for the paratransit operations to continue under Transcendence II, as concluded by the ALJ or that the recently transferred Transcendence II employees were able to access the server remotely, despite Youngblood's failure to relocate the server on February 25.

- I. Contrary to the ALJ's Findings, Respondents' Communications with Stakeholders on Friday February 26 Show that Transcendence II was Operating
 1. Respondent Patriarch's Attorney Stephen's Efforts to Finalize an Agreement with the MTA for Transcendence II to Continue Providing Paratransit Services.

Stephen testified that he spoke with MTA Attorney Morgenroth a few times on Friday February 26, the day after he sent the email admitting that all employees had been transferred to Transcendence II. (Tr. 401-02). They discussed the potential assignment of the paratransit contract and about alternatives if the MTA would not consent to the assignment, such as a short-term contract that would allow Respondent Transcendence II to provide services while the parties worked on a long-term agreement. (Tr. 402). The MTA's representatives wanted to be sure that the ownership of the paratransit contract was not going to be disputed in the TransCare bankruptcy proceedings, so they told Stephen that they wanted the TransCare Trustee to remove the paratransit agreement from the bankruptcy estate or terminate the contract. (Tr. 402). At 2:09 pm, Stephen sent Morgenroth an

through the internet. The employee testimony that the paratransit operation continued unchanged from February 24 through February 26, suggests that the paratransit employees continued to have remote access to the server after the foreclosure.

email on behalf of Respondent Transcendence requesting certain assurances from the MTA in order for Respondent Transcendence to *continue providing paratransit services*; Tilton requested that the MTA commit to paying Respondent Transcendence II for services provided and agreeing that the MTA would make reasonable efforts towards reaching a long-term contract. Stephen stated that unless the MTA provided the requested assurances, “we will, unfortunately, be forced to discontinue service at 5:00 pm today.” (GC Exh. 27; Tr. 435). In concluding that Transcendence did not operate, the ALJ erroneously credited Stephen’s self-serving and unsupported testimony that this email was “poorly drafted” and that Respondent Transcendence had never operated. (ALJD 15: 9-10).

At 3:33 pm on February 26, MTA paratransit representative Thomas Charles emailed Respondent Patriarch Managing Director Jones, informing him that the MTA could not go forward a new agreement with Respondent Transcendence II while there was a risk that the paratransit contract would not be excluded from the TransCare bankruptcy proceedings. (GC 27). After this email was sent, Respondent PPAS attorney Randy Creswell continued to seek the Trustee’s consent to cancel the paratransit contract on behalf of TransCare so that Respondents could move forward negotiating with the MTA for Transcendence II to continue operating the paratransit business. (GC Exh. 9).

2. Respondent PPAS’s Attorney Creswell’s Admission that Respondent Transcendence II was Operating and Request for Trustee LaMonica to Terminate TransCare NY’s Paratransit Contract with the MTA.

The ALJ erred by disregarding another admission of Transcendence II’s active operations by Respondent PPAS attorney Creswell. By email to Trustee LaMonica on Friday February 26, Creswell admitted that Respondent Transcendence II had been providing paratransit services since February 24. The purpose of Creswell’s email was to convince the Trustee to cancel TransCare NY’s contract with the MTA. Creswell’s email states: “Transcendence Transit II has been providing services under the MTA contract above since the [bankruptcy] filing date. The MTA would like [Transcendence II] to continue to provide those services in the near term, with the ultimate goal of,

ideally, entering into a new agreement.” (GC Exh. 9). At 3:15, Creswell emailed LaMonica asking him to respond about the termination of the paratransit contract by 5:00 pm. (GC Exh. 9). LaMonica testified, without contradiction, that he tried unsuccessfully to call Creswell all afternoon in order to respond to Creswell prior to 5:00 pm. (Tr. 155). Ultimately, LaMonica sent Creswell an email at 5:07 pm agreeing to terminate the contract but reserving all rights that the bankruptcy estate had to collect any money due to the estate. (Tr. 148).

J. Despite Tilton’s Promise to Pay Respondent Transcendence II’s Employees Wages Owed to Them by TransCare NY, the Paratransit Employees did not Receive Paychecks on Friday February 26 or Anytime Thereafter

The record evidence shows that Tilton offered to pay wages owed by TransCare NY to the paratransit employees so that they would continue working for Respondent Transcendence II, further showing that, contrary to the ALJ’s finding, the employees were employed by Respondent Transcendence II. On February 25, Respondent Patriarch Attorney Stephen, at the behest of Tilton, instructed Youngblood and Fuchs to inform New Co. employees that if they continue to work as scheduled and that if the TransCare bankruptcy estate does not make payroll for the week of February 14 (Tr. 27-28), employees were due to receive this pay check on February 26, then Respondent Transcendence will pay the employees for their work during the last week that they worked for TransCare. (GC Exh. 15, 30). Tilton testified that she wanted to assure the paratransit employees that they would be paid because she wanted to retain the employees. (Tr. 351). The ALJ failed to consider this evidence even though it suggests that the paratransit employees were employed by Respondent Transcendence, that representatives of Respondent Patriarch, including Stephen, were materially involved in decision making and implementation of policies related to payroll and that actively managed employment issues related to Respondent Transcendence II.

On Friday February 26, Respondent PPAS’s Attorney Creswell called TransCare Trustee LaMonica and explained that Respondent Transcendence II had failed to set up its own payroll

systems after the foreclosure in time to be operational and for checks to be issued that day. (Tr. 120). Creswell asked Trustee LaMonica if he would agree to allow the entity that was running the paratransit business to process the payroll through the debtor's bank accounts and use the debtor's systems to issue payroll checks. (Tr. 120). LaMonica denied Creswell's request. (Tr. 120).

Employee Shunda Watson testified on February 26 she asked Push-Out Manager Tisha Leshane about why she had not received her payroll deposit. Leshane told her that the pay checks were delayed because of the change in the employer's name from TransCare to Transcendence. (Tr. 30-31).

