

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

**M&T ENGINEERING AND CONSTRUCTION  
LLC**

**and**

**Case 14-CA-240972**

**DONNIE SCRUGGS, an Individual**

**and**

**Case 14-CA-241119**

**CONRAD MONACO, an Individual**

**and**

**Case 14-CA-241121**

**BRYAN SCRUGGS, an Individual**

**and**

**Case 14-CA-241333**

**SCOTT CHANEY, an Individual**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

Respectfully Submitted by  
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Counsel for the General Counsel Julie M. Covell respectfully files this brief with the Honorable Michael A. Rosas, Administrative Law Judge (ALJ). This case is before the ALJ based upon an Amended Consolidated Complaint and Notice of Hearing alleging that M&T Engineering and Construction LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act). The issues in this matter were heard by the ALJ in Overland Park, Kansas, on October 2, 3, and 4, 2019, and are addressed below.

### **I. Statement of the Case**

On April 9, 2019,<sup>1</sup> Respondent paid its employees for work performed the previous week. Disputes arose about Respondent's failure to (1) pay employees for the correct number of hours worked, (2) calculate employee wages using the correct wage rate; and (3) reimburse employees for OSHA training they had attended. Documentary evidence introduced at hearing substantiates the allegations that once those disputes arose Respondent made numerous and varied statements which independently violate Section 8(a)(1) of the Act and establish Respondent's animus toward its employees' actual or perceived protected, concerted activity. Then between April 9 and April 12, Respondent unlawfully terminated Charging Parties Donnie Scruggs, Bryan Scruggs, Scott Chaney, and Conrad Monaco. The evidence at hearing establishes that Respondent terminated their employment because (1) they had engaged in protected concerted activities related to employees' terms and conditions of employment; (2) Respondent believed that they were engaged in protected, concerted activities; and/or (3) Respondent wanted to discourage other employees from engaging in protected concerted activities related to employees' terms and conditions of employment.

### **II. Statement of the Facts**

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<sup>1</sup> Hereinafter all dates occurred in 2019 unless otherwise noted.

## **A. Background**

Respondent is a limited liability company with an office and place of business located in Overland Park, Kansas (Respondent's office). GC 1-Q, 1-S, and 2a.<sup>2</sup> Respondent is owned by Tannas "Tonia" Takkavoli and Majid "Max" Nowrouzi (Nowrouzi). T 348:17-18; 349:25; 350:1-5. In early 2019, Respondent successfully bid its very first job and was retained as a subcontractor to perform work, including block work, on a job at the Kansas City Zoo (hereinafter referred to as the "Zoo job"). T 352:14-22. The General Contractor on the project was Centric. T 352:23-25. For the Zoo job, Respondent hired three classifications of employees to perform work on its behalf: (1) bricklayers, (2) laborers, and (3) operators. T 353:10-25; 354:5-6. Hired to perform bricklayer work were Charging Party Donnie Scruggs (D. Scruggs) and his cousin, Charging Party Bryan Scruggs (B. Scruggs), and Charging Party Conrad Monaco (Monaco). T 353:10-23. D. Scruggs was also hired to be a working foreman. T 30:5-6. Charging Party Scott Chaney (Chaney) was hired to be a laborer. T 354:5-6. A fifth employee, Anthony Riley (Riley) was hired to work as an operator and laborer. T 353:24-25. Employees were told that it was a prevailing wage job and that it would last approximately six weeks. T. 29:18; 30:30; 217:4; 218:4-5; 284:4; 320:20-21. During their employment with Respondent, employees communicated with Respondent's co-owner and the Zoo job project manager Max Nowrouzi (Nowrouzi) primarily by text message. T 360:11-21.

## **B. The Charging Parties Report to Work**

On Wednesday, April 3 and Thursday, April 4, D. Scruggs, B. Scruggs, and Riley reported to the Zoo job to set up work site and receive materials. T 31:18-19; 43:8; 218:20, 23; 219:5-7; 220:20; 221:1-6. D. Scruggs also participated in meetings with the General Contractor and other

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<sup>2</sup> References will be denoted using the following abbreviations and followed by page numbers: Trial Transcript (T); General Counsel's exhibits (GC); and Respondent's exhibits (R).

subcontractors about the work that needed to be completed. T 47:1-11; 113:22-25; 114:1; 115:15-19.

On Friday, April 5, all five members of the crew, D. Scruggs, B. Scruggs, Chaney, Monaco, and Riley reported to work. T 54:20-21; 221:16-23; 285:4-12; 322:15-19. The testimony of all witnesses who were on the jobsite that day was that the day got off to a rough start. T 55:23-25; 56:1-3; 323:4-9, 12-18. The absence of batter boards and other marks made it difficult for D. Scruggs to measure out the walls. T 56:16-22, 25; 57:1-6. The employees, including Nowrouzi, had difficulty getting the mixer started. T 252-253; 323:12-18; 355:19-22, 25; 356:1-5. Eventually, the crew was able to get the first course of block laid and grouted. T 58:6-8. When employees left that Friday, it was understood that they would not be returning to work until the middle to the end of the following week due to some concrete work that needed to be done. T 66:11-21; 233:3-5; 287:11-14; 325:9-14.

### **C. Respondent Is Notified of a Mistake**

On April 8, days before employees were scheduled to return to work, Respondent was notified by Centric that there were errors in the placement of the walls. T 438; 439:14. At 5:04 p.m. on April 8, Nowrouzi notified D. Scruggs by text that there had been an error. GC 7 at 1. When D. Scruggs was unable to reach Nowrouzi by phone, D. Scruggs called Centric Superintendent Brian Shields to find out more information about the mistake. T 69:4-20. The record, through Nowrouzi's pre-trial testimony and D. Scruggs' actions, established that there was an expectation that D. Scruggs would be at the Zoo job on April 9 to evaluate the mistake. T 76:11-18. Consistent with that belief, D. Scruggs initiated a text conversation with Nowrouzi to let him know that he couldn't be at work that day because he had fallen on the jobsite that previous Friday and was in pain. GC 8 at 1-2.

#### **D. The Charging Parties Get Paid**

Around 10:34 a.m. on August 9, D. Scruggs texted Nowrouzi again to ask about when paychecks would be ready that day. GC 8 at 3. Nowrouzi responded that the checks would be ready at 6:00 p.m. *Id.* D. Scruggs texted back that employees had been asking him about the checks and that he would pass the information about the time along to the other employees. *Id.* at 3-4. Nowrouzi responded, “Ask them to call me directly.” *Id.* at 3-4.

Late that afternoon, B. Scruggs, Monaco, and Chaney all went to Respondent’s office to pick up their paychecks. T 224:23-25; 237:15-24; 326:22-25; 327:1; GC 21. As previously arranged, B. Scruggs picked up his cousin’s paycheck. T 79:15; 481:22-23. Each of those three employees testified that after looking at their paychecks they believed they had been shorted hours. T: 225:2-5; 290:2; 327:5-11. Despite their beliefs that the paychecks were wrong, none of the three raised their concerns with Respondent that day. T 233:23-25; 234:1-2; 291:3.

Although B. Scruggs did not raise the issue with Respondent, he did call his cousin D. Scruggs as was driving home from Respondent’s office to tell him that he thought his check was short. T 225:6-8; 12-13. D. Scruggs asked that B. Scruggs to look at his check. T 80:1-2; 225:16. B. Scruggs did what his cousin asked and noticed that his cousin had been paid for even fewer hours. T 225:20-25. When B. Scruggs told his cousin that he had also been shorted, D. Scruggs asked if they had been paid for the OSHA training, as Nowrouzi had promised. T 80:19; 226:1-8. Before B. Scruggs got home, he received a phone call from Nowrouzi to come back and get the money. T 226:13-14. When B. Scruggs returned to the office, Respondent had both OSHA reimbursement checks ready. T 262:13-20.

