

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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DH LONG POINT MANAGEMENT LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE LOCAL 11

Intervenor

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)  
)  
)  
) Nos. 20-1030  
) 20-1096

)  
) Board Case No.  
) 31-CA-226377

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD  
TO LODGE WITH THE COURT THE COMPANY’S  
BRIEF IN SUPPORT OF ITS EXCEPTIONS**

To the Honorable, the Judges of the United States  
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, by its Assistant General Counsel, respectfully requests permission to lodge with the Court the brief that DH Long Point Management LLC (“the Company”) filed with the Board in support of its exceptions to the decision of the administrative law judge. In support of its motion, the Board shows:

1. As discussed in the Board’s brief (NLRB Br. 41-43, 53), the Company advances certain arguments in its opening brief to the Court that are jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. §160(e), because the

Company failed to raise them before the Board in its exceptions to the administrative law judge's decision or in its supporting brief.

2. The record in a Board case includes exceptions to a judge's decision but does not include briefs in support of such exceptions. *See* 29 C.F.R. § 102.45(b).<sup>\*</sup> The Board's normal practice in cases where a party's supporting brief or other filings may prove helpful to the Court is to recommend that the Court permit them to be lodged separately from the formal record.

For the foregoing reasons, the Board requests that the Court grant its motion to lodge with the Court the Company's brief in support of its exceptions to the decision of the administrative law judge (Attachment).

/s/ David Habenstreit

David Habenstreit  
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Dated at Washington, DC  
this 24th day of August 2020

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<sup>\*</sup> That section provides that the record before the Board consists of: "The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in [section] 102.46." 29 C.F.R. § 102.45(b).

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Nos. 20-1030  
20-1096

Board Case No.  
31-CA-226377

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 408 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365.

/s/ David Habenstreit

David Habenstreit

Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street SE

Washington, DC 20570-0001

(202) 273-2960

Dated at Washington, DC  
this 24th day of August 2020

# **ATTACHMENT**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

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|                               |                         |
|-------------------------------|-------------------------|
| <b>In the Matter of:</b>      | X                       |
|                               | :                       |
| DH LONG POINT MANAGEMENT LLC, | :                       |
|                               | :                       |
| Respondent,                   | : Case No. 31-CA-226377 |
|                               | :                       |
| - and -                       | :                       |
|                               | :                       |
| UNITE HERE LOCAL 11,          | :                       |
| Charging Party.               | :                       |
|                               | X                       |

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**RESPONDENT DH LONG POINT MANAGEMENT LLC’S BRIEF IN SUPPORT OF  
ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

July 19, 2019

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## **I. INTRODUCTION**

Administrative Law Judge Jeffrey D. Wedekind's ("ALJ") Decision and Recommended Order (the "Decision") in this case is based on select and exaggerated tidbits of evidence that the General Counsel ("GC") and Unite Here Local 11 (the "Union" or "Charging Party") offered in support of the GC's allegations versus the totality of the record evidence and caselaw. The GC claims that DH Long Point Management LLC, the employer at the Terranea Resort ("Terranea", "Resort", "Hotel", or "Respondent"), violated the National Labor Relations Act (the "Act") when it "set up" Junior (Jr.) Sous Chef Freddy Lovato ("Lovato") for termination with a Final Warning issued almost eight months after the Union started a public organizing campaign, and subsequently acted on its illicit plot a few months later when it terminated Lovato's employment. However, a proper review of the record reveals this case to be a classic example of the GC and Charging Party attempting to use an alleged discriminatee's union activism as a shield to protect against legitimate discipline.

As a threshold matter, the ALJ cast aside overwhelming evidence showing that Lovato was a 2(11) Supervisor not subject to the Act's protections. The Resort has eight different restaurant (including In-Room Dining) kitchens and a separate banqueting kitchen. Jr. Sous Chefs routinely oversee and direct cooks and interns working under their direction. Jr. Sous Chefs are frequently the most senior chef in the kitchen responsible to ensure that their respective kitchens are functioning efficiently and preparing food to meet guest expectations.

Lovato was a Jr. Sous Chef in the Resort's In-Room Dining ("IRD") kitchen. Since being promoted to a Jr. Sous Chef in 2012, Lovato's managers repeatedly criticized his leadership skills and his failure to direct and guide kitchen staff working under his supervision. In May 2018, Lovato's immediate supervisor, Mona Guerrero (Guerrero), issued him a Performance Improvement Plan ("PIP") largely focused on his inadequacies as a manager.

These same deficiencies resulted in a disorganized night of service in July. As a result, Guerrero issued Lovato a Note to File warning that future discipline could ensue if the team working under Lovato's direction continued to provide inferior service.

Three Jr. Sous Chefs repeatedly testified to their supervisory authority. Yet, the ALJ cast aside their testimony and corroborating evidence in favor of an incomplete analysis of the record and wrong construction of long-held precedent. Accordingly, the Board should overturn the ALJ and deem Lovato was a 2(11) Supervisor excluded from the Act's protections.

Assuming *arguendo* that Lovato was not a 2(11) supervisor, the GC cannot meet its *prima facie* case that the Resort disciplined Lovato because of his allegiances to the Union. The ALJ's finding otherwise ignores unequivocal evidence demonstrating that the Resort did not harbor any animus and that there was no connection whatsoever to the discipline at issue and Lovato's purportedly protected conduct. As such, the Decision should be reversed, and the Complaint dismissed in its entirety.

## **II. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

### **a. Terranea Resort's Culinary Operation**

Terranea is a luxury oceanfront resort. Chef Bernard Ibarra (Ibarra) is the Resort's Vice President of Culinary Experience and Executive Chef. (Tr. 595:4-6.)<sup>2</sup> Ibarra has over thirty years of culinary experience, including being the executive chef and sous chef for over ten years at hotels where employees had union representation. (Tr. 595:22-596:14.) The Resort consists of nine different food outlets: Mar'sel, Nelsons, Bashi, Catalina Kitchen, Solviva, the Grill, Cielo Point, Sea Beans, and the Lobby Bar. (Tr. 596:17-597:6.) The Resort also provides IRD

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<sup>1</sup> All dates refer to dates in 2018 unless indicated otherwise.

<sup>2</sup> References to the hearing transcript are made as ("Tr. Page Number: Line Numbers"). References to Respondent's post-hearing brief dated May 23, 2019 are made as ("Respondent's Br. at Page Number").

services and hosts banqueting functions. (Tr. 596:17-597:1; 598:13-24.) The restaurants vary based on their menu offerings and overall guest experience. (Tr. 597:14-25.) For example, Mar'sel provides fine dining while Nelson's offers a more casual, sports bar experience with an ocean front view. (Tr. 366:22-25; 597:16-25.) The Resort's IRD services and Lobby bar share a kitchen, while the remaining eight outlets and banqueting have their own dedicated kitchens. (Tr. 597:10-13; 733:20-23.)

Each kitchen contains the following hierarchy of classifications from top to bottom: Chef De Cuisine, Sous Chef, Jr. Sous Chef, Cook I, Cook II, Cook III, Intern, and Kitchen Helper. (Tr. 599:4-23.) (R-14-18.)<sup>3</sup> A kitchen's business volume dictates its staffing levels. (Tr. 598:1-7.) Upon being hired, all cooks and chefs are trained on recipes and receive access to a recipe book. (Tr. 598:1-7; 612:21-613:8; 768:24-769:7.) The Resort commonly promotes cooks to openings in any one of its kitchens. (Tr. 719:17-20) (Ibarra testifying that he has promoted Jr. Sous Chefs to Sous Chefs); (Tr. 822:6-12) (Guerrero explaining "It's typical in our resort . . . if another kitchen has a position open that was higher, like we would suggest such people.")

**b. Terranea's In-Room Dining Kitchen**

The Hotel's IRD kitchen is open 24 hours a day and 7 days a week and serves both lobby bar patrons and IRD meals. (Tr. 33:9-10; 33:24-34:2; 597:2-6; 598:23-24; 733:20-23.) Chef Mona Guerrero (Guerrero) has been the IRD kitchen's Chef De Cuisine since approximately the end of 2017. (Tr. 727:19-728:4.) She was previously both the Sous Chef and Chef De Cuisine at Nelsons. (Tr. 728:3-6; 803:4-6.) Chef Efren Ruan (Ruan) is the Sous Chef and Chef Josie (Josie) is the Jr. Sous Chef. (Tr. 603:21-23; 604:1-4.) Chef Josie was previously a Cook I. (Tr.

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<sup>3</sup> References to Respondent's exhibits are made as "R-[Exhibit Number]," references to Charging Party's exhibits are made as "CP-[Exhibit Number]," references to General Counsel's exhibits are made as "GC-[Exhibit Number]," and references to Joint Exhibits are made as "JX-[Exhibit Number]."

734:13-14.) (R-23.) The Resort promoted Chef Josie to Jr. Sous Chef upon Lovato's separation of employment. (Tr. 604:1-10.) The IRD Kitchen has only one Jr. Sous Chef. (Tr. 33:18-23.)

(R-3.) During 2018, Guerrero and Ruan typically worked the following schedules:

Guerrero

- 9:00 am to 7:00 pm Fridays through Sundays;
- Noon-9:00 pm on Wednesdays; and
- 10:00 am to 8:00 pm on Thursdays.

Ruan

- Noon to 10:00 pm Fridays through Sunday
- 10:00 am to 9:00 pm Mondays and Tuesday.

(Tr. 163:3-6.) (R-3.)

Ruan and Guerrero are away from the kitchen 20%-30% of the time performing tasks such as writing menus and reviewing inventory. (Tr. 36:14-16; 76:24-77:1; 605:13-606:9.)

During those times, the Jr. Sous Chef is in charge. (Tr. 606:18-21; 607:13-23.)

The IRD kitchen has three sections: the cold side, the fryer, and the hot side. (Tr. 741:23-742:3.) Cooks prepare pizza and salads on the cold side and meats, pastas, and vegetables on the hot side. (Tr. 37:1-8; 741:16-22.) New or less experienced cooks typically begin on the cold side. (Tr. 741:16-22.) The kitchen generally staffs approximately three cooks for the breakfast shift, four for the lunch shift, six to ten for the dinner shift, and one to two for the overnight shift. (Tr. 33:3-6.) Jr. Sous Chefs and cooks work 8.5-hour shifts. (Tr. 33:14-15; 159:9-22.) (GC-9; R-5.) Shifts generally begin at 3:00 am, 6:00 am, 11:00 am, 2:00 pm, 4:00 pm or 5:00 pm. (GC-9; R-5; R-30.)

An order taker receives guest orders and transmits the ticket to the kitchen. (Tr. 291:18-292:12; 747:1-11.) The order taker sits in the IRD office, which is about 18 feet from the kitchen and is open to the entire IRD kitchen staff, including the cooks. (Tr. 612:6-20.) A chart is posted in the IRD office showing which dishes contain nuts, garlic, shellfish, gluten dairy, sesame, egg or alcohol. (Tr. 610:21-611:16.) (R-19.) The chart identifies these ingredients because they are most commonly associated with allergies. (Tr. 611:23-612:5.) (R-19.)

A cook will prepare an order and place it on the window (*i.e.*, shelf) for the server to pick up. (Tr. 38:15-18; 39:22-39:11.) If a Chef De Cuisine or Sous Chef is in the kitchen, he/she will sometimes function as an expeditor by standing on the other side of the window to ensure dishes are prepared correctly. (Tr. 38:23-39:18.) As described *infra*, Jr. Sous Chefs often work as the expeditors in all of the kitchens. This is particularly true in the IRD kitchen where an expeditor is not frequently needed because of the simplicity of the dishes. (Tr. 668:14-669:7; 803:22-804:1) (Guerrero testifying she works as the expeditor approximately once or twice per week.) The kitchen staff is responsible for communicating any special instructions about a dish to the server. (Tr. 669:23-670:4; 801:21-802:13.)

