

# 20-731(L)

## 20-1009(XAP), 20-1028(XAP)

---

---

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

---

---

NATIONAL LABOR RELATIONS BOARD,

—against— *Petitioner-Cross-Respondent,*

KEY FOOD STORES CO-OPERATIVE, INC., 1525 ALBANY AVE MEAT LLC,  
HB FOOD CORP., PARAMOUNT SUPERMARKETS INC.,  
RIVERDALE GROCERS LLC, SEVEN SEAS UNION SQUARE, LLC,  
100 GREAVES LANE MEAT LLC, JAR 259 FOOD CORP.,

*Respondents-Cross-Petitioners.*

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

---

---

**FINAL FORM BRIEF FOR RESPONDENT-CROSS-PETITIONER  
KEY FOOD STORES CO-OPERATIVE, INC.**

---

---

ROBERT S. FISCHLER  
ROPES & GRAY LLP  
1211 Avenue of the Americas  
New York, New York 10036  
(212) 596-9000

*Attorneys for Respondent-Cross-  
Petitioner Key Food Stores  
Co-Operative, Inc.*

---

---

## **CORPORATE DISCLOSURE STATEMENT**

Respondent-Cross-Petitioner Key Food Stores Co-Operative, Inc. is a privately held New York cooperative corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

## TABLE OF CONTENTS

	<b>Page</b>
Table of Authorities .....	iii
JURISDICTIONAL STATEMENT .....	1
ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE.....	1
A. Nature Of The Case And Procedural History .....	1
B. Factual Background.....	4
1. The A&P Transaction .....	5
2. The Collective Bargaining Process.....	8
3. The Members And Key Food Reach Agreement With Locals 338, 464, And 1500, But Not With Local 342.....	12
STANDARD OF REVIEW .....	14
SUMMARY OF ARGUMENT .....	14
ARGUMENT .....	16
I. THE BOARD ERRED IN CONCLUDING THAT KEY FOOD WAS A JOINT EMPLOYER OF ITS MEMBERS' EMPLOYEES.....	16
A. The Board Erred By Ignoring Four Of The Five Relevant Factors .....	18
B. The Board Erred By Failing To Consider That The Collective Bargaining Did Not Produce An Agreement .....	20
C. No Substantial Evidence Supports The Board's Finding That Key Food Exercised "Near-Absolute Control" Of The Collective Bargaining Process .....	21
D. The Other Evidence Cited By The Board Does Not Support Joint Employer Status.....	24

II. EVEN IF KEY FOOD WERE A JOINT EMPLOYER, IT IS NOT  
LIABLE FOR ITS MEMBERS' PURPORTED VIOLATIONS OF  
THE ACT.....26

CONCLUSION.....28

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>AM Prop. Holding Corp.</i> , 350 N.L.R.B. 998 (2007) .....	20
<i>Arculeo v. On-Site Sales &amp; Mktg. LLC</i> , 425 F.3d 193 (2d Cir. 2005) .....	16
<i>AT&amp;T v. NLRB</i> , 67 F.3d 446 (2d Cir. 1995) .....	<i>passim</i>
<i>Browning-Ferris Indus. of Cal., Inc.</i> , 362 N.L.R.B. 1599 (2015), <i>aff'd in part, reversed in part, and</i> <i>remanded in part</i> , 911 F.3d 1195 (D.C. Cir. 2018).....	21
<i>Clinton's Ditch Coop. Co. v. NLRB</i> , 778 F.2d 132 (2d Cir. 1985), <i>cert. denied</i> 479 U.S. 814 (1986) .....	17, 19, 24
<i>Hy-Brand Indus. Contractors, Ltd.</i> , 365 N.L.R.B. No. 156 (2017) .....	21
<i>Hy-Brand Indus. Contractors, Ltd.</i> , 366 N.L.R.B. No. 26 (2018) .....	21
<i>Int'l House v. NLRB</i> , 676 F.2d 906 (2d Cir. 1982) .....	15, 18, 20
<i>Mason Tenders Dist. Council of Greater N.Y. &amp; Long Island v. CAC of</i> <i>N.Y., Inc.</i> , 46 F. Supp. 3d 432 (S.D.N.Y. 2014) .....	17, 20, 22
<i>Miscellaneous Drivers &amp; Helpers Union, Local No. 610 v. NLRB</i> , 624 F.2d 831 (8th Cir. 1980) .....	23
<i>Nat'l Basketball Ass'n v. Williams</i> , 45 F.3d 684 (2d Cir. 1995) .....	9, 23
<i>NLRB v. Seven Seas Union Square, LLC</i> , 368 N.L.R.B. No. 92 (2019) .....	3

*Pulitzer Publ’g Co. v. NLRB*,  
618 F.2d 1275 (8th Cir.), cert denied 449 U.S. 875 (1980) .....18

*Serv. Emps. Int’l Union, Local 32BJ v. NLRB*,  
647 F.3d 435 (2d Cir. 2011) .....17, 18

*Seven Seas Union Square, LLC*, No. 29-CA-164058, 2018 WL 818125 (N.L.R.B. Feb. 9, 2018) .....*passim*

