

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

DH Long Point Management LLC,

*Petitioner/Cross-Respondent,*

v.

National Labor Relations Board,

*Respondent/Cross-Petitioner,*

&

UNITE HERE Local 11,

*Intervenor.*

Case Nos. 20-1030 & 20-1096

Oral Argument Not Yet Scheduled

**PETITIONER/CROSS-RESPONDENT'S MOTION TO LODGE WITH  
THE COURT THE GENERAL COUNSEL'S ANSWERING BRIEF TO  
THE COMPANY'S EXCEPTIONS**

DH Long Point Management LLC (“Terranea”) respectfully requests permission to lodge with the Court the brief that the General Counsel of the National Labor Relations Board (the “General Counsel”) filed with the Board in response to Terranea’s Exceptions to the Administrative Law Judge’s decision. The General Counsel moved on August 24, 2020 to lodge with this Court the brief Terranea submitted to the Board in support of its objections on grounds that the brief was relevant to the General Counsel’s contentions that Terranea did not preserve certain contentions before the Board. Terranea did not oppose that motion, and it was granted on September 21, 2020.

Terranea respectfully submits that the General Counsel’s briefing is also probative on the Board’s issue-preservation contentions. *See* Terranea Reply 12.

The brief provides further information regarding the arguments the parties understood to be raised before the Board and supports Terranea's position that it has not waived certain arguments. Terranea therefore respectfully requests that the Court accept the General Counsel's brief for the same reasons it accepted Terranea's brief.

September 29, 2020

Respectfully submitted,

MARK W. DELAQUIL  
BAKER & HOSTETLER LLP  
Washington Square, Suite 1100  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
T: (202) 861-1527  
F: (202) 861-1783  
mdelaquil@bakerlaw.com

/s/ Paul Rosenberg  
PAUL ROSENBERG  
BAKER & HOSTETLER LLP  
45 Rockefeller Plaza  
New York, NY 10111  
T: (212) 589-4299  
F: (212) 589-4201  
prosenberg@bakerlaw.com

*Attorneys for Petitioner/Cross-Respondent DH Long Point Management LLC*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 32(a)(7) because it is 173 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs.

/s/ Paul Rosenberg

PAUL ROSENBERG

BAKER & HOSTETLER LLP

45 Rockefeller Plaza

New York, NY 10111

T: (212) 589-4299

F: (212) 589-4201

prosenberg@bakerlaw.com

*Counsel for Petitioner/Cross-Respondent  
DH Long Point Management LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which will accomplish service on counsel of record for all parties in this case.

/s/ Paul Rosenberg\_\_\_\_\_

PAUL ROSENBERG

BAKER & HOSTETLER LLP

45 Rockefeller Plaza

New York, NY 10111

T: (212) 589-4299

F: (212) 589-4201

prosenberg@bakerlaw.com

*Counsel for Petitioner/Cross-Respondent  
DH Long Point Management LLC*

# Attachment

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 31**

**DH LONG POINT MANAGEMENT LLC  
D/B/A TERRANEA RESORT,**

**Respondent**

**and**

**Case No. 31-CA-226377**

**UNITE HERE LOCAL 11,**

**Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

Submitted by:  
Marissa B. Dagdagan  
Counsel for the General Counsel  
National Labor Relations Board, Region 31  
11500 W. Olympic Blvd. Suite 600  
Los Angeles, CA 90064

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Answering Brief in Opposition to Respondent's Exceptions to Administrative Law Judge Jeffrey D. Wedekind's Decision in the captioned matter.<sup>1</sup>

## I. PROCEDURAL HISTORY

This case was tried before the Honorable Jeffrey D. Wedekind April 2-5, 2019, in Los Angeles, California based on a *Complaint and Notice of Hearing* issued by the Regional Director for Region 31 on December 28, 2018 (hereinafter "Complaint"). The *Complaint* alleges that Respondent DH Long Point Management LLC (hereinafter "Respondent" or "Terranea") violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employee Freddy Lovato ("Lovato") in retaliation for his union and protected concerted activities.

