UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRANSCENDENCE TRANSIT II, INC.; TRANSCENDENCE TRANSIT, INC.; PATRIARCH PARTNERS, LLC AND PATRIARCH PARTNERS AGENCY SERVICES; Single Employers or Joint Employers and LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO	Case No. 29-CA-182049

RESPONDENTS' ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S AND COUNSEL FOR THE CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dated: November 27, 2019

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 4

I. THE RELATIONSHIP BETWEEN TRANSCARE AND EACH OF RESPONDENTS. 4

A. TransCare and the Respondents..... 4

B. Creation of Transcendence and Transcendence II. 7

II. THE EVENTS OF FEBRUARY 24, 25, AND 26, 2016, AND RESPONDENTS' FAILED ATTEMPT TO RESTRUCTURE TRANSCARE'S PARATRANSIT BUSINESS. 8

A. The Foreclosure and TransCare's Chapter 7 Bankruptcy Filing. 8

B. Respondents' Failed Efforts to Transfer the MTA Contract and to Assume Control of the Paratransit Assets. 10

C. The Closure of TransCare's Paratransit Business. 13

III. PROCEDURAL HISTORY 14

ARGUMENT 16

I. ALJ CHU CORRECTLY HELD THAT TRANSCENDENCE II NEVER COMMENCED OPERATIONS AND, THEREFORE, WAS NOT TRANSCARE'S SUCCESSOR. 16

A. ALJ Chu Correctly Found That the General Counsel Failed to Establish That Transcendence II Possessed the Assets Necessary to Operate. 17

1. ALJ Chu Correctly Found That the MTA Contract Was Never Transferred. 17

2. ALJ Chu Correctly Concluded That Transcendence II Would Not Have Provided Services to the MTA Without a Contract. 18

3. ALJ Chu Correctly Understood, and Properly Credited, Testimony Concerning Mr. Stephen's and Mr. Creswell's Communications About Transcendence II's Status. 20

B. ALJ Chu Correctly Found That Transcendence II Never Obtained Access to the Servers or Vehicles Necessary for It to Commence Operations. 22

C. ALJ Chu Correctly Found That the General Counsel Failed to Establish Transcendence II Ever Hired TransCare's Bargaining Unit Employees. 25

D. The TransCare Bankruptcy Estate Billed the MTA for Work Performed in February 2016. 28

II. ALJ CHU CORRECTLY FOUND THAT THE GENERAL COUNSEL FAILED TO MEET ITS BURDEN OF PROVING THAT PATRIARCH PARTNERS,

TABLE OF CONTENTS
(cont'd)

Page

PPAS, OR TRANSCENDENCE WERE SINGLE OR JOINT EMPLOYERS OF TRANSCENDENCE II. 28

A. None of the Respondents Were Single Employers of Transcendence II. 28

1. ALJ Chu Correctly Concluded That Common Ownership Was Insufficient to Satisfy a Single-Employer Finding. 29

2. ALJ Chu Correctly Found No Interrelation of Operations Among Respondents. 31

3. ALJ Chu Correctly Held There Was No Common Management Among the Respondents. 32

4. ALJ Chu Correctly Concluded There Was No Centralized Control of Labor Relations Among or Between Any of the Respondents. 35

5. ALJ Chu Correctly Found That Each of the Respondents Had an Arms-Length Relationship With One Another. 37

B. ALJ Chu Correctly Found That None of the Respondents Were Joint Employers With Transcendence II. 39

III. ALJ CHU CORRECTLY EXCLUDED A PORTION OF THE VOLUMINOUS AND IRRELEVANT BANKRUPTCY RECORDS THE UNION AND GENERAL COUNSEL SOUGHT TO INTRODUCE. 40

IV. ALJ CHU CORRECTLY DECLINED TO APPLY A *TRANSMARINE* REMEDY. 43

CONCLUSION……..45

CERTIFICATE OF SERVICE 46

TABLE OF AUTHORITIES

Page(s)

CASES

Bolivar-Tees,
349 NLRB 720 (2007) 29, 30

Browning-Ferris Indus. of Cal., Inc.,
2015 NLRB LEXIS 672 (N.L.R.B. Aug. 27, 2015) 39

Canned Foods, Inc.,
332 NLRB 1449 (2000) 35

Carr Finishing Specialties, Inc.,
358 NLRB 1766 (2012) 37

Clinton's Ditch Coop. Co. v. NLRB,
778 F.2d 132 (2d Cir. 1985).....29

Dow Chem. Co.,
326 NLRB 288 (1998) 33

DuPont Dow Elastomers,
332 NLRB 1071 (2000) 15

Elec. Workers IBEW Local 3 (Telecom Plus),
286 NLRB 235 (1987) 29

Emsing's Supermarker Inc.,
284 NLRB 302 (1987) 38

Ewing v. NLRB,
732 F.2d 1117 (2d Cir. 1984).....43

Fedex Freight, Inc. & Int'l Bhd. of Teamsters, Local 107, Petitioner,
362 NLRB 323 (2015) 2

Grane Healthcare Co.,
357 NLRB 1412 (2011) 38

Melody Toyota,
325 NLRB 846 (1998) 44

In re Mercy Hosp. of Buffalo,
336 NLRB 1282 (2001) 33, 35

TABLE OF AUTHORITIES
(cont'd)

Page(s)

In re Stevens Creek Chrysler Jeep Dodge,
357 NLRB 633 (2011) 37

L & J Equip. Co.,
274 NLRB 20 (1985) 35

Nexeo Sols.,
016 NLRB LEXIS 529 (N.L.R.B. July 18, 2016).....41

NLRB v. Burns Int'l Sec. Servs., Inc.,
406 U.S. 272 (1972).....16, 24

NLRB v. Carson Cable TV,
795 F.2d 879 (9th Cir. 1986) 32

Penntech Papers, Inc. v. NLRB,
706 F.2d 18 (1st Cir. 1983).....32

Precision Builders, R.S., Inc.,
296 NLRB 105 (1989) 29

Premium Foods, Inc. v. NLRB,
709 F.2d 623 (9th Cir. 1983) 16

Seven Seas Union Square, LLC,
2019 NLRB LEXIS 556 (NLRB Oct. 16, 2019) 41

Sprain Brook Manor Rehab, LLC,
365 NLRB No. 45 (2017) 24, 25

Spurlino Materials, Inc.,
357 NLRB 1510 (2011) 37

Standard Dry Wall Prods., Inc.,
91 NLRB 544 (1950) 2, 16

Transmarine Navigation Corp.,
170 NLRB 389 (1968) 15, 43, 44

Vitek Elecs., Inc.,
268 NLRB 522 (1984) 41

Western Union Corp.,
224 NLRB 274 (1976) 30

Wis. Educ. Ass'n,
292 NLRB 702 (1989) 35

TABLE OF AUTHORITIES
(cont'd)

Page(s)

STATUTES

National Labor Relations Act 1, 15

PRELIMINARY STATEMENT

Respondents Transcendence Transit II, Inc. ("Transcendence II"), Transcendence Transit, Inc. ("Transcendence"), Patriarch Partners, LLC ("Patriarch"), and Patriarch Partners Agency Services ("PPAS", collectively "Respondents"), submit this brief pursuant to Section 102.46(d) of the Rules and Regulations, in support of Administrative Law Judge Kenneth Chu's (the "ALJ" or "ALJ Chu") September 3, 2019 decision (the "Decision"), dismissing the amended complaint, *Transcendence Transit II, et al. and Local 1181-1061, Amalgamated Transit Union, AFL-CIO*, Case No. 29-CA-182049 ("the Amended Complaint") in its entirety. Consistent with the overwhelming record evidence and credible testimony, ALJ Chu found that Transcendence II was not a successor to TransCare New York, Inc. ("TransCare") and, therefore, that Respondents did not violate Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "NLRA" or the "Act") by failing to bargain with TransCare's Union. ALJ Chu also correctly found that Respondents were not joint or single employers under settled Board law.

A year of discovery in this case culminated in five days of live testimony at a hearing held in Brooklyn, New York (the "Hearing"), before ALJ Chu. At the end of the Hearing, following the introduction of hundreds of pages of documents and testimony from numerous witnesses, it was clear that Counsel for the General Counsel ("General Counsel") utterly failed to meet its burden of proving that Transcendence II (or any of the other Respondents) was a successor to TransCare during the three-day period in issue, February 24, 25, and 26, 2016.[1] Likewise, the General Counsel failed to prove its theory that Transcendence, Patriarch Partners, and/or PPAS were single or joint employers with Transcendence II. Rather, the facts adduced during discovery and the Hearing overwhelmingly demonstrated that (i) none of the Respondents

[1] Unless otherwise noted, all dates provided took place in 2016.

were successors to or single or joint employers with Transcendence II, and (ii) the General Counsel fundamentally misunderstood both Respondents' respective businesses and the circumstances giving rise to the heroic, but ultimately failed, effort to save a portion of TransCare's business from a bankruptcy liquidation.

The General Counsel and Union's combined 152 exceptions, many of which are duplicative, redundant, subsumed within each other, or of no practical significance, do not allege that ALJ Chu was mistaken as a matter of law. The exceptions do not suggest that ALJ Chu used the incorrect legal standard, applied the relevant case law incorrectly, or that there is any other basis to disturb ALJ Chu's legal conclusions (there is none).

Rather, all of the General Counsel and Union's exceptions challenge ALJ Chu's factual findings. These factual findings were largely based on ALJ Chu's witness credibility determinations, having personally observed the witnesses – their testimony and demeanor – at the Hearing, and were further bolstered by the documentary evidence.[2] ALJ Chu's credibility determinations are entitled to substantial deference under *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950) ("[T]he Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings.") As the Board has repeatedly reiterated, "[t]he Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Fedex Freight, Inc. & Int'l Bhd. of Teamsters, Local 107, Petitioner*, 362 NLRB 323, 323 n.1 (2015). Neither the General Counsel nor the Union has come close to meeting this high burden.

[2] In the interest of clarity and relevance, this brief primarily addresses exceptions that were discussed in the General Counsel's and Union's briefing and that hold practical significance. Respondents in no way concede the merits of the exceptions not directly addressed, and reserve all rights and objections.

The undisputed evidence established that during the early part of 2016, TransCare, a company engaged in the medical transportation business, was experiencing financial difficulties. In response to these difficulties, Lynn Tilton, TransCare's sole director, developed a plan to restructure TransCare. The restructuring plan was intended to save as many jobs as possible. In connection with this plan, Ms. Tilton, with the assistance of certain Patriarch Partners employees, another entity owned by Ms. Tilton, created Transcendence II to obtain the assets necessary to operate TransCare's paratransit business. TransCare's paratransit business employees were represented by the Union. Despite valiant, round-the-clock efforts by Ms. Tilton, certain Patriarch Partners employees and senior TransCare management, the uncontroverted testimony and documentary evidence demonstrated that the hoped-for restructuring plan failed; the assets necessary to operate the paratransit business were never obtained, Transcendence and Transcendence II never commenced operations, and the entirety of TransCare filed for Chapter 7 bankruptcy liquidation.

