

JIM McMULLEN
JMCMULLEN@GRSM.COM
DIRECT DIAL: (619) 230-7746

GORDON & REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER™

ATTORNEYS AT LAW
101 WEST BROADWAY, SUITE 2000
SAN DIEGO, CA 92101
WWW.GRSM.COM

June 11, 2020

VIA ELECTRONIC FILING

John F. Ring, Chairman
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

**RE: Certification of Representative Petition No. 21-RC-257595
Employer's Request for Review of the Regional Director's Decision**

Dear Mr. Ring:

On June 5, 2020, my client timely filed with the Board a request for review of National Labor Relations Board ("NLRB") Region 21 ("Region 21") Director William Cowen's May 22, 2020 Decision on Epsilon Systems' Objections and Certification of Representative ("RD Decision"). On June 8, 2020, counsel received a letter advising that my client's filing failed to conform to the Board's Rules and Regulations because it was not double-spaced, and requiring my client to re-file a conforming version of its request for review no later than June 12, 2020.

Pursuant to the Board's request, and in accordance with 29 CFR § 102.69(c)(2), Epsilon Systems Solutions, Inc. ("Epsilon Systems" or "Employer") hereby submits this conformed request for review of National Labor Relations Board ("NLRB") Region 21 ("Region 21") Director

William Cowen’s May 22, 2020 Decision on Epsilon Systems’ Objections and Certification of Representative (“RD Decision”).¹

I. Brief Overview of Relevant Facts

On April 6, 2020, Region 21 conducted a mail-in ballot election (“Election”) in the above-captioned matter to determine the collective-bargaining future of four hoist-technician employees of Epsilon Systems.² However, prior to the Election, Epsilon Systems made numerous pleas to Region 21 to postpone same due to the significant adverse impacts COVID-19 had on Epsilon Systems’ ability to effectively and thoroughly communicate with the employees at issue in both the days and weeks prior to the Election. Indeed, Epsilon Systems relied on communications from various Region 21 employees indicating postponement was nearly inevitable because of the pandemic, resulting in Epsilon Systems choosing to fully respect California’s shelter-in-place mandates and not try to engage in election-related activities that could have otherwise jeopardized the health and safety of its personnel and/or be considered a breach of the state’s health and safety order(s). Yet, despite Epsilon Systems taking legitimate issue with the Election as scheduled, providing good cause for a postponement, and otherwise fully respecting California stay-at-home COVID-19 orders by not attempting to engage in risky face-to-face interactions during the critical timeframe leading up to the April 6, 2020, Region 21 still proceeded with the election, which resulted in a 4-0 vote in favor of the union.

¹ Epsilon Systems represents that it has made no additional arguments or substantive changes from its original June 5, 2020 filing.

² The four hoist technicians were not previously members of a majority union representative, but were solicited by the International Association of Machinists Union (“IAM” or “Union”), which ultimately prompted the underlying petition. The hoist-technician employees are responsible for rebuilding, repairing, and remanufacturing integral parts of United States Navy (“USN”) hoist apertures that are located on USN vessels due for overhaul.

Epsilon Systems timely filed objections to the Election/outcome of the petition³ as well as a detailed written offer of proof⁴ challenging the conduct related to and process of same. However, Region 21 denied the Employer's objections and certified the petition based on the election results without a hearing.⁵ For the reasons set forth below, Epsilon Systems asserts that Region 21's decision to not only allow the Election to proceed but also to subsequently deny the Employer's objections and certify the petition (especially without hearing) cannot stand and is subject to reversal.

II. Region 21 Did Not Properly Account for or Consider the Lopsided and Fundamentally Unfair Campaigning Opportunities that Existed in Favor of the Union Leading up to the Petition, with the Disparity Only Being Further Compounded by Region 21's Communications with Epsilon Systems During that Critical Period

Epsilon Systems was at a distinct and fundamentally unfair disadvantage throughout the entirety of the Union election process at issue. As of March 9, 2020, the day Epsilon Systems received the underlying petition,⁶ California had already been subject to Governor Gavin Newsom's March 4, 2020 State of Emergency declaration for five days. Complicating matters further, the hoist-technician employees at issue worked on North Island's Naval Air Station; Epsilon Systems did/does not have a physical office at that location, rendering in-person access to these particular employees relatively limited, even under normal circumstances. And, it is not

³ A copy of Epsilon Systems' April 27, 2020 Objections is attached hereto as Exhibit "A" for the Board's reference and consideration.

⁴ A copy of Epsilon Systems' May 4, 2020 written offer of proof is attached hereto as Exhibit "B" for the Board's consideration.

⁵ A copy of the Region's May 22, 2020 Decision is attached hereto as Exhibit "C" for the Board's reference and consideration.

⁶ The representation petition at issue in this matter was initially served via email on Epsilon Systems on March 6, 2020. However, that email was only sent to a single Human Resources employee who was (and still is) out on leave. As a result, Epsilon Systems only actually received the petition on March 9, 2020.

unreasonable or far-fetched to recognize that the Union had already undoubtedly heavily campaigned on numerous occasions leading up to the petition. In fact, no petition would have been filed if a strong sense did not exist that the hoist technicians were interested in the prospect of unionizing. Overall, common sense dictates that a potential majority union representative would not seek a petition without first thoroughly and extensively campaigning as to its target members and thereafter determining that the chance of a successful election was high.

Not only did geographic realities, coupled with the State of Emergency ramifications, negatively impact Epsilon Systems in relation to the Election, but at the time the Employer received the petition, it was almost exclusively involved in and preoccupied with its own emergency preparations for the rapidly spreading virus and resulting shutdowns. Indeed, if Region 21 held a hearing, Epsilon Systems CEO Bryan Min would have testified in support of the Employer's objections and its dedication to fully addressing the COVID-19 crisis as it related to its business and employees by explaining Epsilon Systems established a COVID-19 Task Force on March 11, 2020.⁷ He also would have been able to discuss how Epsilon Systems had to determine, under very severe time constraints: (1) which of its employees it considered "essential" under new legal mandates; and (2) how its operations would be impacted in all facilities within which Epsilon Systems' employees work, including NAS North Island. And, of course, he would have been able to opine on how the COVID-19-related mandates impacted Epsilon Systems' ability to campaign as to the Election.

⁷ It bears noting that the Region summarily dismissed the information contained in Epsilon Systems' offer of proof without ever giving any of the proposed witnesses mentioned therein an opportunity to testify on the record at a meaningful hearing. This is particularly troubling in that the Region noted on more than one occasion in its May 22, 2020 decision that Epsilon Systems failed to establish certain dispositive facts (despite the fact that Epsilon Systems submitted a rather lengthy and detailed offer of proof) which very well could and would have been expounded upon were Epsilon Systems' witnesses given a chance to do so.

For example, Mr. Min and others at Epsilon Systems would have been able to explain that by March 13, 2020, Epsilon Systems Program Manager Brant Robinson, the supervisor of the four employees at issue, had no choice but to begin working from home pursuant to COVID-19-related state mandates and the fact that he was a single father of three whose younger children were no longer in school due as a result of the pandemic. This resulted in his in-person access to the base, facility, and (most importantly) employees at issue being cut-off in its entirety but for one occasion on March 23, 2020.⁸ And although Mr. Robinson was Epsilon Systems' supervisor of the four hoist-technicians, an onsite lead technician who was neither a member of the Union nor an Epsilon Systems' employee actually oversaw the hoist-technicians' day-to-day operations.⁹ Given that the lead technician had no interest or involvement in the matters associated with the underlying petition, he did not serve as any type of advocate or conduit for Epsilon Systems' position as to the petition itself.

Much like Mr. Robinson, COVID-19 also forced Epsilon Systems Vice President and Professional Services Group Manager John Riley to work remotely. Due to an underlying health condition, which rendered him particularly susceptible to COVID-19, Mr. Riley was unable to engage in meaningful discussions with Epsilon Systems' hoist-technician employees leading up to the Election. If Region 21 had held a hearing, Mr. Riley would have testified that during past successor negotiations, he personally met with the hoist-technician employees off-site, which had proven quite effective and satisfying for both the employer and the employees as Epsilon Systems had a long history of peaceful, non-unionized operations and negotiations. But, despite Mr. Riley's

⁸ If Region 21 conducted a hearing as requested, Mr. Robinson would have testified that he usually met with the hoist technicians approximately once a month onsite to check in but, as a non-essential employee, was precluded from doing so given the Governor's March 19, 2020 (even more restrictive) stay-at-home order.

⁹ The lead technician is instead employed by the Prime Contractor, Huntington Ingalls.

anticipated attestations, Region 21 unfortunately discounted Mr. Riley's offer of proof by claiming Epsilon Systems did not indicate when Mr. Riley began working remotely. (*See* RD Decision at p. 3, n.4). Mr. Riley could have easily provided such information had Region 21 given him an opportunity to do so via hearing.¹⁰

Additionally, as the highly contagious virus continued to rapidly spread, access to the Naval Air Station—an already secure site—became even more limited for non-essential employees. If Region 21 had allowed her to testify, Epsilon Systems Director of Human Resources Janeece Tanaka would have provided information detailing the increasing pressures Epsilon Systems faced from the Naval Sea Systems Command Southwest Regional Maintenance Center (NAVSEA SWRMC) to ensure that the company was complying with the host location's new requirement for daily COVID-19 reporting during the time leading up to the anticipated date of the ballot mailing. NAVSEA SWRMC first updated these requirements on March 19, 2020, forcing Epsilon Systems to analyze and investigate over 200 employees company-wide and arrange new travel and living situations where necessary. Then, NACSEA SWRMC required Epsilon Systems to institute a process on March 20, 2020 to contact each of its employees who had recently been out of work (approximately 80 individuals) to determine if recent absences were COVID-19-related. From that point forward, the requirements changed on an almost daily basis, making it extremely difficult for a non-essential Epsilon Systems representative to simply come and go from the Naval Air Station with ease and requiring Epsilon Systems to dedicate a significant amount of time to addressing these issues.

Overall, Epsilon Systems believes Region 21 improperly overemphasized Mr. Robinson's ability to ultimately meet with the hoist-technician employees on a single day (March 23, 2020)

¹⁰ To note, Mr. Riley began working remotely on March 16, 2020.

when rendering its May 22, 2020 decision. Moreover, Region 21 claimed that it failed to see how Mr. Robinson or any other Epsilon Systems' representative was prevented from conducting additional in-person meetings had they chosen to do so or how limited access to the onsite facility was any different because the facility belonged to the USN. (RD Decision at p. 6) But, both of these conclusions are flawed and could only be reached by Region 21 completely ignoring the complexities and difficulties in arranging such meetings due to Governor Newsom's stay-at-home order(s) and the increased health and safety security measures in place at the Naval Air Station. Overall, these two factors made it virtually impossible for Epsilon Systems to conduct more than a single face-to-face meeting, which is indisputably a wholly insufficient opportunity for an employer to effectively communicate with its employees over the myriad of nuanced and complex issues presented by a unionizing campaign.

