UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

G&E REAL ESTATE MANAGEMENT SERVICES,
INC. d/b/a NEWMARK GRUBB KNIGHT FRANK,

Case 28-CA-178893

and

PATRICK S. THURMAN, an individual.

RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE

By Notice dated April 15, 2020, the Board directed the parties to show cause "why the complaint allegation involving the maintenance of the Use of Company Information Technology Policy should not be severed and remanded to the administrative law judge for further proceedings consistent with the Board's decision in *Caesars Entertainment*, including reopening the record if necessary."

For the reasons set forth below, Respondent G&E Real Estate Management Services, Inc. ("G&E") respectfully submits that severance and remand to the administrative law judge as described in the Board's April 15 Notice is neither warranted nor appropriate. The record is fully developed on the issue at hand—whether maintaining a rule restricting the nonbusiness use of G&E's IT resources would, under the circumstances, otherwise deprive employees of "any reasonable means of communicating with each other." No further proceedings to elicit evidence on this issue are needed.

The facts concerning G&E's workplace and operations are undisputed. They establish that G&E's employees are fully capable of communicating with one another by means that do not put them in jeopardy of violating G&E's policy. Accordingly, the limited exception to the Board's

standard in *Caesars Entertainment*, 368 NLRB No. 143 (Dec. 16, 2019) does not apply. The Board should reverse the ALJ's recommended decision and dismiss the Amended Complaint in its entirety.

DISCUSSION

The ALJ decision currently under review held, *inter alia*, that G&E's Use of Company Information Technology Policy (Handbook Section 707) "is overbroad and unlawful, inasmuch as it bans employees from using email and IT systems during nonworking time for §7 activities." (Nov. 8, 2019 ALJD, 4-5). This determination cannot stand, as it rests entirely on the Board's authority in *Purple Communications*, 361 NLRB 1050 (2014), which has been overturned. The question now is whether this portion of the ALJ's decision should be severed from the remainder of the case and remanded for additional fact finding so the ALJ can assess G&E's Use of Company IT policy under the correct legal standard. Respectfully, G&E submits remand is unnecessary and unwarranted, as the record is adequately developed to allow the Board to decide the matter now.

In *Caesars Entertainment*, 368 NLRB No. 143, the Board overruled *Purple Communications* and effectively reinstated the holding of *Register Guard*, 351 NLRB 1110 (2007), that employees do *not* have a Section 7 right to use their employers' email and other information-technology resources for non-work-related communications. Rather, under *Caesars*, employers have the right to control the use of their property and equipment, including email and IT systems, and may lawfully restrict employee use of such systems, so long as they do not discriminate against protected activity.[1] *Caesars*, 368 NLRB No. 143, slip op. at 8.

---

[1] There is no evidence, and no claim, that G&E discriminates against Section 7 activity in its application of the challenged work rules. Rather, the General Counsel's claims consist entirely of facial challenges to various provisions in the G&E Handbook.

There is an exception to the general rule espoused in *Caesars*, but it is a limited one. Only where employees have no other reasonable means of communicating with each other, must an employer's property rights give way. *Id.*, slip op. at 8. In this manner, the *Caesars* standard mirrors longstanding NLRA precedent that balances employee organizing rights on the one hand, with employer property rights on the other. *Id.*, slip op. at 9 (finding instructive and applicable the general principle from *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that "[a]ccommodation between [organizational rights and employer property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other").

Indeed, the narrow scope of the *Caesars* exception is made evident by the fact patterns that, extreme as they are, still do not obligate employers to suffer nonbusiness use of their IT systems. As the Board observed in *Caesars*:

> If the lack of employer-provided email (or any other form of electronic communication, for that matter) was not an obstacle to organizing, for example, a unit comprised of the crews of 58 trans-oceanic steamships based out of at least 2 different ports, it defies reason to suggest that it is an indispensable tool for communications between and among employees who happen to work on different floors of an office building.

Id., slip op. at 11-12 (citing, *Lykes Brothers Steamship Co., Inc.*, 2 NLRB 102 (1936); *Capital Coors Co.*, 309 NLRB 322 (1992) (two facilities located 90-100 miles apart); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965) (multistate 20-store unit)); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (in analogous situation, Supreme Court cites "classic examples" of "logging camps" and "mining camps" as circumstances that might justify an exception to the general rule that employer can exclude nonemployee union organizers from its property).

Thus, the exception to the Board's rule in this context is reserved for cases of absolute necessity—i.e., situations where, absent access to work email, employees truly have no other reasonable means of communicating with one another. *Caesars*, 368 NLRB No. 143, slip op. at 8

("[b]ecause, in the typical workplace, employees do have adequate avenues of communication that do not infringe on employer property rights in employer-provided equipment, we expect such cases to be rare."). As the Board explained, "[w]e do not dispute that in some circumstances, an employer's email system may be a more efficient and convenient means of communication than traditional face-to-face methods. But . . . efficiency and convenience alone are insufficient grounds to override an employer's property rights." *Id.*, slip op. at 12.