*Torres-Negron v. Merck & Co., Inc.*,  
488 F.3d 34 (1st Cir. 2007).....26

**Statutes**

29 U.S.C. §§160(e), (f) .....1

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5).....2

**Other Authorities**

29 C.F.R. § 103.40 .....16, 17

29 C.F.R. § 103.40(a).....17, 21

29 C.F.R. §103.40 (a), (c)(1)-(7) .....20

29 C.F.R. § 103.40(b) .....17

## **JURISDICTIONAL STATEMENT**

Respondent-Cross-Petitioner Key Food Stores Co-Operative, Inc. (“Key Food”) appeals from a Decision and Order (the “Order”) of the National Labor Relations Board (the “Board”) affirming, as modified, a decision of an administrative law judge resolving charges of unfair labor practices. Key Food’s cross-petition was timely filed after the Board filed an application in this Court seeking enforcement of the Order. This Court has jurisdiction of the appeal pursuant to 29 U.S.C. §§160(e) and (f). Venue is proper in this circuit because the alleged unfair labor practices allegedly occurred in this circuit.

## **ISSUES PRESENTED FOR REVIEW**

1. Whether the Board erred in holding that Key Food, a cooperative corporation that provides services to its member-shareholders (“members”) on a centralized basis, was a “joint employer” of certain employees who were employed by Key Food members at grocery stores owned by the members.
2. Whether, if Key Food was a joint employer of its members’ employees, Key Food is liable for the unfair labor practices the Board found were committed by the members.

## **STATEMENT OF THE CASE**

### **A. Nature Of The Case And Procedural History**

This appeal involves charges by a union local that Key Food members (entities that are legally and operationally distinct from Key Food) committed

unfair labor practices against certain of the members' employees, and that Key Food was a "joint employer" of the affected employees such that it shares liability for its members' conduct. As we explain below, Key Food was not a joint employer and the Board erred in so holding.

In September 2016, the Regional Director for Region 29 of the Board, on behalf of Local 342 of the United Food and Commercial Workers Union, AFL-CIO ("UFCW") ("Local 342" or the "Union") issued a Consolidated Complaint ("Complaint") against Key Food and nine of its members that bought a total of ten grocery stores from The Great Atlantic & Pacific Tea Company ("A&P") in 2015, after A&P filed for bankruptcy. (DJA1436-83)<sup>1</sup> The Complaint alleged that the members, in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1), (3), and (5), committed unfair labor practices against employees who worked at the former A&P stores and who were in the Union's bargaining unit. The alleged violations against these "unit employees" included unilateral lay-offs, reductions in hours and wages, and discriminatory refusals to hire.<sup>2</sup> The Complaint further alleged that Key Food was a joint employer, with its members, of the members' unit employees.

---

<sup>1</sup> Citations to "DJA" are to the Deferred Joint Appendix. Citations to "SA" are to the Special Appendix.

<sup>2</sup> The ALJ Decision (defined *infra*) includes a chart that lists, as to each employee, the nature of the member's alleged violation of the Act. (SA53-55)

Hearings began before the ALJ (Benjamin W. Green) on February 8, 2017, and concluded on April 27, 2017. On February 9, 2018, the ALJ issued his Decision (the “ALJ Decision”) (SA27-122),<sup>3</sup> holding that certain members violated Sections 8(a)(1) and 8(a)(3) of the Act, and that Key Food was a joint employer of the unit employees. The members and Key Food timely appealed the ALJ Decision to the Board, a three-member panel of which issued its Order affirming the ALJ Decision, as modified, on October 16, 2019. *NLRB v. Seven Seas Union Square, LLC*, 368 N.L.R.B. No. 92 (2019). (SA1-122) The Board agreed with the ALJ that the members violated the Act and that Key Food was a joint employer of the members’ unit employees because, in the Board’s view, “Key Food exercised direct and immediate control over the essential terms and conditions of employment of the [unit] employees.” (SA2)

The Board ordered that the nine member respondents cease and desist from a number of actions, including refusing to bargain with the Union and unilaterally laying off unit employees, and that the members take certain affirmative steps, including offering reinstatement and paying damages so as to make certain unit

---

<sup>3</sup> The ALJ Decision is part of the Order, which has been submitted to the Court in the Special Appendix, and also is reported at *Seven Seas Union Square, LLC*, No. 29-CA-164058, 2018 WL 818125 (NLRB Feb. 9, 2018). For the Court’s convenience, citations to the ALJ Decision herein are to the corresponding pages of the Special Appendix.

employees whole. (SA2-27) Each remedy was also ordered against Key Food as the purported joint employer of the unit employees. (*Id.*)

On February 27, 2020, the Board filed an Application for Enforcement of an Order of the National Labor Relations Board (the “Application for Enforcement”) (Case No. 20-731) in this Court in which it seeks enforcement of the Order against Key Food and seven of the Key Food members that were respondents in the proceedings below. On March 19, 2020, Key Food filed a Cross-Petition for Review of the Order (Case No. 20-1028), as did the members (Case No. 20-1009).