Indeed, Region 21 appears to implicitly recognize the disadvantages an employer faces when restricted to conducting a single in-person meeting in advance of a union election in its decision. It attempts to inoculate such shortcomings by positing that Epsilon Systems "could have" shared union election-related information through other, non-in-person means, such as via email or telephonic communications. (RD Decision at p. 6.) Region 21's rationale directly contradicts the NLRB's long history of recognizing how face-to-face discussions and interactions with employees during a union campaign have a much more lasting, meaningful, and effective impact as opposed to lesser means of communication (such as those suggested by Region 21). In fact, one of the driving reasons for prohibiting "captive-audience" meetings during the 24 hours leading up to an election is to remove any unfair advantage that may be garnered through face-to-face meetings, given some have proven to be extraordinarily influential and effective (provided, of course, the communications, themselves, do not violate any NLRB rules or regulations).

Additionally, even assuming, *arguendo*, lesser (non-in-person) means of communication with employees leading up to a union election are equivalent, in force and effect, to in-person meetings (a conclusion Epsilon System vehemently rejects), Epsilon Systems was still at a disadvantage given the nature of the facility. Following receipt of the petition, Epsilon Systems attempted to post a notice regarding the election process on the employee/worker bulletin board at the Naval Air Station. However, because Epsilon Systems is a government contractor, it was not permitted to do so pursuant to 41 § 102-74.415(b), which states in pertinent part:

All persons entering in or on Federal property are prohibited from:

b) Posting or affixing materials, such as pamphlets, handbills, or flyers, on bulletin boards or elsewhere on GSA-controlled property, except as authorized in § 102-74.410, or when these displays are conducted as part of authorized Government activities

41 § 102-74.415(b).

Epsilon Systems advised Region 21 Assistant Regional Director Nathan Seidman of this significant setback on March 30, 2020, who recommended the notice be emailed to the technicians and posted at Epsilon Systems home office (even though the employees at issue did not work out of or regularly visit that office, meaning they would not see it prior to the Election).

Despite all of the aforementioned setbacks (which Epsilon Systems kept Region 21 readily apprised of as they arose), Region 21 ultimately “concluded” that Epsilon Systems had a period of at least four weeks during which its representatives could have investigated and “effectively” discussed a variety of issues related to the petition with the hoist-technician employees at issue. (RD Decision at p. 6) Epsilon Systems is simply at a loss as to how such a conclusion could be reached in the face of overwhelming evidence to the contrary, including finding that Mr. Robinson’s single sit-down with the hoist-technician employees sufficed. And Region 21’s

“conclusion” is further undermined by the fact that Region 21’s own personnel were advising Epsilon Systems that the Election would likely be postponed due to COVID-19-related issues and restrictions. Indeed, on March 30, 2020, Region 21 Assistant Regional Director Nathan Seidman called counsel for Epsilon Systems to advise that the traditional “Guardsmark Letter” would be sent out shortly, but that Mr. Seidman still believed that the Election would be postponed given the challenges presented the ongoing pandemic. Contrary to Mr. Seidman’s representations otherwise, the NLRB then issued a release on April 1, 2020 stating that, effective April 6, 2020, all elections would resume. But, even after such issuance, Mr. Seidman again informed Epsilon Systems’ counsel during a telephone conference on April 2, 2020 that he believed the election would likely be postponed as no guidance had been received from Washington D.C. on how to administer elections during the pandemic. It was not until Friday, April 3, 2020 (a mere handful of days prior to the Election, which also included two weekend days), that NLRB Representative Moises Ruiz-Marquez informed Epsilon Systems’ counsel that despite the terms of the election being “in limbo,” Epsilon Systems may still have to proceed with the Election as scheduled unless some type of affirmative action is otherwise taken.

Apparently not recognizing the adverse effect Region 21’s agents’ communications regarding postponement had on Epsilon Systems and the election process, Region 21 reasoned in its May 22, 2020 decision that even if such representations were made, the fact that Region 21 did not postpone the election does not serve as a sufficient basis to invalidate the results of the election. Region 21 then cited Epsilon Systems’ agreement to voluntarily enter into the Stipulated Election Agreement for a mail-ballot election with the ballots to be mailed on April 6, 2020. (RD Decision at p. 7) But, “reliance” on this stipulation is disingenuous and ignores the practicalities of the situation: Epsilon Systems, like all other employers in its situation (i.e., facing overwhelming

uncertainty regarding the conduct of an election during a global pandemic), had good reason to rely upon the input and advice of both Region 21 and NLRB members alike, especially with those individuals being in the best position to provide insight on a highly unsettled and unprecedented set of circumstances. To suggest Epsilon Systems should have been prepared for the on-again/off-again timeline of the Election, as well as the possibility that the NLRB would render a “last minute” decision to allow the election to proceed unfairly, discounts and disregards the realities of the situation and unreasonably dismisses all information Epsilon Systems was being fed at the time. Additionally, touting the “voluntariness” of the stipulation Epsilon Systems entered into is misleading; Epsilon Systems had no other feasible option aside from entering into such stipulation given this was the best approach that could be negotiated with opposing counsel and the NLRB due to the nature of the hoist-technicians’ employment and the limited access Epsilon Systems had to those individuals at NAS North Island.¹¹

At the very least, the above, both on an individual as well as collective basis, demonstrates Epsilon Systems suffered from a distinct and undue disadvantage throughout the entirety of the election process. As such, Region 21’s decision to not only not postpone the election but also

¹¹ Additionally, the Stipulated Election Agreement was negotiated contemporaneous to when Epsilon Systems first received the union’s petition and was executed by the parties on March 13, 2020, well before anyone could truly appreciate just how disruptive the coronavirus would prove to be in the coming weeks. Moreover, the April 6 election date was mutually agreed upon during the foregoing negotiations and without knowledge or any reason to believe April 6 would be the first date NLRB-conducted elections would be permitted to resume pursuant to the NLRB’s April 1, 2020 press release (which refused to extend its March 19, 2020 temporary suspension of NLRB-conducted elections). And, as Epsilon Systems understands, all elections scheduled to be held between March 19, 2020 and April 3, 2020 were postponed beyond April 6, 2020 as opposed to simply being moved to April 6, 2020. This resulted in the underlying Election—originally scheduled to be held after the elections that were rescheduled due to COVID-19—being conducted first and prior to those earlier scheduled elections (whose postponement likely allowed for all parties at issue, i.e., the unions and employers, to have ample and equal time to campaign), over the reasonable concerns and objections of the Employer.

refuse to set aside the results of same are both unjustifiable, ungrounded, and intolerable. Therefore, out of fundamental fairness, Region 21's decision to deny Epsilon Systems' objections and certify the petition should be rejected outright, and a new election should be ordered.

III. Region 21's Reliance upon "Third-Party Conduct" To Deny Epsilon Systems' Requests Is Entirely Misplaced

Contrary to Region 21's "analysis," this matter is not appropriately decided in the context of "third-party conduct." Overall, the only such "conduct" at issue here would be the questionable communications by NLRB representatives and agents leading up to the Election (that were, by themselves, neither overtly underhanded nor deceptive), which Epsilon Systems rightly relied upon to make an educated guess as to how the Election would proceed in the face of an unpredictable and highly disruptive global pandemic. To be sure, COVID-19 itself, and the crippling and devastating effects of same, would not constitute "third-party conduct" under NLRB precedent, especially given the global disease was no one individual or entity's fault. As such, it would be irresponsible and incongruous to liken the pandemic to "third-party conduct" to justify denial of Epsilon Systems' requests for, in essence, fairness in the election process. But, that is exactly what Region 21 did.

In its May 22, 2020 decision, Region 21 concluded that because neither the conduct of the union nor NLRB agents was ever in question, Epsilon Systems' objections are "analogous" to cases based on third-party conduct. For such cases, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." (RD Decision at p. 5-6 quoting *Independence Residences, Inc.*, 355 NLRB 724, 729 (2010)) (internal citations omitted).) Region 21 then inexplicably states that the third-party standard is also applicable because of the actions of public officials—a puzzling reference

considering Epsilon Systems never petitioned for the election to be overturned based on the alleged actions of any such individuals. (RD Decision at p. 6).¹²

Although the third-party conduct standard itself does not apply here, a lone principle underlying same is highly relevant and actually favours the granting of a new election: namely, the overarching recognition of “the unfairness of saddling parties with the consequences of conduct over which they had no control.” (RD Decision at p. 6 quoting *Independence Residences, Inc.*, 355 NLRB at 729) (emphasis added.) This rationale, and this rationale alone, should have driven Region 21’s analysis and decision. Indeed, due to COVID-19—a global pandemic resulting in government orders and mandates over which Epsilon Systems had no control—Epsilon Systems was stripped of control over: (1) the amount/level of access it had to the hoist-technicians at issue as well as the Naval Air Station, itself; (2) its ability to fully address any issues or concerns the four employees at issue may have had leading up to the election; (3) where its employees were permitted to work (either on-site or remotely) and the impact same had on the election; and (4) the NLRB’s decision on how to handle a union election during a global pandemic.

In fact, Epsilon Systems only had control over the health and safety of its employees, something Epsilon Systems took very seriously. Forced with balancing the dedication of time and effort to the foregoing responsibility compared to focusing on responding to a pending union campaign (especially under the very restrictive circumstances present here), Epsilon Systems chose the former. In its objections and offer of proof, Epsilon Systems specifically detailed all of the efforts it took to ensure the safety and well-being of its employees. Indeed, Epsilon Systems’

¹² With regard to Epsilon Systems’ argument concerning the communications it received from Board representatives and agents, that argument focuses more on the impact those statements had on Epsilon Systems’ plans and efforts leading up to the Election given the totality of the circumstances and the general sense of uncertainty that existed which should have prompted the Region to postpone the Election until a more appropriate time.

CEO Bryan Min even expressed concern about the safety of the mail-in ballot process itself given, at that time, the CDC's warnings that mail and other forms of hardcopy communication could pose COVID-19 transmission risks to individuals.

Due to the unique challenges presented by the pandemic, Region 21 was obligated to treat COVID-19 as a novel issue and establish a precedent based upon fairness and equal opportunity for all. Instead, Region 21 forced an unduly and unfairly prejudiced employer to “accept” the results of a union election by claiming it could not find any conduct attributable to a third party that warranted intervention on the election results. Although such third-party conduct may not have been present, other circumstances clearly existed that Region 21 outright (whether purposefully or inadvertently) ignored; circumstances and conditions that precluded Epsilon Systems from having a full and fair opportunity to campaign under laboratory conditions as contemplated in *General Shoe Corporation*, 77 NLRB 124 (1948). Indeed, in *General Shoe Corporation*, the NLRB established the standard under which it still evaluates whether conduct exists that creates an atmosphere that renders a free choice amongst employees improbable:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe Corporation, 77 NLRB 124, 127 (1948).

No reasonable argument can be made that the strict social-distancing guidelines and stay-at-home orders associated with COVID-19—all of which resulted in a significantly lopsided opportunity for Epsilon Systems to communicate face-to-face with its hoist-technician employees leading up to the election as compared to the Union—allowed for appropriate union election

conditions. Again, as noted herein, no one party is at fault; the circumstances and severe hindrances created by and resulting from COVID-19, as well as the general uncertainty stemming from same, were unforeseen. The fact that COVID-19 was an “Act of God” instead of the byproduct of third-party conduct does not excuse the depriving Epsilon Systems of a full and fair opportunity to discuss its position on the Union with its hoist-technician employees. Rather, the very nature of COVID-19 actually dictates a higher level of scrutiny of the election results and associated process(es). Even minimal scrutiny reveals that the opportunity for exploitation detrimental to Epsilon Systems permeated throughout the election process, an issue Region 21 should have but did not recognize and should have (but did not taken steps to address and prevent. Unlike Epsilon Systems, the Union had unbridled opportunities leading up to the filing of the petition to communicate with the employees; opportunities that were not limited by the COVID-19-related restrictions under which Epsilon Systems was operating as a California employer.