K. Respondents Shut Down Paratransit Operations on February 26, without Giving the Union an Opportunity to Bargain Over the Effects of this Decision

The ALJ made no finding as to Respondent's failure to provide notice and opportunity to bargain regarding the effect of Respondent's decision to cease paratransit operations. However, the record evidence plainly reveals that Respondent did not provide such notice or opportunity. Union delegate Cordiello testified that he first received notice that Respondent Transcendence II ceased its business operation when MTA representative Thomas Charles phoned Cordiello at about 3:00 or 4:00 on the afternoon of February 26. (Tr. 223). Contrary to the record evidence, the ALJ found that Cordiello testified that during this call Charles told Cordiello that "TransCare" was closing. (ALJD 10:45-46). However, Cordiello's actual testimony regarding that call was that Charles explained that the MTA was not comfortable with an aspect of a transfer of money and that as a result, *Transcendence* was out of business. (Tr. 223). Cordiello testified that he called Transcendence II manager Fuchs, telling him that his company was out of business. (Tr. 223). Fuchs was surprised and replied that he was not aware of the company closing. (Tr. 224). Later that day, Fuchs called Cordiello and confirmed that he was correct that the business had closed, telling Cordiello that "it was done." (Tr. 224). Cordiello did not receive any additional communications from Fuchs or any other representative of Respondent Transcendence II regarding the closing of the business or the

layoff of employees. (Tr. 224-25). Respondent Transcendence II never provided the Union with an opportunity to bargain over the effects of the closing on the bargaining unit employees. (Tr. 225)

Scheduler Cleary testified that she received an email from Thomas Fuchs at 5:58 pm on February 26. (Tr. 48), stating that it was a message for “NewCo.” Employees only. In the email, Fuchs explained that due in part to the bankruptcy Trustee disputing “our claims to assets that were foreclosed upon earlier this week . . . we must cease our operations immediately.” (GC Exh. 4). Respondent Patriarch Managing Director W. Randall Jones directed Fuchs to send this email to the paratransit employees. (GC Exh. 28). Fuchs sent it to all employees working at the Bank Street facility who had email accounts including dispatchers, supervisors and upper management. (Tr. 49, 55). Driver Mariane Insogno testified that this email was also displayed on a screen in the office at the Bank Street facility for the drivers to see. (Tr. 93-94).

Cleary testified that after Fuchs sent out the email, another member of upper management instructed Cleary to direct all dispatch employees to call the drivers back to the Bank street facility. (Tr. 53). Driver Watson testified that on her way back to the Bank Street facility, she received a call from Cleary telling her that she should come back quickly because the employer was no longer in business. (Tr. 32). When Watson arrived at the facility at approximately 7:00 pm, she saw that MTA employees were at the Bank Street Facility waiting to close it down. (Tr. 32). Watson and her coworkers helped the quality control manager park the vehicles, return the keys and equipment and prepare the facility to be turned over to the MTA. (Tr. 38-39).

L. Contrary to the ALJ’s Findings, Trustee LaMonica Denied Operating the Paratransit Business After the Bankruptcy Petition was Filed

The ALJ summarily found that that Transcendence II never operated and that, contrary to all the record evidence, the paratransit employees were employed by TransCare NY through February 26. The ALJ does not point to any record evidence he relied upon to conclude that TransCare continued to operate after the bankruptcy petition was filed. Additionally, the ALJ’s conclusion is

contradicted by probative record evidence. In that regard, Trustee LaMonica testified that although as Trustee, he oversaw the winding down of certain parts of TransCare's business, including the New York City ambulance business, he did not take any actions to oversee the operations or wind down of the paratransit business because he relied on PPAS attorney Creswell representations that Respondents were operating the paratransit business pursuant to their February 24 foreclosure.

Trustee Lamonica testified that he had no involvement in or contact with any TransCare paratransit managers or drivers; for example, unlike the ambulance division, LaMonica did not tell paratransit employees to stop working after the bankruptcy petition was filed on February 24. LaMonica also did not tell paratransit employees to keep working after TransCare's bankruptcy petition was filed. (Tr. 126, 146). If Trustee LaMonica had wanted to continue the TransCare NY paratransit operations for any reason, including to retain the MTA contract, after the Chapter 7 petition was filed, he would have filed an emergency application for a 721 order and obtained permission from the bankruptcy court to continue to operate and not wind down. (Tr. 125). He did not request a 721 order to continue paratransit operations. (Tr. 126). The ALJ did not discredit any of LaMonica's testimony and did not provide any basis for finding that TransCare NY operated after the bankruptcy petition was filed without LaMonica's express permission or involvement.

The ALJ found that LaMonica "called the MTA attorney and instructed that the buses be returned to the Foster Avenue facility and that the MTA should secure the vehicles." (ALJD 12: 13-15). However, this conclusion is inconsistent with Trustee LaMonica testimony. LaMonica did not testify that he instructed that the buses be brought back, but rather that he informed the MTA that the buses were going to be brought back to the Bank Street facility. (Tr. 122). LaMonica testified further that he did not recall any paratransit vehicles on February 26, and he did not lock up the assets at the Bank Street facility. (Tr. 148, 477). LaMonica's testimony shows that he did not direct the closing of paratransit operations on February 26. But rather, Patriarch representative Jones directed Transcendence manager Fuchs to inform the paratransit employees that the paratransit operations

were ceasing.

The positions taken by LaMonica in the bankruptcy proceeding are consistent with his testimony that TransCare NY did not continue paratransit operations after the petition was filed on February 24. He testified that he did not request or receive on behalf of the bankruptcy estate any payment from MTA for post-petition paratransit services because he, as Trustee, did not operate the businesses after the petition date. (Tr. 489-90; *see also* GC Exh. 33). The stipulation between the Trustee, the MTA and Wells Fargo concerning amounts due to the bankruptcy estate and Wells Fargo as the secured creditor with a lien on the funds corroborates his testimony that he did not receive payment for post-petition paratransit services. (GC Exh. 33). This agreement is specifically limited to “claims related to the services provided by [TransCare NY] prior to the Petition Date.” (GC Exh. 33, November 9 Stipulation ¶N).

M. The ALJ Did Not Consider the Inconsistent Statements Made by Respondents’ Representatives During the Course of the TransCare Bankruptcy Proceedings

The ALJ erred by failing to consider the inconsistent statements made by Respondents’ witnesses outside of the hearing. Respondent’s witnesses testified at hearing that Respondents Transcendence and Transcendence II never operated. However, on March 10, just two weeks after the shutdown of the paratransit operations, PPAS Attorney Randy Creswell entered into a stipulation with the Trustee setting forth their respective positions regarding the foreclosure and the operation of Respondents Transcendence and Transcendence II. (CP Exh. 1). In the stipulation, Respondent PPAS asserted that with the Lenders it properly conducted a strict foreclosure of assets prior to the filing of the bankruptcy petition and that those assets were transferred, sold and/or assigned to Respondent Transcendence and that Transcendence *ceased operating* on February 26. (CP Exh. 1 (emphasis added)). The stipulation was signed by representatives of Respondent PPAS, Respondent Transcendence and the Trustee. The ALJ did not discuss this evidence in his decision or explain how he determined that Respondents Transcendence and Transcendence II did not operate in light of

Respondents' admission that Transcendence was operating as of February 26.