## **B. Factual Background**

Key Food is a New York cooperative corporation whose shares are held by its members, mostly family owned limited liability corporations. (DJA330:25; 332:2-15) At the time of the events in issue, Key Food was based in Staten Island, New York (it has since moved to Matawan, NJ), and had 100 members that owned 240 grocery stores in the New York metropolitan area. (DJA330:14) Key Food provides purchasing, marketing, advertising, information technology and other services to its members on a centralized basis. (DJA330-31) This allows the members to enjoy economies of scale and expertise that otherwise would be unavailable to them as independent grocery store operators. (*Id.*)

Throughout its 83 year history, Key Food has been legally and operationally distinct from its members. Specifically, Key Food has no ownership interest in its

members or their stores, and plays no role in the stores' day-to-day operations. (DJA351-55) Of particular importance here, Key Food, which has approximately 145 of its own employees, does not make or participate in hiring, firing, or disciplinary decisions concerning its members' employees; is not involved in setting wages, benefits, or work schedules for those employees; does not handle payroll or provide insurance to those employees; does not supervise those employees; and receives no services from those employees. (*Id.*) Simply put, *the members' employees are entirely within the members' domain.*

Some of Key Food's members operate stores with union-represented employees, and some of the stores are entirely non-union. Prior to the collective bargaining process at issue in this case, Key Food never participated in any member's negotiations with a union. (DJA354:7-11)

### **1. The A&P Transaction**

In 2015, A&P filed for bankruptcy and announced that it would be selling its stores in an auction process. (DJA9, 757) Because A&P was unwilling to deal with Key Food members on an individual basis, Key Food agreed to act as an intermediary on behalf of members that were interested in buying a store. (DJA333:16-20; 337-39) In June 2015, after an internal Key Food auction in which members "bid" on stores they wished to buy, the highest bidders entered into letter agreements with Key Food (the "Member Letter Agreements") in which they

committed to buy specified stores from Key Food if Key Food could acquire those stores from A&P. (DJA336, 736)

In July 2015, prior to the A&P auction, Key Food entered into an Asset Purchase Agreement with A&P (as amended, the “Stalking Horse APA”), under which Key Food agreed on behalf of certain of its members to buy sixteen A&P stores. (DJA757-860)<sup>4</sup> In October 2015, Key Food and A&P entered into an amended Asset Purchase Agreement (as amended, the “Amended APA” and together with the Stalking Horse APA, the “APAs”), which amended the Stalking Horse APA and covered eight additional stores as to which Key Food was the winning auction bidder. (DJA566-632)<sup>5</sup> Given that Key Food members, not Key Food, were to be the ultimate buyers of substantially all of the stores, the APAs expressly permitted Key Food to assign all of its rights and obligations thereunder to Key Food members. (DJA612, 833:§9.6)

Separate closings on the twenty-four stores covered by the APAs occurred from late October to late November 2015. (DJA20:2-4; 350:16-17; 873 (showing closing dates for the ten stores at issue in the proceedings below)). On the same

---

<sup>4</sup> As a stalking horse bidder under the Stalking Horse APA, Key Food’s bid was subject to being topped by another bidder. (DJA369:23-25) As discussed above, Key Food ultimately acquired the sixteen stores covered by the Stalking Horse APA and eight additional stores on which Key Food bid at the A&P auction.

<sup>5</sup> See also ALJ Decision referring to testimony regarding “24 locations.” (SA43)

date it closed on a store with A&P, Key Food and the member buying that store entered into an Asset Purchase Agreement (“Member APA”), which was a more formal version of the Member Letter Agreement signed by that member in June. (DJA900-916) The Member APAs contemplated “simultaneous closings” on Key Food’s purchase of a store from A&P and the member’s purchase of the store from Key Food. (DJA358:22-359:12; 915:¶1) The Member APAs also confirmed that Key Food was not seeking to buy the store(s) on its own behalf, but as each member’s “true, exclusive, and lawful agent . . . .” (DJA909:§7.10)

Immediately upon closing with A&P on its purchase of twenty-two of the stores covered by the APAs, Key Food transferred ownership of those stores (the “Member Stores”), to the members that had agreed to buy them. (DJA874-82).<sup>6</sup> Key Food retained (indirect) ownership of the two stores not transferred to its members (the “Key Food Stores”). (DJA328:15-24; 356:15-358:2)

---

<sup>6</sup> This exhibit is a stipulation concerning the nine members that were respondents in the proceedings below. It shows that for each of the ten stores bought by those members, the Member APA was signed and the store(s) transferred to the member on the same date (in October or November 2015) that Key Food and A&P closed on the sale of the store to Key Food. For example, the exhibit shows that on November 9, 2015, Key Food closed on its purchase of the A&P store located at 10 Union Square in Manhattan, and on that same date it entered into a Member APA with the ultimate buyer of the store, member Seven Seas Union Square, LLC, and transferred ownership of the store to Seven Seas. (DJA874)

## 2. The Collective Bargaining Process

A&P had collective bargaining agreements (“CBAs”) with multiple union locals, including Locals 338, 342, 464, and 1500 of the UFCW. (SA30) Local 342 largely represented employees in the meat, seafood, and/or deli departments. (*Id.*) The APAs between Key Food and A&P required that the CBAs be assumed or that “Buyer” (defined as Key Food and its member-assignees) negotiate with the unions for modified CBAs. (DJA566, 603:§6.3) Because the members were unwilling to assume the CBAs, which they believed were largely responsible for the financial woes that drove A&P into bankruptcy,<sup>7</sup> they opted to negotiate for modified CBAs. Locals 338, 342, 464, and 1500 joined forces to negotiate for a common agreement, and bargaining sessions among Key Food, the members for whom Key Food was acting in seeking to acquire A&P stores, and the four union locals began in late July 2015, shortly after Key Food entered into the Stalking Horse APA with A&P. (DJA14-16, 148, 279)