IV. Fundamental Fairness Dictates Rejection of the Petition and the Ordering of a New Election

Had Epsilon Systems simply failed to take advantage of opportunities to meet with its employees to discuss its position with respect to the Union’s petition, the Employer’s objections and this appeal would be insincere and unwarranted. Such is not the case here, though. Epsilon Systems instead faced a set of circumstances entirely beyond its control that precluded it from engaging in election campaign activities as prescribed by the NLRA. That is why Mr. Min requested on April 5, 2020—at a time during which Region 21, itself, was still unsure as to whether the Election would proceed—that Region 21 postpone the election. Mr. Min’s request was not only a reasonable one, but also an entirely necessary one at that. Overall, Region 21 could have easily protected laboratory conditions for the Election by simply granting Mr. Min’s postponement

request. Instead, Region 21 elected to move forward with the Election, thereby preventing same from being conducted under NLRB-prescribed conditions, and subsequently rubber-stamped the Election results, summarily rejecting Epsilon Systems' valid and pertinent objections and written offer of proof.

In light of the foregoing, Epsilon Systems requests the NLRB: (1) review and overturn Region 21's decisions; and (2) order Region 21 to conduct a new election that allows both parties a full and fair opportunity to discuss their respective positions with the four hoist-technician employees at issue before the ballots are cast.

The NLRB's courtesy and cooperation are most appreciated.

Very truly yours,

GORDON REES SCULLY MANSUKHANI LLP



Jim McMullen, Esq.

EXHIBIT A

JIM MCMULLEN
JMCMULLEN@GRSM.COM
DIRECT DIAL: (619) 230-7746

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER™

ATTORNEYS AT LAW
101 WEST BROADWAY, SUITE 2000
SAN DIEGO, CA 92101
WWW.GRSM.COM

April 27, 2020

VIA ELECTRONIC FILING

William C. Cowen
Regional Director
National Labor Relations Board
Region 21
312 N. Spring Street, Suite 10150
Los Angeles, CA 90012

**RE: Certification of Representative Petition No. 21-RC-257595
Employer's Objections to the Mail-in Election Pertaining to Epsilon Systems
Solutions, Inc. Hoist Technicians**

Dear Mr. Cowen:

Pursuant to 29 CFR § 102.69(a), Epsilon Systems Solutions, Inc. (“Epsilon” or “Employer”) hereby timely files its objections to the conduct of the recent mail-in ballot election involving Epsilon’s four hoist-technician employees employed at North Island Naval Air Station. The ballots themselves were mailed by the Region on April 6, 2020 and, in accordance with NLRB regulations, they were tallied two weeks later on April 20, 2020—albeit under unusual procedural conditions.¹ The final tally revealed a total of 4 votes in favor of the International Association of Machinists and Aerospace Workers (“IAM” or “Union”) and 0 votes against. For the following reasons, Epsilon contends that the election should not have been permitted to proceed and that the Region should instead re-host the election in a manner that allows Epsilon a full and fair opportunity to provide critical information to its employees regarding the company’s position on the election before the employees cast their ballots—something that it was unfortunately prevented from doing the first time around for a whole host of reasons beyond Epsilon’s control.

As a preliminary matter, in the days leading up to the election, Epsilon continually received mixed signals from the Region as to whether the election would be carried out as planned in light of the ever-evolving COVID-19 situation. On March 19, 2020, the Board ordered the temporary suspension of all Board-conducted elections through April 3, 2020. Then, on April 1, 2020—a

¹ The parties were invited to witness the unsealing of the ballots and the reporting of the final tally via FaceTime, as the State’s current COVID-19 restrictions prevented any in-person participation in the April 20 ballot count.

mere 5 days before the mail-in ballots were scheduled to be sent out in this matter—the Board announced that it would *not* extend its temporary suspension of Board-conducted elections past April 3, 2020, and would instead resume conducting elections on Monday, April 6, 2020.

Notwithstanding the foregoing, however, Epsilon was advised on more than one occasion by various Region employees during the week leading up to the election that in all likelihood, the election would nevertheless be postponed because of the COVID-19 crisis. Indeed, on March 30, 2020, Region 21 Assistant Regional Director Nathan Seidman had suggested as much to Epsilon’s counsel during a telephone conference discussing the posting procedures for the notice of the election. As late as April 3, 2020, the Region was still unsure as to whether the election would proceed, advising Epsilon’s counsel during a telephone conference that very day that everything remained “in limbo” while simultaneously expressing concerns that conducting an election under a stay-at-home order where threats of fines and punishments for congregating were all-too-real was obviously less than ideal.

All of this uncertainty, coupled with the fact that Epsilon did not have a full and fair opportunity to discuss the petition with its employees in the weeks leading up to the ballot because of the strict guidelines implemented by the State in its aggressive response to the pandemic, prompted Epsilon founder and CEO Bryan Min to submit a good faith plea to the Region on April 5, 2020 to postpone the election. Mr. Min noted in a personal letter addressed to you that the unprecedented current events revolving around COVID-19 had significantly disrupted Epsilon’s business as a whole, requiring his sole and primary focus over the course of the past several weeks to be on taking care of the safety and health of his employees and their families.² As a small business, Epsilon suddenly and unexpectedly found itself in the unenviable position of having to fight for its survival amidst a global pandemic, and the issue of potential union representation naturally took a back seat to the company’s focus on keeping its employee-owned business afloat during this extraordinary time. Mr. Min concluded his April 5, 2020 letter with an offer to further discuss his more than reasonable request and his company’s unique circumstances.

In response, counsel for Epsilon received an e-mail on April 6, 2020 from Nathan Seidman thanking Mr. Min for expressing his concerns but nevertheless advising that there was no basis to postpone the election. Mr. Seidman summarily stated that the Board directed its regions to resume processing elections as of April 6, 2020, and that because the parties entered into a Stipulated Election Agreement to conduct a mail-ballot election, the election would go forward as stipulated.

The Region’s response was not only disappointing given the unusual circumstances presented by COVID-19 and Epsilon’s good faith request for a postponement, it was also entirely unreasonable in light of the fact that the conditions surrounding this particular election process did not allow Epsilon a full and fair opportunity to campaign under laboratory conditions as contemplated in *General Shoe Corporation*, 77 NLRB 124 (1948). In *General Shoe Corporation*, the Board established the standard under which it evaluates whether conduct exists that creates an atmosphere that renders a free choice amongst employees improbable:

² In that regard, Mr. Min expressed concerns about the safety of the mail-in ballot process itself, noting that the CDC expressly warned that mail and other forms of similar communication could still pose risks to individuals.

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe Corporation, 77 NLRB 124, 127 (1948).

No reasonable argument can be made that the strict social distancing guidelines and stay-at-home orders imposed by the State presented appropriate conditions under which to conduct the election at issue here. Admittedly, no one party was at fault for the unforeseen circumstances created by COVID-19 that Epsilon believes deprived the company of a full and fair opportunity to discuss its position on the union with its hoist-technician employees. But, simply because a "unique" ballot-casting process was utilized is not the only reason why the election does not withstand scrutiny.

A brief review of the timeline of events leading up to and including the election is perhaps instructive. The representation petition in this matter was initially served via e-mail on Epsilon on March 6, 2020; however, it was served on a manager who was currently out on leave, and so it was not actually received until March 9, 2020. By that time, the COVID-19 pandemic had already reared its ugly head, with Governor Newsom having declared a State of Emergency in California five days prior on March 4, 2020. Complicating matters further was the fact that the hoist-technician employees who were the subject of the petition work on North Island's Naval Air Station, and Epsilon does not have a physical office on site, rendering access to the employees themselves extremely limited. On March 11, 2020, counsel for Epsilon spoke with Board Agent Moises Ruiz Marquez to discuss the possibility of agreeing to an election stipulation by Friday, March 13, 2020. Because of the unique nature of the circumstances—namely, the security issues presented at the Naval Air Station and the fact that the employees did not physically work on a site owned and operated by Epsilon—the parties ultimately agreed to a mail-in ballot election to be conducted on April 6, 2020 in lieu of an in-person election.

By March 19, 2020, however, the COVID-19 pandemic had progressed to the point that Governor Newsom was forced to issue a statewide stay-at-home order. As if getting on to the North Island Naval Air Station base was not already difficult enough, the additional restrictions implemented by Governor Newsom, coupled with the strict social-distancing guidelines encouraged by the national coronavirus task force, made face-to-face interaction with Epsilon's hoist-technician employees nearly impossible. Epsilon had just one opportunity—on March 23, 2020—to meet with those employees in person. During that meeting, Epsilon Program Manager Brant Robinson noticed many issues upon which the employees required clarification of Epsilon's position, specifically regarding certain contract related matters, wage and hour related issues, and union election related issues. Overall, it became readily apparent that the employees had already been exposed to the views of the union on these issues, some of which were, in his opinion, incorrect. Robinson left the meeting with the general impression that Epsilon would need to

engage in further discussions with its hoist-technician employees in order to explain the employer's position on these same issues.

Unfortunately, a mere two days later, cases of coronavirus on the base began to surface,³ effectively eliminating any further opportunities to engage in additional in-person discussions, question-and-answer sessions, or general meetings during which Epsilon could share valuable information with the hoist-technician employees to assist them in making an informed decision about their future. And, while it can be argued that the information could have been shared through other means, the Board has long recognized the significant and material impact these types of face-to-face discussions and interactions have on workers during union campaigns. Indeed, one of the driving purposes behind prohibiting "captive-audience" meetings during the last 24 hours leading up to an election is to remove any unfair advantage that often comes with such face-to-face meetings, recognizing that they can be extremely influential and effective (provided, of course, the communications themselves are honest and not in violation of any NLRB rules and regulations).

To demonstrate the disadvantages Epsilon faced leading up to the election, when it came time to post the notice regarding the election process, Epsilon advised Region 21 Assistant Regional Director Nathan Seidman on March 30, 2020 that it did not even have access to a bulletin board at the Naval Air Station. It was instead recommended that the notice be e-mailed and posted at the home office (even though none of the employees would see it there because they did not work out of that particular location). From March 23, 2020 through the date upon which the ballots were returned, there were no further face-to-face interactions between Epsilon and its hoist-technician employees regarding the union petition.

When considering the foregoing, and the fact that Epsilon CEO Bryan Min understandably focused all of his time and resources leading up to the election towards steering Epsilon and its employees safely through the still ongoing pandemic, Epsilon was at a distinct disadvantage in that it could not adequately clarify the facts after the pending union campaign. The COVID-19 crisis itself, and the confusion and uncertainty that naturally flowed from it, should not have caused either party to be at such a disadvantage. But, those same circumstances instead created an opportunity for confusion and exploitation, issues that should have been recognized, fully addressed, and prevented by the Region, especially when/after Mr. Min requested in good faith that the election be postponed.