Contrary to Tilton's hearing testimony that Respondents Transcendence and Transcendence II never operated and had no employees, in her October 30, 2018 bankruptcy court deposition, Lynn Tilton testified that the February 26 notice of the cessation of operations went to NewCo. Employees and not TransCare employees. (GC Exh. 35 at p.124 (see Tr. 502 identifying the document referred to during Tilton's deposition testimony as General Counsel's exhibit 4)). Tilton also testified in her October 30, 2018 deposition that "Transcendence Transit was never considered operational because the Trustee did not acknowledge the foreclosure on those assets, and therefore they became Oldco. . . . When the Trustee decided not to acknowledge the foreclosure, those employees became Oldco employees." (GC Exh. 35 p. 141). However, her testimony at the hearing was that the paratransit employees were never hired by Transcendence II, part of new co. Irreconcilably, her deposition testimony was that the employment relationship between Transcendence II and the paratransit employees was nullified after it had been established by the Trustee's decision not to acknowledge the foreclosure. Again, the ALJ ignored this admission by Respondent's primary witness that the paratransit employees who received the February 26 announcement were employees of New Co., i.e., Respondent Transcendence II, at the time the communication was sent to them. The ALJ failed to explain the basis for concluding that Respondent Transcendence II never hired the paratransit drivers in light of Tilton's admission that the paratransit employees were employees of Transcendence II when operations ceased on February 26.

II. QUESTIONS PRESENTED

A. Did ALJ Chu err in finding that Respondent Transcendence II never operated?

Relating to Exception Nos:

B. Did ALJ Chu err in finding that Respondent Transcendence II was not a successor employer to TransCare NY when, on about February 24, it took over and continued

TransCare NY's paratransit operations in unchanged form?

Relating to Exception Nos:

- C. Did ALJ Chu err in finding that Respondent Transcendence II was not a single employer with Respondents Transcendence, Patriarch and/or PPAS?

Relating to Exception Nos:

III. ARGUMENT

The ALJ's decision is replete with factual errors, misapplication of Board law, and gross omissions of facts and analysis and therefore should be overturned. The ALJ's copious errors in his recitation of the facts, including in his misstatement of witness testimony and his mischaracterization of record evidence shows that his conclusions are not based on an accurate evaluation of the probative record evidence. Additionally, the ALJ was silent about and failed to consider and reconcile record evidence that was contrary to his findings, showing that his decision is based on only on select portions of the record evidence, rather than on the record as a whole. It is impossible for a trier of fact to make valid determinations based on a preponderance of the record evidence when that trier of fact fails to consider the complete record. Furthermore, in numerous instances, the ALJ improperly substituted his own speculation and conjecture, for testimonial and documentary evidence. Accordingly, contrary to the ALJ's decision, the Board's de novo review of the evidence and application of relevant Board law will make clear that the probative evidence establishes that Respondent Transcendence II operated, that is was a successor to TransCare NY, that Respondents were a single employer and that they failed to provide the Union with notice and opportunity to bargain over the effects of their decision to shut down paratransit operations on February 26.

A. The ALJ Erred by Failing to Find that Transcendence II Operated

ALJ Chu found that Transcendence II could not have operated because it did not have access to a necessary computer server and because it had not entered into a contract to provide

paratransit services with the MTA. In reaching this erroneous conclusion, the ALJ relied on purported “testimony” that does not exist in the record, ignored probative record evidence and erroneously interpreted the limited evidence he considered.

1. The ALJ ignored probative evidence including numerous admissions by Respondents that Respondent Transcendence II was operating the paratransit business after the February 24 foreclosure.

ALJ Chu erroneously found that Respondent Transcendence II never performed paratransit work, despite the uncontradicted testimony of Trustee LaMonica that on two occasions—first in a meeting on February 25, and again by email on February 26—PPAS Attorney Creswell informed LaMonica that Transcendence II was performing the paratransit work. The ALJ also ignored LaMonica’s testimony, that as Trustee, he had not directed any paratransit work to be performed by TransCare NY after the bankruptcy petition was filed on February 24. Without relying on any record evidence, the ALJ dismissed Creswell’s statement that Transcendence II had taken over the paratransit business out of hand, substituting his own unsupported conjecture that Creswell’s admission was “an overstatement on his part.” In addition, the ALJ incorrectly concluded that Creswell did not represent the Respondents – even though it is undisputed that Creswell was Respondent PPAS’s attorney. *See* GC Exh. 10; Tr. 399.

The ALJ erroneously found that Creswell’s verbal and written admissions that Transcendence II was operating the paratransit business were attempts to get the Trustee’s approval for the voluntary termination of the paratransit contract. This conclusion has no basis in the record. As an initial matter, at the February 25 meeting, Creswell did not request that LaMonica terminate the contract. To the contrary, Creswell asserted that the Trustee did not need to do anything to winddown the paratransit operations because they were not a part of the debtor’s property at the time the bankruptcy petition was filed. Neither the Trustee nor any other party to the meeting challenged this assertion. Therefore, Creswell had no motivation to mislead anyone at

the meeting, since he had no reason to believe that there would be any issues with Transcendence continuing to operate the paratransit business. There is similarly no probative evidence to support the ALJ's determination that Creswell's statement that, "Transcendence Transit II has been providing services under the MTA contract above since the [bankruptcy petition] filing date" was anything but an accurate representation of the facts. To the extent that the ALJ may have relied upon Stephen's admittedly speculative testimony regarding Creswell's state of mind when he wrote the February 26 email (Tr. 411-12),¹² the ALJ's conclusion is unsupported by reliable evidence and should be reversed.

The ALJ also failed to consider Respondents PPAS and Transcendence's admission in the March 10 stipulation with the Trustee that Respondent PAS foreclosed upon TransCare personal property, including equipment and certain contracts, that the property was transferred, sold and/or assigned to Respondent Transcendence and that on February 26 Transcendence *ceased* operating. (CP Exh. 1). This evidence is entirely at odds with the ALJ's findings, as an entity that never operated cannot cease operating.