On June 21, 2019, ALJ Wedekind issued his Decision finding merit to the alleged violations of Section 8(a)(1) and (3) set forth in the Complaint. Specifically, ALJ Wedekind found that that the Respondent's final written warning to Lovato was unlawful, so necessarily was his termination.

## II. RESPONDENT'S EXCEPTIONS

Respondent's Exception No. 1 pertains to the ALJ's overall conclusion that it violated Sections 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(1) and (3)) ("the Act"). Four of Respondent's exceptions are regarding general exceptions to the evidence relied upon by the ALJ and insufficient consideration to Terranea's case law (R Exception Nos. 2-4; 5-6). Twenty of Respondent's Exceptions center on the ALJ's finding that discriminatee

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<sup>1</sup> Citations are as follows: Administrative Law Judge Decision (ALJD at page:line); Respondent's Exceptions (R Exception No(s). \_\_); Respondent's Exceptions Brief (R Exceptions Brief at \_\_); Transcript (Tr. \_\_/witness name); Exhibits (GC Ex \_\_; or R Ex \_\_); Respondent's Post-Hearing Brief (R Post-Hearing Brief at \_\_).

Freddy Lovato was not a Section 2(11) supervisor under the Act (R Exception Nos. 7-26); twenty-six exceptions pertain to the ALJ's finding that, under *Wright Line*, Lovato's discipline and discharge were unlawful (R Exception Nos. 30-32; 35-47; 50-6); and four concern the ALJ's credibility determinations (R Exception Nos. 27-9; 34). Respondent's final two exceptions refer to the appropriateness of the ALJ's proposed remedy. For the reasons set forth below, Respondent's exceptions should be denied in their entirety.

### **III. THE ALJ'S FINDING THAT FREDDY LOVATO IS NOT A SECTION 2(11) SUPERVISOR IS WELL-SUPPORTED BY RECORD EVIDENCE AND EXTANT LAW (R EXCEPTIONS 7-26)**

ALJ Wedekind concisely sets forth the facts and his legal analysis with respect to Lovato's supervisory status. (ALJD at 4-10). In sum, he found that Lovato was not a supervisor because Respondent failed to meet its burden to show by a preponderance of the evidence that Lovato had the authority to perform or effectively recommend at least one of the 2(11) supervisory indicia.<sup>2</sup> (ALJD at 10). *Sam's Club*, 349 NLRB 1007, 1014 (2007) (finding secondary or circumstantial indicia cannot establish Section 2(11) supervisory status absent primary indicia); *Webeo Industries*, 334 NLRB 608, 610 (2001), enf'd. 90 Fed. Appx. 276, 282 (10th Cir. 2003); and *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478 (6th Cir. 2003).

#### **A. The ALJ Correctly Found That Lovato and other Junior Sous Chefs Did Not Exercise Independent Judgment to Direct Kitchen Staff**

Respondent rehashes its conclusory arguments set forth in its Post-Hearing Brief that Lovato and other Terranea junior sous chefs use independent judgment to direct kitchen staff,

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<sup>2</sup> Section 2(11) of the Act, 29 U.S.C. §152 defines supervisor as any individual having authority to 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 effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

therefore making them supervisors under the Act. (R Post-Hearing Brief at 19; R Exceptions Brief at 18).

In support of its instant argument, Respondent simply defines independent judgment as “forming an ‘opinion or evaluation by discerning and comparing data,’ and involves a ‘degree of discretion that rises above the routine or clerical.’”<sup>3</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691 (2006) (R Exceptions Brief at 18). However, it fails to demonstrate how Lovato and other Terranea junior sous chefs exercised such independent judgment under this definition.

To further confuse matters, Respondent’s reliance on pre-*Oakwood* cases is of limited value in evaluating this matter pursuant to extant Board law in an effort to show Terranea junior sous chefs use independent judgment in responsibly directing kitchen staff when they ensure dishes leaving the kitchen have the right presentation and are delivered in a timely manner.<sup>4</sup> (R

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<sup>3</sup> In *Oakwood Healthcare Board*, defined “independent judgment” with guidance from the Supreme Court which identified the ambiguous definition in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Oakwood Healthcare*, 348 NLRB at 693-4.