Had Epsilon simply failed to take advantage of its opportunities to meet with its employees to discuss its position with respect to the union's petition, Mr. Min's April 5, 2020 request for relief would have been insincere and unwarranted. But, such was not the case here. This was instead a set of circumstances entirely beyond Epsilon's control, which is why Mr. Min's request on April 5, 2020 for a postponement—at a time during which the Region itself was still unsure whether the election would proceed, no less—was not only reasonable but entirely necessary. The preferable and only method by which the Region could have protected the laboratory conditions of the election was to grant Mr. Min's request. Instead, the Region elected to move forward with the election, thereby preventing a fair election from being conducted under such conditions. Consequently, Epsilon requests the election results be set aside and a new election be scheduled.

³ Indeed, on March 25, 2020, it was confirmed that a civilian employee working at the Naval Air Station North Island child development center tested positive for COVID-19.

By way of an e-mail dated April 27, 2020, the Board graciously granted Epsilon's request for a seven-day extension—to May 4, 2020—to file its offer of proof in support of the objections stated herein. Those offers of proof will be forthcoming.

Your courtesy and cooperation are most appreciated.

Very truly yours,

GORDON REES SCULLY MANSUKHANI LLP

A handwritten signature in blue ink, appearing to read "Jim McMullen", is positioned above the typed name.

Jim McMullen, Esq.

Case Name: Epsilon System Solutions, Inc.

Case: 21-RC-257595

CERTIFICATE OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which the within-mentioned service occurred; and that I am not a party to the subject cause. My business address is 101 West Broadway, Suite 2000, San Diego, California 92101.

On April 27, 2020, I served the following document(s):

Employer's Objections to the Mail-in Election Pertaining to Epsilon Systems Solutions, Inc. Hoist Technicians

by placing a copy thereof for each addressee named hereafter and addressed as follows:

National Labor Relations Board

William B. Cowen

william.cowen@nrlb.gov

Moises Ruiz Marquez

Moises.RuizMarquez@nrlb.gov

Caren Sencer

csencer@unioncounsel.net

Nathan Siedman

Nathan.Seidman@nrlb.gov

(xx) BY EMAIL OR ELECTRONIC TRANSMISSION. I caused a copy of said document(s) to be electronically sent to the email addressee(s) above.. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 27, 2020.



Elisa Martinez

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21, LOS ANGELES, CALIFORNIA**

EPSILON SYSTEMS SOLUTIONS, INC,)	
)	
Employer,)	Case No. 21-RC-257595
)	
and)	OFFER OF PROOF IN SUPPORT
)	OF EPSILON SYSTEMS SOLUTIONS,
)	INC.'S OBJECTIONS
INTERNATIONAL ASS'N OF)	
MACHINISTS AND AEROSPACE)	
WORKERS)	
)	
Union)	
)	

Pursuant to 29 C.F.R. § 102.66(c) and 29 C.F.R. § 102.69(a), Employer Epsilon Systems Solutions, Inc. (“Epsilon Systems”) hereby relies on the following offer of proof in support of its timely filed April 27, 2020 objections. If called to testify, each of the individuals identified herein would state under oath as follows:

EPSILON SYSTEMS FOUNDER AND CEO BRYAN MIN

Founded by CEO Bryan Min in 1998, Epsilon Systems is an employee-owned company that presently employs approximately 1190 employees nationwide. Epsilon Systems specifically provides total life-cycle support to defense systems, including research, concept development, system architecture, requirements definition and analysis, software development, integration and testing, operational support, training, and maintenance and logistics.

Mr. Min would testify that on or around March 9, 2020, he was informed that Epsilon Systems was served with a petition seeking to unionize its four hoist-technician employees employed on North Island Naval Air Station on Coronado Island (NAS North Island). A copy of the petition is attached hereto as Exhibit “A.” Epsilon Systems’ hoist-technician employees are

responsible for rebuilding, repairing and remanufacturing integral parts of United States Navy hoist apertures that are located on USN vessels that have reached time for overhaul. Prior to receiving the underlying petition, Epsilon Systems had enjoyed a long history of labor peace with this particular group of employees who, for all intents and purposes, work with the Prime Contractor's workers. Having periodically interacted with this group of employees with no prior complaints, Epsilon Systems was admittedly surprised by the petition and the issues which ultimately prompted it.

Mr. Min would further testify that because Epsilon Systems' hoist-technician employees work on site at NAS North Island (where access is understandably limited), traditional face-to-face interaction with these particular employees, even under normal circumstances, can be a bit challenging. For example, in-person meetings on site must generally be arranged in advance. These challenges were only further complicated by the recent COVID-19 pandemic.

To assist in combating the spread of COVID-19 within the company, Mr. Min would testify that Epsilon Systems established a COVID-19 Task Force on March 11, 2020. Approximately one week later, Governor Newsom issued a statewide stay-at-home order, which required Epsilon Systems to determine which of its employees were considered "essential" workers and to further determine how its operations would be affected in all of the different facilities in which Epsilon Systems' employees were working—including NAS North Island. Mr. Min would testify that he directed his employees to strictly adhere to Governor Newsom's order along with the CDC's guidelines, especially those employees required to be at or on a particular work-site (such as the Naval Air Station) due to customer demands. Despite the extra precautions, Mr. Min would testify that between March 16, 2020 and April 3, 2020, Epsilon Systems was made aware of approximately 80 instances amongst its employees of issues related to COVID-19, all of which

had to be researched extensively to determine the best course action for not only the affected employees themselves, but also the safety and well-being of everyone else in the company and other surrounding workers.

As a result of the foregoing circumstances—all of which were out of Epsilon Systems' control—Mr. Min would testify that he was forced to devote a majority if not all of his time and attention to ensuring the safety and well-being of all of his employee owners and their families and complying with Navy and other customers' requirements as opposed to the upcoming election. Mr. Min would testify that he instead deferred to Vice President and Professional Services Group Manager John Riley and his team to handle communicating with the hoist-technician employees leading up to the election. Mr. Min later learned that Epsilon Systems was only able to convene one face-to-face meeting with its hoist-technician employees on March 23, 2020, and that it was not even Mr. Riley who attended that meeting due to underlying health conditions that made it far too risky for him to be out in public in the midst of the pandemic.

Mr. Min would testify that he was relieved to learn that Region 21 employees had communicated to Epsilon Systems in the days leading up to the election that it appeared as though the election would be postponed. Unfortunately, Mr. Min received word at the eleventh hour (the Friday before the ballots were to be sent out) that the election would proceed on April 6, 2020, prompting Mr. Min to draft a personal e-mail to Region 21 Director William Cowen on April 5, 2020 expressing his concerns regarding the conduct of the election in light of the pandemic and all of the challenges it brought with it and requesting a postponement of the mailing of the ballots. A copy of Mr. Min's April 5, 2020 e-mail is attached hereto as Exhibit "B."

Mr. Min was extremely disappointed to learn on the morning of April 6, 2020 that his good-faith request had been denied, especially in light of the all-too-real challenges referenced in his e-

mail. To date, Mr. Min is concerned that Epsilon Systems' hoist-technician employees cast their ballots without having had a full and fair opportunity to consider Epsilon Systems' position on the election and any related concerns associated with it without being in possession of all of the facts. The flawed process, more so than the results themselves, serve as the basis for Epsilon Systems' objections.

EPSILON SYSTEMS PROGRAM MANAGER BRANT ROBINSON

Mr. Robinson would first testify that effective March 13, 2020, he began working remotely due to the fact that he was a single father of three school-aged children, all of whom were now home following San Diego schools being closed. This change in circumstances made communication a challenge, especially not being able to meet with groups of employees face to face. Mr. Robinson did, however, get one opportunity to meet with Epsilon Systems' four hoist-technician employees onsite at North Island's Naval Air Station on March 23, 2020. Mr. Robinson would testify that, for circumstances of this magnitude, he would not have typically been the one to address these employees, but Professional Services Group Manager John Riley—who would have traditionally taken on that role—was forced to shelter in place due to varying underlying health conditions that made him particularly at-risk for complications due to the virus.

Mr. Robinson would testify that during the March 23, 2020 meeting, he was not very well received by the hoist-technician employees, whom he would testify sat mostly silent throughout the meeting. As a result of the noticeable lack of participation or a meaningful back-and-forth, Mr. Robinson was unable to effectively communicate Epsilon Systems' position on the upcoming election or answer any lingering questions the hoist-technician employees may have had. Unfortunately, Mr. Robinson never received another opportunity to engage in any further face-to-face discussions with the hoist-technician employees on any of the issues that were pertinent to

the upcoming election.

**EPSILON SYSTEMS VICE PRESIDENT AND PROFESSIONAL SERVICES GROUP
MANAGER JOHN RILEY**

Much like Mr. Robinson, Mr. Riley would testify that he was also forced to work remotely due to the challenges presented by the COVID-19 crisis. Unfortunately, given his age and the fact that he suffers from underlying health conditions that made him particularly susceptible to the COVID-19 virus, Mr. Riley was unable to engage in meaningful discussions with Epsilon Systems' hoist-technician employees leading up to the election. Mr. Riley would testify that in the past, he would personally meet with the hoist-technician employees off site leading up to and during successor negotiations, a practice that had proven quite effective and satisfying for both sides seeing as though Epsilon Systems enjoyed a long history of labor success with its non-union employees. As a result of his inability to meet with them under the current circumstances, Program Manager Brant Robinson was sent in Mr. Riley's place on March 23, 2020.

Mr. Riley would testify that he unfortunately learned after the fact that one of the biggest issues with respect to the election concerned prevailing wage law and the general labor standards under which the hoist-technician employees were working. The issue dealt specifically with whether the hoist-technician employees were performing work under the Walsh-Healy Public Contracts Act or whether they were performing work under the McNamara-O'Hara Service Contract Act (commonly referred to as the SCA)—the difference between the two being significant to the workers in terms of both wages and benefits.

Mr. Riley would testify that, had he known there was a misunderstanding about the contract classification, he could have provided valuable insight with respect to whether the work performed by the hoist technicians at NAS North Island in the shop contracted for by the Navy amounted to work performed under the Public Contracts Act as opposed to the Service Contracts Act.

Unfortunately, he was never provided the opportunity to effectively communicate the distinctions to the hoist-technician employees in light of the fact that the challenges of the COVID-19 pandemic forced him to shelter in place at home and the fact that Mr. Robinson received hardly any feedback during the one and only opportunity Epsilon Systems had to meet with the employees on March 23, 2020. Even if Mr. Robinson had received such feedback, he understandably would not have had an answer on the spot, and would have needed time to check back with both his supervisors (including Mr. Riley) and HR to better provide the hoist-technician employees with an appropriate response.

Had Mr. Riley been aware of the issue and been given an opportunity to sit down and explain the issue to the hoist-technician employees in detail, Mr. Riley would have advised that overhauls of hoists taken off the ships and put into the shop in which the hoist technicians worked was considered more remanufacturing-like than usual adjustment, fluid change and preventative maintenance work performed by the Navy and the Department of Defense. This is just one important fact that could very well have changed the outcome of the election under different circumstances had Mr. Riley had a legitimate opportunity to sit down with the employees to walk them through the distinction made by the Department of Labor and the Department of Defense. Making things more difficult in terms of communication was that fact that the hoist technician employees themselves were traditional laborers working onsite in a shop at the NAS facility, meaning they did not have constant access to electronic forms of communication such as e-mail or texts because they were not sitting in a traditional office in front of a computer all day.