#### **E. Respondent Terminates Donnie Scruggs and Bryan Scruggs**

At 5:27 p.m., D. Scruggs texted Nowrouzi a third time that day to let him know that he had not been paid for the correct number of hours and that he hadn’t received his OSHA

reimbursement. GC 8 at 4-5. D. Scruggs stated that he would call Centric. *Id.* at 5-6. At 5:41 p.m., Nowrouzi texted D. Scruggs that his service was not needed anymore after stating that he would not have cut D. Scruggs a check if he had known he would call Centric. *Id.* at 6; GC 9 at 6. When D. Scruggs threatened again to contact Centric or file a lien to recover his lost wages, Nowrouzi threatened to make D. Scruggs pay for the mistake. GC 8 at 7.

The next morning D. Scruggs reached out to Nowrouzi again via text and asked if Respondent was going to pay him for the 21 hours he worked. GC 11 at 2. The two exchanged texts back and forth until Nowrouzi threatened to block D. Scruggs' check if he continued to contact Nowrouzi about the wage dispute. GC 11 at 6.

Less than two hours later, Nowrouzi texted B. Scruggs that Nowrouzi was making changes to the field team and that his services were no longer needed. GC 18 at 1. Although Nowrouzi claimed that he was changing the team because they had no knowledge of masonry, he told B. Scruggs that he was hiring an estimator and project manager and requested that B. Scruggs send in a resume if he was interested. *Id.* at 1-2.

#### **F. Respondent Attempts to Learn About Employees' Communications**

At 1:18 p.m. on the afternoon of April 10, D. Scruggs reached out to Anthony Riley via text about wage issues and OSHA certifications. GC 13 at 1; *see also* T 512:16-25; 513:1-5. D. Scruggs also sent Riley screen shots of the prevailing wage rates for operators and claimed that Riley should be making \$56.76 an hour as an operator. *Id.* at 2-3; *see also* T 514:9-12.

Testimonial and documentary evidence establish that Nowrouzi knew that D. Scruggs was texting employees, including Riley. T 518:4-11; GC 11 at 12, 17; R 16 at 2. Specifically, around 2:10 p.m., Nowrouzi texted Estimator Ken Burch and complained that D. Scruggs was texting his other employees. R. 16 at 2. At 2:48 p.m., Nowrouzi texted D. Scruggs, questioning him about

his contacts with Respondent's other employees and that at 3:01 p.m. texted D. Scruggs again stating, "He sent me your print screen." GC 11 at 6, 12; GC 12 at 5, 10.

After learning about D. Scruggs' texts to Riley, Nowrouzi made several attempts to determine who else D. Scruggs had contacted. Nowrouzi texted D. Scruggs multiple times between 2:48 p.m. and 3:31 p.m. on April 10, asking which employees D. Scruggs had talked to and which employees were listening to him. GC 11.

During that same time period, Nowrouzi texted Chaney and asked if D. Scruggs had called him. GC 26 at 4. Nowrouzi went on to question Chaney about whether D. Scruggs had brought up his termination, Chaney's wages, or the OSHA 10 certification. *Id.* at 7, 10-11.

On April 11, Nowrouzi texted Monaco and asked if D. Scruggs has contacted him. GC 22 at 1. When Monaco said no, Nowrouzi told Monaco that D. Scruggs had been fired and that he had been spreading false information to other employees. *Id.* at 1-4.

#### **G. Respondent Terminates Conrad Monaco**

On April 11, Nowrouzi texted D. Scruggs, B. Scruggs, Monaco, and Chaney that there had been a mistake in their paychecks. GC 15 at 1-2; GC 19 at 1; GC 22 at 7-10; GC 27. On April 12, the day after receiving the text about the paycheck error, Monaco reached out to Nowrouzi by text to seek clarification about the mistake. T 331:18-23. When Monaco didn't understand Nowrouzi's response, Monaco attempted to explain what he thought was the error. T 334:2-5; GC 23 at 5-7. Monaco and Nowrouzi exchanged several texts about the source of the wage error, including the number of hours that Monaco worked, the hourly wage he should have received, and even when the work day should have started. GC 23 at 5-19. On more than one occasion, Monaco said that he would let the issue go if he could keep his job, but Nowrouzi eventually agreed to "write a check for the difference. *Id.* at 16-17, 22-23. When Monaco went that afternoon to pick up the check at the office, Burch walked him out to the sidewalk to give him the

check. T 337:1-4. After Monaco had driven away, Burch called him and told him that his job was being terminated. T 337:12-13.

#### **H. Respondent Fails to Recall Scott Chaney**

Earlier on April 10 before Nowrouzi questioned Chaney about his conversation with D. Scruggs, Chaney texted Nowrouzi asking about the status of the job. GC 26 at 1. Nowrouzi responded that they would be going to the jobsite either Friday or Saturday. *Id.* at 2. Chaney attempted to confirm that Nowrouzi would contact him about when Chaney needed to report. *Id.* Nowrouzi responded, “Be ready either for Friday or Saturday. I’ll text you a day in advance.” *Id.* at 3. Other than to text Chaney about the pay mistake, Nowrouzi never contacted Chaney after that. T 310:23-24.

### **III. Respondent Committed Independent 8(a)(1) violations**

The record established that between April 9 and April 12, a time period of before and after D. Scruggs made his initial complaint about his paycheck, Respondent made numerous and varied coercive statements in violation of Section 8(a)(1). Nowrouzi made all but one of these violative statements and those statements attributable to him occurred in text conversations he had with employees. The final statement was made by Estimator Ken Burch to Monaco on April 12. Respondent made no attempt to explain these unlawful statements. The evidence establishes that Respondent’s statements were directed at employees’ rights to engage in Section 7 activity, including but not limited to employees’ ability to discuss terms and conditions of employment, including wage issues, with other employees, former employees, and third parties. The evidence establishes that these unlawful statements occurred on the dates set forth below.

#### **A. April 9, 2019 Violations**

##### **1. Facts**

Before D. Scruggs had ever raised any concerns about his paycheck or had been notified of

his termination, Nowrouzi had already made it clear that he didn't want employees talking about their terms and conditions of employment, including wages. On April 9, at 10:34 a.m., D. Scruggs texted Nowrouzi to ask if the paychecks were ready yet. GC 8 at 3. After receiving Nowrouzi's brief reply of "at 6:00[,]" D. Scruggs texted "I have people calling me asking for checks I will tell them 6 o'clock your office I suppose." *Id.* at 3-4. Nowrouzi responded, "Ask them to call me directly." *Id.* at 4.

Later that day D. Scruggs was notified by his cousin B. Scruggs that the checks appeared short and that they hadn't received their reimbursement for the OSHA training. D. Scruggs texted Nowrouzi at 5:27 p.m. that that he had not been paid the correct number of hours or reimbursed for his OSHA training and stated that he would call the General Contractor Centric. GC 8 at 5; GC 9 at 3. Nowrouzi responded, "I saw your text a little bit late Otherwise I wouldn't write your check until you do whatever you wanna do." GC 8 at 6; GC 9 at 5. Nowrouzi followed that immediately with a text that D. Scruggs' employment was terminated, and D. Scruggs responded that he would "file a lien on the property" and that he was "calling Centric right now." GC 8 at 6-7; GC 9 at 5. Mr. Nowrouzi responded, "Don't push me to force you to pay what you did wrong Centric will give you shit." GC 8 at 7; GC 9 at 7.

## **2. Legal Analysis**

### **a. Respondent prohibited employees from discussing their wages and other terms and conditions of employment**

Respondent's statement that employees should contact it directly with any questions instead of discussing it amongst themselves unlawfully restricts employees in the exercise of rights protected by Section 7 of the Act. Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). The Board has long held that it is unlawful for companies to

prohibit employees from discussing their terms and conditions of employment, including wages. *Alternative Energy Applications*, 361 NLRB 1203 (2014), citing *Waco, Inc.*, 273 NLRB 746, 747-748 (1984). Therefore, when Nowrouzi instructed D. Scruggs to have employees contact Respondent with questions about paychecks as opposed to talking with a fellow employee, Nowrouzi restricted employees' Section 7 rights to discuss their terms and conditions of employment, specifically wages and obtaining payment for hours worked, in violation of Section 8(a)(1) of the Act.