**c. The Jr. Sous Chef's Managerial Functions**

The Chef De Cuisine, Sous Chef, and Jr. Sous Chef constitute a kitchen's "trio of management." (Tr. 730:12-20; 733:24-734:8.) (R-3, R-22.) Cooks recognize Jr. Sous Chefs as their managers. (Tr. 249:19-25; 285:23-286:2.) The new hire rate for Jr. Sous Chefs is \$2.00 per hour more than that of a Cook I. (Tr. 841:6-25.) Jr. Sous Chefs have company email addresses. (Tr. 656:12-13.) They wear black pants and have their names embroidered on their uniforms. (Tr. 655:13-656:3.) In contrast, cooks do not have company email addresses and wear uniforms with a name tag. (Tr. 656:4-18.)

Jr. Sous Chefs supervise and coordinate the activities of cooks working under their direction. (Tr. 604:25-605:6; 606-609.) (R-14.) They are evaluated in part on their ability to lead and delegate cooks working under their supervision. (Tr. 178-10:18.) (GC-3 at 4; GC-5 at 2; R-8 at 2; R-9 at 2; R-10 at 2, 4.) In describing the role of Jr. Sous Chefs, Guerrero explained:

You [are] an extension of the other two managers. . . . So by being an extension of myself or Efren, you know, the junior sous chef is expected to lead the team.

(Tr. 738:14-18.) Ibarra explained that Jr. Sous Chefs must have “the ability to make a decision on the fly” to satisfy guest expectations. (Tr. 719:2-10.) For example, Jr. Sous Chefs’ responsibilities include:

- Inspecting the work of employees (Tr. 56:9-10)
- Monitoring the cooking line to ensure dishes have the right presentation and that orders are delivered in a timely fashion (Tr. 609:4-610:15; 717:24-719:10)
- Ensuring all cooks are “ready prepared to – for lunch or dinner, mak[ing] sure that we have everything to start . . .” (Tr. 367:15-19 (Pablo Noh (Noh) describing his duties as a Jr. Sous Chef));
- Functioning as the expeditor (Tr. 134:1:17 (Lovato affirming he expedited); 371:10-12 (Noh testifying he functioned as the expeditor 70% of the time); 452:20-453:16 (Santos explaining that he performed the duties of an expeditor));
- Directing cooks on how to prepare dishes and redoing orders prepared incorrectly. (Tr. 380:12-23; 453:6-16; 606:14-607:12) (R-14);
- Delegating and taking control of the kitchen (GC-5 at 2; R-6);
- Training and monitoring the progress of Interns (Tr. 607:3-12) (R-22);
- Deciding to send cooks home early based on business volume (Tr. 191:18-193:1) (R-4 at 8 (citing 30:10-31:8));
- Holding cooks accountable if service falls behind (Tr. 731:7-12); and
- Reorganizing the cooking line to better fit service needs (Tr. 777:24-778:6; 797:16-798:3).

The primary distinguishing characteristic separating a Jr. Sous Chef from a Cook I is that a Jr. Sous Chef is accountable for the functioning of the line. (Tr. 609:10-25.) Jr. Sous Chefs are expected to keep an eye on all stations and train and coach lower ranked cooks whereas Cook Is are not expected to demonstrate the same level of initiative in managing and coordinating the cooking team. (Tr. 720:16-24; 738:2-22.) As a result, Cook Is must exhibit certain requisite leadership skills before they can qualify for a promotion to a Jr. Sous Chef. (Tr. 738:2-5; 822:13-19.)

**d. Lovato Was an Inadequate Supervisor**

Lovato applied to work at the Resort after a seven-year stint as the sous chef at Elephant Walk Restaurant – “one of the best French restaurants in Boston” – where he was responsible for supervising a staff of twenty-four cooks. (Tr. 151:1-7.) (R-1.) Lovato was hired as a Cook II in Catalina Kitchen in May 2009 and was promoted to Cook I in March 2010. (R-33 -34.) A few months later, Lovato received a second promotion to Jr. Sous Chef. (R-35.) In March 2012, Lovato was transferred into the IRD kitchen in the same role. (R-36.) Thereafter, Lovato applied for, but was not granted an interview for, a Sous Chef position. (Tr. 47:12-15.)

Lovato typically worked a 2:00 pm-10:30 pm shift on Wednesday through Sunday of each week. (Tr. 33:14-15.) (GC-9, R-3, R-5.) He supervised anywhere from 4-6 employees. (Tr. 188:9-17) (GC-9, R-4 at 2 citing 7:24-8:6.) Between 8:00 pm and 10:30 pm, Lovato would often be the only chef scheduled to oversee any one or combination of the following cooks:

- Angel (Cook II) – 4:00 pm to 12:30 pm shift on Tuesdays and Thursdays
- John (Intern) – 3:00 pm to 11:30 pm on Thursdays and Fridays
- Flamenco (Cook II) – 4:00 pm to 12:30 pm shift Thursdays through Sundays
- Jeannee (Cook III) – 3:00 pm to 11:30 pm Tuesdays through Friday

- Gian (Cook II) – 3:00 pm to 11:30 pm on Sundays and Wednesdays and 2:00 pm to 10:30 pm shift on Mondays and Tuesdays

(Tr. 155:23-161:13.) (GC-9; R-3, R-5.)

Lovato's performance evaluations show he was a subpar manager. In the very first review Lovato received as a Jr. Sous Chef, Lovato's supervisor, Chef Dave, told him to "make sure he did not let something go out" that was below the kitchen's standards when the Chef De Cuisine or Sous Chef were away from the kitchen. (GC-5 at 1.) Chef Dave instructed Lovato to improve on delegating and taking control of the kitchen. (*Id.* at 2.) However, Chef Dave's critique fell on deaf ears. In 2015, Lovato's subsequent supervisor, Chef Li, told Lovato to show more leadership and be more vocal. (GC-3 at 4.)

Guerrero observed the same deficiencies in Lovato's performance as her predecessors. Specifically, she observed Lovato lacked initiative to take ownership of the kitchen. (Tr. 728:25-729:4.) As a result, approximately five months into her tenure as the IRD kitchen's Chef De Cuisine, Guerrero reviewed a PIP with Lovato, the goal of which was to bring Lovato back into the "trio of management." (Tr. 730:7-20.) (R-22.) This meant *inter alia* holding the cooking staff on the line more accountable, helping to make sure the whole team was working together, and training and mentoring new cooks. (Tr. 731:7-20; 732:12-733:5.) (R-22.) At approximately the same time, Guerrero reviewed a performance plan with Josie, a Cook I, aimed towards grooming her to become a Jr. Sous Chef. (Tr. 736:11-737:2.) (R-23.)

The PIP did not remedy Lovato's performance deficiencies. In July, Guerrero gave Lovato a "Note to File" because he was largely responsible for a disorganized night of service. (Tr. 775:21-776:19.) (R-6, R-21.) The Note to File warned Lovato that he would face future

discipline absent improvement in leading, guiding, and supervising the IRD kitchen team. (Tr. 776:20-777:14.) (R-21.)

**e. The Union's Corporate Campaign**

On October 19, 2017, the Union launched a public campaign designed to pressure the Resort to sign a neutrality agreement. (Tr. 345:8-19.) It conducted a demonstration with approximately 100 people consisting of both employees and union activists. (Tr. 339:10-22.) The demonstrators assembled in the Resort's parking lot and held a press conference outside of the Resort's front entrance. (Tr. 58:9-25; 341:3-10; 342:3-23.) (CP-5.) A group of employees along with community and purported clergy members trespassed into Resort President Terri Haack's (Haack) office.<sup>4</sup> (Tr. 526:20-527:19.) Lovato, Frank Santos (Santos), Zach Anderson, Luis Manso, Antonio Rodriguez, and Rita Martinez were amongst the employees that stormed into Haack's office. (Tr. 526:20-527:19; 58:17-59:15.)

The campaign is ongoing. The Union has tried numerous vehicles to pressure the Resort such as encouraging employees to file lawsuits, asking customer groups to boycott the Resort, posting messages on wedding couples' registry websites, smearing the Resort to media outlets, promoting a pornographic video about Haack, and paying Santos to travel from Los Angeles to Pennsylvania to disparage the Resort to hotel investors. (Tr. 346:19-23; 347:10-12; 197:24-199:22; 400:8-23; 436:24-437:17; 505:18-507:6.) (CP-7-9.) Lovato was quoted in three different newspaper articles between October and December 2017. (Tr. 70:15-25.) (GC-11-14.)

The Union also drafted an ordinance (the "Ordinance") that, if enacted, would apply exclusively to the Resort and the Trump Golf Course. (Tr. 513:9-12.) (GC-15.) The Rancho Palos Verdes (RPV) City Attorney has titled the Ordinance "An initiative measure to adopt for

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<sup>4</sup> The clergy members are from an organization known as CLUE. (Tr. 350:11-21; 530:2-10.) CLUE and the Union's offices are in the same building. (Tr. 530:11-531:24.)

employees of large hotels . . . new regulations protections, and procedures concerning wages, hours, work, transit, panic buttons, responses to threatening conduct, and records.” (GC-15 at 1.) The Union asked RPV to place the Ordinance up for vote in 2018. (Tr. 197:3-20.) RPV denied this request, instead putting it on the 2019 ballot. (Tr. 197:3-20.) The Resort is opposed to the Ordinance. (GC-15.)

The Union has not filed a petition to represent the Resort’s employees. (Tr. 350:7-10.) In early 2018, the Hotel invited the Union to participate in an election under an expedited timeframe. (Tr. 345:20-346:1.) (CP-7.) The Union rejected this offer. (Tr. 346:10-13.)

**f. A Guest Has An Allergic Reaction To Pizza That Was Supposed To Be Gluten-Free. Four Days Later, Lovato Is Responsible For Poisoning A Guest (A Child) That Ordered Gluten-Free Macaroni And Cheese.<sup>5</sup>**

Resort guests frequently place food orders with special allergy requests. (Tr. 72:15-73:2.) In these instances, the order ticket will display the allergy annotation. (Tr. 668:6-11.) The cooks follow a set of procedures to keep the special-order segregated and safe from cross-contamination. (Tr. 620:1-13.) The Jr. Sous Chef is often responsible for directing and policing cooks to make sure they follow these protocols. (Tr. 376:5-23; 380:12-23.)

On the evening of May 19, a guest had an allergic reaction to pizza that was supposed to be gluten-free (the “Pizza Incident”).<sup>6</sup> (Tr. 618:5-619:14; 623:6-9; 751:17-20.) (JX-5, R-26.) Lovato was working when the kitchen received the gluten-free pizza order. (Tr. 754:1-2.) (R-5, R-25-26.) The Resort prepares gluten-free pizza with pre-packed, frozen dough made with a rice flour. (Tr. 210:5-14; 752:14-20.) As a result, Ibarra and Guerrero could not determine if a

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<sup>5</sup> Unless otherwise stated, the kitchen refers to the IRD kitchen.

<sup>6</sup> Flour contains gluten.

breach that resulted in the guest becoming ill occurred and did not recommend discipline. (Tr. 621:11-25; 751:24-752:20.)<sup>7</sup>

Ibarra though was very much concerned about a guest getting sick. (Tr. 619:15-20.) (JX-5.) He immediately instructed Guerrero and Ruan to emphasize during their daily pre-shift meetings with the kitchen staff procedures to follow to safeguard any special-orders. (Tr. 620:14-621:10.) In the ensuing days, Ibarra heard Guerrero and Ruan doing so. (Tr. 623:6-625:9.)