EPSILON SYSTEMS DIRECTOR OF HUMAN RESOURCES JANECE TANAKA

Ms. Tanaka would first testify that on March 11, 2020, she received a telephone call from Board Representative Moises Ruiz-Marquez, who explained that a petition had been filed

regarding Epsilon Systems' hoist-technician employees, but that it was discovered that the petition itself was served on an Epsilon Systems HR employee that was out on extended leave. Ms. Tanaka would also testify that the HR employee who was out on leave had clearly indicated in her out-of-office message that any information sent to her be forwarded to Epsilon Systems' general HR e-mail, but that HR never received any such e-mail from the Board or the Union. As a follow-up to the out-of-office notification and their discussion, Mr. Moises Ruiz-Marquez forwarded Ms. Tanaka a copy of the petition for the first time on March 11, 2020.

Ms. Tanaka would further testify that on March 12, 2020, Epsilon Systems' Professional Services Group Management team and its Human Resources Department met to discuss how to handle the proposed election due to the extremely limited access Epsilon Systems had to NAS North Island even before the COVID-19 crisis. As a result of this discussion, Epsilon Systems proposed (and the parties ultimately agreed) to conduct the election through mail-in ballots, with the ballots to be sent on April 6, 2020. This was the best approach that could be negotiated with opposing counsel and the Board Agent given the unique circumstances presented by the nature of the hoist-technicians' employment and the limited access Epsilon Systems had to those individuals on NAS North Island. At that point in time, COVID-19 was not yet a determinative factor in the election.

Ms. Tanaka would also testify, however, that leading up to the date on which the ballots were set to be mailed, Epsilon Systems began to encounter increasing pressure from the Naval Sea Systems Command Southwest Regional Maintenance Center (NAVSEA COM SW) to ensure that it was complying with their new requirement for daily COVID-19 reporting subject to certain detailed requirements. Those requirements were first updated on March 19, 2020—whereby Epsilon Systems was required to investigate over 200 employees and to arrange new travel and

living situations where necessary—and again on March 20, 2020—whereby Epsilon Systems was required to institute a process to contact each and every employee who had recently been out of work (approximately 80 employees) to determine if routine absences were or were not COVID-19 related. Ms. Tanaka would testify that from that point forward, the requirements changed on almost a daily basis.

In light of the foregoing pressures, Ms. Tanaka would testify that all of management’s time and attention during the pandemic was focused on meeting not only its customer’s specific needs, but the needs of its employees and their families, including issues related to unemployment, disability, and wage-replacement programs. Complicating matters was the fact that that in the days leading up to the election, Epsilon Systems had received varying opinions from the Region on whether the election would proceed. Ms. Tanaka would testify that notwithstanding continual speculation from Region employees that the election would be postponed, Epsilon Systems nevertheless followed the Region’s instructions concerning the posting of the election and the ballot process.

COUNSEL FOR EPSILON SYSTEMS JIM MCMULLEN

Mr. McMullen is a member of the Law Firm of Gordon Rees Scully Mansukhani, LLP (“Gordon & Rees”), who is counsel of record for Epsilon Systems. Mr. McMullen would testify that Gordon & Rees was retained by Epsilon Systems on March 11, 2020 to assist Epsilon Systems with the representation petition recently filed by the Union, and that his appearance was entered with the Board on March 12, 2020.¹

On March 19, 2020, the Board ordered a temporary suspension of all Board-conducted

¹ Along with Mr. McMullen, Joseph Sbuttoni, Esq. had also entered his appearance on Epsilon Systems’ behalf. Mr. McMullen would testify that he was intimately familiar with all of Mr. Sbuttoni’s communications regarding the upcoming election with the Region. Mr. Sbuttoni, however, is no longer employed with Gordon & Rees.

elections through April 3, 2020. A copy of the Board's March 19, 2020 press release is attached hereto as Exh. "C." Mr. McMullen would testify that on March 30, 2020, Region 21 Assistant Regional Director Nathan Seidman called him to advise that the traditional "Guardsmark Letter" would be sent out shortly but that Mr. Seidman still believed that the election would likely be postponed in light of the challenges presented by the COVID-19 pandemic. Mr. McMullen would testify that he advised Mr. Seidman in response that Epsilon Systems had no access to the bulletin board at NAS North Island on which to post the election notice, but that Mr. Sbuttoni and Mr. Ruiz-Marquez had discussed and agreed to an e-mail notice. As a result, Mr. Seidman instructed Mr. McMullen to have Epsilon Systems post the notice at their home office in addition to forwarding the notice via e-mail to the affected employees (as Mr. Sbuttoni had discussed with Mr. Ruiz-Marquez). Contrary to Mr. Seidman's speculation otherwise, the Board issued another release on April 1, 2020 that, effective April 6, 2020, all elections would resume. A copy of the Board's April 1, 2020 press release is attached hereto as Exhibit "D."

Mr. McMullen would also testify that on April 2, 2020, Mr. Seidman again informed him during a telephone conference that he believed the election would likely be postponed as no guidance had been received from Washington D.C. on how to administer the elections during the pandemic. Mr. McMullen spoke with an individual at the Region again on April 3, 2020, at which time he was advised that the Region still did not have guidance on what to do on Monday, April 6, 2020—the date on which the ballots were scheduled to be mailed in this matter. Mr. McMullen would testify that he was further advised on April 3, 2020 that there was supposed to be a briefing earlier that morning that would provide guidance on a national level, but that the Region had not received any information yet from that meeting. Mr. McMullen left his cell phone number for Mr. Ruiz Marquez, and Mr. McMullen will testify that when Mr. Ruiz Marquez called him back later

that morning, Mr. McMullen was told that everything was still in limbo in terms of the election, but that Epsilon Systems may have to go forward with the election as scheduled unless something affirmative happened. This conversation took place late in the day on the Friday before Monday's election. Without waiving any attorney-client privilege, Mr. McMullen would testify that he and Mr. Sbuttoni reported each piece of information they received from the NLRB and Region 21 representatives to Epsilon Systems contemporaneous to when the information was received so that Epsilon Systems could be kept abreast of the ever-changing developments concerning the conduct of the election.

On April 5, 2020, Mr. McMullen forwarded to Mr. Seidman a copy of a personal e-mail written by Epsilon Systems' founder and CEO Bryan Min to Region 21 Director William Cowen requesting, in good faith, a postponement of the April 6, 2020 mail-in ballot election. *See* Exhibit "B." Mr. McMullen would testify that he not only forwarded Mr. Min's communication by e-mail, but that he also called both of the Region's representatives to advise that Epsilon Systems had expressed to him that the timing of the NLRB press releases and the election itself could not have been worse for Epsilon Systems in that the off-again, on-again messaging caused prejudice to Epsilon Systems from a communication and operational perspective given the many extraordinary circumstances created by the pandemic.

Mr. McMullen would testify that on the morning of April 6, 2020, he received an e-mail response from Mr. Seidman stating that the Region had determined that there was no basis upon which to postpone the election. A copy of Mr. Seidman's April 6, 2020 e-mail is attached hereto as Exhibit "E." In his April 6, 2020 e-mail, Mr. Seidman noted that the Board had directed regions to resume processing elections effective April 6, 2020, and that because the parties in this matter entered into a Stipulated Election Agreement to conduct a mail ballot election on April 6, the

election would accordingly go forward as stipulated. *Id.* That stipulation, however, was merely to accommodate the already difficult challenges that Epsilon Systems faced in communicating with its hoist-technician employees through the normal course of the workweek given that they not only worked off site, but that they worked on a highly regulated and secure facility operated by the US Navy. Mr. McMullen would testify that the COVID-19 pandemic was in its early stages and was not necessarily a driving force behind the parties' decision to stipulate to a mail-in ballot.

Mr. McMullen would finally testify that on April 20, 2020, the ballots were opened and tallied by Region 21 Field Examiner David Selder, who invited the parties to witness the tally via FaceTime given that in-person attendance was impossible. The result of the ballots were 4-0 in favor of the Union.

FORMER COUNSEL FOR EPSILON SYSTEMS JOSEPH SBUTTONI

Epsilon Systems presumes that the Region's representatives would agree with Mr. McMullen's characterization of the facts as set forth herein concerning the various communications that took place between counsel for Epsilon Systems and region employees regarding the conduct of the election. In the event that there is a difference of opinion on those communications, Epsilon Systems reserves the right to call formal counsel, Joseph Sbuttoni, who would testify that in every instance in which he spoke to a Region representative in the final days before the election, the sentiment was the same: the election would likely be postponed in light of the challenges presented by the COVID-19 crisis. Indeed, every election that was scheduled prior to April 6, 2020 had already been postponed, and the circumstances regarding the pandemic were only getting worse.

The foregoing proffer, and any all relevant information referenced herein, constitutes an accurate representation of what each of the individuals named in this offer of proof would testify to should the Board elect to conduct a hearing in this matter. I would be glad to provide the Board with any additional information it deems necessary in considering Epsilon Systems' objections.

Very truly yours,

GORDON REES SCULLY MANSUKHANI LLP



Jim McMullen, Esquire

EXHIBIT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 21-RC-257595	Date Filed 3-6-2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer: Epsilon System Solutions, Inc.
2b. Address(es) of Establishment(s) involved (Street and number, City, State, ZIP code): Building 42 NAS North Island, Coronado, CA

3a. Employer Representative - Name and Title: Chelsea Wignall, Human Resources
3b. Address (if same as 2b - state same): Same

3c. Tel. No. 619.702.1700
3d. Cell No. 619.573.7827
3e. Fax No.
3f. E-Mail Address cwignall@epsilonsystems.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.): Military Contractor
4b. Principal Product or Service: Military Support
5a. City and State where unit is located: Coronado, CA

5b. Description of Unit Involved:
Included: All full-time and regular part-time Hoist Technicians.
Excluded: All managers, guards and supervisors as defined by the Act.
6a. Number of Employees in Unit: 4
6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: **7a. Request for recognition as Bargaining Representative was made on (Date) on or about (Date)** (If no reply received, so state). By petition and Employer declined recognition
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state) None
8b. Address:

8c. Tel. No.
8d. Cell No.
8e. Fax No.
8f. E-Mail Address

8g. Affiliation, if any:
8h. Date of Recognition or Certification
8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer(s) establishment(s) involved? **NO** If so, approximately how many employees are participating?
(Name of Labor Organization) _____, has picketed the Employer since (Month, Day, Year)

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)
None

10a. Name
10b. Address
10c. Tel. No.
10d. Cell No.
10e. Fax No.
10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election:
11a. Election Type: Manual Mail Mixed Manual/Mail

11b. Election Date(s): Tuesday, March 26th, 2020
11c. Election Time(s): 11:00 a.m. – 11:15 a.m.
11d. Election Location(s): Building 42 Break Room or Conference

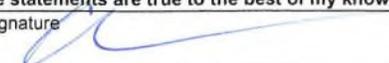
12a. Full Name of Petitioner (including local name and number): International Association of Machinists and Aerospace Workers, District Lodge 725
12b. Address (street and number, city, State and ZIP code): 5150 Kearney Mesa Road, San Diego, CA 92111