2. The record evidence does not support the ALJ's conclusion that the Trustee refused to release the server to Respondents and that this refusal prevented Respondents from taking over the paratransit operations.

Regarding the computer server, the ALJ found that as a condition precedent to Transcendence II actually operating, it needed "a computer server that contained valuable data on routes, passengers, schedules and other information to pick up and drop off passengers." The ALJ based his conclusion upon what he called the "undisputed" and "credible" testimony of Trustee LaMonica "that [LaMonica] would not release the server." (ALJD p. 14 at 38-43). However, the evidence shows LaMonica did not testify that he would not release the server, and neither

¹² In response to the ALJ's question as to whether Creswell's February 26 email stating that Transcendence II had been providing services under the MTA contract since February 24 could have been an overstatement, Stephen testified that Creswell's email was "probably an overstatement."

LaMonica nor his representatives ever refused to release any server. It is appropriate for the Board not to defer to an ALJ's credibility determinations when, as here, the ALJ mistakenly characterizes the state of the record. *Bralco Metals*, 227 NLRB 973, 974 (1977).

Contrary to the ALJ's finding that the Trustee would not release the server, Respondent's evidence shows that on the night of February 25, Transcendence II President Glen Youngblood spoke to the Trustee's attorney, Gary Herbst about taking possession of the server. Herbst told Youngblood that it would not be appropriate for Youngblood, on behalf of Transcendence, to take possession of the server at that time, but that Herbst and Trustee Lamonica would be available the following day to work out the issue. (R. Exh. 1). Thus, it is clear that the Trustee did not refuse to release the server. Additionally, the record evidence shows that as of 8:49 pm on February 25, the Trustee had not expressed any misgivings or concerns about PPAS's foreclosure of certain TransCare assets, including the server. (GC Exh. 26). However, at that time the Trustee had no way of knowing which assets had been subject to the foreclosure and which assets continued to be property of the debtor because Respondents did not provide him with list of foreclosed upon assets until it was produced during the discovery phase of litigation in the Bankruptcy Court. (Tr. 481)

The ALJ further erroneously concluded that the ownership of the server could not be transferred without the consent of the Trustee, and then relied on his incorrect conclusion to support his incorrect finding that Transcendence did not operate. (ALJD p.15 2-5). This conclusion is contrary to the law and the record evidence. Respondents consistently took the position in the bankruptcy proceedings that on February 24, Respondent PPAS, as an agent for certain lenders to TransCare NY, successfully and legally foreclosed upon certain assets, including TransCare's server, before TransCare NY filed for bankruptcy. If the Trustee had unlawfully interfered with the transfer of the server, then PPAS would have legal recourse. *See* UCC §9-601. In fact, the record shows that the Trustee and PPAS raised the issue of the validity of the foreclosure before the Bankruptcy court and ultimately reached an agreement providing that PPAS would receive eighty

percent of the proceeds of the sales of any of the foreclosed assets. (CP Exh. 1).

Finally, the record evidence shows that the paratransit employees had access to the necessary server during the days of operation following the foreclosure and bankruptcy petition inasmuch as they continued to receive and complete route assignments under the MTA contract. (Tr. 26-27, 41, 68, 73-74, 83).

The foregoing evidence shows that, contrary to the ALJ's findings, the Trustee did not prevent Respondents from securing the computer server and Youngblood's failure to secure the server the night of February 25 did not prevent Transcendence II from operating the paratransit business from February 24 through February 26.

3. The ALJ's conclusion that Transcendence II could not conduct paratransit operations without a preapproved contract with the MTA is erroneous and is contradicted by record evidence.

ALJ Chu also erroneously concluded that Transcendence II could not operate the paratransit business unless it was under contract with the MTA and that it would not have made business sense without having a revenue source derived from the contract. (ALJD 15:39-40). However, in coming to this conclusion, the ALJ improperly substituted his own judgment in assessing what would make "business sense," rather than considering the clear record evidence establishing that Transcendence II began operating the paratransit business as of February 24 with the expectation that the MTA would approve the transfer of the TransCare NY contract or enter into a new contract with Respondent Transcendence II. Board law does not direct or permit the trier of fact to substitute his conjecture or his own business judgment, which is not a fact of record, for that of the Respondent. *FPC Advertising, Inc.*, 231 NLRB 1135, 1136 (1977).

The ALJ erred in failing to consider Tilton's sworn deposition testimony related to the bankruptcy proceedings. The ALJ failed to consider Tilton's deposition testimony that Patriarch would not have moved forward with the restructuring if the MTA had not agreed that Respondent

Transcendence II could take over the paratransit contract. (GC Exh. 34, p. 306). The ALJ failed to consider Tilton's testimony that she initiated the foreclosure of the TransCare assets minutes after securing the insurance necessary to have Transcendence "up and running the next day." (GC Exh. 34, p 284-85). Additionally, Patriarch Attorney Stephen testified at the hearing that he was advised by counsel that Respondent PPAS effectuate the foreclosure on the paratransit contract and seek the MTA's consent for the assignment after the transfer of the asset. (Tr. 437).

Tilton and Stephen's statements show that Respondents effectuated their plan and had Respondent Transcendence II take over and operate the paratransit business on February 24, 2016, all while operating under the assumption that the MTA would necessarily approve the transfer of the paratransit contract after they made the change.

It was not until late in the day on February 25, 2016, after the restructuring plan had been irreversibly launched by the foreclosure and the filing of the TransCare bankruptcy petition that Stephens learned that the MTA had some concerns about whether the paratransit contract would be part of the bankruptcy estate. Stephens assured the MTA officials that the contract had been foreclosed upon and that it was no longer TransCare NY's property at the time the bankruptcy petition was filed and that Transcendence had hired all of the paratransit employees. (GC Exh. 26).

The record evidence also shows that the reason that Transcendence and the MTA were unable to reach a deal was not the Trustee's refusal to terminate the TransCare NY contract (which he did on February 26) or the MTA's unwillingness to enter into a contract (Respondent admit that the MTA expressed willingness to enter into an interim agreement as soon that the Trustee confirmed the termination of the TransCare contract), but rather Tilton's unwillingness to enter into a contract because no deal could be reached by her arbitrary Friday at 5:00 pm deadline. (Tr. 422-23).