ALJ Chu correctly concluded that the record evidence clearly established that TransCare–and only TransCare–operated its paratransit business until its closure on Friday, February 26. In short, and as discussed in more detail below, the General Counsel failed to establish any of the elements of successor liability: (1) Transcendence II never had access to the assets necessary to run the paratransit operation; (2) Transcendence II never became party to the contract necessary to run that operation; and (3) Transcendence II never employed a workforce to operate the business. Further, there was no evidence that Transcendence II ever hired any TransCare bargaining unit employees. There was simply no record evidence of any continuity of business enterprise or workforce.

Because the General Counsel failed to establish a successor relationship between TransCare and Transcendence II, and has not alleged that any of Respondents had a single or joint employer relationship with TransCare, the General Counsel's contention that Respondents were single or joint employers among themselves is wholly irrelevant. The General Counsel cannot hold Patriarch Partners, PPAS, or Transcendence II liable for the TransCare bargaining unit employees' wages if it cannot (as it has not) first establish successorship between TransCare and Transcendence II. Even if the General Counsel had been able to establish that link (which it did not), the General Counsel lacks any support for its claim that any of the other Respondents were a single or joint employer with Transcendence II. As discussed below, Respondents did not share common management, have interrelation of operations, or share centralized control of labor relations.

For these reasons and those set forth herein, ALJ Chu's conclusions that Respondents did not violate the Act and were not single or joint employers are amply supported by the record and relevant Board law. Accordingly, the Board should affirm ALJ Chu's findings and conclusions, and dismiss the Amended Complaint in its entirety.

STATEMENT OF FACTS

I. THE RELATIONSHIP BETWEEN TRANSCARE AND EACH OF RESPONDENTS.

A. TransCare and the Respondents.

TransCare was a provider of medical transportation services. (Tr. 114:21-115:4.) Ms. Tilton saved TransCare from bankruptcy and became its sole director in 2001. (Tr. 270:25-271:1; 267:16-20.) Over the years, Ms. Tilton invested millions of dollars of her own personal

money and money from investment funds that she owned and managed, in TransCare and succeeded in reviving TransCare's business.[3] (Tr. 331:3-12.)

TransCare New York, a subsidiary of TransCare, was party to a contract with the Metropolitan Transportation Agency (the "MTA Contract") that enabled it to operate a paratransit business for the transportation of the elderly and handicapped throughout New York City. (Tr. 211:16-21, 308:17-22; Joint Exh. 7.) Pursuant to the MTA Contract, TransCare would invoice the MTA for the work it performed pursuant to that contract, and the MTA would pay TransCare for those services. (Joint Exh. 7.) The MTA requested work and provided paratransit routes to TransCare solely through the "AS 400" computer server, which the MTA provided to TransCare. (Tr. 338:1-15, 404:1-3.)

TransCare employees who provided paratransit services were represented by The Amalgamated Transit Union, Local 1181-1061 AFL-CIO (the "Charging Party" or "Union"). (Tr. 211:9-21; GC Exhs. 20, 21, 22.)

During the relevant time period, TransCare received working capital financing from Wells Fargo Bank, N.A. ("Wells Fargo") pursuant to an asset-based lending agreement (an "ABL"). (Tr. 269:5-8, 332:2-12.) The ABL was a revolving credit facility primarily secured by receivables and cash. *Id*. TransCare also had a secured term-loan facility with a consortium of term lenders, some but not all of which were affiliated with Ms. Tilton. (Tr. 382:23-25.)

PPAS, a Tilton-owned and controlled entity, was the administrative agent under the credit agreement between TransCare and its secured term loan lenders.[4] (Tr. 264:14-18, 329:11-

[3] Since 2001, Ms. Tilton invested in TransCare $10,000,000 of her own personal funds plus $45,000,000 from her various investment funds. (Tr. 324:18-24, 331:3-12.)

[4] PPAS did not serve as the administrative agent for the ABL, under which Wells Fargo provided TransCare with working capital financing.

330:11, 382:7-383:8; Joint Exhs. 1, 5.) PPAS does not have, and never had, any subsidiaries or employees. (Tr. 266:10-267:12.) Further, PPAS never had an ownership stake in TransCare. (Tr. 328:9-11.) PPAS also was never an owner or parent of Transcendence or Transcendence II. (Tr. 328:9-11).

Patriarch Partners, a separate Tilton-owned and controlled entity, is a family office investment firm whose employees, inter alia, support her in her position as director or manager of some of the many companies in which the investment funds have investments (known as "portfolio companies"), including TransCare.[5] (Tr. 257:12-16; Joint Exh. 2.) Although Patriarch Partners' employees supported Ms. Tilton in her role as TransCare's sole director, Patriarch Partners was not TransCare's parent corporation and never had any ownership stake in TransCare. (Tr. 325:24-326:4.) Patriarch Partners was not a lender to TransCare. (Tr. 390:17-391:1). Patriarch Partners also never shared bank accounts, financial books, employment policies, or employees with TransCare. (Tr. 326:7-327:1.) Further, Patriarch Partners' employees never set the terms and conditions of employment for TransCare employees, never managed TransCare's day-to-day operations and/or labor relations, and never had any independent authority to make decisions for TransCare. (Tr. 327:2-10.) Additionally, Patriarch Partners was never an owner or parent of Transcendence or Transcendence II. (Tr. 325:5-326:6.) Patriarch hired an independent executive team for the Transcendence entities' start-up process and did not share bank accounts or employees with Transcendence or Transcendence II. (Tr. 326:7-23.)

[5] In or about February 2016, Patriarch Partners had roughly fifty employees. (Tr. 326:13-17.)

B. Creation of Transcendence and Transcendence II.

By early 2016, TransCare was having financial difficulties. (Tr. 332:16-333:1.) Compounding such difficulties, Wells Fargo communicated to TransCare that it wanted to exit the ABL. (Tr. 269:18-270:4.) Without the ABL, TransCare could not continue its operations. (Tr. 332:16-333:1.) Because of Wells Fargo's actions, Ms. Tilton was forced to find a path forward for the Company that would save as much of the business and as many jobs as possible. (Tr. 269:18-270:4, 332:16-333:1.) Patriarch Partners' employees, assisting Ms. Tilton in her position as TransCare's sole director, analyzed each unit of the Company from a quantitative and qualitative perspective with the goal of understanding which business entities could be restructured and made profitable, and which business entities were no longer viable and could be subject to an orderly wind down. (Tr. 269:5-271:1, 386:18-23.)

In early February 2016, Ms. Tilton developed a restructuring plan. (Tr. 271:5-22.) Pursuant to this plan, certain of TransCare's senior secured term loan lenders (pursuant to the terms of the credit agreement between TransCare and its secured term loan lenders) would foreclose upon TransCare and those lenders would accept certain TransCare assets in partial satisfaction of TransCare's debt obligations. (Tr. 386:7-18.) Those assets would then be sold and/or transferred to a newly created entity, Transcendence, in order for it and its subsidiary, Transcendence II, to operate certain businesses formerly operated by TransCare, including the paratransit business.[6] (Tr. 168:21-169:19, 272:5-17, 278:21-279:4, 415:25-416:9, 422:12-14.) The remainder of the TransCare business would be wound down over the ensuing sixty-to-ninety days pursuant to Chapter 11 of the Bankruptcy Code, allowing those businesses to pay off certain

[6] Transcendence and Transcendence II were incorporated in Delaware on February 10, 2016. (Tr. 274:14-275:2; Joint Exhs. 3, 4.)

payables and avoid an abrupt shutdown of vital public health services. (Tr. 386:18-23.) Wells Fargo would continue to lend to TransCare to enable the remaining businesses to fund payroll during this wind down. (Tr. 386:3-23.) If fully executed, the plan would have preserved 700 TransCare jobs. (Tr. 261:2-8.)

In furtherance of this plan, and at the direction of Ms. Tilton as sole director of Transcendence and Transcendence II, certain Patriarch Partners' employees and TransCare's management team made preparations to do business, including, but not limited to, obtaining a number of necessary insurance policies and attempting to set up payroll for the new entities. (Tr. 279:20-283:18, 384:3-16; GC Exhs. 11, 16, 19.) Although these preparatory activities commenced, as the record evidence made clear, such efforts were ultimately abandoned, and Transcendence and Transcendence II never actually operated. (Tr. 277:19-24, 316:6-16.)

II. THE EVENTS OF FEBRUARY 24, 25, AND 26, 2016, AND RESPONDENTS' FAILED ATTEMPT TO RESTRUCTURE TRANSCARE'S PARATRANSIT BUSINESS.

A. The Foreclosure and TransCare's Chapter 7 Bankruptcy Filing.

On or about February 24, Wells Fargo notified Ms. Tilton that, contrary to their prior representations, Wells Fargo would not fund TransCare's payroll unless the planned bankruptcy was commenced as a liquidation pursuant to Chapter 7 of the Bankruptcy Code. (Tr. 335:17-22.) Unlike the planned Chapter 11 filing contemplated by Ms. Tilton's restructuring plan, which would have allowed for the orderly sixty-to-ninety day wind down, a Chapter 7 filing would force an immediate sell-off of the debtor's assets. (Tr. 170:19-171:1, 335:13-22.) This action by Wells Fargo undermined weeks of careful planning and forced Ms. Tilton to swiftly act in an attempt to keep the restructuring plan alive. (Tr. 112:16-23, 335:13-22; GC Exh. 8.)

In furtherance of the restructuring plan and in anticipation of the Chapter 7 bankruptcy filing desired by Wells Fargo, TransCare's secured term loan lenders foreclosed on certain

TransCare assets shortly after midnight on Wednesday, February 24, with the intention of selling those assets to Transcendence immediately thereafter.[7] (Tr. 386:7-18; GC Exh. 12; Joint Exh. 6.) The foreclosed upon collateral from this transaction included, among other things, capital stock of three TransCare entities[8] and the assets needed to run the paratransit business–including the MTA Contract and the AS 400 computer server, which was necessary to receive assignments from the MTA and assign those routes to paratransit employees. (Tr. 338:1-15, 388:23-389:1-3, 404:1-3; GC Exh. 12; Joint Exh. 6.) However, the foreclosure and sale alone did not transfer the MTA Contract to Transcendence II, because Article 204 of the MTA Contract required the MTA's consent to effectuate a transfer. (Tr. 142:1-9, 334:1-335:12, 392:9-16; Joint Exh. 7.) Accordingly only TransCare had the right to operate the paratransit business up to and until the MTA consented to transfer or agreed to terminate the MTA Contract and negotiate a new agreement.[9] *Id*. Further, it was impossible for *any* entity to operate the paratransit business without the AS 400 server that received the actual paratransit assignments from the MTA.