**b. Respondent threatened to withhold employees' pay if they engaged in protected, concerted activities**

Respondent's threat that it would have withheld pay for hours worked if it had known that employees were going to contact the General Contractor unlawfully restricts employees in the exercise of rights protected by Section 7 of the Act. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether under the totality of circumstances the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *Park 'N Fly, Inc.*, 349 NLRB 132, 140 (2007). Moreover, the Board has found that "[l]ike the threat of discharge, threats of economic reprisal for engaging in protected activities . . . strike at the heart of the Act and the rights intended to be protected therein." *Electrical Fittings Corp.*, 216 NLRB 1076, 1077 (1975).

Nowrouzi's threat to withhold payment of wages was directly tied to D. Scruggs' statement that he intended to engage in protected, concerted activity, specifically calling and enlisting the assistance of Centric, the General Contractor. The Board has held that employee communications with third parties are considered protected, concerted activity so long as the "communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection." *Emarco, Inc.*, 284 NLRB

832, 833 (1987). D. Scruggs' complaint about his wages and OSHA reimbursement were part of an ongoing labor dispute. The record contains no evidence that D. Scruggs' claim that he had not been accurately paid were so loyal, reckless or malicious as to lose the protection of the Act. Therefore, a threat to retaliate against an employee for engaging in protected activity would have a reasonable tendency to interfere with, restrain, or coerce employees who might be considering whether to involve a third party in trying to resolve an ongoing labor dispute.

**c. Respondent threatened employees with monetary action if they engaged in protected, concerted activities**

After terminating D. Scruggs, Nowrouzi's threat to make him pay for a mistake if he called Centric also violates Section 8(a)(1) of the Act. As noted above, communication with a third party to discuss ongoing labor disputes, such as failure to pay wages, is protected, concerted activity. The fact that Respondent had just terminated D. Scruggs does not remove him from the ambit of the Act's protection. The Board has repeatedly held that former employees fall within the definition of "employee" as set forth in Section 2(3) of the Act. *MEI-GSR Holdings, LLC*, 365 NLRB No. 76, at \*1 n.1 (May 16, 2017). Moreover, the Board has repeatedly held that the term "employee" as defined in the Act includes former employees even if they were not unlawfully terminated. *IGT d/b/a Int'l Game Tech. & Int'l Union of Operating Engineers Local Union 501, AFL-CIO*, 366 NLRB No. 170 (Aug. 24, 2018). Nor does the fact that the statement was only made to a former employee make it any less unlawful. The Board has held such statements still violate Section 8(a)(1) of the Act even when said only in the presence of a former employee. *L.D. Brinkman Se.*, 261 NLRB 204, 210 (1982).

**B. April 10, 2019 Violations**

**1. Facts**

On the morning of April 10, D. Scruggs followed up with Nowrouzi to ask about whether

Respondent intended to pay him for all the hours he worked. Nowrouzi's response mirrored his response from the day before when D. Scruggs attempted to address the issue. Nowrouzi replied, "I will block your check for more investigation. The accountant might make a mistake." GC 11 at 5; GC 12 at 5.

Despite telling D. Scruggs multiple times on the morning of April 10 to stop texting him, Nowrouzi initiated contact with D. Scruggs later that afternoon at 2:48 p.m. GC 11 at 4-6. Upon learning that D. Scruggs had been texting at least one of Respondent's other employees, Nowrouzi texted D. Scruggs the following: "So you called my other employees. Did they give you a shit? Did Anthony give you a shit? Did Centric give a shit?" GC 11 at 6-7; GC 12 at 5-6. Nowrouzi followed up his questions by telling D. Scruggs, "It's illegal to contact my employees asshole. Don't put yourself in trouble." GC 11 at 8; GC 12 at 7. When D. Scruggs refused to provide the requested information, Nowrouzi texted again at 2:59 p.m. asking, "Who is such asshole to listen to you? Leaving a prevailing wage and be against his boss? Scott? Anthony? Conrad? Huh, who?" When Scruggs failed to provide a name, Nowrouzi demanded, "Tell me, who?" GC 11 at 11; GC 12 at 9-10. Minutes later after receiving no texts responsive to his demand for names, Nowrouzi texted D. Scruggs, "Don't call/text my employees any-more asshole." GC 11 at 14; GC 12 at 12. Finally, at 3:29 p.m., Nowrouzi texted him, "You are emotional and calling people I told them who-ever gives you a shit, he is out." GC 11 at 17; GC 12 at 14.

When Nowrouzi failed to ascertain who else D. Scruggs had contacted, he began interrogating his remaining employees about their conversations with D. Scruggs. At 3:18 p.m., even as he continued to text D. Scruggs, Nowrouzi texted Chaney, "Scott Has Donnie called you?" GC Exhibit 26 at 4. In response to Chaney's admission that Donnie had called him, Nowrouzi asked, "Anything I should know?" *Id.* at 5. Although Chaney initially responded with information about D. Scruggs' fall at the jobsite on April 5, Nowrouzi followed up with Chaney at

4:23 p.m. asking, “Did he tell you why I fired him?” *Id.* at 7. When Chaney said that he didn’t remember, Nowrouzi responded by asking Chaney, “Did he tell you I will fire you as well? As he has told the other guys he called (like Anthony, Conrad and ...). *Id.* at 8. Nowrouzi texted Chaney, “I have no plans to fire anyone else, unless someone plays in his dirty game.” *Id.* at 10. A minute later Nowrouzi texted Chaney, “Did he ask you how much I pay you hourly?” *Id.* When Chaney did not respond, Nowrouzi texted, “Are you with me Scott?” *Id.* When Chaney responded that D. Scruggs did not ask him that, Nowrouzi asked, “Did he ask you if you have OSHA 10?” *Id.* at 11.

## **2. Legal Analysis**

### **a. Respondent threatened to withhold employees’ pay if they engaged in protected, concerted activities**

Nowrouzi’s reiterated threat to withhold pay if employees continue to pursue wage complaints and simultaneous threat that the accountant might find a mistake is an independent violation of Section 8(a)(1) of the Act. Given the totality of the circumstances, a reasonable employee would view the statement in a manner that would interfere with their Section 7 rights. Based on the conversations on April 9 and 10, Nowrouzi had already made it clear that he did not want employees talking to one another or to third parties to resolve disputes about terms and conditions of employment. On April 10, Nowrouzi explicitly directed the manner in which employees must resolve the issue – the legal process. By threatening to freeze D. Scruggs’ paycheck and threatening that the accountant could find another error if D. Scruggs attempted to resolve the manner in any other way than that identified by Nowrouzi, Respondent unlawfully communicated to employees that Section 7 activity was unacceptable in violation of Section 8(a)(1) of the Act.

### **b. Respondent interrogated employees about their protected, concerted activities**

Nowrouzi's questioning of D. Scruggs and Chaney on April 10 is also violative of Section 8(a)(1) of the Act. The test for determining whether an employer unlawfully interrogated an employee is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the free exercise of rights guaranteed by the Act. *Pan-Oston Co.*, 336 NLRB 305, 307 (2001), citing *Rossmore House*, 269 NLRB 1176 (1984). The Board looks at 1) whether there is a history of employer hostility to or discrimination against protected activity; 2) the nature of the information sought; 3) the identity of the questioner; 4) the place and method of interrogation; and 5) the truthfulness of the employee's reply. *Intertape Polymer Corp.*, 360 NLRB 957, 957 (2014).