On the evening of May 25, a guest placed an IRD order for gluten-free macaroni and cheese. (R-24.) The IRD kitchen prepares gluten-free pasta with a different shape noodle than regular pasta. (Tr. 271:6-14.) Typical cheese sauce contains flour. (Tr. 212:8-25.) There is no special recipe for gluten-free cheese sauce. (Tr. 825:2-17.) Thus, gluten-free macaroni and cheese is usually served with either olive oil or butter. (Tr. 825:2-17.)

May 25 was not a particularly busy evening in the IRD kitchen. (Tr. 821:2-10.) As is often the case, Ruan and Guerrero were away from the kitchen and Lovato was the chef in charge. (Tr. 632:13-17; 745:4-22.) Lovato and Flamenco were working on the hot line about five to eight feet from each other. (Tr. 208:8-13; 741:10-15; 742:19-20; 743:19-21.) (R-5.) Lovato saw both the ticket and Flamenco make the macaroni and cheese.<sup>8</sup> (Tr. 208:14-19.) Flamenco placed the dish on the window for pick up. (Tr. 270:15-17.) The sauce was yellow just as ordinary cheese sauce would be. (Tr. 212:10-20.)

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<sup>7</sup> There was another reported incident on May 19 concerning a party of four which complained of suffering food poisoning following a Mother's Day brunch in Catalina Kitchen. This brunch served 600-700 people. Ibarra investigated the complaint and determined Catalina Kitchen was not responsible for the alleged food poisoning. (Tr. 627:25-629:12.) (GC-19.)

<sup>8</sup> Lovato claims to have seen Flamenco make the pasta, but incredibly could not recall seeing if Flamenco made the cheese sauce. (Tr. 208:14-19.)

Front of the house manager (*i.e.*, manager of the servers), Michael LaMay, informed Guerrero that a guest complained that their child had an allergic reaction to macaroni and cheese that was supposed to be gluten-free (the “Macaroni and Cheese Incident”). (Tr. 744:23-745:3.) Upon learning this, Guerrero reviewed the ticket and confirmed that the order was indeed supposed to be gluten-free. (Tr. 747:20-24.) (R-24.) She went to the hot line to ask Lovato and Flamenco what could have happened. (Tr. 748:18-749:13.) Lovato explained they used the right pasta and prepared it in a separate pot to avoid cross-contamination. (Tr. 748:18-749:13.) Guerrero questioned what could have caused the guest to become sick, and Lovato responded, “oh the cheese sauce.” (Tr. 748:18-749:13.) Flamenco never claimed that he made gluten-free sauce. (Tr. 643:6-8; 748:18-749:23.) (JX-4.) After learning that it was the cheese sauce that caused the guest to fall ill, Guerrero emailed Ibarra to explain what transpired. (JX-3 at 3.) Ibarra was shocked this could have happened so soon after the Pizza Incident. (Tr. 630:25-631:9.) (JX 3 at 2-3.) He asked, and Guerrero confirmed, that she reviewed allergy procedures during the pre-shift meeting. (Tr. 633:18-634:2.) (JX-3 at 2-3.)

On May 29, the first day after a long holiday weekend, Ibarra informed Anita Kwok (Kwok) – the Resort’s Chief Human Resources Officer – about the Macaroni and Cheese Incident. (JX-3 at 1.) He also sent Kwok the Manager on Duty Report which described the guest’s complaint, and his email correspondence with Guerrero regarding the matter. (Tr. 843:16-24.) (JX-3 at 1-4.)

Kwok prepared a written warning for both Flamenco and Lovato. (Tr. 842:23-25; 848:7-12.) (R-20 at 5-6.) However, because of Ibarra and Guerrero’s institutional knowledge regarding culinary matters, she left the final decision concerning the appropriate level of discipline to their discretion. (Tr. 845:10-846:3.) Guerrero and Ibarra determined that Lovato

should receive a final written warning (the “Final Warning”) because, as the chef in charge at the time, he was ultimately responsible for stopping Flamenco from placing the macaroni and cheese on the window for service. (Tr. 638:10-19; 640:21-641:13; 760:7-20.) As a Cook II, Flamenco did not have the same level of authority and accountability. (Tr. 638:20-639:3.) As a result, Guerrero and Ibarra decided to issue Flamenco a written warning. (Tr. 638:20-639:5.)

Guerrero and Ibarra delivered both the final and written warnings to Lovato and Flamenco. (Tr. 640:10-20; 642:11-25.) At no point during these meetings or anytime afterwards did either Lovato or Flamenco claim that they prepared gluten-free sauce. (Tr. 640:21-24; 643:6-8; 847:20-848:1; 849:1-3.) (JX-1; JX-4.)

**g. An Intern Receives A Verbal Warning And Lovato Is Not Disciplined Following A Third Allergy Incident.**

Approximately one month after the Macaroni and Cheese Incident, Colin Lindayao (“Lindayao”), an Intern in the IRD kitchen, placed pineapple on a plate despite the order ticket explicitly noting a pineapple allergy (the “Pineapple Incident”).<sup>9</sup> (R-29.) Guerrero was away from the kitchen while Lovato was working when this occurred. (Tr. 793:8-15; 794:2-14.) (R-30 (Lovato working a 2 pm - 10:30 pm shift); R-29 (order placed around 4:00 pm).)

Interns are fresh out of school. (Tr. 599:13-23.) As the internship program is designed to teach and develop them into successful cooks, Guerrero determined that a verbal warning was appropriate for Lindayao. (Tr. 792:2-9.) Lovato did not receive discipline in connection with the Pineapple Incident. (Tr. 794:2-20.)

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<sup>9</sup> The guest did not ingest the pineapple. (Tr. 791:4-21.)

**h. The Hotel Terminates Lovato For Being Insubordinate, Preparing to Serve Compromised Food to Guests, and Violating Health Code Standards.**

The IRD Kitchen uses pre-cooked chicken wings. (Tr. 648:6-649:6.) Cooks heat the wings in the fryer and toss them in sauce. (Tr. 648:6-649:6.)

On the evening of August 8, a lobby bar party ordered a large amount of chicken wings (the “Chicken Wing Incident”). (JX-2.) After receiving some wings made with buffalo sauce, the party requested that the kitchen use barbeque sauce instead. (Tr. 217:15-218:7.) Lovato had already tossed a second batch of wings with buffalo sauce upon learning that the guests changed the order. (Tr. 217:15-218:7.) (R-27.) Guerrero asked, and Lovato ignored her direction to make new wings. (Tr. 779::12-780:19; 782:2-24.) Instead, he tried to wash the wings off in water, apply barbecue sauce, and then refry the wings a second time. (Tr. 218:8-221-7.)

Guerrero was shocked. (R-27.) She testified:

I was pretty mortified and disgusted. This is something, first of all that is not a typical practice in my kitchen. I really haven’t seen anybody ever do it; it was pretty disgusting to me. Our break-out wings have a breading, a coating on it. And so the whole thought of just this water gushing over the wings and all of this breading just soaking into it and then a guest biting into it literally turned my stomach. It was just – it was disgusting.

(Tr. 780:3-24.)

Guerrero immediately told Lovato to “get rid” of the tainted wings and prepare new ones. (Tr. 780:3-24.) Later that evening, Guerrero found the washed wings stored uncovered and unlabeled in the walk-in cooler. (Tr. 783:3-784:1.) (R-28.) By leaving the wings unprotected and without a label, Lovato ignored Guerrero’s previous instruction to trash the wings, and further, breached health code standards. (Tr. 783:3-784:1.) (JX-2.)

Guerrero reported the incident to Ibarra who agreed that Lovato’s actions were unacceptable. (Tr. 648:6-649:6.) Lovato was operating on the Final Warning, had received multiple coachings for his sustained underperformance as a supervisor, and was now brazenly

compromising the integrity of a very basic dish while also being patently insubordinate. (JX-1, R-21- 22.) As such, Ibarra, Guerrero and Kwok consulted and unanimously agreed to terminate Lovato’s employment. (Tr. 650:4-24; 784:2-13; 850:9-851:5; 845:10-846:14.)

Ibarra and Guerrero delivered the termination notice to Lovato. (Tr. 651:24-652:10.) Lovato never denied any wrongdoing. (Tr. 652:11-13.)

**i. The Hearing and Decision (Exception No. 6)**

A hearing in this matter took place before the ALJ (the “Hearing”) between April 2, 2019 and April 5, 2019.<sup>10</sup> For the reasons cited to during the Hearing, the Resort excepts to the ALJ’s admission of several exhibits the GC and Union offered as evidence on relevancy grounds. (Exception No. 6.) (*See e.g.*, CP-3-4, 6, GC-15, GC-17.) (Tr. 105:18-110:8; 142:24-145:5; 418:20-422:19; 357:8-362:3.)

Following the Hearing, the ALJ issued the Decision on June 21, 2019, concluding, among other things, that the Final Warning and Lovato’s termination on August 13, 2018 violated Sections 8(a)(1) and 8(a)(3) of the Act. (Decision at 2.) As explained below, the Decision is not supported by a preponderance of the evidence. Accordingly, the Decision should be reversed, and the Complaint dismissed in its entirety.

**III. APPLICABLE LEGAL STANDARDS**

**a. Supervisor Standard**

The Act excludes from its definition of “employee” any individual employed as a supervisor. 29 U.S.C. § 152(3). Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or *responsibly to direct them*, or to adjust their grievances, or

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<sup>10</sup> The Resort also excepts to the ALJ’s granting of the GC’s Motion to take the testimony of Galen Landsberg by videoconference based on his finding that the GC set forth “good cause based on compelling circumstances” under Sec. 102.35(c) of the Board’s Rules. (Decision at 6, fn. 9.) (March 29, 2019 Order granting GC’s Motion to Permit Testimony of Witness by Videoconference.) (Exception No. 4.)

effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

This provision is to be read in the disjunctive. As such, any one of these enumerated powers is sufficient to confer supervisory authority, provided such authority is held in the interest of the employer and exercised with the use of independent judgment. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

The totality of the employee's responsibility must be considered to determine if an employee is a 2(11) supervisor. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2d Cir. 2000) (while powers viewed in isolation might fall outside Section 2(11)'s definition, the aggregate may well amount to supervisory status). In that regard, it is the authority to act independently that is determinative, rather than the exercise of the authority. *Alaska Cummins Services, Inc.*, 281 NLRB 1194, n.1 (1986); *Wilson Tree Co.*, 312 NLRB 883, 885 (1993). Furthermore, an individual can be a statutory supervisor despite spending a vast majority of his/her time on work which other bargaining unit members also perform. *Rose Metal Prods. Inc.*, 289 NLRB 1153, 1153 (1988). Accordingly, a supervisor who exercises one of the twelve powers in Section 2(11) over only one or two other employees can be a supervisor under the Act. *See NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 940 (5th Cir. 1993); *Spentonbush/Red Star Companies v. NLRB*, 106 F.3d 484, 487 (1997) (holding captain of barge to be supervisor where captain and mate comprised entire crew of barge under tow); *Alaska Cummins Services, Inc.*, 281 NLRB at 1204 (finding shop foreman to be statutory supervisor because he directed the work of others).

**b. *Wright Line* Analysis**

The Board applies the two-part *Wright Line* analysis to determine if discipline was in retaliation to an employee's participation in protected concerted activities. 251 NLRB 1083,

1089 (1980) *enfd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under this test, the GC must first show the following:

- (i) That the employee engaged in protected activity;
- (ii) That the employer knew of the employee's protected activity;
- (iii) That the employee was subject to an adverse employment action; and
- (iv) That the employer harbored unlawful animus or that some other nexus existed between the employee's protected activity and the adverse employment action.