On the evening of February 24, Ms. Tilton, as TransCare's sole director, authorized TransCare's Chapter 7 bankruptcy filing. (Tr. 335:13-22.) That same night, the United States Department of Justice appointed Salvatore LaMonica (the "Trustee") as trustee to handle the TransCare liquidation. *Id*.

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[7] To accomplish this, the secured term loan lenders issued a Notice of Default and Acceleration to TransCare, and TransCare, certain of its secured lenders, and PPAS, as an agent of those secure lenders, then executed a Notice of Acceptance of Subject Collateral in Partial Satisfaction of Obligation. (Joint Exh. 6.)

[8] TransCare Pennsylvania, Inc., TC Hudson Valley Ambulance Corp., and TC Ambulance Corporation. (Joint Exh. 6.)

[9] The article, titled "Consent of Authority Required for Any Subcontracting, Subletting, or Assignment," read:

> The contractor 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 the prior written consent of the authority. A violation of this provision shall be deemed to be a material breach of the contract. (Tr. 334:24-335:12; Joint Exh. 7.)

B. Respondents' Failed Efforts to Transfer the MTA Contract and to Assume Control of the Paratransit Assets.

The very next morning, February 25, Mr. LaMonica met with TransCare's and Wells Fargo's bankruptcy attorneys, as well as Randy Creswell, an attorney representing PPAS in connection with the foreclosure action.[10] (Tr. 115:14-116:11, 303:21-304:4.) At the meeting, Mr. Creswell notified Mr. LaMonica that PPAS had, on behalf of the secured term loan lenders, foreclosed on various TransCare assets. (Tr. 118:3-16.) Though Mr. LaMonica testified at the Hearing that he initially concluded that he was no longer responsible for the paratransit operations, he took a contrary position just hours later, informing the MTA that he believed the MTA Contract was part of the bankrupt TransCare estate. (Tr. 118:3-16, 139:23-140:7, 341:18-342:3.) Mr. LaMonica's position caused the MTA to become concerned that its contract would be tied up in the bankruptcy proceedings. *Id*.

Despite Mr. LaMonica's efforts to interfere with the transfer of the MTA Contract to Transcendence II, Patriarch Partners' attorney Brian Stephen and others continued their round-the-clock efforts to save as many TransCare jobs as possible. (Tr. 263:3-9.) On February 25, Mr. Stephen learned that the MTA was concerned about the restructuring. Among other things, the MTA was concerned about ramifications of the Trustee's position that the MTA Contract was part of the bankruptcy estate, and what that might mean for the MTA. (Tr. 399:7-400:1.) Attempting to allay the MTA's concerns, Ms. Tilton instructed Mr. Stephen to send an email to Diane Morgenroth, counsel to the MTA, explaining the restructuring transactions and

[10] Mr. Creswell did not represent Patriarch Partners, Transcendence, or Transcendence II, and had no role in operational decisions related to Respondents (including PPAS) during the period in question. (Tr. 300:10-12, 303:21-304:4.)

"present[ing] to [the MTA] a case to continue with [Transcendence] and try to get…an agreement together for Transcendence Transit to operate." (Tr. 399:7-400:1; GC Exh. 26.)

In the email, Mr. Stephen assured Ms. Morgenroth that the foreclosure was proper, and that the Trustee did not have the power to unwind it. (Tr. 400:2-21; GC Exh. 26.) In his efforts to keep the restructuring alive and persuade the MTA to assign the MTA Contract, Mr. Stephen overestimated how far along in the process Transcendence and Transcendence II were, writing that TransCare employees had already been transferred to Transcendence and Transcendence II. (GC Exh. 26.) In reality, as Mr. Stephen stated in sworn testimony and at the Hearing before ALJ Chu, no employees had been transferred at that time, and the General Counsel presented no evidence to the contrary. (Tr. 195:21-200:8, 202:24-203:12, 401:2-4.)[11]

Not only did Mr. LaMonica continue to interfere with the attempted transfer of the MTA Contract, he took additional steps to block the effectuation of the foreclosure by preventing Transcendence II from timely obtaining the paratransit vehicles and the computer server, both of which were necessary to operate the paratransit business. (Tr. 338:10-23, 473:2-6; Res. Exh. 1.) To that end, on the evening of February 25, Mr. Youngblood was tasked with leading a team to physically transport the AS 400 server to a proposed Transcendence II location. (Res. Exh. 1.) Without such server, Transcendence II would not have been able operate the paratransit business. (Tr. 338:1-23, 340:3-6, 403:16-405:17.) At that time, Mr. Youngblood called TransCare's bankruptcy counsel, Cindi Giglio, to confirm that it was appropriate to retrieve the foreclosed upon AS 400. (Tr. 404:18-405:1.) Ms. Giglio told him to call the Trustee. (Tr. 405:1-5.) Mr.

[11] Indeed, Glen Youngblood, a TransCare executive who was asked by Ms. Tilton to serve as Transcendence and Transcendence II's President (although he declined such offer on the evening of February 25), testified that he did not personally distribute any transfer of employment letters to any TransCare bargaining unit employees and did not know if any were, in fact, ever distributed. (Tr. 205:2-15, 339:6-340:2, 404:18-405:17; Res. Exh. 1.)

Youngblood was unable to reach Mr. LaMonica but eventually spoke with his counsel, Gary Herbst. (Res. Exh. 1.) Mr. Herbst warned Mr. Youngblood that removing the AS 400 would expose Mr. Youngblood to possible legal action. (Tr. 405:5-8; Res. Exh. 1.) Mr. Youngblood called Mr. Stephen to advise him of the Trustee's position, and expressed to Mr. Stephen that he was fearful that he would "have to spend the rest of his life dealing with this." (Tr. 405:8-13.) As a result of the Trustee's threat, Mr. Youngblood did not retrieve the AS 400 or accept a position with Transcendence and Transcendence II.[12] (Tr. 404:20-22, 405:8-17; Res. Exh. 1.)

Meanwhile, Mr. LaMonica continued to hamper efforts to transfer the MTA Contract to Transcendence II by failing and refusing to agree to terminate the MTA Contract on behalf of TransCare until after the MTA had already started reclaiming vehicles. (Tr. 342:3-8, 403:11-15.) On February 26, Mr. Stephen advised the MTA in a 2:09 PM email, and later by voicemail, that Ms. Tilton needed a response by 5:00 PM as to whether the MTA would agree to transfer the MTA Contract. (Tr. 423:17-424:7; GC Exh. 27.) Ms. Tilton set the 5:00 PM deadline due to concerns that, with the weekend approaching, after the unexpected Chapter 7 bankruptcy TransCare bargaining unit employees would "scatter to the winds" without some clarity as to whether the paratransit business would operate going forward. (Tr. 423:5-9; GC Exh. 27.) At the same time that Mr. Stephen advised the MTA of the 5:00 PM deadline, Mr. Creswell contacted Mr. LaMonica, advising him of such deadline and asking that he terminate the MTA Contract; such termination would address the MTA's concern that the MTA Contract would be tied up in the TransCare bankruptcy estate, and would enable the MTA to negotiate a new contract with Transcendence II. (Tr. 148:11-21; GC Exh. 9.)

[12] Upon questioning, Mr. LaMonica conceded that he never confirmed whether or not the assets critical for Transcendence II to operate the paratransit business had in fact been secured by the foreclosure and offered only that at the time he "wasn't sure" whether the server belonged to the TransCare estate or not. (Tr. 481:21-25.)

At the same time, Mr. LaMonica was engaging in discussions with the MTA with respect to the MTA Contract and its paratransit vehicles. (Tr. 471:15-473:6; Res. Exh. 2.) During the course of these discussions, Mr. LaMonica claimed to control both the MTA Contract and the vehicles associated with the MTA Contract. *Id*. Based upon such claim, Mr. LaMonica obtained an agreement from the MTA to pay TransCare certain amounts due for services rendered under the MTA Contract, and further authorized the MTA to take possession of the vehicles and other assets used for the paratransit business. *Id*.

Having heard nothing from the MTA, at 3:04 PM, W. Randall Jones, Managing Director of Media, Entertainment, and Talent Acquisition for Patriarch Partners, escalated the issue to Thomas Charles, Vice President of the Paratransit Division at the MTA. (GC Exh. 27.) At 3:33 PM, Mr. Charles responded: "According to [MTA] attorneys the [MTA Contract] will not be excluded from the Bankruptcy proceedings. Therefore [the MTA] cannot move forward while this is a risk." (GC Exh. 27.)

C. <u>The Closure of TransCare's Paratransit Business.</u>

The 5:00 PM deadline passed without any assurance or response from Mr. LaMonica that he would not interfere with the transfer of the MTA Contract to Transcendence II. (Tr. 342:9-17.) Finally, at 5:07 PM, Mr. LaMonica responded to Mr. Creswell that he would agree to terminate the MTA Contract, subject to certain onerous conditions. (Tr. 148:11-150:10; GC Exh. 9.) But it was too little, too late.

At 5:58 PM, Thomas Fuchs, TransCare's Vice President of Transit Services, who was responsible for the paratransit operation, sent an announcement to TransCare employees, including to those select paratransit workers with computer access, with the header: "TransCare Additional Employee Communication - 2.26.2016 ET." (GC Exh. 4.) The announcement stated:

> This is a sad day for all of us who have loved and respected the work of TransCare employees. We were excited to have an opportunity to begin anew with our Hudson Valley, Pittsburg and Paratransit divisions in a new company to preserve 700 jobs. Unfortunately, today Wells Fargo, the Carl Marks restructuring firm and the Trustee of the bankrupt estate have decided not to fund payroll for last week's payroll obligation. This is particularly distressing given Wells Fargo's previous commitment to fund a proper wind down plan upon which we agreed to file for Chapter 7 bankruptcy protection. Regrettably, the Trustee disputes our claims to assets that were foreclosed upon earlier this week. This action prevents our ability to operate these three divisions. Consequently, we simply cannot effectively serve our customers and our communities with these restrictions. We are devastated by today's decisions, but unfortunately our hands are tied. This means we must cease our operations immediately. Please secure your vehicles and operations and await further instruction from the court appointed Trustee.

(GC Exh. 4.) That evening, the communication circulated among other paratransit workers, including those without computer access.[13] (Tr. 48:14-20, 49:20-50:8, 51:25-52:13, 55:7-18, 77:11-78:1, 95:2-96:8; GC Exh. 4.) TransCare's doors were completely shuttered by February 26. *Id*.

In the days following the February 26 closure, the Trustee, not Respondents, managed the wind down of TransCare's paratransit business, including turning over hundreds of boxes of documents and the AS 400 file server to the MTA. (Tr. 469:3-12, 476:9-477:20, 479:8-480:8; Res. Exh. 4.)