Notably, the MTA never objected to Transcendence II providing paratransit services during this interim period, despite Stephen's emails clearly putting it on notice that the paratransit contract had been foreclosed upon and sold without the MTA's approval. (Tr. 424). The MTA's failure to

object to Transcendence II operating the paratransit business and its efforts to reach an agreement for Transcendence to continue providing the services show that the MTA did not oppose Transcendence II operating the paratransit business without prior approval of the transfer of the paratransit contract. Instead, the conduct of both the MTA and Respondent Patriarch Attorney Stephen shows that both parties intended for the MTA to approve the transfer of the contract or, as discussed in later negotiations, execute a new contract with Transcendence II after Transcendence II had already commenced paratransit operations. The language of Article 204 requiring the MTA's pre-approval of the transfer or assignment of the contract was not a barrier to these negotiations or to Respondent Transcendence II's interim operations, but rather a formality that would have been granted after the transfer if the parties could have reach agreement on future contract.

The ALJ again speculates that it did not make financial sense for Respondent Transcendence II to provide services to the MTA without a guarantee of payment. However, by their own admission, Respondents were doing everything they could to preserve the lucrative paratransit contract, the most profitable of the TransCare businesses. In that regard, Stephen believed that if Respondent Transcendence II provided the MTA with uninterrupted paratransit services, the MTA would be more likely to award Respondent Transcendence II a contract. Tilton even offered to pay New Co. employees' wages owed to them by TransCare NY in order to keep the employees from abandoning their jobs. Contrary to the ALJ's personal judgment, the record evidence shows that Respondents were clearly willing to invest their resources in securing an MTA contract, including operating Transcendence II without an already assigned or new contract. That the ALJ would have chosen a different course of action if he were in Respondent's position does not disprove the simple and demonstrated fact that Respondent operated the paratransit business and that the drivers took clients to their appointments through February 26.

4. The ALJ's conclusion that TransCare NY continued to operate after the bankruptcy petition was filed is contrary to all record evidence and bankruptcy law.

In making his determination that TransCare NY continued to operate after it filed for bankruptcy the ALJ found that Transcendence could not have been operating because it was not fully set up. However, testimony by Respondents witnesses shows that Transcendence and Transcendence had bank accounts, and on February 24, right after it bound the necessary insurance policies, effectuated the foreclosure for the assets necessary to run the paratransit company. The ALJ ignores all documentary evidence, Trustee LaMonica's testimony and the basic tenets of bankruptcy law by finding that TransCare continued to operate the paratransit business after the petition was filed. The record evidence shows that Tilton and Patriarch representative on her behalf directed the paratransit operations. However, as of the filing of the bankruptcy petition, Tilton and Patriarch no longer had any control of TransCare NY; instead, Trustee LaMonica was responsible for the debtor's operations. 11 USC § 704. The only reasonable conclusion to take from the foregoing facts is that Tilton and Patriarch's post foreclosure efforts related to paratransit operations were done on behalf of Respondent Transcendence II.

The emails in evidence indisputably show that Tilton and Patriarch efforts to run the paratransit business, including their communications with employees as well as its target customer, the MTA, and the Trustee, were undertaken on behalf of Transcendence II, not TransCare.

The ALJ found that Tilton may have violated bankruptcy law by continuing to operate the TransCare business. This is an erroneous conclusion unsupported by any record evidence. Tilton's own testimony makes clear that as of February 24, she was no longer the director of TransCare. Therefore, neither Tilton nor the Patriarch representatives (even if they were acting on behalf of Tilton, as argued by Respondents) had any authority, nor would they have had any motivation, to direct paratransit operations on behalf of TransCare NY. The inescapable conclusion supported by the evidence is that as of the February 24 foreclosure, Tilton was using Transcendence II to run the

paratransit business, as planned.

The ALJ also erred when he credited Tilton's testimony that TransCare's failure to produce the foreclosed upon assets, including the computer server and the MTA contract, rendered foreclosure effectuated by the Notice of Acceptance of Collateral (Joint Exh. 6) null and void.¹³ However, Tilton testified that because the foreclosed assets were never delivered, and that if a party to an agreement "violates or breeches that agreement, that agreement is null and void," suggesting that the foreclosure agreement was null and void. This is clearly a misstatement of basic tenets of contract law made by a non-lawyer.¹⁴ Instead of disregarding this obvious mischaracterization of the law, the ALJ credited Tilton's statement as an accurate summary of the state of the and reproduced it in his decision. This obvious error places the ALJ's judgement in question.

The record evidence conclusively demonstrates that Respondent Transcendence II operated - including the uncontested testimonial and documentary evidence showing Respondents' plans for Transcendence II to take over the paratransit operations, the evidence showing that Respondents implemented these plans including by initiating the foreclosure, filing the bankruptcy petition, Respondents' representatives Creswell and Stephens's statements confirming that Transcendence commenced operations, the Trustee's unrefuted testimony that TransCare NY did not continue to operate after the bankruptcy petition was filed, the fact that Tilton had no authority to continue to direct TransCare NY's operations, Respondents' communications with the paratransit employees (discussed below) and employee testimony that they continued to report to work and perform their responsibilities as paratransit drivers. The fact that Respondent

¹³ The ALJ "credited" Tilton's testimony that TransCare's assets where "never transferred, sold and/or assigned to Transcendence." (ALJD 15:28-29). However, this was not Tilton's testimony. Immediately following the ALJ's mischaracterization of Tilton's testimony, he accurately quotes her actual testimony, which was that the foreclosed assets were not delivered. (ALJD 15:32-27).

¹⁴ A breach by one party to a contract does not render that contract null and void, but rather the party's non-performance gives rise to a claim for damages for the breach. Restatement (Second) of Contracts § 236 (1981).

Transcendence II did not have possession of the server or that it did not have a contract with the MTA may have prevented it from operating successfully in the long term, however, these details did not prevent Respondent Transcendence from operating during the short period of time that is relevant to this case. In light of the preponderance of the evidence, the Board should find that Transcendence II operated from February 24 to February 26.

The preponderance of the record evidence shows that Respondent Transcendence took over TransCare's paratransit operations on February 24. The only record evidence that supports the ALJ's finding that Respondent Transcendence did not operate is the self-serving testimony of Respondents' witnesses. Notably, the ALJ did not make a credibility determination regarding any witness' denials that Respondent Transcendence II operated at any time.¹⁵ However, it would be inappropriate for the ALJ or the Board to credit the denials by Respondents' witnesses because these statements are directly contradicted by the preponderance of the record evidence. *Standard Dry Wall Products, Inc.* 91 NLRB 544 (1950).