At the outset of the negotiations, the members appointed a negotiating committee (the “Members Committee”) that included Richard Almonte, Pat Conte,

---

<sup>7</sup> Several member representatives testified, for example, that there were too many employees in the A&P stores and that staffing would have to be reduced to make the stores financially viable. (DJA310:12-14; 312:25-313:9; 314:5-8; 322:23-25) Mr. Abondolo, Local 342’s president, conceded that one of the stores was “heavy,” meaning that it had too many full-time employees. (DJA51:22-52:17; SA53, 90) Indeed, as noted by the ALJ, “the General Counsel [did] not claim that [store] layoffs were economically unjustified . . . .” (SA90)

and Leonard Mandell, two of whom (Conte and Mandell) had substantial experience negotiating with the unions. (DJA341) The Members Committee members regularly attended bargaining sessions, as did representatives of other Key Food members, including Gilbert Almonte, Sam Abed, Randy Abed, and Alvin Diaz (DJA 292:9-17 (Almonte); 311:2-19 (the Abeds); 325:10-14, 326:17-20 (Diaz)). Representatives of other members, including Steve DiCarlo, Jamie Luna, and Joe Verdorosa, attended occasionally. (DJA13:3-8; 19:8-16; 23:10-15) Sharon Konzelman, Key Food's Vice President of Finance, regularly attended the bargaining sessions on behalf of the two Key Food Stores. (DJA343:20-344:6; 360:13-24)

Both the members and Key Food were represented by attorney Douglas Catalano, who acted as their lead negotiator. (DJA17-25; SA34) As a multiemployer bargaining unit, the members and Key Food sought to negotiate a common agreement that would cover the twenty-two Member Stores and the two Key Food Stores.<sup>8</sup>

---

<sup>8</sup> Multiemployer bargaining is a common process in labor negotiations “by which employers band together to act as a single entity in bargaining with a common union or unions.” *Nat’l Basketball Ass’n v. Williams*, 45 F.3d 684, 688 (2d Cir. 1995). As described by the ALJ here, “Key Food and its member-owners banded together in order to negotiate common collective-bargaining agreements that would cover all of the stores that were purchased through the A&P liquidation.” (SA97)

The members actively participated in the negotiations through counsel, the Members Committee, and individually. Moreover, they made all decisions concerning unit employees in the Member Stores (who became employed by the members when they assumed ownership of the Member Stores in October and November 2015). For example, Mr. Catalano, who was a witness at the hearings before the ALJ as well as counsel to the members and Key Food, testified that the members authorized all proposals from the Key Food side. (DJA281.1:4-24) And several member representatives testified about *their* decisions to retain certain unit employees, to lay off others, and to take other actions they deemed necessary to make the Member Stores financially viable. (*E.g.*, DJA293:11-294:6 (testimony of Almonte of member HB 84 Food Corp. about decisions that he and his brother made concerning unit employees); DJA327 (testimony of Diaz of member Jar 59 Food Corp. that he and other member representatives advised the Union which unit employees the members had decided to hire)<sup>9</sup>; DJA307:21-25; 310:4-6 (testimony of Conte of member Seven Seas Union Square, LLC that “[m]y brother and I” decided not to hire some of the unit employees); DJA320:14-17; 322:23-25; 324:3-6 (testimony of Abed of members 100 Greaves Lane Meat LLC and 1525 Albany

---

<sup>9</sup> The ALJ similarly described the October 14 bargaining session. (SA43) (“On October 14, certain owners attended the bargaining session and took turns indicating the number of employees they intended to keep.”).

Avenue Meat LLC that he and his brother decided on layoffs that were necessary to reduce staffing)).

Key Food played no role in decisions about the employment status of unit employees in the Member Stores. Instead, Key Food's principal role in the collective bargaining was to represent the two Key Food Stores, both of which had unit employees. (DJA360:13-24 (Konzelman testimony that she "spoke for the [two Key Food Stores]" and *the "members spoke for their stores."*) (emphasis added). While Ms. Konzelman occasionally conveyed information to the Union on behalf of both the members and Key Food, she played a relatively minor role in the negotiations, speaking only "[o]nce in a great while" according to Lisa O'Leary, Local 342's secretary/treasurer. (DJA19:19-25)

Local 342 understood from the start of collective bargaining that the members would decide such critical issues as which unit employees would be retained in the Member Stores and under what terms and conditions. Indeed, as conceded by the Board's general counsel ("General Counsel"), who represented Local 342 in the proceedings below, the union representatives were advised at the first bargaining session that the members would have to approve any agreement covering unit employees in the Member Stores.<sup>10</sup> Given its understanding that the