III. PROCEDURAL HISTORY

On September 28, 2018, the Regional Director for the National Labor Relations Board, Region 29 (the "Regional Director) issued the Complaint and Notice of Hearing against Respondents.[14] The Complaint alleged that Respondents failed to bargain collectively and in

[13] The General Counsel failed to show that any other communication was distributed to TransCare's bargaining unit employees by any Respondent.

[14] The Charging Party filed an unfair labor practice charge on August 12 and amendments to those charges on September 15 (the "Charges") alleging that Transcendence II bargained in bad faith by unilaterally changing terms and conditions of employment, including by failing to pay its bargaining unit employees for wages. The Charges also alleged that–as single employers, joint employers, or alter egos–various other entities were liable for

good faith with the Charging Party in violation of Sections 8(a)(1) and (5) of the Act based on the events surrounding and leading to TransCare's cessation of operations on February 26. The Complaint also sought as a remedy an order requiring Respondents to make the unit employees whole in accordance with *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).[15] On December 19, 2018, the Regional Director issued its Amended Complaint and Notice of Hearing. The Hearing before ALJ Chu took place on April 9, 17, and 18, and May 9 and 30, 2019.

Approximately three months following the Hearing, ALJ Chu issued his decision finding for Respondents on every front and recommending that the Amended Complaint be dismissed in its entirety. ALJ Chu found that: (1) Transcendence II was not a successor to predecessor TransCare New York; (2) Respondents were not joint employers; (3) Respondents were not a single employer; and (4) Respondents did not fail and refuse to bargain collectively and in good faith with the Union in violation of Sections 8(a)(1) and (5).[16]

The General Counsel and Union filed exceptions ("GC Exceptions" and "CP Exceptions," respectively) and briefs in support of their exceptions (the "GC Exceptions Brief" and "CP Exceptions Brief," respectively) on October 30, 2019.

Transcendence II's actions. The Board ultimately determined to proceed solely against Transcendence, Patriarch Partners, and PPAS.

[15] The General Counsel initially claimed alter ego status among Respondents in its amended ULP charges. (NLRB Am. Ch.) ("The remaining charged parties are liable as a single employer, joint employer, or alter ego with Transcendence Transit II, Inc."). However, the alter ego claim did not appear in its Complaint or Amended Complaint. To the extent General Counsel attempts to resuscitate its alter ego allegation, Respondents hereby deny said allegation. In such cases, the Board typically looks at whether the two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. *DuPont Dow Elastomers*, 332 NLRB 1071 (2000). As discussed herein, there was no evidence of substantially identical management, business purposes, operations, equipment, customers or supervision among Respondents. (*See infra* section II.A. of Argument.)

[16] Notably, ALJ Chu reached this decision without considering Respondents' post-hearing brief. (ALJ Dec. at 2, n. 4.) The General Counsel moved to strike Respondents' post-hearing brief on the grounds that it was untimely. It alleged that the brief was not timely because, although submitted on the day due, it was submitted after "the close of business." Respondents vigorously opposed the motion to strike but ALJ Chu granted the motion and did not consider Respondents' post-hearing brief.

ARGUMENT

I. ALJ CHU CORRECTLY HELD THAT TRANSCENDENCE II NEVER COMMENCED OPERATIONS AND, THEREFORE, WAS NOT TRANSCARE'S SUCCESSOR.

The General Counsel and Union except to ALJ Chu's finding that Transcendence II was not TransCare's successor. A "successor" employer is an entity that assumes preexisting operations from an employer and continues to operate substantially the same business, with a workforce that is made up of a majority of its predecessor's employees. *Premium Foods, Inc. v. NLRB*, 709 F.2d 623 (9th Cir. 1983). For the Board to find an employer to be a successor, it must find (1) a continuity of business enterprise and (2) a continuity of workforce. *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 280 (1972); *see also*, ALJ Dec. at 14:7-14. The record evidence clearly established, and ALJ Chu found based on credible testimony, that "the successorship argument fails because there was no substantial continuity of operations after the takeover and Transcendence II never hired a majority of the predecessor's (TransCare[]) employees . . . it is clear that Transcendence II never began operating." (ALJ Dec. at 14:27-31.)

Neither the General Counsel nor the Union take exception with ALJ Chu's legal analysis and application of governing Board law. Rather, both take exception only with respect to ALJ Chu's factual findings and credibility determinations. While the Board may review factual findings *de novo*, to the extent such findings were made based on the testimony and credibility of the witnesses, they should not be disturbed. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950). As discussed herein, the General Counsel and the Union cannot satisfy their burden of proof, and instead impermissibly ask the Board to substitute its judgment of the witnesses' credibility. Thus, the Decision should be affirmed.

A. ALJ Chu Correctly Found That the General Counsel Failed to Establish That Transcendence II Possessed the Assets Necessary to Operate.

The record evidence clearly established, and ALJ Chu properly decided, that Transcendence II never operated because, among other things, it never possessed the assets necessary to operate the paratransit business. (ALJ Dec. at 14:31-16:14.) Although a legal entity, Transcendence II, was created in order to run a paratransit business, Transcendence II never obtained and possessed the critical assets necessary to operate such a business, *i.e.*, the MTA Contract, the associated vehicles, and the AS 400 computer server. The MTA also never provided the written authorization necessary to transfer the MTA Contract from TransCare to Transcendence II, and the Trustee refused to transfer, or blocked access to, the necessary vehicles and computer server. Accordingly, ALJ Chu correctly found that because Transcendence II lacked the requisite assets critical to operate, no continued business enterprise ever existed. (ALJ Dec. at 16:8-14.)

1. ALJ Chu Correctly Found That the MTA Contract Was Never Transferred.

It is undisputed that the MTA's contract with TransCare was not assignable at-will. (Joint Exh. 7.) Rather, the MTA's express written consent was required for TransCare to transfer the contract to Transcendence II. This consent was never obtained. Based on conversations with the Trustee, the MTA became concerned that its contract would be tied up in the Bankruptcy. As Thomas Charles, Vice President of the Paratransit Division at the MTA, wrote in an e-mail to Patriarch Partners: "According to [MTA] attorneys the [MTA Contract] will not be excluded from the Bankruptcy proceedings. Therefore [the MTA] cannot move forward while this is a risk." (GC Exh. 27.) Thus, the MTA took the position that it would not consent to the assignment of the contract unless the Trustee agreed to TransCare's termination of its contract with the MTA. (Tr. 148:11-21.) The Trustee dragged his feet and did not give his consent until

5:07 PM on February 26, at which point, as ALJ Chu noted, it was too late for Transcendence II to assume the contract. (ALJ Dec. at 16:3-6; GC Exh. 9.) Indeed, the General Counsel and Union *admit* that the MTA never consented to assignment of the contract to Transcendence II, and that the MTA and Transcendence II were never party to a paratransit contract. (GC Exceptions Br. at 34; CP Exceptions Br. at 34.) This admission is fatal to the General Counsel and Union's claim.

2. ALJ Chu Correctly Concluded That Transcendence II Would Not Have Provided Services to the MTA Without a Contract.

In addition to admitting the MTA and Transcendence II were never a party to a contract, the General Counsel and Union also admit that if Transcendence II had performed paratransit services on behalf of the MTA without a contract, it would have been engaging in *ultra vires* activity, exposing Transcendence II to considerable legal damages. (GC Exceptions Br.at 34-35; CP Exceptions Br. at 34, 38-39.) Moreover, the General Counsel and Union further recognize that if Transcendence II had performed the paratransit services without a contract, it likely would not have been entitled to any compensation for such work.

The General Counsel and Union nevertheless except to ALJ Chu's finding, based on the credited testimony of Ms. Tilton and Mr. Stephen, that the MTA Contract was a predicate to Transcendence II performing paratransit service work. (ALJ Dec. at 15:39-42; GC Exceptions 20, 25, 26; CP Exceptions 34, 39, 41.) In the absence of any record evidence supporting their exceptions, the General Counsel and Union offer a series of speculative theories as to why Transcendence II would have been willing and able to provide services without a contract. For example, they posit that Transcendence II was so desperate to keep the MTA contract that it would have been willing to perform services for free for as long as it took for Transcendence II

and the MTA could come to an agreement. There is utterly no record evidence to support the theories advanced.

Instead, the record is clear that, as ALJ Chu determined, Transcendence II would not have performed work without a contract. In the Decision, ALJ Chu appropriately credited Ms. Tilton's testimony that it would have made "little business sense for Transcendence II to operate when it cannot pay employees and expenses" and that the MTA Contract was a predicate to Transcendence II obtaining the necessary resources. (ALJ Dec. at 15:39-42.) As Ms. Tilton explained "we didn't want to effectuate a new entity and hire people if there wasn't going to be long-term employment." (Tr. 345:10-11.) He also rightly credited Mr. Stephen's testimony that "without the paratransit contract, all of Transcendence was going to fail; there was no way it could survive without that contract." (Tr. 401:10-12.) These credibility findings should not be disturbed.

In addition to the credited testimony, the rest of the record supports ALJ Chu's decision. The record indisputably established that from February 24 to February 26, Ms. Tilton was tirelessly attempting to come to an agreement with the MTA, even pursuing a non-ideal, short-term contract in an attempt to buy more time. (Tr. 343:10-346:13; GC Exh. 27.)

The General Counsel's and Union's speculation that Transcendence II could have operated indefinitely without a contract simply does not make sense. If such were the case, Ms. Tilton would not have worked so hard to reach an agreement with the MTA and the Trustee, and would have had no reason to give up plans for the eventual operation of Transcendence II after just three days. ALJ Chu was correct to reject these theories in favor of the actual facts and credible testimony presented.

The General Counsel also excepts to ALJ Chu's findings concerning the MTA Contract by positing that the MTA had no reservations about Transcendence II continuing to provide services. (GC Exceptions Br. at 35-36.) This baseless assertion is belied by the record evidence, which established that the MTA refused to transfer the contract as long as it was tied up in the bankruptcy estate. (GC Exh. 27.) ("According to [MTA] attorneys the [MTA Contract] will not be excluded from the Bankruptcy proceedings. Therefore [the MTA] cannot move forward while this is a risk.") This exception has no merit.

3. ALJ Chu Correctly Understood, and Properly Credited, Testimony Concerning Mr. Stephen's and Mr. Creswell's Communications About Transcendence II's Status.

Relying on a single e-mail, the General Counsel and Union object to ALJ Chu's determination that Mr. Stephen credibly testified that he did not make any statements that would amount to an admission that Transcendence II was operational. As ALJ Chu recognized, in his efforts to keep the restructuring alive and persuade the MTA to assign the MTA Contract, Mr. Stephen overestimated how far along Transcendence and Transcendence II were in the transition process, by writing that TransCare employees had already been transferred to Transcendence and Transcendence II. (ALJ Dec. at 15:5-16; GC Exception 19; CP Exceptions 28, 36; GC Exh. 26.) In point of fact, as Mr. Stephen admitted, no employees had been transferred at that time, and the General Counsel presented no evidence to the contrary. (Tr. 195:21-200:8, 202:24-203:12, 401:2-4.) As ALJ Chu explained in his opinion:

> I credit Stephen's testimony that his statement to the MTA on February 26 that Transcendence II was operating the paratransit business was "poorly drafted." A close reading of his email to the MTA corroborated his testimony because he never stated that Transcendence II was operating but had in fact stated to the MTA attorney, Diana Morgenroth, that his principle would be ". . . *amendable to moving forward and providing services* (emphasis added) while we work through the MTA's process with a few accommodations" (GC Exh. 27). In my opinion, this showed that Transcendence II could be up and running the paratransit operations

> but only if certain accommodations (conditions) could be reached, namely, the contract approval by the MTA.