*Wright Line*, 251 NLRB at 1089.

The causal link between the employee's protected activities and the adverse employment action is imperative for the GC to establish a *prima facie* case. A claim of unlawful discipline fails if the GC does not establish a link between the employee's protected activities and the relevant adverse employment action. *See Forsyth Electrical Co., Inc.*, 349 NLRB 635, 638-39 (2007); *see also Meyers Industries*, 268 NLRB 493, 497 (1984), *remanded on other grounds* 755 F.2d 941 (D.C. Cir. 1985).

If the GC can satisfy its *prima facie Wright Line* burden, the employer can avoid liability by establishing an affirmative defense, *i.e.*, that it would have taken the same action in the absence of the protected conduct. *Security U.S.A.*, 328 NLRB 374 (1999); *DSI Enterprises, Inc.*, 311 NLRB 444 (1993). An employer does not have to prove that the employee engaged in misconduct. Rather, the employer need only establish an honest belief that misconduct occurred. *See Yuker Constr. Co.*, 335 NLRB 1072, 1073 (2001).

**IV. THE ALJ WRONGLY FOUND THAT LOVATO DID NOT RESPONSIBLY DIRECT KITCHEN STAFF. (EXCEPTION NOS. 7- 26)**

**a. Jr. Sous Chefs Use Independent Judgment to Direct Kitchen Staff. (Exception No. 14)**

The ALJ incorrectly held that Lovato did not responsibly direct Cooks, Interns, and Kitchen Helpers working under his supervision. (Exception No. 15.) In *Oakwood Healthcare, Inc.*, the Board defined responsible direction as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgement.” 348 NLRB 686, 691 (2006). Judgment is independent if it requires forming an “opinion or evaluation by discerning and comparing data,” and involves a “degree of discretion that rises above the routine or clerical.” *Id.* at 692-93.

The Board has routinely recognized that employees who direct and oversee restaurant staff are supervisors. *See, e.g., Fortinbras Servs., Inc. d/b/a Darbar Indian Restaurant*, 288 NLRB 545 (1988) (Maitre’d was a supervisor in part because he trained new waiters as well as directed and corrected the work of dining employees); *North Adams Inn Corp.*, 223 NLRB 807 (1976), *aff’d*, 559 F.2d 187 (D.C. Cir. 1977) (assistant chef was responsible to ensure that the kitchen staff performed their assigned tasks); *Pioneer Hotel & Gambling Hall, Inc.* 276 NLRB 694, 701 (1985) (concluding that the sous chefs had authority to direct the eight employees they managed during a shift.)

*Piccadilly Cafeterias, Inc.* is particularly instructive. There, the assistant chefs “train[ed], instruct[ed], and help[ed] employees, [told] them to hurry, shift[ed] them around temporarily, [told] them to clean up, and to put food out or take it off the line.” 231 NLRB 1302, 1311 (1977). Based on these facts, the Board affirmed the administrative law judge’s conclusion that

**although recipes, menus, and work schedules were provided**, and even though one or more managers exercised frequent additional overall and direct supervision, the assistant chefs' immediate responsibility for the **preparation, timing, and presentation** of a variety of foods constituted responsible direction of employees requiring the use of independent judgment. *Piccadilly Cafeterias*, 231 NLRB at 1311 (emphasis added).

The same is true here. Jr. Sous Chefs oversee the cooking line and are responsible for making sure that dishes have the right presentation and that orders are delivered in a timely fashion. (Tr. 609:4-610:15; 717:24-719:10.) Lovato was frequently either scheduled alone with cooks under his supervision or was in charge when the Chef De Cuisine or Sous Chef were away from the kitchen. (Tr. 163:22-165:5.)<sup>11</sup> Jr. Sous Chefs also play an integral role in training and monitoring the progress of Interns, (Tr. 607:3-12; 215:4-6) (GC-14 at 5) (Lovato describing that he trains the interns), can reorganize the cooking line (Tr. 797:19-798:3), and are consistently evaluated on their ability to delegate and take control of the kitchen (Tr. 178:1-5; 179:4-7; 180:14-16) (GC-2-3, R-10). *See Woodman's Food Mkt., Inc. & United Food & Commercial Workers Union, Local 1473*, 359 NLRB 1016, 1023 (2013) (little doubt as to employee's authority to "direct" employees where evaluation specifically rated his ability to handle employees and direct the workforce).

Further, the Jr. Sous Chef job description vests Jr. Sous Chefs with significant supervisory authority and responsibilities. (Exception No. 11.) (R-14.) Three Jr. Sous Chefs testified to frequently exercising such authority. For example, Lovato affirmed he could

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<sup>11</sup> The ALJ's suggestion that the lack of a chef on duty during the overnight/early breakfast hours diminishes the value of the evidence of Lovato working alone with cooks under his supervision is backwards. (Exception No. 25.) (Decision at 7, fn. 11 and Decision at 10, fn. 17.) This simply means that, during the overnight hours when business demand is low, the Resort does not believe a supervisor is necessary. However, during periods when demand is higher, the Resort values having a supervisor on duty to oversee and direct the cooks. (Tr. 598:1-7 (business volume determines staffing).)

unilaterally send a cook home early during a slow evening of service. (Tr. 191:18-193:1.)<sup>12</sup> See *Piccadilly Cafeterias*, 231 NLRB at 1311 (supervisory status supported by the fact that assistant chefs occasionally asked employees to stay and finish up and let them leave a few minutes early). Lovato also testified that his job duties included supervising and keeping an eye on the cooks to make sure they were doing their jobs (Tr. 50:17-21), helping cooks solve problems (Tr. 55:5-12), inspecting cooks' work and telling them if something was wrong (Tr. 55:25-56:10; 153:13-22). See *Alton Riverboat Gambling P'ship*, 314 NLRB 611, fn. 23 (1994) (finding sous chef to be supervisor, in part based on job description, and his own testimony, showing that he had authority to responsibly direct the work of others, and that, in the absence of the head chef, he performed some of the duties of that position.)

Santos testified in detail about how he uses his judgment to determine if a dish is presented correctly or could be prepared better, and that he is expected to make such decisions on his own. (Tr. 452:20-453:16.) Noh explained it was his job to make sure that food came out in the right way and went to the right table. (Tr. 369:1-7; 371:10-12). Both Santos and Noh testified to frequently expediting and having the authority to instruct cooks to redo dishes made incorrectly. (Tr. 380:12-23; 453:6-16.)

Notwithstanding these uncontroverted facts, the ALJ concluded there was insufficient evidence that Jr. Sous Chefs used independent judgment when directing cooks. The ALJ based this finding almost exclusively on testimony that Jr. Sous Chefs have a limited role in creating recipes and menus. (Decision at 6.) However, as described *supra* the Board rejected this same

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<sup>12</sup> The ALJ's finding that the record did not show that Lovato had this authority between October 2017 and August 2018 is inaccurate. (Exception No. 9.) (Decision at 4, fn. 6.) At a deposition on September 15, 2016, Lovato acknowledged having the authority to decide whether to send a cook home early based on business volume. (R-4 at 8 (citing 30:10-31:8).) At the Hearing, Lovato affirmed that his duties remained unchanged since that deposition. (Tr. 181:8-12.) Even more specific, Lovato agreed that during October 2017 he maintained the ability to send Flamenco home early if the overnight business volume was low and no other chef was around. (Tr. 192:1-193:1.)

short-sighted reasoning in *Piccadilly Cafeterias*. The evidence and testimony at hand overwhelmingly demonstrate that Jr. Sous Chefs train, instruct, delegate and inspect cooks' work product in nearly the same fashion as the assistant chefs in *Piccadilly Cafeterias*. Accordingly, the Board should adhere to the same logic here, and find Lovato exercised independent judgment when directing the kitchen staff.

**b. Jr. Sous Chefs are Accountable for Directing Kitchen Staff. (Exception Nos. 21-23)**

The ALJ ignored irrefutable evidence showing Lovato's direction of kitchen staff was "responsible." For direction to be responsible:

The person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequences **may** befall the one providing the oversight if the tasks performed by the employee are not performed properly . . . . Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work, and the authority to take corrective action if necessary. **It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take this step.**

*See Oakwood Healthcare*, 348 NLRB at 692 (emphasis added).

As explained herein, Jr. Sous Chefs guide and lead their kitchen teams. They inspect cooks' work product and tell cooks to redo dishes made incorrectly. Jr. Sous Chefs are "responsible for leadership of direct reports and all of their employees." (R-14 at 2.) Ibarra emphasized that Jr. Sous Chefs are held "accountable" for the overall performance of the kitchen line. (Tr. 609:4-25.) The record contains numerous examples corroborating Ibarra's testimony which the ALJ failed to properly consider.

**(i) Lovato's PIP, Note to File, and Santos' Discipline (Exception Nos. 18, 21)**

The ALJ entirely ignored the PIP as evidence of Lovato being held accountable for his insubordinates. (Decision at 7.) The team of cooks Lovato was supervising were not

functioning as a cohesive unit. As a result, Guerrero issued the PIP to remind Lovato that he was responsible for “help[ing] build the team of less-seasoned culinarians that makes up our staff.”

(R-22.)

The ALJ erred even further in discounting the July Note to File which Guerrero gave Lovato when he failed to take the PIP to heart. Guerrero issued this counseling because Lovato’s poor leadership resulted in a disorganized night of service. (Tr. 776:5-19.) (R-21.) Guerrero told Lovato that she needed his help in managing the Interns. (R-21.) She felt counseling was warranted because “**it was expected of him to get his team together**, and that station, and it crumbled. It was just not a good night of service . . .” (Tr. 776:12-14.) The counseling explained, “[Lovato] is lacking any kind of initiative to guide the team in any sort of fashion. This being the reason for the conversation.” (R-21 at 2.) Guerrero told Lovato that future discipline would ensue if he continued to exhibit poor leadership. (R-21 at 2.)

The ALJ cast aside the Note to File because (a) it did not elaborate on what constituted a disorganized night of service; and (b) Ibarra testified the evening service did not warrant discipline. (Decision at 7.) This reasoning is fatally flawed. First, Guerrero explained Lovato’s station crumbled and it was a poor night of service. In a restaurant setting, this obviously means the kitchen was slow in preparing guest orders. Moreover, Ibarra explained that notes to file are used to create a record of an incident. (Tr. 646:4-17.) Consistent with this testimony, the July Note to File explicitly warned Lovato that he would face discipline if his poor direction of cooks continued. (Tr. 776:20-777:8.) (R-21 at 2.)

The ALJ also wrongly emphasized that, outside of the instant matter and the July Note to File, neither Guerrero nor Ibarra could recall another instance of a junior sous chef being disciplined for the poor performance of other. (Exception No. 23.) However, the prospect of

discipline - not a showing of specific examples of accountability - is the appropriate standard. *Lakeland HealthCare Associates, LLC v. NLRB*, 696 F.3d 1332, 1345 (11<sup>th</sup> Cir. 2012) (citing *Oakwood Healthcare*, 348 NLRB 646, 691-692 (2006)). In *Lakeland*, the court rejected the Board's reliance on the lack of specific examples of accountability as evidence that an employee was not a supervisor. Instead, the court relied on testimony together with job descriptions and performance reviews to find that License Practical Nurses were held accountable for Certified Nursing Assistants. The evidence at hand is even more persuasive. The Note to File was due to disorganized service that occurred under Lovato's watch. It explicitly warned "disciplinary actions may transpire" if similar incidents occur in the future. (R-21.) This in conjunction with the PIP, the Jr. Sous Chef job description, performance reviews, and Ibarra's testimony overwhelmingly show that Lovato faced the prospect of being held accountable for the performance of the kitchen staff.