---

<sup>10</sup> In its post-hearing brief submitted to the ALJ, the General Counsel, citing to Local 342's notes of the initial bargaining session in July 2015, (DJA379), argued that "Attorney Catalano and Sharon Konzelman [of Key Food] said that the Coop

members were the decision-makers concerning those employees, Local 342 requested that member representatives attend the bargaining sessions, (DJA288:24-289:12; 311:2-13; 345:14-16), and Local 342 negotiated directly with the member representatives when they did so. (*E.g.*, DJA290:22-291:8 (testimony of member representative Luna); 312:25-313:9 (testimony of member representative Abed); 327:10-24 (testimony of member representative Diaz)).<sup>11</sup>

### **3. The Members And Key Food Reach Agreement With Locals 338, 464, And 1500, But Not With Local 342**

In September 2015, after multiple bargaining sessions with Locals 338, 342, 464, and 1500, Key Food and its members reached collective bargaining

---

would not be able to bind the Coop members to anything, and that both the Coop, along with each individual member who would ultimately own the store would need to sign off on any agreement reached during the negotiations.” Counsel for the General Counsel’s Post-Hearing Brief to the Administrative Law Judge, dated August 18, 2017, at 29. The notes cited by the General Counsel state that Mr. Catalano and Ms. Konzelman advised the union representatives that Key Food “[c]an’t bind anyone” and that “[t]he individual owners have to sign, they’re the ones operating the stores.” (DJA379)

<sup>11</sup> Substantial additional evidence confirms that the members controlled the negotiations insofar as they pertained to unit employees in the Member Stores, and that the Union understood this. For example, Ms. O’Leary of Local 342 testified that she was informed that “[i]t was up to the individual owners” whether the Member Stores would accept a form of agreement proposed by the Union. (DJA22:2-5) In December 2015 correspondence describing the parties’ negotiations to that point, the Union stated that it had attempted “to conclude an agreement . . . acceptable to . . . the various Key Food Co-Op members,” (DJA460-61, letter to Konzelman), and that it wished to negotiate separately with each member. (*E.g.*, DJA439-59, letters to members)

agreements with all of them except Local 342, which refused to accept the terms that were agreed to by the other locals. (DJA347:3-10; 638). Negotiations with Local 342 continued and the members and Key Food believed that they had reached a collective bargaining agreement with Local 342 on October 21, 2015. But the Union disputed this, and claimed that no labor agreement had been reached. The issue was litigated before the ALJ, who agreed with the Union. (SA75, 81)

Following the October 21, 2015 session, both the members and Key Food continued to negotiate with the Union, but to no avail. After obtaining ownership of the Member Stores in October and November 2015, the members implemented offers of employment, layoffs, wage reductions, buyouts and other steps they believed were necessary to make the Member Stores financially viable. (SA53-55) The Union and the General Counsel then filed the charges described above that culminated in the Order from which Key Food now appeals.

As discussed below, this Court should reverse the Order insofar as holds that Key Food was a joint employer. Alternatively, if the Court affirms the Board's "joint employer" determination, it should hold that Key Food nevertheless is not liable for its members' alleged violations of the Act.

## STANDARD OF REVIEW

This Court reviews “Board factual findings to determine whether they are supported by substantial evidence, and the Board’s legal conclusions for whether they have a ‘reasonable basis in law.’ While a determination of joint employer status is basically a finding of fact when the correct legal standards have been applied, where the wrong legal standards are applied, the Board’s determination is an application of law to the facts which is reviewable *de novo*, though if there is simply a ‘choice between two fairly conflicting views,’ the Board’s choice should be deferred to.” *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (citations omitted).

## SUMMARY OF ARGUMENT

The Board erred as a matter of law in holding that Key Food was a joint employer of its members’ unit employees. To meet its burden on this issue, the Union was required to prove that Key Food exercised “immediate control” over those employees. *AT&T*, 67 F.3d at 451. Whether immediate control was exercised is determined by weighing five factors, one of which is whether the putative joint employer participated in collective bargaining. (*Id.*) As a matter of law, however, such participation, by itself, is not enough to demonstrate immediate control. *Id.*

In holding that Key Food was a joint employer, the Board committed reversible error because the *only* relevant “immediate control” factor satisfied here

(and the only relevant factor considered by both the Board and the ALJ) is that Key Food participated in the collective bargaining process. This error alone requires reversal of the Order's holding that Key Food was a joint employer of its members' unit employees.

Even if, under this Court's precedent, participating in collective bargaining alone could satisfy the "immediate control" test (and it cannot), there would be no basis to conclude that Key Food exercised immediate control over its members' employees. First, unlike other cases where a union has alleged joint employer status based on collective bargaining, the parties' negotiations here, as the Union successfully argued below, did *not result in a collective bargaining agreement*. (SA75, 81); *compare, e.g., AT&T*, 67 F.3d at 449 (labor contract executed). It follows that the bargaining did *not* establish the terms and conditions of employment for unit employees and that, by participating in the bargaining, Key Food did not exercise immediate (or indeed *any*) control over those employees.