<sup>4</sup> All the cases cited by Respondent (R Exceptions Brief at 18-20) are inapplicable in the case of Terranea junior sous chefs, which Respondent admits do not meet any other of the primary indicia of 2(11) supervisory status as detailed in the Act other than responsible direction. (Tr: 54-6/Lovato; Tr. 702-704/Ibarra; Tr. 798/Guerrero.) In *Fortinbras Servs., Inc., d/b/a Darbar Indian Restaurant*, 288 NLRB 545 (1988), the Board agreed with the ALJ’s finding that the maitre’d was a supervisor not only because he trained new waiters and directed and corrected the work of dining employees like Lovato, but also because he had the authority to hire, fire, lay off, discipline, and issue warnings to employees—primary 2(11) indicia of supervisory status that Lovato did not enjoy. Respondent’s citation of *North Adams Inn Corp.*, 223 NLRB 807 (1976), *aff’d*, 559 F.2d 187 (D.C. Cir. 1977) is also misplaced. The putative supervisor in *North Adams Inn* pertains to an Assistant Chef who was second in command, similar to Terranea Sous Chef Ruano, not Junior Sous Chef Lovato. The Assistant Chef was involved with menu planning, scheduling personnel, the performance of personnel, and attended weekly department head meetings when the Executive Chef was unavailable. Similarly, in *Pioneer Hotel & Gambling Hall, Inc.*, 276 NLRB 694, 701 (1985) the Board found that the sous chefs were supervisors not only because they had the authority to direct eight employees they managed during their shift but also because they had the authority to grant overtime and discipline employees. Again, authority that Terranea sous chefs do not possess.

Exception No. 8). Respondent especially focuses on *Picadilly Cafeterias, Inc.*, 231 NLRB 1302, 1311 (1977). In *Picadilly Cafeterias*, the Board adopted the ALJ's finding that assistant and relief chefs were supervisors because they oversaw up to 10 employees engaged in vital functions of the Employer's operation even though recipes, menus, and work schedules were provided and even though one or more managers exercised frequent additional supervision. However, the ALJ in *Picadilly* simply made this finding based on the assumption that the nature of the work provided the opportunity for independent judgment without citing specific examples of employees' actual use. *Id.* *Picadilly* also pre-dates the *Oakwood* decision, where the Board defined the contours of "independent judgment" and "responsible direction" because the Supreme Court previously found such statutory language ambiguous."<sup>5</sup>

ALJ Wedekind in the instant matter correctly disposes of Respondent's citations to inappropriate case authority. Terranea junior sous chefs' duties to oversee the cooking line, make sure dishes have the right presentation, and train the interns do not rise to "independent judgment" as outlined by the definition in *Oakwood Healthcare, Inc.*, at 693: "...judgment is not independent within the meaning of that provision if it is 'dictated or controlled by detailed instructions, whether set forth in company policies or rules [or] the verbal instructions of higher authority.'" (ALJD at 6:8-19).

B. The ALJ Correctly Determined That Junior Sous Chef Lovato Did Not Have Authority to Responsibly Direct Other Cooks Within the Meaning of Section 2(11)

In support of its argument that Terranea junior sous chefs responsibly direct kitchen staff, Respondent restates its argument from its Post-Hearing Brief by relying on Lovato's Performance Improvement Plan ("PIP"), July 2018 note to file, Santos' discipline, and the fact that it failed to promote Lovato for failing to exhibit leadership as ways that Lovato was held

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<sup>5</sup> See fn. 3 *supra*.

accountable for his direction of subordinate cooks. The ALJ correctly found that such evidence does not support a finding of responsible direction under the *Oakwood Healthcare* definition. “Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also being accountable for that performance, i.e. there is a prospect of material consequences to the alleged supervisor if the employees he/she directs do not perform their tasks correctly. 348 NLRB at 691-2. (ALJD at 6: 30-33; 7:1-5). The ALJ disposed of each of Respondent’s pieces of evidence as insufficient to show responsible direction after careful consideration and Respondent offered no new argument in response to the ALJD other than misstating that the ALJ improperly ignored or discounted its proffered evidence.