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state): International Association of Machinists and Aerospace Workers, AFL-CIO

12d. Tel. No. 619-906-0394
12e. Cell No.
12f. Fax No.
12g. E-Mail Address jmauldin@iam725.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.
13a. Name and Title: Caren P. Sencer, Attorney
13b. Address (street and number, city, State and ZIP code): Weinberg, Roger & Rosenfeld, 1001 Marina Village Parkway, Suite 200, Alameda, CA 94501

13c. Tel. No. 510-337-1001
13d. Cell No.
13e. Fax No. 510-337-1023
13f. E-Mail Address NLRBnotices@unioncounsel.net

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.
Name (Print) Caren P. Sencer
Signature 
Title Attorney
Date 3/6/2020

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT 111073812**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942.43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

EXHIBIT B

From: Jim McMullen
Sent: Sunday, April 5, 2020 3:22 PM
To: 'Nathan.Seidman@NLRB.gov' <Nathan.Seidman@NLRB.gov>; Moises.RuizMarquez@nlrb.gov; 'Judith.Saenz@NLRB.com' <Judith.Saenz@NLRB.com>
Cc: Joseph Sbuttoni <jsbuttoni@grsm.com>; David Hiester <dhiester@grsm.com>; Caren P. Sencer (csencer@unioncounsel.net) <csencer@unioncounsel.net>
Subject: Personal letter to the Regional Director, NLRB///// 21-RC-257595

Dear Mr. Seidman,
Attached is an e-mail my client's CEO asked me to forward to you and the Regional Director. Obviously, the employer is concerned that the current circumstances are not conducive to the "proper test tube conditions" for a NLRB Election. Thank you and the Region for considering this information and request.
Jim McMullen

From: Bryan Min <bmin@epsilonsystems.com>
Sent: Sunday, April 5, 2020 2:12 PM
To: Jim McMullen <jmcmullen@grsm.com>
Subject: Personal letter to the Regional Director, NLRB

Jim,

Would you please forward my email to the NLRB's Regional Director or his/her representative? Thanks for your help.

Stay healthy!

Bryan

Dear Sir/Mam:

I trust that this email finds you well.

This past week, I learned that the NLRB intends to move forward with an election on Monday, April 6, 2020, to give my four fellow employee-owners in Coronado, CA, an option to unionize. I would humbly request for a postponement of this election until a later date.

My name is Bryan Byung-ik Min. I'm the founder and CEO of Epsilon Systems Solutions, Inc. As a way of an introduction, if I may provide my background: I'm a Korean-American, who immigrated to America when I was 8 years old. I grew up in Downey, CA, with my siblings – one is a LAPD officer and the other a school teacher in Hollywood. With the

opportunity afforded me by this country, I was able to attend USC on a NROTC scholarship, where I trained with future Navy and Marine Corps servicemen alike. I served 12 years in the US Navy.

In 1998, I resigned my enlistment, and decided to pursue entrepreneurship. I started Epsilon Systems out of Barrio Logan, using a modicum of working capital I could scrounge up from my home equity line and a USAA credit card, which I still carry today. My vision was to establish the best Employee-Owned business in America. It was an unenviable start - a humble beginning to say the least; but 22 years later, I am grateful to our country and to all the fellow employee-owners for affording me this opportunity. In fact, last week was our 22nd Anniversary. Coincidentally, this past week, I was caught off guard with NLRB's plan to continue with the election this coming Monday, given our unprecedented current events, which have disrupted the flow of our business as well as the frequency and topics of our employee communications.

I know you have your job to do as well. I understand that the Labor Board has strictly followed the guidelines and given Epsilon Systems the administrative time necessary per the statute. However, with this on-going pandemic, and our State's aggressive response still in effect, our primary focus has been about taking care of the safety and health of our people and their families, first and foremost. (In fact, we have been concerned about mail and other forms of communication that even the CDC says pose risks.) I have directed my company to strictly adhere to the "Stay-Home" Ordinance as well as the CDC guidelines if required to be at work-site due to customer demands. Most of our engagements have been conducted electronically whenever possible. In fact, given the extraordinary and unpredictable nature of this battle, it has required me to seek, as with so many other companies, the Small Business Administration's (SBA) support and otherwise divert my time from employee morale and communication. We are fighting for our survival, preparing for the worst, and I am deeply concerned of a protracted "lock-down" due to the novel coronavirus.

Again, given this unusual circumstances, I would respectfully request a postponement of the election process until the workplace returns to some semblance of normalcy. At that time I am sure the parties can agree upon an appropriate time line to resume and conclude the process.

I would hope that the NLRB could appreciate the legitimate concerns of my company including its many employee owners who have not really had a chance to be aware of this situation. I will be available 24 hours a day on my mobile to answer or assist any who need information about our company's unique circumstances. Please do not hesitate to reach out to me directly on my personal mobile - 619-507-0100.

Thank you for the NLRB's consideration and courtesy.

Sincerely,

Bryan

Bryan B. Min
Founder & CEO
Epsilon Systems Solutions, Inc.
www.epsilonystems.com
619-702-1700 x101



Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

This email has been scanned for viruses and malware, and may have been automatically archived by **Mimecast Ltd**, an innovator in Software as a Service (SaaS) for business. Providing a **safer** and **more useful** place for your human generated data. Specializing in; Security, archiving and compliance. To find out more [Click Here](#).

EXHIBIT C



NLRB
National Labor
Relations Board



[Home](#)

News & Publications

National Labor Relations Board Suspends Representation Elections Through April 3, 2020

Office of Public Affairs

202-273-1991

publicinfo@nrlrb.gov

www.nrlrb.gov

March 19, 2020

Due to the extraordinary circumstances related to the COVID-19 pandemic, the National Labor Relations Board today approved the suspension of all representation elections, including mail ballot elections, for the next two weeks effective immediately, through and including April 3, 2020.

The Board deems this action necessary to ensure the health and safety of our employees, as well as those members of the public who are involved in the election process. Moreover, given the closure of several Regional Offices and limited operations and significant telework at others, the Board does not believe that it is possible to effectively conduct elections at this time.

The Board will continue to monitor this evolving situation and determine whether additional extension of this suspension may be necessary.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees, employers, and unions from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

Connect With NLRB

[NLRB Subscription Updates](#)

[Download NLRB Mobile App](#)



National Labor Relations Board

[Site Map](#) | [Policies](#) | [OpenGov](#) | [USA.gov](#) | [FOIA](#) | [Privacy](#) | [No Fear Act](#)

About

[Rights We Protect](#)
[What We Do](#)
[Who We Are](#)

Resources

[Inspector General](#)
[Fact Sheets](#)
[Fillable Forms](#)
[Related Agencies](#)
[E-file via FOIAOnline](#)
[Section 508](#)
[Employee Rights Poster](#)

Other

[Site Feedback](#)
[FAQ](#)
[Contact Us](#)

EXHIBIT D



[Home](#)

News & Publications

NLRB Resumes Representation Elections

Office of Public Affairs

202-273-1991

publicinfo@nrlb.gov

www.nrlb.gov

April 01, 2020

WASHINGTON, DC – The National Labor Relations Board will not extend its temporary suspension of Board-conducted elections past April 3, 2020 and will instead resume conducting elections beginning Monday, April 6, 2020. On March 19, 2020, because of the extraordinary circumstances related to the COVID-19 pandemic, the NLRB had ordered the temporary suspension of all Board-conducted elections through April 3, 2020.

As explained when ordering the suspension, the Board took the extraordinary action to ensure the safety of Agency employees and members of the public involved in elections. At the time, several of the NLRB’s regional offices had been closed and other locations were operating with limited staffing such that the Board did not believe it was possible to effectively conduct elections.

Chairman John F. Ring stated: “Conducting representation elections is core to the NLRB’s mission, and ensuring elections are carried out safely and effectively is one of our primary responsibilities. Two weeks ago, when the Board made the difficult decision to suspend elections, the developing situation made it impossible to ensure the safety of our employees or the public. With many regional offices closed and most employees teleworking, the Board was not confident that *any* type of election could be run effectively. Based on these concerns, the Board determined that a two-week suspension would provide the General Counsel, who is delegated authority to supervise the regional offices, which conduct elections on the Board’s behalf, the opportunity to fully review the logistics of the election procedures in light of the unprecedented situation. The General Counsel now has advised that appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors. We appreciate the patience and understanding of all NLRB stakeholders during this challenging time.”

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees, employers, and unions from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

Connect With NLRB

[NLRB Subscription Updates](#)

[Download NLRB Mobile App](#)



National Labor Relations Board

[Site Map](#) | [Policies](#) | [OpenGov](#) | [USA.gov](#) | [FOIA](#) | [Privacy](#) | [No Fear Act](#)

About

- [Rights We Protect](#)
- [What We Do](#)
- [Who We Are](#)

Resources

- [Inspector General](#)
- [Fact Sheets](#)
- [Fillable Forms](#)
- [Related Agencies](#)
- [E-file via FOIAOnline](#)
- [Section 508](#)
- [Employee Rights Poster](#)

Other

- [Site Feedback](#)
- [FAQ](#)
- [Contact Us](#)

EXHIBIT E

From: Seidman, Nathan M <Nathan.Seidman@nlrb.gov>
Sent: Monday, April 6, 2020 9:50 AM
To: Jim McMullen <jmcmullen@grsm.com>
Cc: Joseph Sbuttoni <jsbuttoni@grsm.com>; David Hiester <dhiester@grsm.com>; Caren P. Sencer (csencer@unioncounsel.net) <csencer@unioncounsel.net>; RuizMarquez, Moises <Moises.RuizMarquez@nlrb.gov>; Saenz, Judith <Judith.Saenz@nlrb.gov>
Subject: RE: Personal letter to the Regional Director, NLRB///// 21-RC-257595

Dear Mr. McMullen,

Thank you for forwarding the message from the Employer's CEO, which was shared with the Regional Director.

While we understand your client's concerns, there is no basis upon which to postpone the election. The Board directed regions to resume processing elections, and the parties in this matter entered into a Stipulated Election Agreement to conduct a mail ballot election.

Accordingly, the election will go forward as stipulated by the parties.

Sincerely,

Nathan Seidman
Assistant to the Regional Director
NLRB, Region 21 – Downtown Los Angeles and San Diego Resident Office
(213) 634-6518

From: Jim McMullen <jmcmullen@grsm.com>
Sent: Sunday, April 5, 2020 3:22 PM
To: Seidman, Nathan M <Nathan.Seidman@nlrb.gov>; RuizMarquez, Moises <Moises.RuizMarquez@nlrb.gov>; 'Judith.Saenz@NLRB.com' <Judith.Saenz@NLRB.com>
Cc: Joseph Sbuttoni <jsbuttoni@grsm.com>; David Hiester <dhiester@grsm.com>; Caren P. Sencer (csencer@unioncounsel.net) <csencer@unioncounsel.net>
Subject: Personal letter to the Regional Director, NLRB///// 21-RC-257595

Dear Mr. Seidman,
Attached is an e-mail my client's CEO asked me to forward to you and the Regional Director. Obviously, the employer is concerned that the current circumstances are not conducive to the "proper test tube conditions" for a NLRB Election. Thank you and the Region for considering this information and request.
Jim McMullen

From: Bryan Min <bmin@epsilonsystems.com>
Sent: Sunday, April 5, 2020 2:12 PM
To: Jim McMullen <jmcmullen@grsm.com>
Subject: Personal letter to the Regional Director, NLRB

Jim,

Would you please forward my email to the NLRB's Regional Director or his/her representative? Thanks for your help.