(ALJ Dec. at 15:8-16.) Moreover, ALJ Chu found that Ms. Tilton's testimony that TransCare assets were never delivered to Transcendence II was credible. (ALJ Dec. at 15:28-38; Tr. 313:2-13; CP Exh. 1.) As Ms. Tilton clearly testified, "TransCare, nor its subsidiaries, ever delivered th[e required] assets because the trustee got involved and stopped the delivery." (Tr. 313:11-13). While the General Counsel bore the burden of proving its case, it failed to elicit any testimony to support an alternative explanation of Mr. Stephen's conduct. There is none.

The General Counsel and Union also take exception with ALJ Chu's credibility determinations surrounding Mr. Creswell's communications with the Trustee. (GC Exceptions 21, 22; CP Exception 25.) Contrary to the General Counsel's and Union's exceptions, Mr. Creswell did not admit that Transcendence II was operating in a manner that would make it a successor to TransCare. ALJ Chu correctly found, after evaluating the Trustee's testimony, that, at best, Mr. Creswell's statements at the February 25 meeting with Mr. LaMonica were "an overstatement" and "a clumsy attempt to get LaMonica's approval to allow for the voluntarily [sic] termination of the [paratransit] contract." (ALJ Dec. at 15:18-25.) Indeed, the General Counsel did not present evidence supporting an alternative conclusion with regard to Mr. LaMonica and Mr. Creswell's conversation. Despite ALJ Chu recommending that the General Counsel call Mr. Creswell as a witness on multiple occasions, it failed to do so. (Tr. 157:16-158:20.)

Finally, the General Counsel and Union except to the ALJ's decision on the ground that TransCare and PPAS allegedly admitted in a March 10 stipulation that Transcendence II ceased operating on February 26. (GC Exceptions Br. at 28-29, 32; CP Exceptions Br.at 23-24.) This exception relies on an overly simplistic reading of the word "operating." There was no

admission that Transcendence II had employees, or was operating in a way that would be relevant to a successorship analysis on February 26. Instead, while there were attempts to get Transcendence II up and running between February 24 and February 26, it was abandoned as a potentially viable entity on February 26.

B. ALJ Chu Correctly Found That Transcendence II Never Obtained Access to the Servers or Vehicles Necessary for It to Commence Operations.

ALJ Chu correctly found that Transcendence II could not have commenced operations without possessing the necessary MTA server and paratransit vehicles that were in TransCare's possession. Several witnesses consistently and credibly testified that Transcendence II would not, and could not, have operated without the server. The Trustee testified that on February 24, 25, and 26 he refused to release the server to Mr. Youngblood or any other official of TransCare, let alone for use by Transcendence II, because the server was deemed a valuable asset for bankruptcy purposes. Additionally, record evidence established that the Trustee's counsel advised Mr. Youngblood that taking possession of the server, "would not be appropriate, even given the claims of ownership of some assets to do so . . . , until the Trustee had been able to determine a course of action." (Tr. 403:16-405:17; Res. Exh. 1.) The record is also clear that the Trustee controlled the paratransit vehicles and server during the relevant time period. (Tr. 476:9-478:8; GC Exh. 9; Res. Exh. 4.)

The Trustee's refusal to relinquish control over these critical assets is significant. As Mr. Stephen, in credited testimony, explained "in order for Transcendence II to operate, it needed the computer server that contained the valuable data on routes, passengers, schedules, and other information to pick up and drop off passengers. Without the server, Transcendence II would be in the dark." (ALJ Dec. at 14:38-41.) Ms. Tilton confirmed that the server contained "the

logistics, mathematical model that runs the vehicles around, so without the server and the systems, there would be no way to establish the business." (Tr. 338:10-23).

The General Counsel and Union except to the ALJ's findings concerning Transcendence II's access to the assets on several fronts. First, they make the tautological argument that Transcendence II had access to the assets, as some entity was providing services to the MTA February 24, 25, and 26. (GC Exceptions Br.at 34; CP Exceptions Br. at 42-43.) Neither offers any record evidence in support of these arguments, because no such evidence exists. As ALJ Chu found and the record supports, the entity providing services was TransCare. (ALJ Dec. at 16:13-14.) As discussed above and as supported by the record evidence, when Transcendence II attempted to get control of the vehicles from TransCare, the Trustee again blocked the attempt and then told the MTA it could take possession of the vehicles. (Tr. 476:9-478:8; GC Exh. 9; Res. Exh. 4.)

The General Counsel and Union, through their exceptions, next attempt to suggest that Transcendence II may have had access to the server and vehicles because: (1) the Trustee did not know whether the server was his, (2) the Trustee did not say that Transcendence II could not have the server, but instead that he would address the question later, and (3) the server could have been transferred without the Trustee's consent. (GC Exception 15; CP Exception 32.)

ALJ Chu correctly rejected these arguments. Even if the Trustee did not know the state of ownership of the server[17], or his consent was not required, the record evidence is crystal clear that that he and his attorney actively prevented Transcendence II from obtaining the asset in the timeline necessary to operate. (Tr. 480:24-481:25; Joint Exh. 6.) The Trustee testified that on

[17] There is no testimony to support the notion that the Trustee did not know the state of ownership of the server. To the contrary, he clearly believed that he had some entitlement to the server, as he refused to allow Mr. Youngblood to access the serve on February 24, 25, or 26.

February 24, 25, and 26 he refused to release the server to Mr. Youngblood or any other official of TransCare, let alone for use by Transcendence II. Indeed the Trustee's counsel warned Mr. Youngblood that removing the server would expose Mr. Youngblood to possible legal action. (Tr. 405:5-8; Res. Exh. 1.) Similarly, to the extent that the Trustee's attorney may have said that the parties could work out the server issue later, he still prevented Transcendence II from having access to the server during the three days in question. Moreover, even if there were some theoretical scenario in which Transcendence II could have obtained access to the server, the record remains completely void of any evidence that Transcendence II ever had the server in its possession. The only entity with access to the server and the information contained therein–information that was critical to the operation of the paratransit business–was TransCare.

For its part, the Union, through yet another exception, takes the startling position that Transcendence II could have still been a successor of TransCare even if it did not have access to the assets required to operate. It contends that a company need not have title to a business or customers to be an employer, and that one can operate a business while waiting for licensing or a deal to close. (CP Exceptions Br. at 38-41.) While this argument may be accurate in the abstract and in isolation, it is not relevant to the current dispute. To be a successor under Board law, the relevant question is whether one party continued another's operations. *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 280 (1972); *see also*, ALJ Dec. at 14. Here, ALJ Chu correctly determined that in this case (i) Transcendence II did not operate, and could not have operated, without the required assets, (ii) it did not have the required assets, and (iii) it therefore did not operate. (ALJ Dec. at 14:31-15:16.)[18]

[18] The Union's reliance on *Sprain Brook Manor Rehab, LLC*, 365 NLRB No. 45 (2017), is misplaced. As the excerpted portion of the decision reveals, *Sprain Brook Manor Rehab* concerns a buyer of a business who steps in and manages the business while a transaction is in the process of closing. Here, there is no evidence that Transcendence II was managing TransCare, or performing services on behalf of TransCare, while the parties were

C. ALJ Chu Correctly Found That the General Counsel Failed to Establish Transcendence II Ever Hired TransCare's Bargaining Unit Employees.

At the Hearing, the General Counsel introduced certain communications from TransCare management to TransCare bargaining unit employees in an effort to establish that Transcendence II hired TransCare bargaining unit employees. (GC Exhs. 2, 3, 13, 14, 17, 18.) However, ALJ Chu correctly found that those communications, addressed below, do not prove that any employees were actually hired by, or did any work for, Transcendence II. To that end, ALJ Chu correctly determined that the General Counsel (i) never established that Transcendence II distributed transfer of employment letters to any TransCare bargaining unit employees (ALJ Dec. at 16:16-17:6) and (ii) did not prove that TransCare bargaining unit employees received such letters from any other source. The General Counsel's and Union's exceptions seek to rehash these factual findings, asking the Board to make assumptions and draw inferences that the record does not support.

The General Counsel and Union except to the ALJ's findings, and contend that Transcendence II hired TransCare employees on the premise that two of the General Counsel's witnesses, Ms. Watson and Ms. Insogno, testified that they received an announcement addressing the state of the TransCare business and its potential restructuring. These witnesses claim to have seen this announcement on February 23, outside TransCare's "cash out office" and that the announcement was signed by "the TransCare Management Team." (Tr. 21:11-23:25, 81:14-82:22; GC Exh. 2.) However, ALJ Chu, based on credible testimony, correctly held that the

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waiting for a transaction to close. Indeed, as discussed in detail above, Transcendence II could not possibly have operated given that it did not have the assets required to do so. As such, *Sprain Brook Manor Rehab* is inapposite.

General Counsel failed to prove that this announcement was intentionally distributed or was in its final form. (ALJ Dec. at 16:16-31.)

ALJ Chu credited Mr. Jones and Mr. Stephen's testimony that the announcement regarding employees' jobs being transferred from TransCare to Transcendence II was only a draft. *Id*. Respondents' witness, Mr. Jones, credibly testified that General Counsel Exhibit 2 was an unfinished draft of the announcement and the final version of the announcement was not emailed to TransCare for distribution until Wednesday, February 24. (Tr. 449:4-14.) His testimony was corroborated by General Counsel Exhibit 13, an email from Mr. Jones to Mr. Youngblood on the morning of Wednesday, February 24, with the final versions of the announcement attached. (GC Exh. 13.) ALJ Chu found this testimony to be credible. In accepting Mr. Jones' testimony, ALJ Chu explained:

> [Mr. Jones and Mr. Stephen's] testimony was corroborated by the objective evidence in the record. The email from Jones to Fuchs dated February 24 that contained the announcement clearly stated that it was a draft. The announcement was dated February 23, while the email from Jones was dated February 24. As such, any leakage of the announcement to the unit drivers was in anticipation of the job transfers that never occurred. Obviously, the notice would not have gone out to the employees in such a format (GC Exh. 29).

(ALJ Dec. at 16:19-24.)