Finally, Santos, another Jr. Sous Chef, was held accountable for the carelessness of kitchen staff. (Exception No. 22.) He received a written warning because the banquet kitchen served a dinner party of 14 guests undercooked chicken and, as a junior sous chef, "**it was [his] responsibility to ensure the food was cooked properly and safe for consumption.**" (GC-21 at 12-13.) (emphasis added.) At the Hearing, despite GC's numerous attempts to elicit a different answer, Santos repeatedly admitted this discipline was due at least in part because he was responsible for the cooks' performance:

Q: Have you ever had the occasion where you received discipline for a cook's not correcting a dish that you identified as a problem dish?

A: **Yes.**

Q: Can you explain?

A: **It was mentioned in one of the write ups. . . .**

(Tr. 475:20-25.) (Emphasis added.)

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Q: But you were -- so **you were ultimately responsible for the actual dish.** But I'm talking --

A: **Yes.**

(Tr. 477:10-14.) (Emphasis added.)

\*\*\*\*\*

Q: Have you ever received discipline if the Cook 1, 2, or 3 messed up the dish?

A: **Except** this write up that I have -- no.

(Tr. 480:11-20.) (Emphasis added.)

In a footnote, the ALJ disregarded Santos' admission that he was disciplined for somebody else's mistake by inferring that Santos was "referring to the failure of someone to cook the chicken the day before, not the mistake of someone under his direction on the day the chicken was served." (Decision at 7, fn. 11.) Even if the ALJ's inference is correct, it is a distinction without a difference. Whether the cook's mistake was made one day prior or on the day of the event is irrelevant to the seminal point that the banquet cook was responsible for cooking the chicken, and his failure to do so resulted in Santos discipline. (Tr. 478:21-23 ("I trust him that particular piece [of chicken] was cooked by one of the shifts . . .").) Accordingly, the ALJ should have considered the written warning as evidence of a Jr. Sous Chef being held accountable for his subordinates.

**(ii) *The Resort Did Not Promote Lovato. (Exception No. 23)***

The record is inapposite with the ALJ's conclusion that the evidence does not support an inference that Lovato's poor leadership was the reason the Resort rejected his application for a promotion to a Sous Chef. (Decision at 9.) (Exception No. 23.) The culinary department uses

performance evaluations to determine whether to grant promotions. (Tr. 719:21-720:4.) The promotions of Josie to Jr. Sous Chef, Guerrero to Chef De Cuisine, and even Lovato from Cook I to Jr. Sous Chef are emblematic of management's preference to promote from within. (Tr. 604:1-10; 734:9-14; 727:19-728:2; 803:4-7; 34:6-12.) However, despite Lovato being a competent cook, the Resort did not even grant him an interview in response to his application for a promotion to a Sous Chef. (Tr. 47:12-15; 731:23-732:11.) Given these facts, the only plausible conclusion is that Lovato's poor performance as a supervisor played a critical role in his Resort career stalling at the Jr. Sous Chef level.

The job description explains that Jr. Sous Chefs are responsible for their direct reports. Guerrero issued Lovato the PIP because his inadequacies as a manager were impacting the performance of the cooking staff working under his supervision. The July Note to File explicitly told Lovato that he could face discipline if cooks working under his supervision continued to deliver poor service. Santos admitted he was held responsible for the performance of cooks working under his direction. These three instances are concrete examples of Jr. Sous Chefs being held accountable for cooks working under their direction. The Resort's not granting Lovato's request for a promotion further demonstrate that adverse consequences stemmed from Lovato's sustained underperformance in adequately directing staff working under his supervision. Accordingly, in stark contrast to the ALJ's findings, the record plainly establishes that Jr. Sous Chefs are held accountable for their performance in directing the cooking staff.

\* \* \*

In sum, the Jr. Sous Chefs use independent judgment to direct cooks. They are held responsible for ensuring that their kitchens are functioning efficiently and preparing orders to

meet guest expectations. For the foregoing reasons, Lovato responsibly directed employees working under his supervision and was a (2)(11) supervisor.

**c. *Secondary Indicia Confirm Jr. Sous Chefs Are Supervisors. (Exception No. 24)***

Numerous secondary indicia reinforce Lovato's supervisory status. *See Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (1989) (secondary supervisory indicia include whether individual is perceived by coworkers as supervisor and is held out to employees as supervisors); *see also Baby Watson Cheesecake*, 320 NLRB 779, 784 (1996) (where evidence shows individual was considered supervisor by management, employees and self, there is no doubt that the secondary indicia in this matter clearly support a finding that he is a supervisor under the Act).

Here, the Resort views Jr. Sous Chefs as supervisors as evidenced by their receipt of email addresses and distinct uniforms, which differ from the uniforms cooks wear. (Tr. 608:1-12; 655:17-656:18.) In addition, as evidenced by the testimony of Landsberg and Flamenco, cooks view Jr. Sous Chefs as supervisors. (Tr. 249:19-25; 261:8-14; 285:23-286:2.)

Equally significant is that Lovato, Santos, and Noh – who have all held the role of Jr. Sous Chef – view the Jr. Sous Chef as a supervisory position. In a prior deposition, Lovato emphasized that as the Jr. Sous Chef he was “the supervisor in charge.”<sup>13</sup> (R-4 at 9 (citing 34:19-24).) Referring to new cooks and Interns, Santos testified that “I am the one in charge. They put me in charge to teach those people . . . because I am the one with knowledge.” (Tr. 462:7-463:14.) Referring to Cook Is, Cook IIs, Cook IIIs and Interns, he further testified “I’m the one on top of the group, I’m the one to oversee all of the operation where we work.” (Tr. 456:1-17.)

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<sup>13</sup> Lovato's testimony that he functioned as an acting sous chef is incredible. (Tr. 228:19-229:12.) It contravenes his prior deposition. (R-4 at 2 (citing 6:16-19).) There is no accompanying personnel action form. Moreover, by his own admission, he was never granted an interview for the sous chef position. (Tr. 47:12-15.)

Similarly, Noh testified that, as a Jr. Sous Chef, he “was one of the kind of managers [and] . . . was the third person in charge.” (Tr. 367:13-19.)

Contrary to the Decision, these secondary indicia cement Lovato’s supervisory status. *Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel & Unite Here Local 11*, 350 NLRB 1114, 1115 (2007) (listing several similar “secondary indicia” as corroborating evidence of 2(11) supervisory status).

**V. THE ALJ’S FINDING THAT THE DISPUTED DISCIPLINE VIOLATES THE ACT COLLAPSES BASED ON A PROPER READING OF THE RECORD. (EXCEPTION NOS. 1, 2, 3, 27-56)**

The ALJ’S holding that the Final Warning and Lovato’s subsequent discharge violated Sections 8(a)(1) and (3) of the Act ignores critical facts and testimony elicited at the Hearing, and in turn, misapplies the *Wright Line* test. There is no direct *or* circumstantial evidence that the Resort harbored any anti-union animus. Furthermore, the evidence and testimony plainly dispel of any causal connection between Lovato’s union activism and the discipline at issue.

**a. There Is No Direct Evidence of Any Anti-Union Animus. (Exception Nos. 30, 33-38)**

**(i) *Haack’s alleged statements and correspondence with RPV City officials do not evidence anti-union animus. (Exception Nos. 33-38)***

In finding direct evidence of anti-union animus, the ALJ relied on the testimony of Santos, an unquestionably *biased* witness with a vendetta against the Resort, that during a meeting with the banqueting department in March or April Haack allegedly stated that the Union would get in the Hotel “over [her] dead body.” (Exception No. 34.) (Decision at 22 citing Tr. 430:3-30.)<sup>14</sup>

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<sup>14</sup> The Resort also excepts to the ALJ’s improper adverse inference against the Resort because it did not call Haack as a witness because such a conclusion is not supported by the record or the caselaw. (Exception No. 33.) (Decision at 21-22, fns. 32 and 36.)

As an initial matter, no other banquet employee corroborated that Haack made this statement. (Decision at 22, fn. 36.) The Union paid for Santos' cross-country flight, hotel room, and meals to speak negatively about the Hotel. (Tr. 436:24-437:17.) Santos has filed multiple charges against the Hotel all of which were subsequently withdrawn. (Tr. 441:14-22.) These facts render Santos' testimony about Haack's purported "over my dead body" comment unbelievable.<sup>15</sup>

Moreover, in January, the Hotel invited the Union to participate in a free and fair expedited election. (Exception No. 36.) (Tr. 345:20-346:13.) (CP-7.) In direct contradiction to the alleged "over my dead body" comment, this offer shows the Hotel has never contested, much less even frowned upon, workers' rights to organize a union. (Tr. 345:23-346:2.)<sup>16</sup> *See Meaden Screw Prod. Co.*, 325 NLRB 762, 770 (1998) (referring to employer's voluntary agreement to hold a Board conducted election as evidence that the GC could not establish animus.)

Even assuming *arguendo* the ALJ properly credited Santos testimony, as the Decision recognizes, Haack was not involved in Lovato's discipline and subsequent termination. As such, the purported "over my dead body" comment constituted "less than substantial evidence of anti-union animus." *See MECO Corp. v. NLRB*, 986 F.2d 1434, 1437 (D.C.Cir.1993).

The Decision's reliance on *Parsippany Hotel Management Co v. NLRB*, 99 F.3d 413 (1996) and its progeny to suggest Haack's purported animus can be impugned to Ibarra and Guerrero is misplaced. (Decision at 23.) In *Parsippany* and in the other cases the Decision relies on to support its imputation theory, managers heard their boss express anti-union animus.

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<sup>15</sup> The fact that Santos testified truthfully regarding his supervisory authority does not detract from his incredible testimony regarding the Hotel's alleged animus. It simply shows he is prideful about ascending to a managerial role. (Decision at 22, fn. 36.)

<sup>16</sup> The Union rejected this invitation in favor of pursuing a neutrality agreement. (Tr. 346:3-13.)

See e.g., *Parsippany Hotel Mgmt. Co.*, 319 NLRB 114, 116-117 (1995). Here, there is no such evidence.

Santos testified that the statement occurred at a banqueting “department[al]” meeting. (Tr. 430:3-431:4.) Guerrero oversees IRD and Ibarra directs the Resort’s entire food operations. They are not in the banqueting department. Thus, there is no basis to conclude that Ibarra and Guerrero were at the meeting Santos testified about, and in turn, it is impossible to impugn the alleged “over my dead body” comment to them.

In a gross mischaracterization of the Record, the ALJ also relies on testimony about Haack expressing her unhappiness about the Union at senior management meetings as evidence of animus that can be impugned to managers. (Exception No. 38.) (Decision at 23.) This testimony though refers to Haack’s displeasure about the *effect* of the Union’s conduct on guests – not about the Union itself:

Q: (Charging Party): . . . She said things expressing irritation with the activity of the Union; it’s fair to say?

A: (Ibarra) I wouldn’t call it irritation.

Q: (Charging Party): Would you say she’s expressed frustration with the activities of the Union?

A: (Ibarra): She doesn’t like to see that. **We have to face guests who are not happy and being disturbed when they reach the hotel, so yeah, she is – she was not happy about it.**

(Tr. 677:5-13.) (Emphasis added.)

The Hotel routinely held senior management meetings before the start of the Union’s campaign where topics such as forecast, *cancellation of rooms*, income, etc. were commonly discussed. (Tr. 721:4-22.) The Union’s campaign did not change the meeting agenda. (Tr. 721:18-22.) The Hotel is in the customer service business. Regardless of the cause, how to best

address guest dissatisfaction would inevitably be an agenda item during leadership meetings. Such conversations in the ordinary course of business at long-standing meetings are thereby incomparable to the cases the Decision cites to in which senior managers called for closed captioned meetings purely to disparage and criticize the union. (Decision at 23 (citing to *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (6<sup>th</sup> Cir. 2013) and *Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413-423-424 (D.C. Cir. 1996)).) Accordingly, the ALJ's imputation theory fails.