First, with regards to Lovato’s PIP and his July 2018 note to file, the ALJ disregarded these negative performance evaluations for “lacking leadership” alone as insufficient to establish accountability because the Company must show that Lovato or Santos suffered or might have suffered material adverse consequences as a result. (ALJD at 8:34-9). While Respondent attempts to liberally interpret Lovato’s PIP, his July 2018 note to file, and negative performance reviews as a “prospect of material consequences,” merely stating so does not make it true. Respondent even attempts to analogize *Lakeland HealthCare Associates, LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012) in support of its claim that job descriptions of supervisor duties and the prospect of discipline arising from Lovato’s PIP, July 2018 note to file are similar to those in *Lakeland*. However, *Lakeland HealthCare Assoc.*, is easily distinguishable. Unlike in the instant case, the employer in *Lakeland* elicited testimony demonstrating that if a Licensed Practical Nurse (“LPN”) witnessed a Certified Nurses Assistant (“CNA”) deviate from standard practice, such as witnessing patient abuse, that LPN would be disciplined if s/he did not have the CNA leave the premises. *Id.* Here, Respondent points to vague negative comments about

Lovato's "lack of leadership" and attempts to equate such comments as the same concrete prospect of material consequences of automatic discipline in response to a specific hypothetical. The ALJ properly found that no such material consequences existed for failing to adequately direct the staff. The ALJ also considered Respondent's contention that its failure to promote Lovato to Sous Chef was evidence of a material consequence to his poor kitchen leadership. However, the ALJ rightly dismissed such a claim since the Company "never presented any direct evidence that this was or might have been due to Lovato's inadequate direction of the other kitchen staff. Nor does the record as a whole support an inference of cause and effect." (ALJD at 9:1-6).

Finally, Respondent excepts to the ALJ's failure to give credence to Junior Sous Chef Santos being disciplined the carelessness of kitchen staff. (R Exception No. 22). The ALJ fully explained his underlying reasoning in light of the entire record through clarifying testimony and a review of Santos' discipline itself (GC Exh. 21: 12; Tr. 475-476, 480). (ALJD at 7: fn. 11). Respondent again attempts to mislead by failing to review the record as a whole and cherry-picking self-serving quotes to support its positions.

## **V. THE RECORD SUPPORTS THE ALJ'S FINDING THAT LOVATO'S DISCIPLINE AND DISCHARGE WERE UNLAWFUL**

### **A. The ALJ Properly Cited Direct Evidence of Union Animus Over Respondent's Objections**

Respondent vigorously denies that it harbors anti-union animus, despite direct evidence supported by the record. The ALJ properly cites direct evidence of animus presented by the Union but not relied upon by the General Counsel in his case in chief. First, within a few weeks the union organizing campaign was announced, Respondent held a series of mandatory meetings, where Terranea, through CEO Terry Haack, stated that the Union would get in over her dead body. Respondent defends against Haack's threat of futility by attacking witness Santos'

credibility based on his pro-union bias, which the ALJ properly rejected. Nor does the Employer's invitation to have an expedited election establish a lack of animus. While Respondent cites *Meaden Screw Prod. Co.*, 325 NLRB 762, 770 (1998) for the proposition that the Board will not find animus where an employer voluntarily agrees to hold a Board conducted election (R Exceptions Brief at 28), it ignores the fact that the employer in that case not only agreed to have the Board conduct an election among its employees, but also eventually recognized the union, and successfully bargained with the union to agreement on a new contract. 325 NLRB at 770.