B. The ALJ Erred in Finding that Transcendence II was not a Successor to TransCare NY.

In finding that Transcendence II was not a successor to TransCare NY, the ALJ found that CGC failed to show that Transcendence II hired a majority of the bargaining unit employees. In making this finding, the ALJ ignored probative record evidence, including Patriarch Attorney Brian Stephen's February 25 email admission that "[a]ll of the 390 drivers and other TransCare employees necessary for Transcendence Transit II to continue to provide service under the [MTA paratransit] Agreement were transferred to Transcendence Transit II at the time of the foreclosure and are now employees of Transcendence Transit II; complete with health benefits and the availability of direct deposit for wages, which was no longer possible with TransCare New York."

¹⁵ The ALJ's credibility determinations related to the operation of Respondent Transcendence II are limited to crediting Stephen's testimony that "his statement to the MTA on February 26 that Transcendence II was operating the para-transit business was 'poorly drafted'" and crediting Tilton's statement that TransCare never delivered the foreclosed assets and her inaccurate statement about the result of a contract breach. (ALJD 15:32-37).

Notably, the ALJ credited Stephen's testimony that his statement to the MTA on February 26 that Transcendence II was operating the paratransit business was "poorly drafted," but the ALJ was silent about and made no finding regarding Stephen's February 25 admission that the drivers' employment had been transferred to Transcendence II as of the February 24 foreclosure.

In finding that the bargaining unit employees were not hired, the ALJ erroneously "credited" testimony of Respondent witnesses Jones and Stephen that the announcement that the employees' jobs were being transferred to a new company was only a draft. However, the record evidence shows that Stephen never testified about the February 24 announcement and Jones' testimony does not support the ALJ's "credited testimony" finding, additionally, Jones' February 24 email to manager Fuchs directing Fuchs to distribute the announcement to the paratransit employees. (GC Exh. 28). As such, the Board should not rely upon the ALJ's credibility finding that the announcement was merely a draft. *Bralco Metals*, 227 NLRB at 974. The ALJ characterized the distribution of the announcement notifying employees that their employment was being transferred as "leakage." However, the documentary evidence shows that at 12:47 pm on February 24, Patriarch representative Jones specifically directed Tom Fuchs, the head of the paratransit business, to distribute the announcement to the paratransit employees. (GC Exh. 29). Fuchs sent this email to Union representative Cordiello less than three hours after receiving Jones' direction with one small but important change - he removed the word "draft."

The ALJ also erroneously concluded that the employment offers to TransCare NY employees were never distributed to employees - despite uncontested record evidence that transfer letters were sent to Transcendence office employees as well as to paratransit employees Thomas Fuchs and Alejandrina Cleary. Cleary's acknowledged letter stating that her employment had been transferred as of February 24 is part of the evidentiary record. (GC Exh. 3). While neither Fuchs nor Cleary were bargaining unit employees, these letters directly contradict the ALJ's finding that the transfer of employment letter were drafts that were never distributed to employees.

The ALJ erroneously found that because the bargaining unit employees did not receive transfer of employment letters, they should not have been under the impression that they were working for Transcendence II. This finding is flawed for two reasons. First, the February 24 Announcement of the transfer of employment that was distributed to employees provided unambiguous notice to the employees and the Union that the bargaining unit employees' employment *had been* transferred to Respondent Transcendence II. Second, in determining whether Transcendence was a successor to TransCare, the ALJ improperly speculated about what the employees should or should not have thought about their employment - rather than analyzing successorship based on the objective standards under Board law.

The ALJ found that the February 24 Announcement put the employees on notice that their employment would be transferred sometime in the future. However, his conclusion is flatly contradicted by any reasonable reading of the Announcement. The Announcement states that the new entity, Respondent Transcendence II, had already been set up and capitalized. The Announcement to employees states that the employees' employment "is being transferred," not that it will be transferred sometime in the future. The Announcement states that within 24 hours, the employees will receive an employment letter "reflecting this change." Thus, the announcement makes clear that the subsequent letter would memorialize the change in employment. The transfer letter referred to in the announcement was finalized the same day that the Announcement was distributed and states that the employees' employment was transferred as of February 24. While the record evidence shows that the letter was not widely distributed to paratransit drivers as of February 26, likely delayed by a typographical error, the ALJ's finding that the absence of distribution establishes that the paratransit drivers were never employed by Transcendence II is erroneous.

In making his determination that Respondent Transcendence II was not a successor to TransCare NY, the ALJ failed to consider and apply relevant Board law. The Board has held that

an employer who takes over another employer's operations becomes a successor and has an obligation to bargain with the Union at the time the successor effectively managed and controlled the predecessor's operations. See *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1206 (1994) (Board found that successor had a bargaining obligation even though legal ownership of the business had not yet been transferred and a required license had not yet been granted). Similar to this case, in *Golden Cross*, the successor employer could not officially take over the business without first having certain licenses but the successor effectively managed and controlled operations prior to acquiring the license. The Board in *Golden Cross* found that the successor employer was required to bargain with the Union one month prior to the date that the successor gave the bargaining unit employees formal offers of employment because it had already taken control of the relevant operations. *Id.* at 1209. The ALJ failed to consider *Golden Cross* or other related cases cited by Counsel for the General Counsel and the Charging Party.

C. The ALJ's Erred in Finding that Respondents were not a Single Employer with Respondent Transcendence II

1. Common ownership

Finally, the ALJ determined that Respondents were not single employers with Respondent Transcendence II.¹⁶ In making this determination the ALJ correctly found that the Respondent have common ownership in Lynn Tilton, but minimized the importance of this factor in the single employer test by stating, "[t]o say that the common ownership of financial control factor is critical in establishing single-employer status . . . essentially disregards how businesses operate when ownership and financial control are by other entities" (ALJD p. 23 20-23).

The ALJ went on to find that Respondents have no common management, interrelations of

¹⁶ Judge Chu also found that Respondents were not joint employers. The evidence adduced at the hearing supports a single employer theory, rather than a joint employer theory and therefore Counsel for the General Counsel does not except to the ALJ's conclusion regarding joint employer. However, in as much as the ALJ or the Board may rely upon factual findings the ALJ made related to his joint employer conclusion, CGC excepts to some of the ALJ's conclusions that were not supported by the record evidence.

operations, or centralized control of labor relations. However, his conclusions are flawed as they are contrary to the record evidence and based on the ALJ's substitutions of his own judgment rather than application of Board law.