Each of the factors described above weigh in favor of finding that Nowrouzi's questioning of D. Scruggs would reasonably tend to restrain, coerce, or interfere with his exercise of Section 7 rights. Factors three and four weigh in favor of finding that Respondent unlawfully interrogated D. Scruggs. Nowrouzi is a co-owner of Respondent and his questioning of D. Scruggs occurred in private text messages between the two. In less than twelve minutes, Nowrouzi asked three times for the names of employees with whom D. Scruggs had spoken. Factor 1 also weighs in favor of finding that an unlawful interrogation occurred. As identified in the General Counsel's Amended Consolidated Complaint and supported by the record, Respondent's hostility to and discrimination against protected, concerted activity were not isolated. Based on previous statements to D. Scruggs and his termination, as addressed in Section IV, Respondent had already made clear its hostility toward protected concerted activity and its willingness to discriminate against employees who engaged, or who it believed had engaged, in such activity. The information sought by Nowrouzi, factor two, strikes at the very heart of Section 7 activity: identities of its employees who were discussing wages. Although Nowrouzi only requests the names of employees, a comparison of record evidence supports that Nowrouzi's initial text at 2:48 p.m. came in response

to him learning that D. Scruggs was sending information about prevailing wage information to one or more employees, including Anthony Ray Riley. The timing of the text falls on the heels of Mr. Scruggs text exchange with employee Anthony Ray Riley which occurred between 1:18 p.m. and 2:16 p.m. (GC 13 at 1-5, GC 14 at 1-5) as well as Nowrouzi's text to Estimator Ken Burch that Mr. Scruggs was texting other employees. R 16 at 2. Nowrouzi's demand to know whether the employees gave him a shit makes sense when read in conjunction with Mr. Nowrouzi's later admission that he had told employees that anyone who gave Scruggs a shit would be out. GC 11 at 17. Mr. Nowrouzi's attempt to ascertain who gave Scruggs a shit was really Mr. Nowrouzi's way of asking which employees agreed with Scruggs. Finally factor 5 also weighs in favor of finding a violation. As supported by the text messages, D. Scruggs did not confirm for Nowrouzi that he had talked to other employees, who those employees were, or whether the other employees or Centric "gave a shit." The evidence set forth at hearing established that on April 10, between 2:48 p.m. and 3:00 p.m., Nowrouzi interrogated D. Scruggs on three occasions about his protected, concerted activities.

Similarly, the evidence, when considered considering the factors described above, also supports finding that Nowrouzi's questioning of Chaney on the afternoon of April 10 would reasonably tend to restrain, coerce, or interfere with his exercise of Section 7 rights. Nowrouzi, co-owner of Respondent, reached out to his new employee Chaney starting at 3:18 p.m. by text and for nearly the next two hours peppered Chaney with questions about his communications with D. Scruggs. The method of Nowrouzi's questioning over that time period, followed by his phone call to Chaney, weighs in favor of finding that the questioning would have a reasonable tendency to restrain employees in the exercise of Section 7 rights. For example, when Chaney didn't immediately respond to Nowrouzi's first question of whether Donnie had called him, Nowrouzi responded in such a way that made it seem as if Chaney had no option but to answer, texting, "I

asked you a question Scott.” *See* GC 26. In another instance when Chaney didn’t respond, Nowrouzi questioned his loyalty asking, “Are you with me Scott?” *See* GC 26. Like with his questioning of D. Scruggs, Nowrouzi’s questions of Chaney also strike at the heart of the Act. Now only did Nowrouzi question whether D. Scruggs had contacted Chaney, Nowrouzi sought information about the subject matter of those discussions by asking whether there was anything he should know, whether D. Scruggs had asked about Chaney’s wages, and whether D. Scruggs had asked about Chaney’s OSHA 10 certification. *See* GC 26. Nowrouzi also attempted to solicit from Chaney a statement of loyalty by asking if Chaney was with him. Lastly, as supported by the exhibits, Chaney did not directly answer Nowrouzi’s questions about the content of his conversation with D. Scruggs, frequently telling Nowrouzi he did not remember or that he did not think that they had discussed an issue. Record evidence establishes that on April 10 between 3:18 p.m. and 4:53 p.m., Nowrouzi unlawfully interrogated Chaney about his protected, concerted activities in violation of Section 8(a)(1).

**c. Respondent prohibited employees from discussing their wages and other terms and conditions of employment**

On two occasions on April 10, Nowrouzi unlawfully prohibited employees from contacting one another. First, Nowrouzi texted D. Scruggs and told him that it was illegal to contact Respondent’s employees. Later, Nowrouzi texted D. Scruggs again with an explicit instruction not to contact Respondent’s employees anymore. A total ban on communicating with other employees by its very nature would reasonably tend to restrain, coerce, or interfere with employees’ ability to engage in protected, concerted activity. As such, these text messages from Nowrouzi to D. Scruggs are violative of Section 8(a)(1) of the Act.

**d. Respondent threatened to terminate employees if they engaged in protected, concerted activities**

Also, on April 10, Respondent unlawfully threatened to terminate employees if they engaged in protected, concerted activities. A communication to an employee that they are prohibited from activities protected by Section 7, with the threat of termination looming, is a blatant coercive restriction and threat in violation of Section 8(a)(1) of the Act. *See, e.g., TaylorMade Transportation Services, Inc.*, 358 NLRB No. 53 at slip op. 8-9 (June 7, 2012)(employer violated Section 8(a)(1) of the Act by publishing a memorandum reminding employees of its unlawful policy prohibiting discussions concerning wages; memo threatened employees with discipline up to and including termination); *Bryant Health Center, Inc.*, 353 NLRB 739, 746-747 (2009)(Employer violated Section 8(a)(1) of the Act by threatening employees with discipline and discharge if they discussed their wages with other employees).

In this instance, Nowrouzi threatened to terminate employees if they engaged in protected, concerted activities when he texted Chaney that he had no places to fire anyone else, unless they played Donnie's "dirty game." Following that Nowrouzi attempted to confirm whether D. Scruggs had questioned Chaney about wages or the OSHA certification. From the context of the text conversation that day, Donnie's dirty game is his assertion to Nowrouzi and other employees that Respondent was not paying employees correctly. As such, Nowrouzi's threat to terminate employees for joining Donnie in questioning their wages, which would be protected, concerted activity, is a violation of Section 8(a)(1) of the Act.

### **C. April 11, 2019 Violations**

#### **1. Facts**

On April 11, despite having told Chaney the day prior that Scruggs had contacted Monaco, Nowrouzi reached out to Monaco via text and asked, "Hey Conrad? Has Donnie called you?" GC 22 at 1; GC 26. When Monaco responded no, Nowrouzi told Monaco that D. Scruggs was no longer with the Company and that D. Scruggs had been calling the others with false information

and causing panic. GC 22 at 4.

## **2. Legal Analysis**

### **a. Respondent interrogated employees about their protected, concerted activities**

Like Nowrouzi's questioning of Chaney, Nowrouzi's questioning of Monaco on April 11th is equally violative of Section 8(a)(1) of the Act. The same "totality of the circumstances" factors described above, *supra* III.B.2.b, weigh in favor of finding that Nowrouzi's questioning of Monaco would reasonably tend to interfere with, restrain, or coerce Monaco's exercise of his Section 7 rights. This is another situation in which the co-owner of Respondent, at the very beginning of a prevailing wage job, questions a new employee about his communication with another employee. As alleged in the Amended Consolidated Complaint and supported by the evidentiary record, Respondent has a recent history of animus toward protected, concerted activity. Even if Monaco was not aware of Respondent's communications with other employees that demonstrate that animus, Nowrouzi's response to Monaco reflects animus toward protected, concerted activity. When Monaco denied have any communication with D. Scruggs, Nowrouzi's response provides insight into the reason he reached out to Monaco to begin with. Nowrouzi tells Monaco that D. Scruggs is contacting employees, spreading false information, and causing panic. An employee would reasonably draw the connection between D. Scruggs' termination and his contacting other employees. Moreover, the nature of the information sought by Nowrouzi weighs in favor of finding the questioning to be unlawful. The record is clear that D. Scruggs' communication with other employees was related to the issue of prevailing wage. Consequently, the purpose of Nowrouzi's question to Monaco is clear. Nowrouzi was seeking to determine if D. Scruggs had shared similar information with Monaco, something Nowrouzi had been unable to get out of D. Scruggs the day before. For the reasons identified above, the evidence set forth at hearing established that on April 11 Nowrouzi unlawfully interrogated about Monaco about

whether he had engaged in protected, concerted activities.

**b. Respondent told employees that Respondent terminated an employee because the employee engaged in protected, concerted activity**

When an employer tells an employee that it disciplined the employee or another employee because of union or protected concerted activity, it violates Section 8(a)(1). *Bowling Transportation, Inc.*, 336 NLRB 393, 393 (2001)(finding Section 8(a)(1) violation because employer told employees they were removed from the employer’s property because they engaged in union and/or protected concerted activity); *Atlas Transit Mix Corp.*, 323 NLRB 1144, 1150 (1997). When Nowrouzi told Monaco that Scruggs no longer worked there and that he had been calling employees, Nowrouzi was in fact letting Monaco know that D. Scruggs had been terminated for engaging in protected, concerted activity. The fact that D. Scruggs might have been mistaken about the prevailing wage information he was providing does not make his communications with employees any less protected. *See, e.g., Tradewest Incineration*, 336 NLRB 902, 907 (2001) (employees who posted flyer containing erroneous information about a new employee’s wages did not lose the protection of the Act absent evidence that the information was deliberately or maliciously false). Consequently, Nowrouzi’s statement to Monaco on April 11 violates Section 8(a)(1) of the Act.