Second, no substantial evidence supports the Board's erroneous conclusion, based more on contract provisions related to collective bargaining than on the bargaining itself, that Key Food exercised "near-absolute control" of the collective bargaining. (SA2) In fact, the evidence shows the opposite – *i.e.*, that the members actively participated in the bargaining sessions and that they, not Key Food, made all decisions related to their unit employees. Moreover, the contracts relied on by

the Board are irrelevant to joint employer status, which, under both this Court's precedent and a recently promulgated Board rule, turns on whether the putative joint employer *actually exercised* immediate control over another's employees. *See AT&T*, 67 F.3d at 451; *Int'l House v. NLRB*, 676 F.2d 906, 915 (2d Cir. 1982); 29 C.F.R. § 103.40. Here, the contract provisions cited by the Board are entirely unmoored to any actual exercise of control by Key Food over its members' employees.

To the extent that the Board relied on evidence unrelated to collective bargaining, it erred because the Board either misconstrued the evidence or gave it probative value the evidence simply does not have.

Finally, even if the Court were to conclude that Key Food was a joint employer, Key Food would not be liable for any of the purported violations of the Act by its members because Key Food did not participate in those purported violations. *See AT&T*, 67 F.3d at 451.

## **ARGUMENT**

### **I. THE BOARD ERRED IN CONCLUDING THAT KEY FOOD WAS A JOINT EMPLOYER OF ITS MEMBERS' EMPLOYEES**

Under the joint employer doctrine, "an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violations of employment law on the constructive

employer, on the theory that this other entity is the employee's joint employer.”

*Arculeo v. On-Site Sales & Mktg. LLC*, 425 F.3d 193, 198 (2d Cir. 2005), citing *Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 137 (2d Cir. 1985), *cert. denied* 479 U.S. 814 (1986).

“[A]n essential element of any joint employer determination is sufficient evidence of immediate control over the employees . . . .” *Serv. Emps. Int’l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 442-43 (2d Cir. 2011) (internal quotation marks omitted), *quoting Clinton’s Ditch*, 778 F.2d at 138-39; *see AT&T*, 67 F.3d at 451; *Mason Tenders Dist. Council of Greater N.Y. & Long Island v. CAC of N.Y., Inc.*, 46 F. Supp. 3d 432, 437-38 (S.D.N.Y. 2014).<sup>12</sup> Under *Clinton’s Ditch* and its progeny, in determining whether immediate control was exercised, a court must weigh “whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled

---

<sup>12</sup> This Court’s “immediate control” test is consistent with a final rule, effective April 27, 2020, issued by the Board on the joint employer issue. 29 C.F.R. § 103.40 (the “Board Rule”). The Board Rule requires that the putative joint employer “share or codetermine the employees’ essential terms and conditions of employment,” and that it exercise “*substantial direct and immediate control* over one or more essential terms and conditions of employment as would warrant finding that the [putative joint employer] meaningfully affects matters relating to the employment relationship with those employees.” *Id.* § 103.40(a) (emphasis added). The Board Rule defines “essential terms and conditions of employment” to mean “wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.” 29 C.F.R. § 103.40(b).

the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.” *AT&T*, 67 F.3d at 451.

**A. The Board Erred By Ignoring Four Of The Five Relevant Factors**

As a matter of law, a joint employer determination may not be based solely on the putative joint employer’s participation in collective bargaining. *AT&T*, 67 F.3d at 451 (“While both the ALJ and the Board relied on the fact of AT&T participation in the collective bargaining between ECS and the union, by doing so a single factor in the *Clinton Ditch* analysis became an independent alternate basis for finding joint employer status. ***This is not enough*** . . .”) (emphasis added), citing *Int’l House*, 676 F.2d at 915 (no joint employer status where there was no evidence “that IH actually supervised or exercised control” over another’s employees, and the only factor “supporting a joint employer relationship . . . was the close contact between IH and Daka in dealing with the Union”); see *Pulitzer Publ’g Co. v. NLRB*, 618 F.2d 1275, 1280 (8th Cir. 1980), *cert denied* 449 U.S. 875 (1980) (quoted with approval in *Int’l House* and *AT&T*) (no joint employer status based on participation in collective bargaining process and explaining that “even a very substantial qualitative degree of centralized control of labor relations does not in itself determine the joint employer issue.”). There “**must** be proof” of

one or more other relevant factors – indicating a level of day-to-day control – to satisfy the “immediate control” test. *AT&T*, 67 F.3d at 450 (emphasis added).<sup>13</sup>

In its cursory analysis of the joint employer issue in this case, the Board, like the ALJ, ignored the first four *Clinton’s Ditch* factors, and focused almost entirely on Key Food’s participation in collective bargaining (and related contract provisions). This was error as a matter of law. Had the Board considered the other relevant factors, as it should have, it would have had to conclude that *none is satisfied* here. Specifically, as discussed in detail above, there is no evidence, nor could there be, that Key Food made hiring or firing decisions regarding unit employees in the Member Stores; maintained records of hours for those employees; handled the payroll or provided insurance for the those employees; or supervised those employees. The General Counsel effectively conceded the complete absence of these factors by making no effort in the proceedings below to prove any of them.<sup>14</sup>

---

<sup>13</sup> *AT&T* illustrates that even the presence of one or more additional factors will not necessarily support joint employer status. There, in addition to participating in collective bargaining, AT&T exercised “[l]imited and routine” supervision of the actual employer’s employees. 67 F.3d at 452. Nevertheless, this Court concluded that AT&T was not a joint employer. *See Srv. Empls.*, 647 F.3d at 443 (citing cases holding that limited and routine supervision is insufficient to support joint employer status). Here, there is no evidence that Key Food exercised *any* supervision over unit employees in the Member Stores.