Finally, Respondent seeks to discount the ALJ's reliance on CEO Terry Haack's open hostility to the Union's ballot initiative for a \$15 minimum wage and panic buttons. As late as April 2018, Haack appealed to the mayor and other city officials to ask if they could stop the Union and its supporters from soliciting city residents to sign a petition. (ALJD at 23:5-13). Respondent states that "At no point did Haack ask, much less even encourage, city officials to stop the petitioning." (R Exceptions Brief at 31). However, in Respondent's own emphasized quote, Haack asks the very question, "Is there anything we can do?" regarding the Union gathering signatures. Respondent's characterization of this as only referring to aggressive behavior is specious at best.

Notably, Respondent failed to respond to the ALJ's circumstantial evidence of animus through false or misleading testimony. (ALJD at 26: 13-23).

**B. Circumstantial Evidence of Union Animus and Discriminatory Motive Abound Throughout the Record**

Reviewing the record as a whole, the ALJ appropriately identified several instances of circumstantial evidence of animus, including a cursory investigation, failure to apply progressive discipline, disparate treatment, and false or misleading testimony.

Respondent first defends against a causal link between alleged animus and Lovato's discipline by identifying 8 months between the onset of the union campaign and Lovato's final warning. However, it then undercuts its own argument by admitting that Respondent issued Lovato his unlawful discipline less than a month after Lovato's delegation to City Hall on May 2, 2019.

In Respondent's defense of a cursory investigation, it is silent as to the length of time spent on the investigation into the Macaroni and Cheese Incident that triggered Lovato's final warning (30-45 seconds) compared to the other two other similar food mishandling investigations where no disciplines were issued (the Pizza Incident and Pineapple Incident).

With regards to the ALJ's finding of Lovato's disparate treatment, Respondent argues that Flamenco and Lindayao received lesser discipline than Lovato for mishandling allergenic foods because they have less responsibility as Cook II and intern, respectively. It was Lovato's job to ensure that subordinate cooks performed their jobs properly. At the same time, it admits that for the Pizza Incident, Pineapple Incident, and Mother's Day brunch, no cook nor chef received discipline. To underline the point further, Respondent through Ibarra, Guerrero, and Kwok could not identify any example in the last five years where any other chef de cuisine or junior sous chef at Terranea had been disciplined for the poor performance of other kitchen staff. (Tr. 692, 695-697 (Ibarra); 818 (Guerrero); and 842-843, 864, 871 (Kwok); ALJD at 7: 31-6)

C. Respondent Does Not Meet Its *Wright Line Burden* to Demonstrate That It Would Have Disciplined and Discharged Lovato Absent His Union and/or Protected Concerted Activities

Respondent contends that the proper inquiry in applying the *Wright Line* test is merely a showing that the Hotel had an honest belief that Lovato caused the Macaroni and Cheese Incident. The ALJ already dismissed this argument because "A good-faith belief... is of little aid to an employer where the discipline imposed by the company departs from its policy or

practice.” *Fort Dearborn*, 827 F. 3d 1067, 1076 (D.C. Cir. 2016). (ALJD at 27: 29-35). As discussed above, there is ample evidence of pretext for Lovato’s unlawful final warning underlying his eventual discharge.

Respondent’s reliance on *Sutter East Bay Hospitals v. NLRB*, 687 F. 3d 424 (D.C. Cir. 2012) is also misplaced. In *Sutter East Bay*, the judge found that the Employer based its decision to issue discipline based on reports from two supervisors the employee engaged in the profane tirade and on the employee’s own admission, the ALJ erred in not relying on the honest belief that the employee engaged in the bad behavior. In the instant case, Lovato did not enjoy the benefit of such an investigation as in *Sutter East Bay*. Rather, the investigation underlying his final warning lasted 30-45 seconds and Guerrero asked two questions before Terranea made its decision to issue Lovato’s final warning. Respondent’s good faith belief argument also fails (as it would in *Sutter East Bay*) because Respondent in fact did not discipline other employees for the exact same behavior in the Pizza Incident, Pineapple Incident, absent union animus.