**D. April 12, 2019 Violations**

**1. Facts**

The next day, after Mr. Monaco had raised similar concerns about his paycheck he was terminated. Mr. Monaco’s un rebutted testimony was that when Burch terminated him, he said that “what was going on was wrong and that he was going to talk to Max about trying to save [Monaco’s] job.” T 133:16-18.

**2. Legal Analysis**

Given the totality of the circumstances, Burch’s un rebutted statement that Monaco’s

termination is “wrong” is an admission that Respondent had terminated employees for engaging in protected, concerted activity or to discourage PCA. If Burch really believed, as he testified, that the mistakes made by employees were so egregious to warrant termination, he would not have characterized the termination as wrong.

#### **IV. Respondent Unlawfully Terminated Charging Parties in Violation of Section 8(a)(1)**

##### **A. Legal Standard**

Section 7 of the Act protects employees’ rights “to engage in ... concerted activities for [their]... mutual aid or protection. An employer violates the Act if it takes an adverse employment action that is “motivated by the employee's protected concerted activity.” *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). The burdens of proof in this case fall under the framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The General Counsel must first prove by a preponderance of the evidence that the Charging Parties’ conduct was a motivating factor in Respondent’s decision to terminate their employment. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). In order to do so, the General Counsel must show (1) that the employee conduct was protected and concerted; (2) the employer knew or believed that the employee engaged in the protected conduct; and (3) the employer harbored animus against the employee’s protected activity. *Id.*

Once the General Counsel establishes a *prima facie* case of discriminatory conduct through these factors, it has met its burden of persuasion that the protected activity was a motivating factor in the employer’s conduct. The burden then shifts to the Respondent to show that it would have taken the same action in the absence of the employee’s protected activity. Respondent cannot simply present a legitimate reason for its decision, but it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of

the protected activity. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011); *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

That same legal theory applies where, as here, the complaint alleges that the employer has retaliated against an employee because the employer believes that the employee engaged in protected concerted activity. See *Alternative Energy Applications, Inc. & David Rivera-Chapman*, 361 NLRB 1203, 1205 (2014). Under this theory, the General Counsel carries his burden by demonstrating that the employer's belief was a motivating factor in its decision. *Id.* The burden then shifts to the employer to show that it would have taken the same action in the absence of its belief that the employee engaged in protected conduct. *Id.*

### **B. Respondent Terminated Charging Parties for Engaging in Protected, Concerted Activities<sup>3</sup>**

As discussed below, the evidence indisputably establishes that, in violation of Section 8(a)(1) of the Act, Respondent terminated the Charging Parties because they engaged in activities protected by the Act and/or because Respondent believed that they had engaged in protected, concerted activities. Respondent has the burden to show that it would have terminated the Charging Parties' employment regardless of their protected conduct. As discussed below in Section IV.D, Respondent has failed to meet its burden.

#### **1. Evidence of Protected, Concerted Activities**

For employee conduct to fall within the protection of Section 7, it must be both concerted and engaged in for the purpose of "mutual aid or protection." *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). To be "protected," an employee's actions must be undertaken "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1976). The analysis of whether the activity is protected focuses on "whether there is a link between the

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<sup>3</sup> Complaint Paragraph 5(h) and (i). GC 2A.

activity and matters concerning the workplace or employees' interests as employees." *Quicken Loans, Inc.*, 267 NLRB No. 112, slip op. at \*6 (April 10, 2019).

To be "concerted," an employee's actions must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. The Board's definition has also presented an inclusive interpretation of concerted activity that covers individual activities that "seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887. An individual conversation may constitute concerted activity although it involves only a speaker and a listener if the speaker sought to initiate, induce, or prepare for group action, or if the speaker's words had some relation to group action in the interest of the employees. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

However, "the requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7." *Desert Cab, Inc. d/b/a Ods Chauffeured Transportation & Paul Lyons*, 367 NLRB No. 87 (Feb. 8, 2019). In this regard, "inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition." *Id.* (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). Testimonial and documentary evidence establish that D. Scruggs and B. Scruggs engaged in protected conversations on April 9, specifically conversations regarding their wages. The Board has long held that Section 7 protects the rights of employees to discuss wages with other employees or third parties. *Triple Play Sports Bar & Grille*, 361 NLRB NO. 31, slip op. at \*1 (Aug. 22, 2014) (employees have a Section 7 right to communication with each other and with

the public in order to act together to improve their terms and conditions of employment). It is undisputed that after B. Scruggs picked up their paychecks, he called his cousin about his paycheck being short. He also told D. Scruggs that they hadn't received any money for the OSHA reimbursement. D. Scruggs texted Nowrouzi and reported that his check was short and that he hadn't received the OSHA reimbursement. It is reasonable to find that D. Scruggs' complaint was concerted, at least in part, because the OSHA reimbursement affected both cousins. Moreover, Nowrouzi's understanding that it was a concerted complaint is supported by his response which was to call B. Scruggs and tell him to return to the office. When B. Scruggs arrived, he was not given just D. Scruggs' OSHA reimbursement check; he was given the reimbursement checks owed to both cousins. Even in the absence of an express announcement about the object of a single employee's activity, the Board may infer from the circumstances whether the activity was concerted. *Whittaker Corp.*, 289 NLRB 993, 993-994 (1988). In the instance, such an inference is appropriate because it is the very inference that Nowrouzi drew when he made the decision to call B. Scruggs and made the decision to have both reimbursements available.

Additionally, the cousins' discussion about their paychecks is protected because it falls within the "inherently concerted" category due to the nature of the issues discussed. The Board has held that employee discussions involving certain vital employment terms are inherently concerted, and thus protected even when no group action is contemplated. Employee discussions of wages is one example. *See Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992)(employee discussions of wages are inherently concerted); *see also Waco, Inc.*, 273 NLRB 746, 747-48 (1984) (wage discussions are inherently protected activity.). Thus, the fact that the cousins did not explicitly discuss group action prior to D. Scruggs sending the text to Nowrouzi at 5:27 p.m. does not prevent a finding that they were engaged in protected, concerted activity when discussing their paychecks.

Finally, the Board has held that it does not matter if the employee engaged in the protected, concerted activity when “an employer holds a mistaken belief that an employee has engaged in union or protected concerted activity and discharges that employee because of its mistaken belief.” *Johnston Fire Servs., LLC & Rd. Sprinkler Fitters, Local Union 669*, 367 NLRB No. 49 (Jan. 3, 2019) (citing *United States Service Industries, Inc.*, 314 NLRB 30 (1994)). The Board has held that the discharge of an employee under those circumstances is also a violation of Section 8(a)(1) of the Act. *Id.*; see also *Advance Pierre Foods*, 366 NLRB No. 133, n. 43 (July 19, 2018).

The record establishes that Respondent believed, perhaps mistakenly in some cases, that the four charging parties were engaged in protected, concerted activity. The substance of Nowrouzi’s communications with Chaney and Monaco on April 10 and 11 establish that Nowrouzi not only knew that D. Scruggs had contacted Riley but also that he believed D. Scruggs was contacting them. The questions Nowrouzi asked Chaney were specifically targeted at the issues D. Scruggs raised with Riley, including whether employees were being paid correctly under the prevailing wage guidelines and the OSHA 10 certification. GC 26 at 10-11. Their text message exchange on April 10 also indicates that Nowrouzi questioned whether Chaney was being honest or forthcoming in his answers. For example, when Chaney didn’t immediately respond to Nowrouzi’s question about the wages sent at 4:32 p.m., Nowrouzi followed up seven minutes later, asking, “Are you with me Scott?” *Id.* at 10. Finally, Nowrouzi’s threat to discharge additional employees for playing D. Scruggs’ game is further evidence that Nowrouzi believed employees were acting in concert. Nowrouzi’s text conversation with Monaco on April 12 also supports finding Nowrouzi believed Monaco was engaged in protected, concerted activity with D. Scruggs. Like Nowrouzi did with Chaney, he questioned whether Monaco had talked to D. Scruggs. Nowrouzi also acknowledges that Monaco’s pay issue was like that of B. Scruggs.