<sup>14</sup> The absence of these factors is entirely consistent with Key Food’s business model, under which its members – entities that are legally and operationally

**B. The Board Erred By Failing To Consider That The Collective Bargaining Did Not Produce An Agreement**

As argued by the General Counsel below, found by the ALJ, and affirmed by the Board, the collective bargaining here *did not result in a collective bargaining agreement*. (SA 75, 81) It follows that, by participating in the bargaining, Key Food did not exercise control over unit employees in the Member Stores. This is fatal to the Union’s position because the “immediate control” test requires that the putative joint employer “*actually supervise or exercise control*” over another’s employees. *Int’l House*, 676 F.2d at 915 (emphasis added) (citation omitted); *see AT&T*, 67 F.3d at 451, quoting *Int’l House*; *Mason Tenders*, 46 F. Supp. 3d at 439-40 (no joint employer status where defendant did not “*actually play a role in managing the employees. . . .*”) (emphasis in original); Board Rule, 29 C.F.R. § 103.40 (a), (c)(1)-(7) (a joint employer must “possess *and exercise*” direct and immediate control over one or more essential terms and conditions of employment by “*actually determin[ing]*” or “*actually decid[ing]*” the relevant term or condition) (emphasis added).

Indeed, the Board purported to apply – but in reality misapplied – an “actual exercise” of control standard here, holding that Key Food was a joint employer

---

distinct from Key Food – are solely responsible for the employees in their stores, who provide no services to Key Food (which has approximately 145 of its own employees). (DJA351-55)

because, in the Board’s view, Key Food “*exercised direct and immediate control* over the essential terms and conditions of employment” of the unit employees in the Member Stores. (SA2) (emphasis added)<sup>15</sup> In reaching this erroneous conclusion, the Board did not consider, as it should have, that its Order affirmed the ALJ’s holding that the collective bargaining failed to result in an agreement on the terms and conditions of employment for the members’ unit employees.

**C. No Substantial Evidence Supports The Board’s Finding That Key Food Exercised “Near-Absolute Control” Of The Collective Bargaining Process**

Even if, under this Court’s precedent, Key Food’s participation in collective bargaining alone could support joint employer status, the Board’s “joint employer” holding here would be erroneous. Among other reasons, the holding rests largely

---

<sup>15</sup> Board case law on joint employer status has been anything but consistent over the past fifteen years. When the events at issue here began in July 2015, the Board test required the actual exercise of control by the putative joint employer. *See, e.g., AM Prop. Holding Corp.*, 350 N.L.R.B. 998, 1000 (2007). In *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599 (2015), *aff’d in part, reversed in part, and remanded in part*, 911 F.3d 1195 (D.C. Cir. 2018) (“*BFI*”), cited in the Order, the Board announced a new test under which it would no longer require the actual exercise of control where the putative employer had reserved control and was an employer under the common law. In *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156 (2017), cited by the ALJ, the Board overruled *BFI* and held that a joint employer must actually exercise control over the terms and conditions of employment. *Hy-Brand* later was vacated due to a Board member’s conflict of interest. *Hy-Brand Indus. Contractors, Ltd.*, 366 N.L.R.B. No. 26 (2018). In the Board Rule, effective April 27, 2020, the Board rejects *BFI*’s “reserved control” standard and adopts *Hy-Brand* by requiring that the putative joint employer “possess *and exercise*” the requisite degree of control over the affected employees. 29 C.F.R. § 103.40(a) (emphasis added).

on the incorrect and unsupported assertion that Key Food exercised “near-absolute control” of the collective bargaining. (SA2) As discussed in detail above, the evidence leaves no doubt that the *members* controlled the bargaining insofar as it pertained to unit employees in the Member Stores, and that the Union recognized this and acted accordingly. (*See* pages 8-12, *supra*) More specifically, it is indisputable that the member representatives, *with whom the Union negotiated directly on matters pertaining to the members’ unit employees*, made all decisions about which unit employees would be retained in the Member Stores and under what terms and conditions.<sup>16</sup> (*Id.*)

The Board’s fallacious “near-absolute control” finding appears to have been based more on contract provisions pertaining to collective bargaining than on the bargaining itself. In the Board’s view, provisions of the APAs and the Member APAs gave “Key Food significant control over the scope and identity of each store’s initial work force.” (SA2) These contract provisions, however, are irrelevant. Among other reasons, as discussed above, under this Court’s “immediate control” test – as well as under Board’s own joint employer test when the events at issue here began (*see* footnote 14, *supra*) – a putative joint employer must *actually exercise* control over another’s employees, not merely have a right to

---

<sup>16</sup> The Order incorrectly states the ALJ “found” that Key Food exercised “near-absolute control” over the negotiations with the Union. (SA2) The ALJ made no such finding.