Additionally, Mr. Jones testified that he had no knowledge of whether the announcement was actually distributed to TransCare bargaining unit employees. (Tr. 446:10-448:25, 449:4-14; GC Exh. 13.) Mr. Youngblood similarly testified that he did not know whether the announcement he received from Mr. Jones in General Counsel Exhibit 13 was distributed to paratransit employees because Mr. Fuchs–not Mr. Youngblood–was responsible for communicating with the paratransit staff. (Tr. 186:20-188:4.) The General Counsel failed to call Mr. Fuchs or in any other way confirm any distribution of General Counsel Exhibit 2 or General Counsel Exhibit 13.

Moreover, the General Counsel's attempts to position this announcement as proof that Transcendence II hired TransCare employees are undercut by its failure, here or at the Hearing, to provide any evidence that the actions set forth in the announcement actually happened. In the "announcement"–which ALJ Chu accurately found was a draft not intended for distribution–TransCare Management notified bargaining unit employees that they could expect "a new employment letter" from their manager within 24 hours. (GC Exh. 2.) But the General Counsel failed to establish that any letters were distributed to any TransCare bargaining unit employees. (Tr. 195:21-200:8.)

In fact, the only transfer letters the General Counsel entered into evidence were for non-bargaining unit employees. (Tr. 196:4-23; GC Exhs. 3, 17, 18.) While the General Counsel introduced communications discussing the drafting and distribution of transfer letters, these communications in no way supported the claim that TransCare bargaining unit employees ever received such letters. (GC Exhs. 17, 18.) The draft letters were not addressed to any specific employee, and the transfer letters introduced at the Hearing, ALJ Chu determined, were only addressed to non-bargaining unit TransCare employees. (Tr. 196:4-20; GC Exhs. 17, 18.) No evidence was introduced to establish that such letters were ever sent to, or received by bargaining unit employees. *Tellingly, the General Counsel called three TransCare bargaining unit employees as witnesses and did not ask a single one of them if they received a transfer letter*. Thus, there is not a shred of evidence that TransCare bargaining unit employees were ever notified by or received documentation from Transcendence II regarding any successor employment.

D. The TransCare Bankruptcy Estate Billed the MTA for Work Performed in February 2016.

The Union also excepted to ALJ Chu's successorship finding on the basis that the MTA only paid for pre-petition services. They suggest that this means Transcendence II was providing services to the MTA once TransCare filed for Chapter 7 bankruptcy. To the contrary, there is no significance to the MTA's failure to pay TransCare for all days of service provided beyond that the MTA failed to pay for all services rendered. Indeed, the record evidence demonstrates that the TransCare bankruptcy estate, not Transcendence II, intended to bill the MTA for paratransit services provided on February 24, 25, and 26. (Tr. 479:22-480:8; GC Exh. 8.) Carl Marks, the advisory firm that assisted the Trustee with such billing, sent an email to the Trustee on March 23, 2016 at 10:36 PM advising him that they needed to "begin all the prebilling activities required to ultimately generate an invoice to the MTA for paratransit services provided during the 2/1-2/26 period." (Tr. 479:8-480:8; Res. Exh. 5.) The record is clear that Transcendence II never billed the MTA, and that the MTA never paid Transcendence II. *Id*.

II. ALJ CHU CORRECTLY FOUND THAT THE GENERAL COUNSEL FAILED TO MEET ITS BURDEN OF PROVING THAT PATRIARCH PARTNERS, PPAS, OR TRANSCENDENCE WERE SINGLE OR JOINT EMPLOYERS OF TRANSCENDENCE II.

ALJ Chu correctly held that Transcendence II was not TransCare's successor; therefore, the question of whether any of Respondents were single or joint employers of Transcendence II is irrelevant. Nevertheless, based on the record evidence and credible testimony presented at the Hearing, ALJ Chu correctly held that none of Respondents were single or joint employers of Transcendence II.

A. None of the Respondents Were Single Employers of Transcendence II.

A "single employer" relationship exists "where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a

'single employer'." *Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 137 (2d Cir. 1985), *cert. denied sub nom, Teamster's Local 317 v. Clinton's Ditch Coop. Co.*, 479 U.S. 814 (1986) (internal quotation marks omitted). The Board and courts examine four factors in determining whether a single employer relationship exists: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *Precision Builders, R.S., Inc.*, 296 NLRB 105, 109 (1989). Not all of the criteria must be present to determine a single employer relationship exists, and no single factor is dispositive. *Id.* Board precedent has held that centralized control of labor relations is considered the most important factor, while common ownership is the least important. *Id.* The test is relatively fluid, and courts routinely take into account the overall facts and totality of the circumstances that surround a particular employer; even if it means discounting a whole factor entirely. *See Bolivar-Tees*, 349 NLRB 720, 720 (2007) (finding single employer status despite lack of centralized control of labor relations). The General Counsel and Union do not deny that ALJ Chu applied the correct legal standard to his single employer analysis.

1. <u>ALJ Chu Correctly Concluded That Common Ownership Was Insufficient to Satisfy a Single-Employer Finding.</u>

The Board has long considered common ownership to be the *least* important factor when analyzing single employer status. *Precision Builders, R.S., Inc.*, 296 NLRB at 109; *see Elec. Workers IBEW Local 3 (Telecom Plus*), 286 NLRB 235, 235, 237, 241 (1987) (affirming ALJ's holding that although one entity was "the parent company of [several other] organizations, this common ownership cannot serve to make the Charging Party an alter ego of or single employer with the other Telecom entities.") The General Counsel and Union, nevertheless, take exception

with ALJ Chu's finding that the limited common ownership in this case did not justify a single employer finding. (GC Exceptions 56, 57, 67; CP Exceptions 53.)[19]

ALJ Chu recognized that there was some degree of common ownership and financial control among Respondents insofar as Ms. Tilton was the owner and/or director of each of them. However, ALJ Chu correctly held that, given the portfolio business model, these facts are not outcome-determinative. As found by ALJ Chu, Ms. Tilton's business model is to own and manage private investment funds that make loans to numerous portfolio companies that she also owns. He found that, therefore, by logical extension, if the type of ownership and control that Ms. Tilton exercised was sufficient to establish single employer status, then most, if not all, investment funds and investment firms would be in the inevitable position of being single employers with every company in which they invest. Such a finding would be an absurd result, and essentially disregard how the businesses in the portfolio actually operate. It would also be contrary to the law, as the Board and courts have consistently found that because common ownership is a feature of any conglomerate organization, common ownership without common control will not establish a single employer status. *Western Union Corp.*, 224 NLRB 274, 276 (1976).

In line with years of Board precedent, ALJ Chu instead focused his analysis on the remaining three factors considered in single employer analysis. *See Bolivar-Tees*, 349 NLRB at 720 (giving little weight to the "common ownership" factor.)

[19] Notably, in Exception 57 the General Counsel bizarrely claims that ALJ Chu failed to consider the common ownership factor. This is plainly refuted by the Decision, which expressly discusses this factor.

2. ALJ Chu Correctly Found No Interrelation of Operations Among Respondents.

The General Counsel and Union take exception with ALJ Chu's finding that Respondents do not have interrelated operations. This exception should be rejected; neither the General Counsel not Union introduced any evidence whatsoever of interrelated operations. Indeed, there could not possibly have been any interrelation of operations between any entity and Transcendence II because, as discussed above, Transcendence II never operated. The exceptions also fail to recognize key differences between each entity.

With regard to Patriarch and Transcendence and Transcendence II, there was no overlap of business services or activities. Patriarch was and is in the business of, among other things, providing financial, legal, and other services as requested by Ms. Tilton, and to assist her in her capacity as director of her portfolio companies; Transcendence and Transcendence II were incorporated to provide ambulatory and paratransit services. (ALJ Dec. at 23:33-36; Tr. 168:21-169:19, 257:12-15; Joint Exhs. 2, 3, 4.) ALJ Chu correctly found, and the General Counsel and Union do not dispute, that Patriarch, PPAS, and Transcendence did not share equipment or machinery with Transcendence II or with each other. (ALJ Dec. at 23:38-39.)

With regard to PPAS's relationship to the other Respondents, it is undisputed that PPAS is an administrative agent under certain credit agreements between Ms. Tilton's portfolio companies and their secured lenders. (Tr. 264:14-18, 329:11-330:11, 382:7-383:8; Joint Exhs. 1, 5.) In that capacity, PPAS collects principal and interest payments, and asserts the rights of the secured lenders, including by foreclosing upon assets in the event of default under lending documents. (ALJ Dec. at 23:39-40.) Ms. Tilton's and Mr. Stephen's unrebutted testimony confirmed that PPAS has never had any employees and does not and never has shared financial books or bank accounts with Patriarch Partners or any portfolio company. And it is indisputable

that PPAS have never been in the business of providing paratransit services (ALJ Dec. at 23:43-44.) As such, its operations were not interrelated with those of other entities.

In the face of these undisputed facts, the General Counsel asserts that, for the time period in question, all entities worked as a single enterprise for the purpose of initiating and continuing paratransit operations. But the record evidence demonstrated that PPAS and Patriarch were never, at any time, involved in the business of paratransit operations. (Tr. 264:14-18, 329:11-330:11, 382:7-383:8; Joint Exhs. 1, 5.) PPAS was the administrative agent for certain secured lenders under certain credit agreements. *Id.* Patriarch provided legal and business support services to Ms. Tilton. (Tr. 378:6-379:2.) The fact that these entities would assist with the financial and legal tasks associated with restructuring one portfolio company into another does not suggest an interrelation of operations, but instead that each company was engaging in carefully defined and circumscribed activities in line with their regular business practices.

3. ALJ Chu Correctly Held There Was No Common Management Among the Respondents.

The General Counsel and Union except to ALJ Chu's findings on common management. In determining common management, the Board examines the degree of shared administrative functions, such as commonly prescribed accounting systems or operating rules; centralized budgeting procedures; shared expenses; common supervisory or management personnel; common lines of authority; production processes; scheduling; sales; marketing; and accounting. *NLRB v. Carson Cable TV*, 795 F.2d 879, 882 (9th Cir. 1986); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 25-26 (1st Cir. 1983), *cert. denied*, 464 U.S. 892 (1983).

In his Decision, the ALJ rightly determined that the "common management" factor did not support a single employer finding in this case. He correctly explained that Transcendence and Transcendence II were never operational. They never established policies or billing, payroll,

accounting, budgeting or expense procedures. Nor did they possess the tools necessary to function. (Tr. 119:15-120:24, 277:19-24, 282:11-15, 316:6-16.) *See In re Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1284 (2001) (finding no common management when an entity was not yet operational, because there were not yet any employees to control.)