In this case, laying the developed, undisputed record against the limited scope of the *Caesars* exception yields no gaps that might justify further evidentiary proceedings. Indeed, the parties have already tried this case twice. On March 21, 2017, the parties tried the instant case, wherein the General Counsel initially challenged 17 policies in the G&E Employee Handbook. Thereafter, the General Counsel pursued separate complaints challenging 5 of those same 17 policies in the same Employee Handbook, but against two different Respondents (Cantor Fitzgerald, LP and BGC Partners, Inc.), which were alleged to be related entities to G&E. These complaints were tried in a second hearing on June 20, 2018 before a different ALJ. *BGC Partners, Inc.*, Case 28-CA-195500 and *Cantor Fitzgerald, LP*, Case 28-CA-195506.[2]

In addition to trying the case twice, the parties have briefed it multiple times. In this case against G&E alone, the parties have submitted: (1) post-hearing briefs to the ALJ following the initial hearing, (2) exceptions and cross-exceptions briefs to the Board following the ALJ's initial decision, (3) supplemental briefs to the ALJ after the matter was remanded following the Board's

[2] In *BGC Partners* and *Cantor Fitzgerald*, Administrative Law Judge Jeffrey Wedekind dismissed the complaints in their entireties because the General Counsel failed to establish jurisdiction over either Respondent. The General Counsel did not file exceptions to the dismissals.

decision in *The Boeing Co.*, 365 NLRB No. 154 (2017),[3] and (4) another round of exceptions and cross-exceptions briefing to the Board (which is the current case posture).

Thus, over the past several years, the parties have had ample opportunity to present evidence and briefing concerning this Handbook and the workforce to which it applies. Notably, at no time during these extended proceedings has the Charging Party offered testimony.[4] But the record has nevertheless been developed through testimony—elicited by G&E, Cantor Fitzgerald, BGC Partners, and the General Counsel—from Respondent's Director of Human Resources, Lindsey Sherman. Ms. Sherman's testimony is unrebutted, and it establishes beyond question that the G&E working environment is *not* akin to a logging camp or a multitude of trans-oceanic steamships in different ports.

Rather, the record establishes that G&E, which does business under the trade name Newmark Knight Frank (formerly Newmark Grubb Knight Frank, or "NGKF"), is a facilities management company (Transcript of 3/21/2017 Hearing Testimony of Lindsey Sherman ("Tr.") at 54:24-55:11). It is part of a family of companies that includes financial services companies like Cantor Fitzgerald and BGC Partners, as well as other businesses that use the Newmark trade name, including in the commercial real estate brokerage context (*See, e.g.*, Tr. 61:12-21; 92:25-93:5).

As a facilities management business, G&E handles all aspects of the management of its customers' buildings and facilities, from tasks like "groundskeep[ing]" and "trash removal" to more complex responsibilities like "manag[ing] building sites' integrity," "environmental issues,"

---

[3] In their supplemental briefing to the ALJ in this case, the parties were permitted to cite and rely on evidence from the evidentiary hearings in this case, as well as the *Cantor Fitzgerald* and *BGC Partners* cases. (Nov. 8, 2019 ALJD, at 1, n.1).

[4] The Charging Party in this case and also the *Cantor Fitzgerald* and *BGC Partners* cases is an individual, Patrick Thurman, who worked for G&E in Tucson, Arizona. Thurman did not appear at either hearing.

"safety concerns" (Tr. 72:20-25) and managing "common areas, roads, infrastructure, telecommunications, and sewer treatment plants" (Tr. 75:17-20).

G&E provides its services to customers from offices that are, as a general rule, embedded on the customers' property and owned by the customers (Tr. 87:11-18). G&E's employees thus are assigned to work at particular customer sites. For example, the Charging Party in this case, Patrick Thurman, worked at G&E's former site in Tucson, Arizona as the Environmental Engineer (Tr. 77:4-7), along with 19 other G&E employees. At the Tucson site in particular, G&E managed and provided onsite services, including the maintenance of a massive water treatment facility and management of telecommunications and security infrastructure (Tr. 75:11-25).[5]

All of these facts concerning the G&E working environment are established and undisputed. And manifestly, they establish that G&E's employees are not isolated from one another. To the contrary, they work together at common customer work sites, they have access to one another at the sites, and they are able to communicate with one another while at work—even if Section 707 of the Handbook prohibits them from engaging in nonwork communication over email. Simply, this is not a situation where the limited exception to the *Caesars* standard applies, and there is no additional evidence needed to assess the issue and conclude as much.

For these reasons, there is no need for remand and additional evidentiary proceedings. Such proceedings, if not entirely futile, would provide no meaningful addition to the already developed record. As such, they would cause unnecessary delay in the Board's resolution of this case, not to mention unnecessary expense to Respondent and the agency. The Board should decide

[5] For business reasons unrelated to this case, G&E ceased providing services at the Tucson site in early 2017 (Tr. 75:4-7).

this case on Respondent's exceptions, reverse the ALJ's recommended decision, and dismiss the Amended Complaint in its entirety.

Dated: April 29, 2020

G&E REAL ESTATE MANAGEMENT SERVICES, INC.
d/b/a NEWMARK GRUBB KNIGHT FRANK,

By: /s/ Derek G. Barella
One of its Attorneys

Derek G. Barella
SCHIFF HARDIN LLP
233 S. Wacker Dr.
Suite 7100
Chicago, IL 60606
312.258.5582
dbarella@schiffhardin.com

Nirav S. Shah
Managing Director, Co-Head of Litigation
110 E. 59th St., 7th Fl.
New York, NY 10022
(212) 294-7873
nirav.shah@cantor.com

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing to be served upon:

N. Miguel Zarate Mancilla
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue
Suite 1400
Phoenix, Arizona 85004
nestor.zarate-mancilla@nlrb.gov

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central A venue
Suite 1400
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Patrick Thurman
7612 East Autumn Leaf Drive
Tucson, Arizona 85756-6130
thurmanesq@aol.com

via the Board's electronic filing system and electronic mail, this 29th day of April, 2020.

/s/ Derek G. Barella
Derek G. Barella

CH2\23294595.1