The ALJ erred further by relying on Haack's correspondence with RPV City officials as evidence of animus. (Exception No. 37.) (Decision at 23 citing to GC-15.) The Hotel could and likely would oppose the Ordinance regardless of its sponsoring party. RPV residents – not the Union - will determine the Ordinance's fate. In the same manner that the Union can campaign in its favor, the First Amendment permits the Hotel to campaign against the Ordinance's enactment. Thus, there is simply no basis to construe the Hotel's opposition to the Ordinance as evincing animus.

Further, the Decision inaccurately explains that Haack asked RPV city officials to stop the Union from soliciting city residents to sign a petition in favor of the Ordinance at a local public event. (Exception No. 37.) (Decision at 23.) She wrote:

Good afternoon, the union is gathering signatures at the Whale of the Day Festival, a local event being held less than a mile from Terranea today April 14th. (it's a beautiful day here). The event is sponsored jointly by the City of Rancho Palos Verdes and the volunteer docent group 'Los Servenos de Point Vicente' (they are sponsored by the city of Rancho Palos Verdes) so this entire event is city sponsored. They are using the clergy group CLUE to gather signatures. Apparently, they are being very aggressive. **Is there anything we can do since this is a community event, sponsored by the city or because it is a public place/park, they can do this?**

*See* (GC-15 at 56.)

At no point did Haack ask, much less even encourage, city officials to stop the petitioning. She simply inquired whether the Union's aggressiveness towards community residents was permitted. It is a quantum leap to proclaim that this perfectly legitimate question evinces animus, and the ALJ's suggestion otherwise should be rejected.

Likewise, Haack's characterization of the Union's picketing as "disgusting" must also be viewed in context. (GC-15 at 76.) The Complaint does not include an independent 8(a)(1) allegation. (GC-1(g).) Section 8(c) of the Act provides that the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice [], if such expression contains no threat of reprisal or force or promise of benefit.

Haack never contested the Union's right to demonstrate or threatened that any employees would face discipline for participating in such demonstrations. (GC-15.) She merely expressed her opinion to a third-party regarding the Union's ability to disturb guests while they were checking into the Resort. (GC-15.) Accordingly, the "disgusting" remark was perfectly lawful, and in the absence of any specific 8(a)(1) allegation in the Complaint, is insufficient to show animus. *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1988) (speech protected by Section 8(c) cannot be used by the GC to establish an employer's antiunion animus).<sup>17</sup>

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<sup>17</sup> The same analysis applies to Haack's letters to employees which the ALJ elected to not address. (CP-7-9.) (Decision at 22, fn. 37.) They do not show animus, but rather truthfully inform employees of how the Union's plea for a boycott could detrimentally impact their earnings. (Tr. 347:10-348:8.) (CP-7-9.)

(ii) ***Additional evidence which the Charging Party introduced, but the ALJ did not address, also do not evince any animus. (Exception No. 55)***

The testimony Charging Party elicited regarding purported surveillance ignores the public nature of the Union's protests.<sup>18</sup> (Tr. 310:3-311:2; 322:19-323:15.) When employees are protesting on company premises in plain view, as in the case at hand, an employer can observe the activity. *See Chemtronics, Inc.*, 236 NLRB 178, 178 (1978); *Emenee Accessories*, 267 NLRB 1344, 1344 (1983) (union representatives and employees who choose to engage in their union activities in full public view at the employer's place of business cannot complain that management observes them). During such open demonstrations, surveillance is prohibited only if management does something, "out of the ordinary." *See Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991). The record contains no evidence of such conduct.

Charging Party's reliance on the Hotel's attempt to identify which employees stormed into Haack's office as evidence of animus is also specious. (Tr. 885:17-886:14.) (CP-10 at 3-4.) An employer may photograph or videotape employees if it has a reasonable basis to anticipate misconduct or to document unlawful activity for a later action. For instance, in *Lock Joint Pipe Co.*, 141 NLRB 943 (1963), the company recorded a group of 100 picketers who unexpectedly arrived at the employer's front entrance. The Board concluded that the recording was permissible to preserve evidence for a possible injunction. *See id.* Similarly, here, employees barged into Haack's office unannounced accompanied by trespassing community activists. This presented a threat to the security of the Hotel and its guests. As such, the Hotel's recording of the activities and wanting to identify who caused an unsafe situation was appropriate. *See Rahn*

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<sup>18</sup> The Complaint does not allege unlawful surveillance. (GC-1(g).) In lieu of discounting this evidence entirely as he should have, the ALJ deemed it unnecessary to address. (Decision at 22, fn. 37.) (Exception No. 55.)

*Sonoma Ltd.*, 322 NLRB 898, 902 (1997) (affirming an employer’s rights to take pictures or videotape to document trespassory activity).

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The Hotel invited the Union to participate in an election. The Hotel’s opposition to the Ordinance is irrelevant. The Hotel did not unlawfully surveil the Union’s protests. Haack’s communications to both the employees and RPV city officials were devoid of any threat of reprisals for employees engaging in protected conduct. Santos’ propensity for fabricating allegations and pecuniary allegiances to the Union undermines his credibility. For the foregoing reasons, it is abundantly clear that the Hotel does not harbor any anti-union animus and the ALJ’s finding otherwise is erroneous.

**b. The GC Cannot Establish a Causal Link Between Any Alleged Animus and Lovato’s Discipline and Termination. (Exception Nos. 31, 51)**

The ALJ gave an inkling of credit to the argument that the Hotel knew Lovato was a vocal Union supporter from the onset of the corporate campaign, and its issuance of the Final Warning eight months later negates an inference of animus. (Decision at 27.) (JX-2.) *Irving Tanning Co.*, 273 NLRB 6, 8 (1984) (termination of “known union adherent” five months after unsuccessful organizational drive was insufficient “affirmative proof” of unlawful motive); *Old Tucson Corp.*, 269 NLRB 492, 496 and 498 (1984) (passage of time from January to June suggests the employer did not harbor an illicit motive when it discharged well known supporter of the union’s organizing campaign who had solicited authorization cards and openly wore union insignia.) However, the ALJ found the Hotel’s argument lacked force because Lovato engaged in protected activities throughout the campaign purportedly until shortly before the Final Warning. (Decision at 27). As with so many other facets of the Decision, this explanation turns a blind eye to several irrefutable facts.

Lovato's continued union activism was well known. In December, he was quoted in an LA times article. (GC-14.) Presumably, the activity near the Final Warning that the ALJ deemed significant is Lovato's alleged testimony on May 2 before the RPV City Hall. There is a myriad of evidence disposing of any causal connection between this testimony and the Final Warning. Neither Kwok, Guerrero or Ibarra knew of Lovato's May 2nd testimony. (Tr. 643:24-644:1; 786:16-21; 852:11-15.) Moreover, the issuance of the PIP, the Pizza Incident and the July Note to File all occurred *after* Lovato appeared before City Hall. (Tr. 203:10-19.) (R-21-22.) If Ibarra or Guerrero wanted to punish Lovato for his testimony at the RPV City Hall, they would have done so at the first opportunity. But, they did not. *See Cellco Partners*, 349 NLRB 640, 665 (2007) (exercising leniency and not terminating employee at first opportunity militates against an unlawful motive).

The ALJ's incomplete review of the record evidence is obviated by his overlooking that Guerrero issued the PIP and July note to file to *coach* Lovato to turn his performance around. (R-21 at 2 (stating "hopes that Freddy [Lovato] will be able to provide leadership, guidance, and supervision to our team at the capacity of Jr. Sous Chef) and R-22 at 1 (stating the intent to "guide Freddy back on track as a Jr. Sous Chef").) Guerrero was a decision-maker for both the Final Warning and Lovato's termination. (Tr. 759:7-12; 784:2-8.) Her desire to help Lovato succeed as Jr. Sous Chef several months after he was quoted in the LA times and even after his testimony to RPV city officials flies in the face of a supervisor targeting an employee because of his union allegiances. Similarly, Kwok's initial recommendation of a written warning for Lovato, which the ALJ also ignored, is irreconcilable with the notion that the Resort was plotting some grand scheme to retaliate against Lovato because of his RPV City Hall testimony or any other protected conduct. (R-20 at 1.) *See Affiliated Foods, Inc.*, 328 NLRB 1107, 1112 (1999)

(where union's organizing drive had been going on for at least a month and there did not appear to be any connection between any particular instance of employee engaging in protected activity and the decision to discharge him, timing did not support inference of discriminatory motive).

The same is true with the Pizza Incident. In rejecting the Resort's reliance on the Pizza Incident because it "perpetuates Guerrero's false hearing testimony that Lovato might have made the pizza (referring to the Pizza Incident), the ALJ misses the mark entirely. (Exception No. 49.) (Decision at 27, n.43.) The Hotel is *not* implying that Lovato caused the Pizza Incident. The Hotel is asserting that its restraint is inconsistent with the GC's theory that the Resort was "set[ting] up" Lovato for discharge. (Tr. 18:10-15.)

A guest got sick after eating a pizza that the IRD kitchen prepared and was supposed to be gluten free. Lovato, the IRD's only Jr. Sous Chef, was working when the pizza was cooked. (R-25-26). On their surface, these facts are very similar to the Macaroni and Cheese Incident.<sup>19</sup> Thus, logic dictates that if the Hotel was plotting to terminate Lovato, at minimum, the Pizza Incident would have caused the Resort to counsel Lovato to be more cognizant of special food orders. It did not do so choosing instead to refrain from issuing discipline to anybody because ultimately, and unlike the Macaroni and Cheese Incident, the Resort could not determine who was at fault.

Finally, contrary to the Decision, when viewed in totality with the timing of Lovato's discipline, the Hotel's consistently fair and favorable treatment of other Union supporters is relevant. (Exception No. 52.) (Decision at 27.) Nearly every employee who has vocalized support for the Union remains employed at the Hotel. (Tr. 856:1-860:23; 527:16-528:13; 337:15-339:9.) *Old Tucson Corp.*, 269 NLRB at 498 (continued employment of numerous employees

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<sup>19</sup> While Lovato was usually on the hot line, he often moved around the kitchen. (Tr. 805:22-806:12.)

known to support the union cuts against a showing of animus.) Most notably, since the start of the campaign, Santos has received low level warnings for a variety of infractions. (GC-21 at 12-15.) Similarly, in lieu of termination, the Resort gave warnings to Anderson and Rhoades, Union supporters, for wildly inappropriate behavior and making sexually derogative remarks. (Tr. 852:20-854:1; 854:9-855:25.)<sup>20</sup> (R-38-39.) *See Cellco Partners* cited supra.

In addition, in December 2017 – **two months into the campaign** – Santos received an improved performance rating compared to his two prior evaluations. (*Compare R-9-10 with R-11.*) Another known Union supporter, Martha Castro, received an improved performance rating in 2018 compared to her 2017 score. (Tr. 857:10-16.) (R-40 at 1.) *See Meaden Screw Prod. Co.*, 325 NLRB at 770 (employer’s providing of favorable performance evaluation after learning of employee’s union activity is relevant to finding GC did not establish employer’s hostility to unionization).

It is illogical that, on one hand, the Hotel would repeatedly show leniency to known and very vocal Union supporters while simultaneously launching a mischievous scheme to terminate Lovato eight months into the campaign. Rather, the timing of the discipline, Guerrero’s continued efforts to coach Lovato while his protected activities persisted, and the Hotel’s treatment of other known Union supporters effectively negate any inference of a nexus between Lovato’s Union activism and the discipline at issue.