Additionally, ALJ Chu credited record evidence that "Patriarch employees would not have managed Transcendence and Transcendence II employees[, and] Transcendence and Transcendence II employees would not have managed (and did not manage) Patriarch employees." (ALJ Dec. at 24:12-16.) Ms. Tilton, Mr. Stephen, and Mr. Jones all testified that no Patriarch Partners employee managed day-to-day operations for any portfolio companies, and there is no evidence that Transcendence or Transcendence II would have operated differently. (Tr. 327:2-4, 328:19-21, 380:9-11, 445:5-7.) Mr. Youngblood, who declined the offer to be the future President of Transcendence and Transcendence II, was not an officer of Patriarch Partners or PPAS; in fact, he had no role whatsoever with Patriarch Partners or PPAS. (ALJ Dec. at 24:14-16.) As such, there could not have been common management amongst Respondents.

Faced with this factual reality, the General Counsel and Union make a series of scattershot arguments with varying degrees of relevance. First, aware of the utter lack of *any* common managerial personnel or other evidence of common management, the General Counsel seeks to rehash its "common ownership" argument. It reiterates that Ms. Tilton was the sole corporate director for Transcendence and Transcendence II, and the manager for Patriarch and PPAS. (GC Exceptions Br. at 43.) However, as noted by ALJ Chu, Ms. Tilton's role was no different than any other entrepreneur that manages several companies or investment funds, and does not demonstrate common management to the degree required to support a single employer finding. (ALJ Dec. at 24, n. 17.) *See Dow Chem. Co.*, 326 NLRB 288, 289 (1998) (finding no

common management despite common directors, when entities had their own officers). Moreover, Ms. Tilton did not manage Transcendence II on a day-to-day basis, supervise employees, or oversee billing. Even if there had been an operational business – and there was not – Ms. Tilton would not have engaged in these functions. Ms. Tilton's role was solely at the board-level.

Second, the General Counsel argues that there was common management because of Patriarch's alleged recruiting efforts on behalf of Transcendence II. (GC Exceptions Br. at 44.) It is true that Mr. Jones testified that among his many responsibilities, he was involved in recruiting c-level talent and recommending individuals for Tilton to hire. (ALJ Dec. at 24:8-9.) In that role, Mr. Jones recommended to Ms. Tilton that Mr. Youngblood be hired as president of Transcendence and Transcendence II. (ALJ Dec. at 24:9-10.) However, Mr. Youngblood never worked at Patriarch or PPAS. (Tr. 204:17-22.) Additionally, as ALJ Chu found, it cannot be said that Mr. Jones' recommendations demonstrated common management, as by its plain language, common management implies that companies share managerial employees. (ALJ Dec. at 24:10-12.) Moreover, the General Counsel provided no evidence that Mr. Jones recruited any rank-and-file employees to Transcendence or Transcendence II (he did not).

Third, the Union contends that preparatory activities that Patriarch employees engaged in regarding Transcendence and Transcendence II, such as establishing bank accounts, insurance, workers' compensation, pay-roll, taxes, and other items needed to start-up the company were evidence of a single employer relationship. (CP Exceptions Br. at 47.) This contention is meritless. As ALJ Chu appropriately determined, Patriarch hired an *independent* executive team for the Transcendence entities' start-up process and did not share financial and bank accounts or employees with any portfolio companies, including Transcendence and Transcendence II. (ALJ

Dec. at 22:11-16.) Additionally, Board law supports the position that mere preliminary support at the infancy of a company's start does not lead to a finding of single employer status. *See Wis. Educ. Ass'n*, 292 NLRB 702, 705-06 (1989) (holding entities were not single employers despite the fact that parent entity helped affiliates acquire office space, arrange financing, provided bookkeeping systems, and provided tax services); *see also L & J Equip. Co.*, 274 NLRB 20, 27-28 (1985) (holding that company's assistance of affiliated entity in its infancy with flexible lease agreements, extensive credit arrangements, use of office space, below market loans, startup money, and gratis use of equipment was not enough to find single employer status without operational integration). The General Counsel and Union's contention that engaging in start-up services, like those at issue here, creates a single employer relationship is, unsurprisingly, entirely unsupported by Board precedent.

4. <u>ALJ Chu Correctly Concluded There Was No Centralized Control of Labor Relations Among or Between Any of the Respondents.</u>

The most critical factor in establishing single employer status is centralized control of labor relations. *In re Mercy Hosp. of Buffalo*, 336 NLRB at 1284. This factor focuses its analysis on whether there is centralized control regarding employee staffing, scheduling, hiring, firing, disciplining, wages, and benefits. *See Canned Foods, Inc.*, 332 NLRB 1449, 1449 (2000) (finding no centralized control of labor relations because the entity in question did not determine the schedules, job descriptions, wages, benefits such as health insurance and workers' compensation, or vacation policy of the employees in question, as well as having nothing to do with hiring, firing or disciplining.)

In this matter, ALJ Chu correctly concluded that "[t]here is no evidence in the record that the labor relations functions of Transcendence and Transcendence II would have been the responsibilities of Patriarch. Patriarch had its own labor relations office and there is no evidence

that the EEO, harassment, FMLA, drug, safety, and other policies in effect at Patriarch would have applied to Transcendence and Transcendence II." (ALJ Dec. at 24:20-24.) He further stated that:

> Transcendence and Transcendence II would have their own bank accounts, financial books, payroll, tax, and direct deposit matters through ADP. Indeed, Transcendence II was required to have a separate bank account from Transcendence because the MTA Contract prohibited the comingle (sic) of revenues and expenses between the two Transcendence companies. Any health, workers' compensation insurance policies and other benefits at the Transcendence entities would have been separate and apart from the employee benefits provided at Patriarch.

(ALJ Dec. at 24:27-33.)

Indeed the General Counsel's own witnesses, including former TransCare bargaining unit employees and the Union representative, confirmed that there was no interrelation of operations. They consistently testified that they only communicated with their TransCare management, and never communicated with Respondents. (Tr. 26:12-27:22, 31:1-12, 35:20-36:7, 41:16-24, 73:24-74:11, 82:23-84:3.) The General Counsel failed to prove that Transcendence II would have operated differently from TransCare (or any other portfolio company), such that Patriarch Partners, PPAS, or Transcendence would have maintained centralized labor relations with Transcendence II.

The General Counsel takes exception, without any citation to the record, to ALJ Chu's finding that there is no evidence Patriarch exercised unilateral control over employees, assigned tasks, set terms and conditions of employment, hired employees, or fired employees. (GC Exceptions 50, 51, 52, 54.) The General Counsel did not cite the record in connection with this exception because it could not. ALJ Chu was correct – the record contains absolutely no evidence that Patriarch Partners or PPAS set terms and conditions of employment or bargained with a collective bargaining representative for TransCare, or any portfolio company. (Tr. 328:5-

7, 328:22-24.) Moreover, ALJ Chu made credibility determinations, based on witness testimony and their demeanor while testifying, regarding Patriarch's role (or lack thereof) in setting the terms and conditions of employment for Transcendence and Transcendence II employees. (ALJ Dec. at 21:8-10.) Those credibility determinations should not be disturbed. *See In re Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 635 (2011) ("It is well settled that the 'Board is reluctant to overturn the credibility findings of an Administrative Law Judge'… and 'only in rare cases' will it do so.")

In the face of this overwhelming evidence of Transcendence II's independence of labor relations, the General Counsel and Union put great weight on the fact that Patriarch drafted offers of employment to certain TransCare employees. However, as ALJ Chu noted, the drafting of these notices "was the extent of any apparent centralized control of labor relations by Patriarch." (ALJ Dec. at 24:26-27.) This one effort by Patriarch in assisting a portfolio company–drafting letters that the General Counsel failed to show were ever distributed–does not establish centralized control of labor relations, especially given the many examples of Respondents acting independently.

5. ALJ Chu Correctly Found That Each of the Respondents Had an Arms-Length Relationship With One Another.

The final factor, and the hallmark of a single employer analysis, is the lack of an arms-length relationship. The lack of an arms-length relationship can be found when, among other things, there is evidence that a bookkeeper performs payroll functions for the companies at issue, the funds of two or more entities are comingled, one entity pays the bills of another, one entity provides another with interest free loans or free rent, or parties engage in non-documented transactions. *Spurlino Materials, Inc.*, 357 NLRB 1510, 1516 (2011) (controller runs accounting department for both companies); *Carr Finishing Specialties, Inc.*, 358 NLRB 1766, 1766 (2012)

(comingling of funds and one company paying the obligations of another demonstrated lack of arms-length relationship); *Grane Healthcare Co.*, 357 NLRB 1412, 1441 (2011) (funds for purchase of a new facility jointly borrowed and guaranteed by number of entities by owners of entities); *Emsing's Supermarker Inc.*, 284 NLRB 302, 304 (1987) (finding of single employer status is supported by propensity to operate both companies "in such a manner that the exigencies of one would be met by the other.")

ALJ Chu concluded that none of the situations that give rise to suspicion of a non-arms-length relationship existed with regard to Respondents. ALJ Chu credited testimony and evidence that Patriarch did not perform payroll functions for Transcendence and Transcendence II, and PPAS did not comingle funds to the benefit of Patriarch or any other companies in Ms. Tilton's portfolio. (ALJ Dec.at 25:19-20.) Further, ALJ Chu held based on testimony and record evidence that Patriarch and PPAS were not directed to write checks to cover the payrolls of Transcendence and Transcendence II employees. (ALJ Dec. at 25:20-21.) Lastly, Transcendence and Transcendence II had their own bank accounts and would have had their own payroll accounts with ADP. (ALJ Dec. at 25:22.)

ALJ Chu was also correct that the transfer of the assets was at arms' length. (ALJ Dec. at 25:18-30.) Further demonstrating their inability to understand the nature and relationship of the various entities at issue, the General Counsel and Union allege that "Tilton's companies" were on both sides, and in the middle, of the bill-of-sale and transfer of interests in the foreclosed assets. This argument is another attempt to reductively and incorrectly explain a business model that ALJ Chu accurately described in his decision. (ALJ Dec. at 23:16-23.) Just because Ms. Tilton had a role in these entities, does not make Transcendence the same as TransCare, and TransCare the same as PPAS, and PPAS the same as Ms. Tilton's numerous investment

vehicles. All companies were different entities with different business purposes, activities and interests. (ALJ Dec. at 23:32-44.) As ALJ Chu astutely noted in his decision, to place too much importance on common ownership or financial control "would place most, if not all, investment and management funds in the inevitable position of being single employers with every company that they own or have financial control. This essentially disregards how businesses operate when ownership and financial control are by other corporate entities." (ALJ Dec. at 23:19-24.)

In sum, ALJ Chu's holding that a single employer relationship between or among the Respondents and Transcendence II did not exist should be affirmed.

B. ALJ Chu Correctly Found That None of the Respondents Were Joint Employers With Transcendence II.

Although the General Counsel and Union did not brief the issue, they except to ALJ Chu's ruling that Respondents were not joint employers and to numerous factual findings that implicate joint employer liability. Notwithstanding the General Counsel's and Union's half-hearted attempts to overturn ALJ Chu's holding on this issue, the undisputed evidence and credible testimony show that there is no joint employer relationship between and/or among the Respondents.