Stay healthy!

Bryan

Dear Sir/Mam:

I trust that this email finds you well.

This past week, I learned that the NLRB intends to move forward with an election on Monday, April 6, 2020, to give my four fellow employee-owners in Coronado, CA, an option to unionize. I would humbly request for a postponement of this election until a later date.

My name is Bryan Byung-ik Min. I'm the founder and CEO of Epsilon Systems Solutions, Inc. As a way of an introduction, if I may provide my background: I'm a Korean-American, who immigrated to America when I was 8 years old. I grew up in Downey, CA, with my siblings – one is a LAPD officer and the other a school teacher in Hollywood. With the opportunity afforded me by this country, I was able to attend USC on a NROTC scholarship, where I trained with future Navy and Marine Corps servicemen alike. I served 12 years in the US Navy.

In 1998, I resigned my enlistment, and decided to pursue entrepreneurship. I started Epsilon Systems out of Barrio Logan, using a modicum of working capital I could scrounge up from my home equity line and a USAA credit card, which I still carry today. My vision was to establish the best Employee-Owned business in America. It was an unenviable start - a humble beginning to say the least; but 22 years later, I am grateful to our country and to all the fellow employee-owners for affording me this opportunity. In fact, last week was our 22nd Anniversary. Coincidentally, this past week, I was caught off guard with NLRB's plan to continue with the election this coming Monday, given our unprecedented current events, which have disrupted the flow of our business as well as the frequency and topics of our employee communications.

I know you have your job to do as well. I understand that the Labor Board has strictly followed the guidelines and given Epsilon Systems the administrative time necessary per the statute. However, with this on-going pandemic, and our State's aggressive response still in effect, our primary focus has been about taking care of the safety and health of our people and their families, first and foremost. (In fact, we have been concerned about mail and other forms of communication that even the CDC says pose risks.) I have directed my company to strictly adhere to the "Stay-Home" Ordinance as well as the CDC guidelines if required to be at work-site due to customer demands. Most of our engagements have been conducted electronically whenever possible. In fact, given the extraordinary and unpredictable nature of this battle, it has required me to seek, as with so many other companies, the Small Business Administration's (SBA) support and otherwise divert my time from employee morale and communication. We are fighting for our survival, preparing for the worst, and I am deeply concerned of a protracted "lock-down" due to the novel coronavirus.

Again, given this unusual circumstances, I would respectfully request a postponement of the election process until the workplace returns to some semblance of normalcy. At that time I am sure the parties can agree upon an appropriate time line to resume and conclude the process.

I would hope that the NLRB could appreciate the legitimate concerns of my company including its many employee owners who have not really had a chance to be aware of this situation. I will be available 24 hours a day on my mobile to answer or assist any who need information about our company's unique circumstances. Please do not hesitate to reach out to me directly on my personal mobile - 619-507-0100.

Thank you for the NLRB's consideration and courtesy.

Sincerely,

Bryan

Bryan B. Min
Founder & CEO
Epsilon Systems Solutions, Inc.
www.epsilon-systems.com
619-702-1700 x101



Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

This email has been scanned for viruses and malware, and may have been automatically archived by **Mimecast Ltd**, an innovator in Software as a Service (SaaS) for business. Providing a **safer** and **more useful** place for your human generated data. Specializing in; Security, archiving and compliance. To find out more [Click Here](#).

This email communication may contain CONFIDENTIAL INFORMATION WHICH ALSO MAY BE LEGALLY PRIVILEGED and is intended only for the use of the intended recipients identified above. If you are not the intended recipient of this communication, you are hereby notified that any unauthorized review, use, dissemination, distribution, downloading, or copying of this communication is strictly prohibited. If you are not the intended recipient and have received this communication in error, please immediately notify us by reply email, delete the communication and destroy all copies.

GORDON REES SCULLY MANSUKHANI, LLP

YOUR 50 STATE PARTNER®

<http://www.grsm.com>

Case Name: Epsilon System Solutions, Inc.

Case: 21-RC-257595

CERTIFICATE OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which the within-mentioned service occurred; and that I am not a party to the subject cause. My business address is 101 West Broadway, Suite 2000, San Diego, California 92101.

On May 4, 2020, I served the following document(s):

Offer of Proof in Support of Epsilon Systems Solutions, Inc.'s Objections

by placing a copy thereof for each addressee named hereafter and addressed as follows:

National Labor Relations Board
William B. Cowen
william.cowen@nlrb.gov

Moises Ruiz Marquez
Moises.RuizMarquez@nlrb.gov

Nathan Siedman
Nathan.Seidman@nlrb.gov

(xx) BY EMAIL OR ELECTRONIC TRANSMISSION. I caused a copy of said document(s) to be electronically sent to the email addressee(s) above.. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**Pursuant to Board Regulations, the above document is not being served on opposing counsel.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 4, 2020.



Elisa Martinez

EXHIBIT C

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

EPSILON SYSTEM SOLUTIONS, INC.

Employer

and

Case 21-RC-257595

**INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
DISTRICT LODGE 725, AFL-CIO**

Petitioner

**DECISION ON OBJECTIONS
AND CERTIFICATION OF REPRESENTATIVE**

For the reasons set forth in this decision, Epsilon System Solutions, Inc.'s (Employer) objections are overruled and International Association of Machinists & Aerospace Workers, District Lodge 725, AFL-CIO (Petitioner or Union) is certified as the collective-bargaining representative of the appropriate bargaining unit.

Based on a petition filed on March 6, 2020, the Petitioner sought to represent certain employees of the Employer at its facility located at Naval Air Station (NAS) Island, Building 24, in Coronado, California (Coronado facility). The parties entered into a Stipulated Election Agreement (Agreement), which was signed by the Employer and the Petitioner on March 13, 2020 and approved by the undersigned on March 16, 2020.

Pursuant to the Agreement, the election was conducted by mail. The parties agreed that the ballots would be mailed to employees employed in the appropriate collective-bargaining unit at 2:30 p.m. on April 6, 2020, and the mail ballots would be commingled and counted at the Region 21 San Diego Resident Office at 2:30 p.m. on April 20, 2020.

The stipulated voting unit consisted of:

Included: All full-time and regular part-time hoist-technicians employed by the Employer at its facility currently located at Naval Air Station (NAS) North Island, Building 42, Coronado, California.

Excluded: All other employees, office clerical employees, professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the [National Labor Relations] Act.

The tally of ballots prepared following the conclusion of the election showed that of the approximately 4 eligible voters, 4 votes were cast for the Petitioner, and 0 votes were cast against the Petitioner. There were no challenged ballots.

The Objections

On April 27, 2020, the Employer filed objections to the conduct of the election. The Employer requested a 7-day extension to file its offer of proof in support of the objections, which was granted, and the Employer timely filed its offer of proof on May 4, 2020.

The Employer's objections contend that the Region should not have permitted the mail-ballot election to proceed on April 6, 2020, and that a new election should be conducted to allow the Employer a full and fair opportunity to provide information to its employees regarding the Employer's position on unionization before the employees cast their ballots. The Employer argues that it was prevented from providing its position to employees based on reasons beyond its control, including: (1) the Employer was focused on its response to the Coronavirus disease 2019 (COVID-19) pandemic and was unable to meet with employees because of the State of California's "stay-at-home" order; and (2) the Employer received conflicting information from Region 21 staff regarding whether the election would be postponed because of a temporary suspension by the National Labor Relations Board of all Board-conducted elections in response to COVID-19.¹

In support of its objections, the Employer would present Founder and Chief Executive Officer (CEO) Bryan Min, Program Manager Brant Robinson, Vice President and Professional Services Group Manager John Riley, Director of Human Resources Janece Tanaka, Outside Counsel for the Employer Jim McMullen, and Former Outside Counsel for the Employer Joseph Sbuttoni.

CEO Min would testify that on about March 9, 2020, he was informed that the Employer was served with the Union's petition. Min would further testify that on March 11, 2020, the Employer established a COVID-19 task force, and that about 1 week later, when the State of California issued a stay-at-home order due to the COVID-19 pandemic, the Employer determined which of its approximately 1,190 employees were considered "essential" workers that would be required to work on-site.² The Employer determined that its employees at the Coronado facility were "essential" and were required to work on-site. CEO Min would further testify that between March 16, 2020 through April 3, 2020, the Employer was made aware of about 80 "instances" among its employees related to COVID-19, which required research to

¹ The Employer's objections are attached in full as Exhibit 1.

² Governor Gavin Newsom of the State of California issued a "stay-at-home" order in response to COVID-19 on March 19, 2020. Office of Governor Gavin Newsome, "Governor Gavin Newsome Issues Stay at Home Order" (Executive Order N-33-20) (March 19, 2020), accessible at <https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/> (last visited on May 18, 2020). The stay-at-home order instructs individuals to stay at home or at their place of residence except as needed to maintain continuity of operations at certain critical infrastructure sectors, and to practice social distancing should people need to leave their homes or places of residence to access necessities or otherwise facilitate authorized necessary activities.

determine the best course of action.³ Min would testify that as a result, he spent a majority of his time and attention ensuring the safety and well-being of employees and complying with Navy and other customers' requirements, instead of the upcoming union-representation election. Min would also testify that he deferred to Vice President Riley and his team to handle communicating with the hoist-technicians leading up to the election. Min later learned that the Employer was only able to conduct one face-to-face meeting with the hoist-technicians on March 23, 2020, and that Vice President Riley did not attend the meeting due to health-related concerns. On April 5, 2020, Outside Counsel McMullen forwarded an e-mail from Min to the Region requesting that the election be postponed. The Region denied Min's request.

Program Manager Robinson would testify that on March 13, 2020, he began working remotely because of family-related reasons related to San Diego school closures. Robinson would testify that he met with the hoist-technicians on-site at the Coronado facility on March 23, 2020. Robinson would testify that at that meeting, he perceived that he was not well received by the hoist-technicians because they sat mostly silent, instead of engaging in a back-and-forth. Robinson would testify that he did not have another opportunity to engage in further face-to-face discussions with the hoist-technician employees regarding the union-representation election.

Vice President Riley would testify that due to personal health-related concerns, he began working remotely, and that Program Manager Robinson therefore met with the hoist-technicians, but that Riley would have otherwise met with them himself.⁴ Riley would further testify that had learned "after the fact" that the biggest issue with respect to the union-representation election concerned prevailing wage law and the general labor standards under which the hoist-technicians were working. Riley would testify that had he known of this issue, he could have provided insight to the employees but never had such an opportunity. According to the Employer, communications were made further difficult because the hoist-technicians are traditional laborers working on-site in a shop, and as such, they did not have constant access to electronic communications such as e-mail or text messages as they were not sitting in front of a computer all day.