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<sup>20</sup> The Union filed and withdrew unfair labor practice charges regarding the discipline to Anderson and Rhoades. (Tr. 853:22-854:1; 855:21-25.)

**c. Contrary to The ALJ's Finding, there is No Circumstantial Evidence Supporting Alleged Animus and a Discriminatory Motive. (Exception Nos. 39-48)**

In addition, the ALJ erred in concluding that there was “abundant” circumstantial evidence of the Resort’s animus and discriminatory motive. (Exception No. 39.) (Decision at 24-26.)

- (i) *The Resort’s investigation into the Macaroni and Cheese Incident does not evince animus. (Exception Nos. 40-41)*

The ALJ improperly found that that the Hotel’s investigation of the Macaroni and Cheese Incident was circumstantial evidence of pretext. Board law does not permit an inference of anti-union animus simply because an investigation could have been more thorough. *See State Bank of India*, 283 NLRB 266, 267 (1987) (there is no rule requiring an employee to have his say before being terminated). In finding otherwise in this instance, the ALJ disregarded the long-established premise that an “employer’s business conduct is not to be judged by any standard other than which it has set for itself.” *FPC Advertising, Inc.*, 231 NLRB No. 184 (1977). Indeed, the critical inquiry is not the adequacy of the investigation but rather whether the investigation *would have been different* had the employee been unassociated with the union. *See State Bank of India*, 283 NLRB at 268. In the instant circumstance, there is no basis to suggest it would have been. In fact, the Hotel followed nearly the same investigative processes with three other incidents of possible food contamination.

- *Pizza Incident*: Guerrero reviewed the order ticket and spoke to the cooks working at the time. (Tr. 751:21-753:17.). The dough was made with gluten-free flour. (Tr. 752:14-20.) Guerrero did not witness any breach of protocol and nobody confessed otherwise. (Tr. 751:24-752:13.) As a result, she reported to Ibarra that she could not determine if the kitchen was responsible for the contamination. (Tr. 698:8-699:18.)

- *Mother's Day Brunch*: Ibarra conferred with Catalina kitchen management, and there was no indication that the kitchen was responsible for any contamination. (Tr. 627:25-629:12.)
- *Pineapple Incident*: Guerrero reviewed the order ticket, and Lindayao admitted to the mistake. (R-29.)

Flawed or not, the Macaroni and Cheese Incident triggered the same process. First, Guerrero determined if the kitchen was possibly at fault by reviewing the order ticket. Upon confirming that detail, she spoke to the only two employees who would have touched the dish during its preparation. (Tr. 844:23-845:1.) Lovato conceded the cheese sauce caused the mishap. (Tr. 748:18-749:19.) Flamenco never claimed that he made the cheese-sauce gluten-free. (Tr. 643:6-8; 748:18-749:23.) (JX-4.) As with the Pizza Incident and Mother's Day Brunch, Ibarra's involvement consisted primarily of gathering information from the sous chef who in this case was Guerrero. These facts show that albeit abbreviated the investigation was wholly consistent with analogous situations.

Guerrero not inquiring into how busy Lovato was or if extenuating circumstances excused the error hardly evinces a discriminatory motive. (Decision at 24.) A chef being busy is not an excuse to contaminate food. Placing that obvious point aside, considering clear evidence that Ibarra and Guerrero investigated comparable incidents very similarly, at best, the ALJ's criticisms of the investigation into the Macaroni and Cheese Incident show hastiness by seasoned culinarians concerned about the second allergy incident in one week. This does not constitute an inference of pretext. *See Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 436 (D.C. Cir. 2012) (explaining that an administrative law judge's disapproval of an employer's investigation was

insufficient to infer animus because an employer is not required to investigate in any particular manner.) (internal citations omitted)

(ii) ***The Resort did not treat Lovato disparately. (Exception Nos. 44-47)***

The ALJ wrongly concluded that the issuance of a Final Warning to Lovato compared to a Written Warning to Flamenco evidences disparate treatment. (Decision at 25.) Disparate treatment sufficient to support a finding of a violation of the Act must be “blatant,” in that it must involve “a plain failure by the employer or its supervisors or managerial agents to treat similarly-situated employees equally.” *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998) (dismissing complaint where evidence of supposed “disparate treatment” was too weak and insubstantial to substitute for the missing element of animus). In the instant case, there is no such evidence.

The Macaroni and Cheese Incident occurred during the same week as the Pizza Incident. (Tr. 623:6-9; 820:18-22.) (*Compare* GC-19 (Pizza Incident took place on May 19) *with* R-20 at 1 (Macaroni and Cheese Incident took place on May 25).) As Lovato acknowledged at the Hearing, an allergy error is a big mistake. (Tr. 239:3-4.) Jr. Sous Chefs are two tiers above Cook IIs in the Resort’s kitchen hierarchy. (R-14-18.) A Cook II is a low-level cook while a Jr. Sous Chef has significant responsibilities to direct the kitchen line and ensure the cooks are preparing food in accordance with the Hotel’s standards. (*Compare* R-16 *with* R-14.) In light of Lovato’s rank and level of responsibility, Ibarra and Guerrero concluded that Lovato deserved harsher discipline than Flamenco despite Kwok’s recommendation otherwise.<sup>21</sup> (Tr. 638:19-639:3; 846:4-14.) *See New Otani Hotel & Garden* cited *supra*; *see also Avondale Industries*,

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<sup>21</sup> Kwok’s testimony that knowledge of who made the macaroni and cheese could have impacted the level of discipline is meaningless. (Tr. 870:9-25.) Ibarra and Guerrero made the final decision and knew very well that Flamenco likely cooked the dish. (Tr. 638:20-639:3; 760:7-20.)

*Inc.*, 329 NLRB 1064, 1066 (1999) (an employer meets its *Wright Line* burden when showing the difference in discipline between comparators is attributable to some qualitative factor unrelated to union activity.)

The ALJ pointed to Flamenco's long tenure at the Resort to diminish the difference between Lovato and Flamenco. (Exception No. 47.) However, Flamenco's seniority does not change the fact that Cook IIs have far less responsibility than Jr. Sous Chefs. (Tr.720:16-24; 738:2-22.) (*Compare R-16 with R-14.*) Even more telling is that Guerrero used the exact same calculus (*i.e.*, discipline based on rank) after the Pineapple Incident in deciding to issue a Verbal Warning to Lindayao because he was an Intern, and it was the Resort's job to "guide and lead and teach." (Tr. 792:2-9.)

The ALJ dismissed the Pineapple Incident as having nothing to do with a lack of guidance or training because Cook III-Interns had already been instructed during pre-shift lineups regarding procedures for preparing allergen-free orders. (Decision at 26.) In reaching this conclusion, the ALJ once again completely misses the point: Lindayao received a verbal warning in lieu of harsher discipline because he was the lowest cook on the totem pole. (Exception No. 46.) This was the identical criteria Guerrero used to determine the difference in discipline for Lovato and Flamenco due to the Macaroni and Cheese Incident. As such, the verbal warning for Lindayao (lower discipline than Flamenco received) is not evidence that the Resort treated Lovato disparately as the ALJ found. Instead, it reiterates that Guerrero considers employee rank to be determinative when deciding the level of discipline for a food contamination incident.

Additionally, the packet of discipline the GC introduced without any corresponding testimony does not show a breath of disparate treatment. (GC-21.) For one, standing alone,

inconsistent application of workplace rules (which did not occur here) against a union activist is insufficient to show that an employer was unlawfully motivated. *See New Otani Hotel* 325 NLRB at 942 (“There are simply too many other explanations for such phenomena that do not raise concerns under the Act.”) Second, the subpoena to which the documents in GC-21 are responsive was limited to discipline for individuals who have committed allergy food handling infractions and safety code violations. *See Respondent’s Petition to Revoke Subpoena B-1-14EVVRX*, Exhibit A at Request 10. This narrow universe is inadequate to test how rigidly the Hotel applies progressive discipline once an employee is already on a final warning.

Moreover, the discipline of Santos is the only other instance of a Jr. Sous Chef being disciplined within the subpoena’s scope. With Santos, the Hotel skipped the initial steps of progressive discipline to a written warning for a careless but seemingly not purposeful food integrity violation and then to a final warning when he tried to steal food. (GC-21 at 12-13 and 8.) Lovato’s conduct was far worse. He jeopardized the wellness of guests, was insubordinate, and absent being told otherwise would have purposely served compromised food to guests. (JX-1-2.) He committed each of these serious infractions despite Guerrero’s repeated coaching and counseling. (R-21-22.) Accordingly, when compared to other Jr. Sous Chefs, there is simply no evidence to suggest that Lovato was treated disparately. *Mitsubishi Hitachi Power Sys. Americas, Inc. & Mohamed Shahat*, 366 NLRB No. 108, n. 28 (June 18, 2018) (disregarding comparator evidence because the GC did not establish that the comparators were similarly situated.)

**(iii) *The Resort did not deviate from its progressive discipline policy. (Exception Nos. 42-43)***

The ALJ also erred by finding that the Company failed to apply its progressive discipline system. (Decision at 24.) The Hotel’s disciplinary policy provides that violations of its

standards may result in an oral *or* written warning, suspension pending investigation *or* termination, in its “*sole and absolute discretion.*” (R-31 at 31.) The policy further provides that, in determining a proper action, the Resort will consider the *seriousness* of the infraction, the *past record* of the team member, and the *circumstances* of the matter. (R-31 at 31.)

Kwok testified that the Resort has bypassed progressive discipline on multiple instances. (Tr. 837:9-14.) The Resort produced several disciplinary forms supporting this testimony. (R-37.) These forms include a box for managers to check that asks whether the associate had any prior disciplinary action for “this” offense. (*Id.*) In nearly every instance, this box was checked “No.” (*Id.*) The ALJ discounted these examples because they did not involve any other cooks and because they did not confirm whether the employees had no prior discipline for “any” offense. This reasoning is a continuation of the same flawed analysis that permeates the Decision.

First, the Record contains multiple instances of the Resort bypassing progressive discipline for cooks. (*See* GC-21 at 5, 10 (describing that a cook received a final warning for “first” incident of harassment); *Id.* at 12 (written warning to Santos for food preparation infraction); *Id.* at 26 (written warning to Flamenco for Macaroni and Cheese Incident); and *Id.* at 45 (final written warning to a Cook II for driving recklessly on Resort grounds).) In any event, whether the examples are kitchen employees is irrelevant to the fundamental point that the Resort has repeatedly bypassed progressive discipline based on the specific circumstances of a matter. Likewise, the ALJ’s nitpicky distinction of “this” versus “any” does not negate the clear evidence showing that the Resort will skip progressive discipline steps based on the severity of

the infraction. (*See e.g.*, R-39 (skipping from verbal to final warning because of an associate’s inappropriate behavior)<sup>22</sup>.)

**(iv) *Additional evidence which the GC and Charging Party relied on to show pretext, and which the ALJ did not address, is fatally flawed. (Exception No. 55)***

The record discredits the other indirect evidence relied upon by the GC and Charging Party to suggest that the Resort’s treatment of the Macaroni and Cheese and Chicken Wing Incidents deviated from its normal procedures. The testimony of three Jr. Sous Chefs that they commonly expedite contravened the GC’s claim that the Hotel departed from its usual practice when neither a Sous Chef nor a Chef De Cuisine were in the kitchen functioning as the expeditor when the Macaroni and Cheese Incident occurred. (Tr. 371:10-12; 368:23-25; 452:20-453:16; 134:1-17.)