The Board has found a "joint employer" relationship when two or more businesses "share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris Indus. of Cal., Inc.*, No. 32-RC-109684, 2015 NLRB LEXIS 672, at *6 (NLRB Aug. 27, 2015), *aff'd in part*, 911 F.3d 1195 (D.C. Cir. 2018). A joint employer relationship therefore requires that one entity either directly or indirectly controls another entity's employees' terms and conditions of employment, or has retained the right to exert such control. *Id.* Essential terms and conditions to consider include hiring, firing, discipline, supervision, and direction; scheduling, assigning work, and determining the manner and method of work

performance; and controlling wages and hours. *Id.* The General Counsel and Union admit that this is the correct legal standard.

ALJ Chu's finding that Patriarch did not govern the essential terms and conditions of employment was based on the credited testimony of Ms. Tilton, Mr. Stephen, and Mr. Jones, and should thus not be disturbed. (ALJ Dec. at 21:8-10). There was no testimony or evidence that Patriarch was involved in the hiring, retention, or removal of TransCare's rank-and-file employees. (ALJ Dec. at 21:15-17.) Moreover, Patriarch did not establish rates of pay for paratransit employees, provide the funds from which they were paid, decide when overtime was required, determine the number of employees necessary for paratransit work, discipline employees, or assign paratransit employees to work. (ALJ Dec. at 21:17-22.) Thus, there are no grounds for the General Counsel's and Union's wholly unsupported exceptions on the joint employer issue.

III. ALJ CHU CORRECTLY EXCLUDED A PORTION OF THE VOLUMINOUS AND IRRELEVANT BANKRUPTCY RECORDS THE UNION AND GENERAL COUNSEL SOUGHT TO INTRODUCE.

Despite being permitted to admit dozens of pages of dubiously relevant documents relating to TransCare's bankruptcy, the Union argues in both its Exceptions and Exceptions Brief that ALJ Chu erred by refusing to admit additional documents from the TransCare bankruptcy proceeding. (CP Exception 70; CP Exceptions Br. at 49-50.) Specifically, the Union takes issue with ALJ Chu's refusal to admit General Counsel proposed Exhibit 31[20], and the subsequent perceived prohibition on additional exhibits concerning the bankruptcy. (CP Exceptions Br. at 49-50.)

[20] Proposed GC Exhibit 31 was the Response of Patriarch Partners Agency Services, LLC to the Chapter 7 Trustee's Motion to Approve Stipulation and for the Public Auction Sale of Certain Personal Property.

"[R]ules applicable to unfair labor practice proceedings provide considerable discretion as to how closely the administrative law judge will apply the rules of evidence." *Vitek Elecs., Inc*., 268 NLRB 522, 549 (1984); *see also Nexeo Sols., LLC*, No. 20-CA-035519, 2016 NLRB LEXIS 529, at *2, n. 2 (NLRB July 18, 2016). Upon review, the Board "will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion." *Seven Seas Union Square, LLC*, 2019 NLRB LEXIS 556, at *2, n. 4 (NLRB Oct. 16, 2019). Here, there was clearly no abuse of discretion. The Union's argument ignores both that ALJ Chu admitted nearly 100 pages of pleadings from the bankruptcy proceeding into the record, and the degree to which ALJ Chu provided *both* the General Counsel and Union the opportunity to explain why further documents should be admitted, something each was unprepared and unable to do.

ALJ Chu was exceedingly indulgent in permitting the General Counsel and Union to admit into evidence TransCare bankruptcy documents of dubious relevance. For example, he admitted (over Respondents objections):

- A 41-page transcript from a hearing on a Motion for Joint Administration and a Motion to Authorize Continued Operation of the Debtors' Business. (GC Exh. 10.) This document concerned a hearing that had occurred more than three years ago, in a different proceeding, about a different issue with mostly different parties.

- A 10-page "Stipulation Respecting the Sale of Certain Property" from the bankruptcy proceeding despite the Union's admission that only two paragraphs of the document were even arguably relevant. (Tr. 316:21-317:19; CP Exh. 1.)

- A collection of miscellaneous bankruptcy filings containing statements made by Patriarch Partners Agency Services relating to the strict foreclosure. (Tr. 317:20-318:1; 320:23-322:1.)

At the Hearing, the General Counsel and Union were able to offer only the most general arguments as to relevance.

It is against this backdrop and indulgence by ALJ Chu, that the General Counsel attempted to admit additional documents from the bankruptcy proceeding.[21] In the middle of the Hearing, the General Counsel halted the Hearing, and required all of the parties and the witness to wait as she decided to "take a quick pass" through multiple bankruptcy documents to "make sure that whatever [it was] putting in [was] necessary." (Tr. 352:21-353:1.) The General Counsel then attempted to enter into evidence PPAS's Response to the Chapter 7 Trustee's Motion to Approve Stipulation and for the Public Auction Sale of Certain Personal Property. When ALJ Chu asked for an explanation of that document's relevance to the instant NLRB proceeding, the General Counsel could offer only that it pertained to PPAS's "position related to the foreclosure, which is at issue here, and, you know, for that reason I think that it is relevant." (Tr. 354:22-355:4.) Respondents' Counsel responded that the present Hearing was not about the foreclosure, but about the narrow question of whether the charged parties were either single employers, joint employers, or successors to the employer of a select group of union workers for a three day period. (Tr. 355:5-13.) ALJ Chu gave the General Counsel a second opportunity to demonstrate relevance, but, again, the General Counsel offered only conclusory statements that "[the document] related most directly to the successorship issue more than the single or joint employer issue," before continuing, "I mean, it's certainly tangentially related to the single and joint employer issue, but I think it's more related to the successorship issue." (Tr. 356:21-357:2.) All told, when pressed on the relevance of the additional documents, the General Counsel was able only to proffer the same vague rationale provided for the previously admitted bankruptcy documents ("they relate to PPAS's statements on the foreclosure") and continued to

[21] By this point, despite the narrow three-day time frame in question, the record consisted of over 350 pages of testimony, 29 exhibits from the General Counsel, two exhibits from the Union, and eight joint exhibits. By the end of the Hearing, that record exceeded 500 pages of testimony and 49 exhibits.

baldly assert, without elaboration, that the documents were relevant to the legal questions before the ALJ (i.e., single employer, successorship). Given the lack of relevance, ALJ Chu correctly excluded PPAS's Response to the Chapter 7 Trustee's Motion.

It is the ALJ's task to separate "factual wheat from evidentiary chaff," and the Board must accord great deference to such determinations. *Ewing v. NLRB*, 732 F.2d 1117, 1118 (2d Cir. 1984). Contrary to the Union's exception, ALJ Chu admitted nearly 100 pages of documents related to the TransCare bankruptcy proceedings, and only refused to do so where such documents were irrelevant or duplicative. The bankruptcy documents at issue in this Exception were plainly duplicative, as the documents previously admitted by ALJ Chu also concerned PPAS's position on the foreclosure in the bankruptcy proceedings.

In any event, as ALJ Chu noted during the Hearing, if the General Counsel was not able to make its argument based on the myriad documents already in the voluminous record, it was unlikely to be able to do so by introducing additional information from a bankruptcy proceeding that was not focused on the legal questions at issue in the present proceeding. (Tr. 356:4-20.) When the Hearing came to a close, of the 35 exhibits proffered by the General Counsel and Union, ALJ Chu rejected only two. (Tr. 91:19-20:7, 102:10-11, 356:4-13.) These documents were appropriately not admitted, as they were cumulative of the documents already in the record, and not relevant to the key legal questions at issue at the Hearing.

IV. ALJ CHU CORRECTLY DECLINED TO APPLY A *TRANSMARINE* REMEDY.

The General Counsel argues in its Exceptions and Exceptions Brief that ALJ Chu erred by failing to find that a *Transmarine* remedy is appropriate in this case. (GC Exception 82; GC Exceptions Br. at 49.) First, ALJ Chu correctly held that Respondents committed no unfair labor practices, thus no remedy, *Transmarine* or otherwise, was warranted. (ALJ Dec. at 25:43-45.) Second, even if a remedy was warranted, the *Transmarine* remedy would not be appropriate.

In *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the Board outlined a standard back-pay remedy in matters in which an effects bargaining obligation arises. The *Transmarine* remedy requires that the employer bargain over the effects of its decisions to cease operations. *Transmarine*, at 390, *as clarified in Melody Toyota*, 325 NLRB 846, 846 (1998). Specifically, *Transmarine* requires that a company adequately bargain with a union about the effects of a plant shut-down and pay to the former employees their normal wages from five days after the date of the Board's order, until the earliest of: (1) the date the respondent bargains for agreement with the union on those subjects pertaining to the effects of the closing on employees; (2) a bona fide impasse in bargaining; (3) the failure of the union to request bargaining within five days of the decision, or to commence negotiations within five days of the respondent's notice of its desire to bargain with the union; or (4) the subsequent failure of the union to bargain in good faith. 170 NLRB at 390. The amount paid to any of the former employees in no event should exceed the amount the employee would have earned as wages from the date the facility was closed, to the time the employee had secured equivalent employment elsewhere. *Id*. At minimum, the sum may not be less than two weeks' of the employee's previous earnings. *Id*.

Setting aside ALJ Chu's well-founded conclusion that Respondents did not commit unfair labor practices, a *Transmarine* remedy is improper because, for *Transmarine* to apply, two things must be true: (1) Respondents had to operate, so those operations could cease; and (2) Respondents had to employ bargaining unit members for a bargaining obligation to attach. ALJ Chu accurately found neither event occurred. None of the former TransCare bargaining unit employees performed any work for any Respondents. (ALJ Dec. at 16:15-31.) As discussed in Section I above, while steps were taken to make Transcendence and Transcendence II operational, Transcendence II never operated, as it never had control of the vehicles, computer

server or MTA Contract necessary to operate. (Tr. 480:24-481:25.) Not only did Transcendence and Transcendence II never operate, they never had any employees. (ALJ Dec. at 16:16-17.) For *Transmarine* to apply, the General Counsel had to show that Transcendence II operated, that it employed former TransCare bargaining unit employees, that it ceased operations, and that it failed to bargain with those employees over the effects of its decision to cease operations. ALJ Chu did not err in finding that the General Counsel failed to prove any of this, and as such the *Transmarine* remedy does not apply.

CONCLUSION

For all the foregoing reasons, the Board should affirm ALJ Chu's Decision and the Complaint should be dismissed in its entirety, with such other and further relief for Respondents as may be just and proper.

Dated: November 27, 2019
New York, New York

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Rebecca Sivitz, an attorney, hereby certify that on November 27, 2019, I caused a true and complete copy of Respondents' Answering Brief to Counsel for the General Counsel's and Counsel for the Charging Party's Exceptions to the Decision of the Administrative Law Judge in the above referenced matter to be served via electronic filing and/or electronic mail, as indicated below, upon the following persons:

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This 27th day of November, 2019.

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