Director Tanaka would testify that on March 11, 2020, she received a phone call from a Board agent who explained that a petition had been filed regarding the Employer's hoist-technicians, but that it was discovered that the petition itself was served on the Employer's HR employee that was out on extended leave. Tanaka would testify that the HR employee's out-of-office message indicated that any information sent to her should be forwarded to the Employer's general HR e-mail, but that the Employer's HR never received such an e-mail from the Board or the Union. The Board agent forwarded Tanaka a copy of the petition on March 11, 2020. Tanaka would further testify that on March 12, 2020, the Employer's professional services group management team and its HR department met to discuss how to handle the proposed election, and due to the limited access that the Employer had to the Coronado facility, the Employer proposed that the election be conducted through mail ballots, with the ballots sent on April 6, 2020. Tanaka would also testify that leading up to the date on which the ballots were to be mailed, the Employer was required to comply with daily COVID-19 reporting by the Naval Sea

³ The Employer's offer of proof does not describe the specifics of these "instances."

⁴ The Employer's offer of proof does not specify when Riley began working remotely.

Systems Command Southwest Maintenance Center. These requirements were updated on March 19, 2020, and the requirements changed on an almost daily basis thereafter.⁵ Director Tanaka would further testify that all of management's time and attention was focused on meeting its customer's needs, and also the needs of its employees and families, related to unemployment, disability, and wage-replacement programs.

Outside Counsel McMullen would testify that he was retained by the Employer as counsel for the present matter on March 11, 2020. He would testify regarding the Board's March 19, 2020 approval of a temporary suspension of all representation petitions, including mail ballot elections, for 2 weeks, through and including April 3, 2020. McMullen would testify that on March 30, 2020, the Assistant to the Regional Director (ARD) for Region 21 called him and stated that the traditional *Guardsmark* letter would be sent out shortly but that he believed that the election would likely be postponed in light of COVID-19.⁶ McMullen would testify that he advised the ARD in response that the Employer had no access to the bulletin board at the Coronado facility on which to post the election notice, but that Former Outside Counsel Sbuttoni and the Board agent had agreed to an e-mail notice. The ARD advised McMullen to post the notice at the Employer's home office in addition to forwarding the notice by e-mail to the hoist-technicians. On April 1, 2020, the Board issued a notice that it would not further extend its temporary suspension of representation elections, and that it would resume conducting elections beginning April 6, 2020. McMullen would testify that on April 2, 2020, the ARD informed him that he believed the election would likely be postponed as the Board had not issued guidance as to how to administer elections during the COVID-19 pandemic. McMullen would further testify that he was advised by the Region on April 3, 2020 that the Region still did not have such guidance. McMullen reported these conversations to the Employer. On April 5, 2020, McMullen forwarded the ARD a copy of the above-referenced e-mail written by CEO Min, and that McMullen had also called the Region to argue that the above-described communications with the Region prejudiced the Employer. McMullen would testify that on April 6, 2020, he received an e-mail from the ARD stating that the Region determined that there was no basis to postpone the election, and that the election would go forward pursuant to the parties' Stipulated Election Agreement. McMullen would further testify that on April 20, 2020, the ballot count was conducted by FaceTime video, rather than in-person.

Former Outside Counsel Sbuttoni would provide testimony corroborating McMullen's characterization of the communications between the Region and counsel for the Employer.

Analysis

The Board has held that conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election, even though such conduct may not constitute an unfair labor practice. *General Shoe Corp.*, 77 NLRB 124, 126 (1948). In analyzing such conduct, the Board examines whether the "surrounding conditions enable[d] employees to

⁵ The Employer's offer of proof does not specify when such requirements were initially instituted, or whether March 19, 2020 was the first day such requirements were in place.

⁶ *Guardsmark, LLC*, 363 NLRB No. 103 (2016).

register a free and untrammelled choice for or against a bargaining representative.” *General Shoe*, 77 NLRB at 126. As the Board stated in *General Shoe*:

In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe, 77 NLRB at 126.

However, a hearing on objections is held only when there are substantial and material issues of fact. *Care Enterprises, Inc.*, 306 NLRB 491, 491 fn. 2 (1992). The burden is on the objecting party to provide evidence that the election should be set aside. *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982); *Consumers Energy Co.*, 337 NLRB 752, 752 (2002). An employer’s evidence must establish a prima facie case in support of its objections. *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992).

Furthermore, it is well settled that “[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citations omitted). Therefore, “the burden of proof on the parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania, Inc.*, 360 NLRB 637, 637 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enf. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden, the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997).

In the present case, the Employer primarily objects to the conduct of the election on the basis that it allegedly did not have a full and fair opportunity to meet with the hoist-technicians, as it was preoccupied by its own response to COVID-19. This objection is not based on alleged conduct of the Union or the Union’s agents. Rather, it appears that the Employer’s complaint is grounded in the unique circumstances of the COVID-19 pandemic, including the State of California’s stay-at-home order and the resulting limitations placed on the Employer’s ability to meet with its own employees. Since the conduct of Union or its agents are not in question, these objections are analogous to objections cases based on third-party conduct.⁷ See *Independence Residences, Inc.*, 355 NLRB 724, 728 (2010) (internal citations omitted). In evaluating non-

⁷ To the extent that the Employer argues that it is entitled to a specific qualitative amount of communication with its employees, it cites no supporting precedent for this curious proposition. In any event, as discussed *infra*, the Employer engaged in significant interaction with its employees regarding the election. Its argument that it has an absolute right to more is rejected.

party conduct, the standard is “whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.” *Independence Residences*, 355 NLRB at 729 (citing *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills, Inc.*, 227 NLRB 57, 58 (1976)). The Board has applied this third-party standard to objections based on the actions of public officials. *Independence Residences*, 355 NLRB at 729 (citing *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765, 767 (1958); *Hill v. Florida*, 325 U.S. 538 (1945)). This heightened standard based on third-party conduct “reflects a recognition of the unfairness of saddling parties with the consequences of conduct over which they had no control.” *Independence Residences*, 335 NLRB at 729.

Here, CEO Min would testify that he was primarily engaged in the Employer’s response to COVID-19 and was forced to devote a majority of his time to that response. However, Min delegated responsibility to the professional services group management team headed by Vice President Riley to communicate the Employer’s views on unionization to the hoist-technicians. The Employer failed to specify the date that Riley began working remotely and was unable to meet with the hoist-technicians in person. Even if Riley was unable to meet with the hoist-technicians during the entire 4-week period between March 9, 2020, the date that CEO Min became aware that the petition was filed, and April 6, 2020, the date the ballots were mailed out, the Employer nevertheless conducted a meeting with the hoist-technicians regarding the Employer’s position on unionization on March 23, 2020. Program Manager Robinson was able to conduct this meeting in-person, although he began working remotely starting on March 13, 2020, 10 days prior to the meeting. The Employer fails to explain how Robinson or other Employer representatives were prevented from conducting additional in-person meetings had the Employer chosen to do so, given that the hoist-technicians continued to work on-site. The Employer also fails to explain how limited access to the facility by the Employer because the facility belongs to the United States Navy is any different under the State of California’s stay-at-home order. In addition, although the Employer argues that e-mail communications were difficult because the hoist-technicians do not primarily work in an office setting in front of a computer, this would be the case regardless of the State of California’s stay-at-home order. Furthermore, there is no indication whether the Employer took advantage of e-mail or telephonic communications during the election campaign at all. The Employer has thus failed to present substantial and material evidence of fact to warrant setting aside the election.

The Employer further argues that it was unable to effectively communicate its position on unionization during Program Manager Robinson’s March 23, 2020 meeting with the hoist-technicians because Robinson believed he was not well received. Simply because the employees appeared unreceptive to the Employer’s views on unionization does not serve as a basis to set aside the election, and the employees’ apparent response is unrelated to the conduct of the Union or any third party, including the State of California. In addition, although the Employer argues that Vice President Riley did not learn until “after the fact” of an issue affecting the hoist-technician employees, there is no indication that Riley would have learned of this issue had he met face-to-face with employees rather than with other forms of communication. The Employer also had a period of at least 4 weeks during which the Employer representatives could learn of and discuss issues surrounding the unionization effort with its employees, and Robinson did meet with the employees in person. There is no basis for overturning the election on the basis that

Riley hypothetically could have learned of an issue affecting employees in order to influence their decision, which was unanimous in favor of representation.

The Employer also objects to the conduct of the election on the basis that the Employer received communications from Region 21 staff that the election could be postponed due to the Board's temporary suspension of Board-conducted elections from March 19, 2020 through April 3, 2020. Where conduct is attributable to a Board agent, the question is whether "the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970); see also *Durham School Services, LP*, 360 NLRB 851, 853 (2014), *enfd.* 821 F.3d 52 (D.C. Cir. 2016). Even assuming that Board agents communicated the possibility that election could be postponed, the fact that the election was not postponed does not serve as a sufficient basis to invalidate the results of the election. The Employer voluntarily entered into the Stipulated Election Agreement for a mail-ballot election, with the ballots to be mailed out on April 6, 2020. Thus, the Employer was well aware of the timeline for the mail ballot election and of the possibility that the election would proceed as scheduled. Furthermore, the Employer had the opportunity to prepare, meet with, and communicate with employees for a period of at least 4 weeks, between March 9, 2020 and April 6, 2020. Thus, even assuming that the Region communicated to the Employer that there was a possibility that the election would be postponed, the fact that the election was not in fact postponed did not disrupt the requisite laboratory conditions for the election to proceed.

Accordingly, for the reasons set forth above, a hearing is not warranted on the Employer's objections and the objections are overruled.

Conclusion

For the reasons set forth above, the Employer's objections are overruled in their entirety, and I find that the following Certification of Representative should issue:

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots has been cast for International Association of Machinists & Aerospace Workers, District Lodge 725, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time hoist-technicians employed by the Employer at its facility currently located at Naval Air Station (NAS) North Island, Building 42, Coronado, California.

Excluded: All other employees, office clerical employees, professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **June 5, 2020**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile.⁸ To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: May 22, 2020



William B. Cowen, Regional Director
National Labor Relations Board, Region 21
312 North Spring Street, 10th Floor
Los Angeles, CA 90012

⁸ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with unfair labor practice or representation cases processed in Regional offices. While the E-filing requirement went into immediate effect on October 21, 2019, a 90-day grace period was put into place. Therefore, parties have until January 21, 2020 to take any necessary measures to enable them to comply with the E-filing mandate. Parties who do not have necessary access to the Agency's E-filing system may provide a statement explaining the circumstances, or why requiring them to e-file would impose an undue burden.

Case Name: Epsilon System Solutions, Inc.

Case: 21-RC-257595

CERTIFICATE OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which the within-mentioned service occurred; and that I am not a party to the subject cause. My business address is 101 West Broadway, Suite 2000, San Diego, California 92101.

On June 11, 2020, I served the following document(s):

Employer's Request for Review of the Regional Director's Decision

by placing a copy thereof for each addressee named hereafter and addressed as follows:

National Labor Relations Board
William B. Cowen
william.cowen@nlrb.gov

Moises Ruiz Marquez
Moises.RuizMarquez@nlrb.gov

Caren Sencer
csencer@unioncounsel.net

Nathan Siedman
Nathan.Seidman@nlrb.gov

(xx) **BY EMAIL OR ELECTRONIC TRANSMISSION.** I caused a copy of said document(s) to be electronically sent to the email addressee(s) above.. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 11, 2020.



Elisa Martinez