2. Common Management

The ALJ found that there is no common management among Respondents. However, the undisputed record evidence shows that Respondents have common management. Respondent Transcendence and Respondent Transcendence II have one-person Boards of Directors, comprised only of Lynn Tilton. Tilton is also the sole manager for Respondents Patriarch and PPAS.

The ALJ substituted his own speculation in place of the record evidence finding that Tilton's role is no different than any other entrepreneur that owns or managers several companies. However, the record evidence shows that Tilton took an active role in managing all of Respondent entities, beyond just that of a passive investor. The record evidence shows that Tilton took a very active role in the set up and management of Respondents Transcendence and Transcendence II. She actively managed Patriarch employees in their efforts to set up Respondents Transcendence and Transcendence II and she and take over paratransit operation and approved almost all actions taken by related to their work for Respondents Transcendence and Transcendence II. Additionally, because Respondent PPAS has no employees, Tilton personally delegates responsibilities related to the operation of PPAS to Patriach employees. Additionally, Youngblood was appointed the President of both Respondents Transcendence and Transcendence II by Tilton, a fact that the ALJ failed to consider.

3. Interrelation of operations

In finding that the Respondents have no interrelations of operations, the ALJ relied on the fact that the Respondent entities were each created to engage in different businesses (Respondent Patriarch was created to provide legal and financial services, PPAS to be a banking entity and Transcendence and Transcendence II were created to provide ambulance and paratransit services,

respectively). However, the ALJ fails to appreciate that while each of these entities were created for separate functions, for the time period in question, they worked as a single enterprise for the purposes of initiating and continuing paratransit operations, and that each function of each of the businesses was necessary for Transcendence II to operate the paratransit business.

The record evidence shows that Respondent Patriarch's employees performed vital functions for Transcendence and Transcendence II during the time those entities were in existence. The ALJ credited Respondents' witnesses' testimony that all fifty employees of Patriarch worked on the TransCare restructuring "around the clock," showing that Patriarch was solely engaged in establishing and running the paratransit business for the relevant time period. Much of the work performed by the Patriarch employees in furtherance of the TransCare restructuring was setting up Respondents Transcendence and Transcendence II. Respondent Patriarch's Attorney Stephen incorporated Respondents Transcendence and Transcendence II. Respondent Patriarch's finance department set up bank accounts for both Transcendence entities. Attorney Stephen directed Transcendence President Youngblood to sign bank documents for those accounts. Respondent Patriarch's Head of Talent Acquisition Randy Jones was responsible for recruiting and offering employment to high level employees of Transcendence and Transcendence II, including Glen Youngblood and Thomas Fuchs. Additionally, Respondent Patriarch's Attorney Stephen was responsible for negotiating an agreement to for Respondent Transcendence II to provide services to the MTA, its only customer. Respondent PPAS's attorney Randy Creswell was responsible for communicating with Trustee LaMonica on behalf of Respondent Transcendence II, asking LaMonica if Respondent Transcendence could use debtor TransCare NY's accounts for payroll purposes on February 26, and asking LaMonica to terminate the paratransit contract. (GC. Exh. 9). The sharing of these employees supports the conclusion that Respondents are a single integrated enterprise. See e.g., *Spurlino Materials*, 357 NLRB 1510, 1516 (one company controller's performance of all accounting work for second company cited as factor in finding interrelated operations), *Pathology Institute*,

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) 320 NLRB 1050, 1060-1061 (1996) (authorization of individuals to draw checks on accounts of the two entities in question shows interrelation of operations).

Furthermore, in communications with the MTA and with the Trustee, Respondent Patriarch's attorney Stephen and PPAS's attorney Creswell use the pronoun "we" referring to Transcendence II's and Patriarch/PPAS's shared interests, showing that Respondents held themselves out to be an integrated enterprise. *Masland Industries*, 311 NLRB 184, 187 (1993); *Cardio Data Systems Corp.*, 264 NLRB 37, 41 (1982), *enfd. mem.* 720 F.2d 660 (3d Cir. 1983).

The record evidence demonstrated that the employees of Respondent Patriarch performed substantial functions for all four of the Respondents. With regard to Respondent PPAS, Respondent Patriarch employees perform all functions as Respondent PPAS does not have employees and accordingly Tilton delegated all tasks related to Respondent PPAS's operations to employees of Respondent Patriarch. (Tr. 266-67).

4. Centralized Control of Labor Relations

The ALJ found that there was no centralized control of labor relations because there was no evidence in the record that "the labor relations functions of Transcendence and Transcendence II *would have been* the responsibilities of Patriarch" (emphasis added). Entirely irreconcilably, the ALJ also found that the Patriarch HR department was initially involved in providing offers of employment to TransCare NY employees to Transcendence and Transcendence II. Notably these offers set the terms and conditions of employment for the Transcendence and Transcendence II employees.

The Board regards centralized control of labor relations as the most important single-employer factor. *See, e.g., Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988); *Fedco Freightlines*, 273 NLRB 399, 399 n.1 (1984). Centralized control of labor relations does not require

that common officials directly oversee the work forces of both entities. Rather, the “more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.” *See Pathology Institute*, 320 NLRB 1050, 1063-64 (1996).

The record evidence shows that Respondent Patriarch’s employees directed all major labor relations decisions effecting the employees of Respondent Transcendence and Transcendence II, including the bargaining unit employees. Respondent Patriarch’s Managing Director Randy Jones instructed Transcendence II Manager Thomas Fuchs to send the initial notice to all New Co. employees that their employment was being transferred to Transcendence or Transcendence II. (GC Exh. 29). This notice advised employees that their terms and conditions of employment would be the same as when they were employed by predecessor TransCare NY. (GC Exh. 29). John Pothin, Patriarch’s Managing Director of its Human Resources Platform, provided the employee transfer letter to Transcendence and Transcendence II’s management stating that employees would work under the same terms and conditions as they did with Transcare NY and directed the managers to have employees sign these letters. Finally, Jones provided notice to Fuchs that paratransit operations were shutting down and instructed him to send it to the paratransit employees. (GC. Exh. 28). These documents show that Patriarch employees were in control of the labor policies for Respondents Transcendence and Transcendence II.