Considering all this evidence, the General Counsel has met its burden to show that Respondent believed the Charging Parties were engaged in protected, concerted activity.

## **2. Evidence of Respondent's Knowledge**

The General Counsel must also establish that the Employer knew or believed that the employees was engaged in protected, concerted activity. Employer knowledge can be established through either direct evidence or circumstantial evidence, including timing or animus. Mistaken belief that employees engaged in protected concerted activity is tantamount to knowledge. *CGLM, Inc.*, 350 NLRB 974, 979-980 (2007).

Based on the timing between when B. Scruggs picked up the paychecks and when D. Scruggs sent the text message to Respondent and Nowrouzi's actions that evening, it is reasonable to infer that Respondent knew or believed that the cousins were discussing their paychecks and OSHA reimbursement.

Even if the cousins were engaged in inherently concerted discussions about their paychecks, an inference that Nowrouzi was aware of those discussions is warranted. B. Scruggs testified to calling D. Scruggs about the paychecks after he left Respondent's office and was still on the road when Nowrouzi called him and told him to turn around. T 226:9-16. Given the short turnaround, Respondent had to know when he received D. Scruggs' text at 5:41 p.m. on April 9<sup>th</sup> that D. Scruggs had talked to B. Scruggs about his paycheck. Moreover, Nowrouzi's actions support such an inference because he had B. Scruggs return to get both OSHA checks.

Nowrouzi's interrogations of D. Scruggs, Chaney, and Monaco also support finding that Respondent believed that Chaney and Monaco were discussing wages and other terms and conditions of employment, such as D. Scruggs' injury and the OSHA 10 certification, with employees.

In this instance, the record supports finding that Respondent knew or *believed* that the

Charging Parties were engaged in protected, concerted activity, and the Board has held that such a belief, even if mistaken, is tantamount to actual knowledge.

### **3. Evidence of Respondent's Animus**

Finally, the General Counsel must show that the employer's animus toward the employee's protected, concerted activity motivated the employer to take the adverse action. An employer's discriminatory motive may be established through several means, including: (1) other unfair labor practices, statements and actions showing the employer's discriminatory motivation; (2) the timing of the adverse action in relationship to the employee's protected activity; and (3) evidence demonstrating that the employer's proffered explanation for the adverse action is pretextual. *Wright Line*, 251 NLRB 1083, 1089 (1980).

The record contains evidence of numerous independent violations of Section 8(a)(1). The first evidence of animus occurred when D. Scruggs told Nowrouzi that employees were asking him about the paychecks and Nowrouzi unlawfully ordered D. Scruggs to tell employees to contact him directly. Before terminating D. Scruggs, Nowrouzi also unlawfully threatened D. Scruggs with monetary reprisals for raising complaints about his paycheck and threatening to take those complaints to the General Contractor. As more fully set forth above in Section III, even after D. Scruggs' termination, Nowrouzi unlawfully (1) interrogated employees, including D. Scruggs, about their protected, concerted conversations with other employees, (2) prohibited employees from talking to one another about wages, (3) threatened employees with monetary action and termination if they engaged in protected, concerted activity, and (4) told employees that Respondent had terminated employees for engaging in protected, concerted activities. Through his statements to employees via text, Nowrouzi engaged in several independent violations of Section 8(a)(1) of the Act and each independent violation constitutes evidence of animus. *See, e.g., Sunrise Health Care Corp.*, 334 NLRB 903 2001 (Independent 8(a)(1) violations constitute

evidence of animus).

Furthermore, the timing of Charging Parties' terminations is indicative of the animus Nowrouzi held. Animus can be inferred from circumstantial evidence such as timing. "The Board has long held that the timing of adverse action shortly after an employee engaged in protected activity will support a finding of unlawful motivation." *Desert Cab, Inc. d/b/a Ods Chauffeured Transportation*, 367 NLRB No. 87 (Feb. 8, 2019); *see also Tubular Corp. of America*, 337 NLRB 99 (2001).

Contrary to Nowrouzi's testimony that he terminated D. Scruggs on Friday, April 5 in response to events that had occurred that day, D. Scruggs was not terminated until 5:41 p.m. on April 9 which was exactly 14 minutes after D. Scruggs texted Nowrouzi complaining that his check was short and that he had not received his OSHA reimbursement and 14 minutes after D. Scruggs threatened to call Centric about the dispute. Nowrouzi had plenty of other opportunities prior to 5:41 p.m. to terminate D. Scruggs if Respondent was unhappy with his work, instead Respondent terminated D. Scruggs immediately after employees received their paychecks, Respondent knew D. Scruggs had spoken with his cousin, D. Scruggs subsequently raised concerns about his wages and the OSHA reimbursement, and D. Scruggs threatened to contact a third party for assistance. Nowrouzi has no plausible explanation for why he didn't notify D. Scruggs on April 8 or at any time prior to 5:41 p.m. on April 9 that his employment was terminated especially when he communicated with D. Scruggs on both of those days.

Respondent makes the same unsubstantiated claim that B. Scruggs was terminated on Friday, April 5. Undisputable evidence, however, demonstrates that B. Scruggs was notified by Nowrouzi via text on April 10 of his termination. Like how it handled D. Scruggs' termination, Respondent had multiple opportunities between April 5 and April 10 to notify B. Scruggs that he was terminated, including on the two occasions that he went to Respondent's office to pick up the

paychecks and the OSHA reimbursement. Instead, Respondent notified B. Scruggs after it was aware that the cousins had been discussing their wages and D. Scruggs was persistent in addressing the issue. Finally, a later text from Nowrouzi to Chaney indicates that Nowrouzi was willing to terminate employees who spoke to D. Scruggs and took his side on the wage issue. There would be no employee more likely to do that than his cousin, B. Scruggs, and in fact, when D. Scruggs persisted in addressing the issue on April 10, Respondent terminated B. Scruggs.

Like with the cousins, Respondent claims that it terminated Monaco on April 5. Monaco's unrefuted testimony was that he was notified of his termination on April 12. Like how it handled the cousins' terminations, Respondent had multiple opportunities in the week between when Nowrouzi allegedly made the decision to terminate Monaco and when it notified Monaco to let him know that he was being terminated. Specifically, Monaco was at Respondent's office on April 9 to pick up his paycheck, and Nowrouzi texted with Monaco on April 11 and 12. In fact, on April 11, Monaco specifically asked when they would be back to work. Nowrouzi gave no indication at that time of that Monaco was being terminated. It was not until after Monaco made complaints about his wages, including that he had been shorted hours and paid the wrong wage rate, which were like those raised by D. Scruggs that Monaco was notified of his termination.

Based on testimonial and documentary evidence, it is completely appropriate and warranted to draw an inference of animus from the timing of discharges of D. Scruggs, B. Scruggs, and Monaco.

Although Respondent contends that it did not terminate Chaney and that Chaney did not reach out to the Employer about returning to work, the timing of events on April 10 suggest the decision to recall Chaney was not an oversight but was motivated by unlawful animus. On April 10<sup>th</sup>, Chaney did reach out to Nowrouzi to find out about returning to work. Nowrouzi offered two possible dates and stated that *he* would contact Chaney when it was time to return to work. Later

that same day, as described in Section III, Nowrouzi interrogated Chaney about his conversations with D. Scruggs, including whether D. Scruggs had asked him about his wages and OSHA 10 certification. After that exchange, Chaney was never recalled. Respondent has failed to provide any logical reason for its failure to recall Chaney to the jobsite or any evidence that it attempted to do what it told Chaney it would do. Consequently, circumstantial evidence, such as the timing described above, supports finding that Respondent possessed animus toward protected, concerted activity that it believed Chaney had or would engage in.