Next, the notion that the Hotel condones health hazards or washing off tainted food strains credulity. As explained in Part V(c)(ii) above, the Hotel consistently disciplined other employees for food integrity and health code violations. (*See e.g.*, GC-21.)<sup>23</sup> Ibarra, who has been a chef for over 30 years in both union and non-union settings, testified to the lunacy of the premise that the Resort permits cooks to prepare tainted food for service. (Tr. 649:17-650:3 (“My way of working, and I believe that the chefs who work in that team would not jeopardize their reputations and their ethics by doing something like that.”).

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<sup>22</sup> The cases the ALJ cited to are easily distinguishable. In *Aliante Casino and Hotel*, 364 No. 78, slip op. at 1, 13 (2016), the employer terminated the employee before issuing any written warning to the employee whereas, here, Lovato first received a Final Warning before his subsequent termination. In *Ft. Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075-1076 (D.C. Cir. 2016), the employer had never taken steps to enforce the relevant policy at issue, which is not the case here, where the Resort has consistently for food handling issues. (*See, e.g.*, GC-21 at 12-13.)

<sup>23</sup> Guerrero explained away Lovato’s testimony about a chicken label and mold in the walk-in cooler. (Tr. 787:8-788:13; 788:22-790:17.) Further, for the reasons set forth herein, Santos’ testimony regarding health-related issues is incredible. (Tr. 412:15-429:3.)

The ALJ's finding of animus and discriminatory motive is based on a short-sighted analysis instead of the totality of evidence. Accordingly, his holdings should be rejected, and the Board should find that the GC cannot meet its *prima facie* case.

**VI. LOVATO WOULD HAVE RECEIVED THE SAME LEVEL OF DISCIPLINE EVEN IN THE ABSENCE OF HIS ALLEGED PROTECTED ACTIVITIES. (EXCEPTION NOS. 50, 53, 56)**

The ALJ's misguided conclusion that the Resort's stated reasons for the discipline at issue were pretextual resulted in him wrongly not entertaining the affirmative defense that Lovato would have received the same level of discipline even in the absence of his alleged protected activities. (Decision at 27.) To establish this defense, the Hotel only needs to show an honest belief that Lovato caused the Macaroni and Cheese Incident. *Yuker Constr. Co.*, 355 NLRB at 1073.

The GC asserts Flamenco properly cooked gluten free macaroni and cheese and the server delivered the incorrect dish whereas the Resort argues Lovato and Flamenco were responsible for the Macaroni and Cheese Incident. (Tr. 18:7:9). Faced with this factual dispute, the ALJ was required to "examin[e] [the Hotel's] reasonable beliefs and how those beliefs might have informed [its] basis for the disciplinary decision." *Sutter E. Bay Hosps. v. NLRB.*, 687 F.3d at 436 (ALJ wrongly failed to consider the employer's affirmative defense where his decision rested almost entirely on his finding that the investigation was evidence of pretext.) However, he did not do so choosing instead to summarily dismiss the Hotel's honest belief defense. (Exception No. 53)

A proper inquiry would have considered that Lovato was working in very close proximity to Flamenco, he saw the order ticket, he knew Flamenco used the correct shaped pasta, and confessed that the cheese sauce must have caused the allergic reaction. (Tr. 208:14-19; 748:18-749:13.) Based on these facts, Ibarra and Guerrero legitimately believed that although Flamenco

likely cooked the macaroni and cheese, Lovato remained principally responsible because he saw that it was made with the improper cheese sauce and did nothing to stop the meal from being served. (JX -1 (explaining it was Lovato’s responsibility to know all ingredients used in a dish.)) (Exception No. 53.) *See Yuker Constr. Co.*, 335 NLRB at 1073 (no unfair labor practice even where “[employer] ‘shot from the hip’ and acted hastily on a mistaken belief [that employees engaged in wrongdoing]”). *See K & K Transp. Corp.*, 262 NLRB 1481, 1482 (1982) (concluding employer had honest belief that employees were responsible for misconduct and dismissing complaint).

Regarding the Chicken Wing Incident, Lovato was both insubordinate and callously disregarded basic food integrity standards. Lovato’s actions set an unacceptable example for his team. The Hotel routinely disciplines employees for violating food integrity and health code standards. (GC-21 at 4, 16-17, 21, 23, 26, 34-35, 37-38, 41, 52-54, 56, 58-59, 66-67; GC-21 sup. at 1-2.) *See Merillat Indus., Inc. & Local No. 2037*, 307 NLRB 1301, 1303 (1992) (an employer meets its *Wright Line* burden when showing it has a rule and that the rule has been applied to employees in the past). For instance, the Hotel issued Santos a written warning for serving undercooked chicken to guests (GC-21 at 12-13), issued Federico Palomera, a Cook II, a verbal warning for violations of health codes (GC-21 at 17), and issued a slew of warnings to cooks for failing to uphold the integrity of the food product. (GC-21 at 4, 16-17, 21, 23, 26, 34-35, 37-38, 41, 52-54, 56, 58-59, 66-67; GC-21 sup. at 1-2.)

Lovato was operating on the Final Warning. (JX-1.) Coaching and counseling of Lovato in the aftermath of the Final Warning were ineffective. (R-21-22.) As such, Ibarra and Guerrero and Kwok consulted and collectively agreed to terminate Lovato’s employment. (Tr. 784:14-20; 850:16-851:5.) *See Mid-Mountain Foods*, 350 NLRB 742, 743 (2007) (employer met rebuttal

burden by following established progressive discipline procedures when it terminated an employee who was on a final warning.)

\* \* \*

For the foregoing reasons, the ALJ misapplied the *Wright Line* test, and moreover, the Resort would have issued the same discipline to Lovato even absent his Union activities

**VII. THE RECORD PATENTLY UNDERMINES THE ALJ'S CREDIBILITY DETERMINATIONS. (EXCEPTION NOS. 5, 27-29, 48)**

It is well-established that “where credibility resolutions are not based primarily upon demeanor, the Board may proceed to an independent evaluation of credibility.” *Electrical Workers, Local 38*, 221 NLRB 1073, 1074 (1975). That is precisely the case here where the ALJ made numerous credibility determinations unrelated to demeanor, and which the record patently undermines.

For instance, the ALJ discredited Guerrero’s testimony that the Macaroni and Cheese Incident occurred when the IRD kitchen was not particularly busy. (Decision at 13, fn. 23.) Guerrero testified there is a “small little dinner push, kind of early, *if we have it at all*, and then it dies down”, and that the order for the macaroni and cheese at issue came in “later in the evening.” (Tr. 821:2-21.) The ALJ discredited this testimony because the order ticket stated 6:22 pm, and the ALJ seemingly determined that the 6:00 hour was the early part of the dinner rush. The record though says otherwise. The kitchen received the macaroni and cheese order nearly 4.5 hours into Lovato’s shift and two plus hours after Flamenco’s shift began. (R-5.) This evidence supports Guerrero’s testimony that the kitchen received the macaroni and cheese order after the early side of the dinner rush.

Further, the order ticket included only six dishes. (R-24.) Ibarra uncontrovertibly testified that during the rush a cook would ordinarily be responsible for closer to 20 orders. (Tr.

708:23-709:11.) Accordingly, the record evidence wholly undermines the ALJ's opinion that Guerrero gave false testimony regarding whether the IRD kitchen was busy at the time of the Macaroni and Cheese Incident. *See, e.g. Starcraft Aerospace*, 346 NLRB 1228, 1231 (2006) (reversing ALJ's credibility determinations regarding multiple witnesses based on ALJ's "misapprehension of the relevant testimony.")

Similarly, the record does not support discrediting Guerrero's and Ibarra's testimony regarding the Pizza Incident. It is not "wholly unbelievable" for Guerrero to forget who cooked a pizza nearly *one year* prior to the Hearing. (Decision at 11-12, fn. 21.) (Tr. 806:9-12.) Furthermore, the ALJ completely ignores that because the pizza dough was pre-made with rice flour unless Guerrero observed a mistake (which she did not) it was impossible to determine if a cook caused the contamination. (Tr. 752:14-20.)

As another example of the ALJ's strained credibility determinations, the ALJ found that Ibarra was evasive and inconsistent when asked if he knew whether Lovato was a union supporter. Ibarra though initially testified that he knew Lovato had sympathetic views towards the Union. (Tr. 639:9-14.) Shortly thereafter, Ibarra clarified that he had seen Lovato participate in some of the demonstrations conducted by the Union. (Tr. 643:14-17.) This testimony shows Ibarra never shied away from knowing Lovato was pro-Union.

The ALJ's belief that Ibarra and Guerrero exaggerated the seriousness of the Macaroni and Cheese Incident also deserves no credence. (Exception No. 29.) (Decision at 26.) It is axiomatic that an allergy error that results in a guest getting sick is a very serious incident. Lovato acknowledged as much. (Tr. 209:10-15.) The seriousness of the Macaroni and Cheese Incident therefore speaks for itself and wholly blunts the ALJ's belief that Ibarra and Guerrero tried to exaggerate the gravity of the infraction.

Finally, Lovato's testimony was *replete with misstatements*. Contrary to his testimony he was working during the Pizza Incident and was often scheduled to work without a supervisor. (Tr. 163:8-16; 175:18-24; 204:7-10.) (R-25-26.) His testimony that nobody ever discussed allergy procedures with him until *after* the Macaroni and Cheese Incident falls apart because he also testified that Li, his former Chef De Cuisine, did discuss special order procedures with him. (*Compare* Tr. 73:9-22 with 206:5-11.) Additionally, Lovato and Flamenco provided conflicting accounts about whether Guerrero spoke to them after the Macaroni and Cheese Incident. (*Compare* Tr. 208:20-209:1 with 265:11-21.) Thus, there was no basis to credit Lovato over Ibarra and Guerrero.<sup>24</sup>

\* \* \*

The record usurps the ALJ's credibility determinations. Accordingly, the Board should reverse them.<sup>25</sup>

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<sup>24</sup> The same is true with Santos. As described *supra*, he was a biased witness with a history of fabricating allegations.

<sup>25</sup> Even if the ALJ's credibility determinations are accepted, they are insufficient to establish pretext when viewed in conjunction with the totality of the record. *See Irving Tanning Co.*, 273 NLRB at 7 (a breakdown in credibility of respondent's witnesses did not establish pretext when evaluated in light of the overall record.)

## VIII. CONCLUSION

For the reasons set forth herein, the Board should reject the ALJ's findings and dismiss the Complaint in its entirety.<sup>26</sup>

Respectfully submitted,

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<sup>26</sup> For all of these reasons, the Resort also excepts to the Cease and Desist and Affirmative Action provisions of the Order following the Decision. (Exception Nos. 57-58.)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 19<sup>th</sup> day of July 2019, a true copy of the foregoing was filed electronically with the Executive Secretary. Copies were also sent by electronic mail to:

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*/s/ Paul Rosenberg* \_\_\_\_\_  
*On Behalf of Respondent*  
*DH Long Point Management LLC*

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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|--------------------------------|---|----------------|
| DH LONG POINT MANAGEMENT LLC   | ) |                |
|                                | ) |                |
| Petitioner/Cross-Respondent    | ) | Nos. 20-1030   |
|                                | ) | 20-1096        |
| v.                             | ) |                |
|                                | ) | Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | ) | 31-CA-226377   |
|                                | ) |                |
| Respondent/Cross-Petitioner    | ) |                |
|                                | ) |                |
| and                            | ) |                |
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| UNITE HERE LOCAL 11            | ) |                |
|                                | ) |                |
| Intervenor                     | ) |                |

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 24, 2020, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit by using CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit  
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Dated at Washington, DC  
this 24th day of August 2020