Respondents claim that Respondent Patriarch’s employees were not in control of labor relations for Respondents Transcendence and Transcendence II, but instead were acting on behalf of Tilton as Director of TransCare.¹⁷ (Tr. 327). Tilton testified that she had the ultimate authority to

¹⁷ Respondents elicited evidence about Respondent Patriarch official’s role in running TransCare or other portfolio companies. The Respondent Patriarch representatives testified to that they played no role in the operations of TransCare. (Tr. 445). However, the role that Respondent Patriarch played in the operations of TransCare or any other portfolio company is not relevant to the role that any of these Respondent Patriarch employees played in relation to Transcendence II.

approve offers of employment and the terms and conditions of employment for the employees of Respondents Patriarch, Transcendence and Transcendence II. Assuming, *arguendo*, that Patriarch representatives did not have the authority to make any labor relations decisions, Tilton's control of the labor relations of Respondents Patriarch, Transcendence and Transcendence II, proves that all three Respondents have centralized control of labor relations.

The fact that Respondent PPAS has no employees does not change the conclusion that it is a single employer with Respondent Patriarch, Transcendence and Transcendence II. In that regard, the Board has held that the lack of centralized labor relations is not a bar to finding separate entities to be a single employer, especially when, as it true here, one of the employers has no employees. *Bolivar-Tees*, supra; *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993), *enfd.* 55 F.3d 684 (D.C. Cir. 1995). The Board has specifically noted that the absence of statutory employees does not necessarily bar a single employer finding. *Cimanto Brothers, Inc.*, 352 NLRB 797, 799 (2008).

The record evidence shows that Respondents are single employers because Respondent exerts "overall control of critical matters at the policy level" for all four Respondent entities. *Good Life Beverage Co.*, 312 NLRB 1060, 1072 (1993).

5. Arms-Length Relationship

The ALJ found that there was no evidence of the lack of an arms-length relationship between Respondents, specifically finding that the bill of sale was an arms-length transaction. However, it is undisputed that despite the execution of the bill of sale and the transfer in interest in the foreclosed assets (valued by Respondents at \$10,000,000) from lenders represented by PPAS to Transcendence and subsequently from Transcendence to Transcendence II, no actual funds were transferred; instead Tilton testified that she was prepared to put up her own personal funds but never did. Contrary to the ALJ's finding that "all loans were well documented," there is no documentary evidence showing loans made to Transcendence or Transcendence II. Instead, the evidence shows that Tilton

transferred valuable assets among numerous entities that she alone controlled with no record of payment for any of those asset transfers. Contrary to the ALJ's legal conclusion, this conclusively shows that there was no arm length dealing between Respondents. The uncontested record evidence also shows that PPAS paid for the workers compensation insurance for Respondents Transcendence and Transcendence II. One company paying for the obligations of another shows a lack of arms-length dealing. *See Rogan Brothers Sanitation*, 362 NLRB 547 (2015); *Grane Healthcare Co.* 357 NLRB 1412, 1441 (2011).

Additionally, the ALJ found that “[o]ther lenders were involved, including Wells Fargo, to ensure that there was proper accounting and fair value for TransCare’s assets.” The only record evidence is that Wells Fargo had an asset-based loan to TransCare that it changed the terms of in February, causing Tilton to have to file the TransCare bankruptcy petition earlier than she expected. (Tr. 332, 335). The record evidence is entirely devoid of any support for the ALJ’s conclusion that Wells Fargo had any sort of oversight role regarding the valuation of the foreclosed assets or the financial transactions between PPAS, any of Tilton’s funds and Transcendence or Transcendence II. The Judge’s unsupported conjecture about Wells Fargo’s role is not a valid basis upon which to conclude whether there was an arms-length transaction.

The preponderance of the record evidence shows that the Respondents were a single employer with Respondent Transcendence II. The record evidence establishes that Respondents have common ownership, common management, centralized control of labor relations and interrelation of operations at all times relevant to this case. *Radio and Television Broadcast Technicians Local Union 1264*, 380 U.S. 255. The Board has held that the fundamental inquiry to determine single employer is whether there exists overall control of critical matters at the policy level. The fundamental purpose for the inquiry is to determine “whether there exists overall control of critical matters at the policy level.” *Good Life Beverage Co.*, 312 NLRB 1060, 1072 (1993). The evidence showed that Tilton, through her ownership of all of Respondents and through her direction of Patriarch employees,

controls critical matters at the policy level for all Respondents. Accordingly, the ALJ's finding that Respondents are not a single employer should be reversed.

- D. The ALJ Erred by failing to find that the Respondents violated Section 8(a)(5) of the Act by failing to provide the Union notice and opportunity to bargain over Respondents' decision to cease paratransit operations on February 26, 2018.

In light of his finding that Respondents were not a single employer and were not successors to TransCare NY, the ALJ did not address whether Respondents provided the Union with notice and opportunity to bargain over the effects of Respondents' decision to cease paratransit operations on February 26. The ALJ also did not address the appropriateness of a *Transmarine* remedy, as clarified in *Melody Toyota. Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *Melody Toyota*, 325 NLRB 846 (1998).

The uncontested testimony of Union Representative Cordiello evidence shows that late in the afternoon of February 26, 2016, Respondent Transcendence II Manager Thomas Fuchs presented Cordiello with a *fait accompli* when Fuchs told Cordiello that Transcendence II was immediately ceasing paratransit operations. (Tr. 224). A *Transmarine* remedy is appropriate in this case because economic consequences are needed to incentivize Patriarch to fulfill its effects-bargaining obligation. *O.L. Willis, Inc.*, 278 NLRB 203, 205 (1986).

IV. CONCLUSION

It is respectfully submitted that based on the entire record, the preponderance of the credible evidence clearly supports each of the allegations of the Complaint. Therefore, it is urged that the Board find that Respondents, as single employers, violated Sections 8(a)(1) and (5) of the Act by failing to bargain over the effects of the February 26, 2016 decision to cease paratransit operations.

It is respectfully urged that the Board issue an Order requiring Respondents, jointly and severally, pay the unit employees their normal wages when in the Respondents' employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the

date the Respondents bargain to agreement with the Union on those subjects pertaining to the effects of the shutdown of the paratransit operations; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within five business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondents' notice of their desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in February 2016, when the employee was terminated as a result of the shutdown of the paratransit operation, to the time he or she secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest. General Counsel further requests that Respondent be required to post and mail appropriate notices in which employees are assured of their Section 7 rights and in which Respondent promises to cease and desist from its unlawful conduct, and any other remedy deemed appropriate.

Respectfully Submitted,

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