The General Counsel has overwhelmingly met its *prima facie* burden to show that D. Scruggs, B. Scruggs, Monaco, and Chaney were terminated because they engaged in protected, concerted activity or because Respondent believed they were engaged in such activity.

### **C. Respondent Terminated Charging Parties to Prevent Protected, Concerted Activities<sup>4</sup>**

Even in instances where an employee has not yet actually engaged in concerted activity, the Board has held that it is violation of the Act for an employer to pre-emptively discharge an employee to prevent their engaging in protected activity. *See Parexel International, LLC*, 356 NLRB 516, 519 (2011). Just as an employer cannot threaten to terminate an employee for protected activity, an employer cannot terminate an employee to ensure they do not engage in Section 7 activity. *Id.* As the Board noted in *Parexel*, “[i]f an employer acts to prevent concerted protected activity—to ‘nip it in the bud’—that action interferes with and restrains the exercise of Section 7 rights and *is unlawful without more.*” 356 NLRB No. 82 at 5 (emphasis added). In this case, record evidence supports the General Counsel’s allegation in Paragraph 5(h) of the Amended Consolidated Complaint that the Charging Parties were terminated to discourage any future protected, concerted activity. GC 2A.

The timing of D. Scruggs’ termination supports the General Counsel’s theory that D.

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<sup>4</sup> Complaint Paragraph 5(h) and (i). GC 2A.

Scruggs was also terminated to prevent or discourage any future protected, concerted activity. While D. Scruggs might not have yet engaged with all the employees regarding paychecks or discussed any type of plan for how to resolve the issue at the time of his termination, D. Scruggs had discussed the paychecks with his cousin and made it clear to Respondent that he was going to take action by calling Centric. Employees are protected under the mutual aid or protection clause of Section 7 even when they seek to improve conditions through channels outside the employee-employer relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Respondent, in response to D. Scruggs' threat, immediately discharged him out of concern for what could happen if he remained employed. As was the situation in *Parexel International*, Respondent terminated D. Scruggs to suppress protected activity before it could even begin and in doing so violated Section 8(a)(1) of the Act.

Respondent was clearly focused on shutting down the conversations between its employees about prevailing wage issues and whether employees were being correctly compensated. This is evidenced by Nowrouzi's (1) interrogations of employees about who they were talking to and what they were discussing; (2) prohibitions against employees communicating with one another; and (3) threats to terminate employees who engaged in these conversations. Respondent was seeking to ensure that employees would be loyal to their employer and not question their working conditions. When Respondent was not sufficiently satisfied that its employees would be loyal, Respondent terminated B. Scruggs, Monaco, and Chaney to squelch any further conversations about wages and pay rates.

The General Counsel, through testimony and document evidence, has established that even if these employees did not engage in protected, concerted activity, the Employer pre-emptively terminated their employment to "nip in the bud" the very beginning of protected, concerted activity about their wages.

#### **D. Respondent Failed to Meet Its Burden**

Where the General Counsel has met its *prima facie* burden that Respondent terminated the employees for engaging in protected, concerted activity or to prevent protected, concerted activity, the burden now shifts to Respondent to show that it made the decision to terminate the employees prior to their protected activity *or* that it would have ended their employment regardless of any present or future protected activity. Respondent has failed on both accounts.

The General Counsel anticipates that Respondent will argue that it made the decision to terminate D. Scruggs, B. Scruggs, and Monaco on April 5 and that Respondent would have terminated them for other non-discriminatory reasons regardless of any protected concerted activities. Based on Respondent's Exhibit 13 and Nowrouzi's testimony, the other non-discriminatory reasons likely to be cited by Respondent include (1) poor work performance; (2) making derogatory statements about Nowrouzi's nationality, religion, and accent; (3) disregarding instructions not to come to work; and/or (4) engaging in time theft.

As an initial matter, Respondent's entire defense to the termination of D. Scruggs, as well as B. Scruggs and Monaco, should be closely scrutinized given Respondent's repeated insistence that these employees were terminated on April 5. Contrary to Respondent's Answer and Nowrouzi's testimony, these three individuals were not terminated prior to April 9. *See* GC 1-S; T 192:22-23; 367:5-6. Nowrouzi's testimony that he terminated these three men on April 5 is without merit. Whether or not Nowrouzi created the Letter of Termination identified as Respondent's Exhibit 13 on April 5, there is no dispute that Nowrouzi did not notify any of the men on that date that they were terminated or on any date thereafter that until the first employee to be terminated, D. Scruggs, was notified by text at 5:41 p.m. on April 9. T 227:11-16; 232:1-3; 366:20-22; 367:7-8; 409:12-15.

The primary evidence proffered by Respondent to substantiate its claim that the decision to terminate D. Scruggs, B. Scruggs, and Monaco was made on April 5 is the testimony of Nowrouzi and the letters that he allegedly drafted that evening. However, the other testimonial and

documentary evidence proffered by Respondent to try and corroborate Nowrouzi's testimony on this issue do not show that Respondent intended to *terminate* the three men's employment. First, Respondent's contention that Nowrouzi reached out to Diego Venegas on April 6 is not dispositive of the fact that Respondent had made the decision to terminate D. Scruggs. Venegas testified that in the initial conversation Nowrouzi merely told him that he needed help because someone was leaving the job. T 462:17-19. There was no mention of who that was or why that employee would be leaving. *Id.* There was no mention of how many employees would be leaving. *Id.* Second, Respondent's contention that Nowrouzi notified Burch of his decision on April 8<sup>th</sup> also falls short of establishing that a decision had been made to terminate D. Scruggs. Burch testified that he was notified that D. Scruggs would no longer be the foreman which is like what Nowrouzi texted him on the morning of April 8. T 440:6-11; R 16. There is, however, no testimony or documentary evidence showing that Nowrouzi told Burch that D. Scruggs was terminated. Finally, Respondent, through its questioning of D. Scruggs, attempted to illicit testimony that D. Scruggs had been informed of his termination by Centric Superintendent Brian Shields. Respondent had every chance to call Brian Shields to confirm that he had been notified of D. Scruggs' termination before April 9, and yet it didn't.

Even assuming *arguendo* that Nowrouzi had decided to terminate the three men on April 5, Respondent's assertion that it intended to follow through on that decision regardless of any protected, concerted activity is undercut by Nowrouzi's subsequent actions as well as his words. Despite allegedly making the decision four days earlier, Nowrouzi did not notify D. Scruggs that he was terminated until the point at which D. Scruggs raised complaints about wages and threatened to contact Centric. As previously explained, Nowrouzi's reason for not terminating D. Scruggs earlier fails to withstand scrutiny. Nowrouzi waited another day to notify B. Scruggs and another two days after that to notify Monaco. In fact, if Nowrouzi had already made the decision

to terminate Monaco back on April 5, there was no reason on April 10 for Nowrouzi to text Monaco and interrogate him about his conversations with D. Scruggs or answer Monaco's questions about when they would be starting work again.

Nowrouzi's words also undercut Respondent's assertion that due to the severity of the performance issues and/or harassing behavior it would have terminated the three men regardless of any protected, concerted activity. On April 10 at 3:04 p.m., Nowrouzi texted that D. Scruggs "All of them you could fix it by an apology instead of threatening." GC 11 at 14; GC 12 at 11. Twenty minutes later Nowrouzi sent a similar text telling D. Scruggs that next time he does something wrong in his job he should apologize. GC 11 at 16; GC 12 at 13. Nowrouzi's own words indicate that any contemplated decision to terminate D. Scruggs was neither final nor irreversible. More importantly, the fact that D. Scruggs could have fixed this with an apology undermines Respondent's assertion that these incidents, including the performance mistakes, were so egregious that it would have terminated him regardless of the protected, concerted activity.

Nowrouzi's statement that afternoon is not the only evidence that Respondent has attempted to inflate the unacceptability of the three men's behavior. When Nowrouzi terminated B. Scruggs, he offered B. Scruggs the opportunity to apply for two other jobs within the Company. If B. Scruggs' performance was so deficient that it warranted termination, it is difficult to understand why Respondent would consider him for other positions.