**V. THE RECORD CLEARLY SUPPORTS THE ALJ’S CREDIBILITY DETERMINATIONS (R EXCEPTIONS 5; 27- 9; 34; 48-9)**

Respondent challenges the ALJ’s credibility determination on hollow grounds. Under the well-established precedent set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), the Board does “not overrule a Trial Examiner’s resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner’s resolution was incorrect.” The Board, rightly so, places great weight on administrative law judges’ credibility findings since the trial examiner observes the witnesses testify first hand. The Board does not overrule credibility determinations except where the clear preponderance of *all* the relevant evidence convinces the Board that the administrative law judge’s resolutions were incorrect. (Id.)

Although Respondent is dissatisfied with many of the ALJ's credibility determinations, Respondent has failed to support such dissatisfaction with actual evidence of bias or any other recognized basis for establishing that the ALJ's credibility determinations run contrary to the "clear preponderance of all the relevant evidence." Likewise, the ALJ's credibility determinations discrediting Respondent's witnesses are supported by Respondent's shifting defense and the shifting testimony of its witnesses on critical evidence. Accordingly, because Respondent has clearly not met its burden all credibility determinations of the ALJ should be sustained.

#### **VII. RESPONDENT'S BARE EXCEPTIONS MUST BE DISREGARDED**

Respondent addressed Exception No. 4 in footnote 10 of its Exceptions Brief. However, it should be disregarded because it fails to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations by failing to state, either in its exceptions or its brief, on what grounds the purportedly erroneous findings or conclusions should be overturned. *Sunshine Piping, Inc.*, 351 NLRB 1371, n.1 (2007) (Board disregarded "bare exceptions" that were unsupported by argument); *New Concept Solutions, LLC*, 349 NLRB 1136, n.2 (2007) (Board disregarded bare unsupported exceptions to judge's findings of violations). In *Carson Trailer, Inc.*, 352 NLRB 1274, 1274 (2008) (2-member Board), the respondent filed exceptions to the judge's recommended decision and order arguing that the "evidence [did] not support" the judge's determination that the respondent had unlawfully laid off two union supporters. In contesting the remedy, respondent argued that there was "insufficient evidence" to support the violations. The Board agreed with the General Counsel that respondent's exceptions did not meet the minimum requirements of Section 102.46(b) of the Board's Rules and Regulations, and disregarded the respondent's exceptions pursuant to Section 102.46(b)(2). *Id.*

Here, Respondent simply states in Exception No. 4 that the GC did not show good cause to take the testimony of Galen Landsberg by videoconference. It does not support this exception with argument or discuss the underlying evidence. For this “bare exception,” Respondent does not explain how the ALJ erred or the grounds on which his findings or conclusions should be overturned. These exceptions, devoid of evidentiary support or legal argument, should be disregarded and denied in their entirety.

#### **VIII. THE ALJ’S RECOMMENDED ORDER AND REMEDY ARE APPROPRIATE**

As the remedy for Freddy Lovato’s unlawful discipline and discharge, the ALJ ordered that Respondent cease and desist from disciplining or discharging employees because of their union or other protected concerted activities, reinstate Lovato, make him whole. Respondent must also remove from its files any references to the unlawful June 2, 2018 final written warning and August 13, 2018 termination, and post a notice to employees notifying them of their rights under the Act and the Board’s decision and order. The foregoing are traditional remedies for an employee that has been unlawfully disciplined and discharged in violation of Section 8(a)(1) and (3) of the Act, and there is no reason presented why such a remedy would not be appropriate in Lovato’s case.

#### **IX. CONCLUSION**

Based upon the foregoing, the entire record in this case, and the Decision of Administrative Law Judge Wedekind, Counsel for the General Counsel submits that Respondent’s Exception to the Administrative Law Judge’s Decision is wholly without merit. Counsel for the General Counsel respectfully requests therefore, that Respondent’s Exceptions be dismissed in its entirety and Judge Wedekind’s recommended Decision, Order, and Remedy be affirmed.

Dated at Los Angeles, California, this 16<sup>th</sup> day of August, 2019.

Respectfully submitted,

*/s/ Marissa Dagdagan*

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Marissa B. Dagdagan  
Counsel for the General Counsel  
National Labor Relations Board, Region 31  
11500 W. Olympic Blvd., Suite 600  
Los Angeles, CA 90064