Likewise, Nowrouzi's testimony to the Region during the investigation also weighs against finding that these purported reasons for termination were so severe that the employees would have been terminated regardless of their protected, concerted activity. In testimony to the Board on June 3, 2019, Nowrouzi testified that "The next day, Tuesday, April 9, 2019, Donnie was supposed to go to jobsite to see what was wrong to fix it." T 364:23-25. Despite Nowrouzi's attempts to claim otherwise, this was his sworn testimony. Changing his story now is just another

red flag that Respondent is trying hard to find a lawful basis for what it unlawfully did on April 9. Although there is no dispute that mistakes were made on the job, as explained above, Respondent has not shown by a preponderance of the evidence that it would have terminated those employees for the performance issues.

Similarly, the record does not show that Respondent would have terminated D. Scruggs for his alleged derogatory behavior toward Nowrouzi. Despite Nowrouzi's testimony about the statements made by D. Scruggs on the worksite, Respondent was unable to find one other employee to corroborate Nowrouzi's allegations. T 273-274; 312: 8-12; 347. Moreover, if the statements were as terrible as Respondent claims, it is hard to understand why Nowrouzi would have been willing to bring him back with just an apology.

Finally, Respondent's assertions that the employees reported to work when they weren't authorized, and D. Scruggs tried to charge Respondent for time that he was not on the job are simply not supported by the weight of the evidence and Respondent's testimony on this matter should be discredited. Ken Burch's testimony that D. Scruggs was not authorized to report to work before April 5 except for the meeting on April 3 is directly contradicted by the text messages sent by Nowrouzi to D. Scruggs on April 1 and 2. Compare T 434:19-24 with GC 3 at 1 and GC 4:5-6. Moreover, texts on April 3 show that D. Scruggs and Nowrouzi texted that morning and Nowrouzi never instructed D. Scruggs to leave and return to work later that day. *See* GC 5. Instead, Nowrouzi requested that D. Scruggs find an additional employee to report that morning. Given Burch's clearly inaccurate testimony about April 3, his testimony regarding the events of April 4 should be discredited as well. Although Burch testified that D. Scruggs was not authorized to be there on April 4, he never testified that he told D. Scruggs not to report as Nowrouzi had asked him to do on the afternoon of April 3. As for the allegation that D. Scruggs claimed time that he did not work on April 4, the record establishes that D. Scruggs only claimed 2 hours on April 4 *See* R 13 (item 1), GC 6. Respondent reported that he worked, and he was paid for 1.5 hours of work. R 17. Moreover, Respondent never addressed this

discrepancy with D. Scruggs before it paid him or before it terminated him. T 201:2-5.

Ultimately, the Respondent may have had legitimate reasons for disciplining or discharging the Charging Parties, but that is not enough given the overwhelming evidence of animus. Respondent was obligated to show that it would have terminated the Charging Parties even if they engaged in protected concerted activity. Respondent failed to meet that burden; therefore, the discharges of D. Scruggs, B. Scruggs, and Monaco were unlawful within the meaning of the Act.

Finally, regarding Chaney, Respondent's sole defense is that it never terminated him. Instead Respondent blames Chaney by saying that he didn't contact the Employer about returning to work. Unrebutted evidence establishes otherwise. Respondent has failed to provide any logical reason for its failure to recall Chaney to the jobsite or any evidence that it attempted to do what it told Chaney it would do. Consequently, Respondent has failed to meet its burden and establish that it had a legitimate, non-discriminatory reason for failing to recall Chaney to the Zoo job.

#### **V. Respondent's Motion for Directed Verdict Should Be Denied**

At the end of the General Counsel's case, Respondent made a Motion for a Directed Verdict as it related to D. Scruggs. Respondent claimed that the charges pertaining to D. Scruggs should be dismissed because D. Scruggs "made an election of remedies by pursuing his remedy prior to going to the NLRB under Missouri State Law, by hiring private counsel, and pursuing his remedy there." T 414: 5-8. Respondent's Exhibit 5, which Respondent referenced in its Motion, notified Respondent that D. Scruggs had retained an attorney to pursue his worker's compensation claim and to resolve the outstanding wage claims. R 5. Contrary to Respondent's assertion, D. Scruggs was not collaterally estopped from alleging he was unlawfully terminated within the meaning of the Act nor is the General Counsel collaterally estopped from issuing Complaint on that allegation simply because D. Scruggs attempted to recoup his lost wages in another forum. His termination and his lost wages are two separate issues. The Complaint, based in part on a charge filed by D. Scruggs, issued by the Board against Respondent does not attempt to remedy either of the issues identified in Respondent's Exhibit

5. Paragraph 5 of the Complaint alleges that D. Scruggs was unlawfully terminated and seeks to remedy that violation of the Act. The Complaint does not allege that D. Scruggs was improperly paid, and the Board has not sought to remedy that allegation. Respondent's Motion for a Directed Verdict should be denied.

## **VI. Conclusion**

For the reasons set forth above, the record establishes that Respondent violated Section 8(a)(1) of the Act when it discharged employees Donnie Scruggs, Bryan Scruggs, Conrad Monaco, and Scott Chaney due to their actual or perceived protected, concerted activity and/or to discourage employees from engaging in protected, concerted activity. Respondent's purported reasons for discharging the four charging parties are clearly pretextual and not supported by the facts. Moreover, Respondent did not meet its burden to show that it would have terminated the Charging Parties regardless of any protected, concerted activity. Counsel for the General Counsel seeks all relief as may be just and proper to remedy the unfair labor practices alleged.

Date: November 8, 2019

Respectfully Submitted,

*/s/ Julie M. Covell*

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## Appendix A: Proposed Findings of Fact and Conclusions of Law

1. Respondent, M&T Engineering & Construction LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. At all material times, Max Nowrouzi and Ken Burch have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.
3. Respondent violated Section 8(a)(1) of the Act on April 9, 2019, by prohibiting employees from discussing their paychecks and other terms and conditions of employment.
4. Respondent violated Section 8(a)(1) of the Act on April 9, 2019, by threatening to withhold employees' pay if they engaged in protected, concerted activities.
5. Respondent violated Section 8(a)(1) of the Act on April 9, 2019, by threatening to take monetary retaliation against employees if they engaged in protected, concerted activities.
6. Respondent violated Section 8(a)(1) of the Act on April 10, 2019, by threatening to withhold employees' pay if they engaged in protected, concerted activities.
7. Respondent violated Section 8(a)(1) of the Act on April 10, 2019, by interrogating employees about their protected, concerted activities.
8. Respondent violated Section 8(a)(1) of the Act on April 10, 2019, by prohibiting employees from discussing their wage and other terms and conditions of employment.
9. Respondent violated Section 8(a)(1) of the Act on April 10, 2019, by threatening to terminate employees if they engaged in protected, concerted activities.
10. Respondent violated Section 8(a)(1) of the Act on April 11, 2019, by interrogating employees about their protected, concerted activities.
11. Respondent violated Section 8(a)(1) of the Act on April 11, 2019, by telling employees that Respondent terminated an employee because the employee engaged in protected, concerted activity.
12. Respondent violated Section 8(a)(1) of the Act on April 12, 2019, by telling employees that Respondent terminated an employee because the employee engaged in protected, concerted activity.
13. Respondent violated Section 8(a)(1) of the Act when it terminated employee Donnie Scruggs' employment on April 9, 2019, because he engaged in protected, concerted activities, and to discourage employees from engaging in these activities.
14. Respondent violated Section 8(a)(1) of the Act when it terminated employee Bryan Scruggs' employment on April 10, 2019, because he engaged in protected, concerted

activities, and to discourage employees from engaging in these activities.

15. Respondent violated Section 8(a)(1) of the Act when it terminated employee Conrad Monaco's employment on April 12, 2019, because Respondent believed he had engaged in protected, concerted activities, and to discourage employees from engaging in these activities.
16. Respondent violated Section 8(a)(1) of the Act when it terminated employee Scott Chaney's employment by failing to recall him to work after April 10, 2019, because Respondent believed he had engaged in protected, concerted activities, and to discourage employees from engaging in these activities.

**STATEMENT OF SERVICE**

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Division of Judges and with service by electronic mail on the parties identified below.

Dated: November 8, 2019

\_\_\_\_\_/s/ Julie M. Covell  
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