control them. *See, e.g., Mason Tenders*, 46 F. Supp. 3d at 439-40 (joint employer status rejected where defendant had legal authority to control employment conditions but did not “*actually* play a role in managing the employees. . . .”) (emphasis in original). Here, there is no evidence, nor could there be, that Key Food invoked any contract provision so as to *actually exercise* control over the “scope and identity” of any Member Store’s workforce, or over any term or condition of employment of unit employees in the Member Stores. Indeed, the opposite is true: the *members* made all decisions, including all hiring and layoff decisions concerning the unit employees in the Member Stores. Thus, the members, not Key Food, controlled the “scope and identity” of the Member Store workforces. (*See* pages 8-12, *supra*)

Finally, the mere fact that Key Food, on behalf of the two Key Food Stores, negotiated alongside its members as part of a multiemployer bargaining unit, was neither unusual nor evidence that Key Food was a joint employer of the members’ unit employees. *See Nat’l Basketball Ass’n*, 45 F.3d at 688 (2d Cir. 1995) (“Multiemployer bargaining is a very common practice throughout the United States . . . .”); *Miscellaneous Drivers & Helpers Union, Local No. 610 v. NLRB*, 624 F.2d 831, 833 (8th Cir. 1980) (no joint employer status based on participation

in multiemployer bargaining unit where respondent was not involved in “hiring, disciplining, or discharging” the affected employees or setting their wages).<sup>17</sup>

In sum, even if participation in or control of collective bargaining, by itself, could support a “joint employer” determination under this Court’s precedent, there would no basis here to conclude that Key Food was a joint employer of its members’ unit employees.

**D. The Other Evidence Cited By The Board Does Not Support Joint Employer Status**

Beyond the realm of collective bargaining, the Board pointed to various pieces of evidence, none of which pertains to any of the *Clinton’s Ditch* factors or is otherwise probative of whether Key Food exercised “immediate control” of unit employees in the Member Stores.

First, the Board mistakenly relied on the fact that Key Food was identified as an “Employer” in the collective bargaining agreements signed by Key Food, its members, and Locals 338, 1500, and 464. (SA2; DJA650-63) These agreements define the term Employer to include both Key Food *and* “its assigns” (*i.e.*, the members who bought the Member Stores), merely reflecting that Key Food

---

<sup>17</sup> Further evidence that Key Food did not control its members with regard to bargaining with Local 342 is the fact that member Dan’s Supreme, Inc., which initially was part of the Key Food-members multiemployer bargaining unit, subsequently decided to negotiate separately with Local 342. Those separate negotiations, in which Key Food played no part, resulted in a collective bargaining agreement between Dan’s Supreme and the Local 342. (DJA676-82)

employed the covered employees in the two Key Food Stores and the members employed the covered employees in the Member Stores. In short, the agreements have no bearing on the “immediate control” issue.

Second, the Board mistakenly relied on an employee handbook purportedly distributed by the member-owner of the store located on Albany Avenue in Brooklyn. (SA2) There is no evidence as to who prepared this document, which does *not*, as the Board apparently believed, specifically refer to the Key Food entity prosecuting this appeal. Instead, the handbook has a single, generic reference – on the cover page title – to “Key Food,” which almost certainly refers to the particular *store* for which the handbook was first prepared.<sup>18</sup> In addition, there is no evidence as to when the document was prepared (it is undated and appears to be quite old), or whether it was distributed by any member other than the owner of the Albany Avenue store. In short, the handbook is not evidence that Key Food exercised immediate control over unit employees in the Member Stores.

Finally, the Board’s reliance on a supposed vague and ambiguous comment by member representative Randy Abed that he could not enter into a hand billing agreement because “he couldn’t do anything without the Key Food Cooperative,”

---

<sup>18</sup> Many of Key Food’s members operate their stores under the “Key Food” banner. Thus, it is likely that the handbook at issue here, entitled “Key Food Rules and Regulations,” was prepared by a member for use at its store, not by the entity that is the cross-petitioner on this appeal.

(SA2), was mistaken. Exactly what Mr. Abed meant, the basis for the comment, and the full context for it, are unclear. In all events, Mr. Abed's comment does not support the Board's conclusion that Key Food "exercised direct and immediate control" of the terms and conditions of employment of unit employees in the Member Stores.

**II. EVEN IF KEY FOOD WERE A JOINT EMPLOYER, IT IS NOT LIABLE FOR ITS MEMBERS' PURPORTED VIOLATIONS OF THE ACT**

The Order directs each of the nine members named as respondents below (including the seven members named in the Board's Application for Enforcement), and Key Food as a purported joint employer, to take multiple actions to remedy the members' purported violations of the Act. (SA2-27) Even if this Court were to agree with the Board that Key Food was a joint employer, it should deny enforcement of the Order against Key Food because there is no evidence that Key Food participated in the specific violations of the Act found to have been committed by the members. *See AT&T*, 67 F.3d at 451 ("Even if we were to conclude that AT&T was a joint employer with ECS [AT&T's cleaning contractor], AT&T still could not have violated the Act because it played no role in the decision to terminate the contract with ECS, nor was it a party to the contract. That decision was TCA's [the party to the contract] alone."); *Torres-Negron v. Merck & Co., Inc.*, 488 F.3d 34, 46 n. 6 (1st Cir. 2007) (" [T]he "joint employer"

concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those conditions of employment.’ Thus, a finding that two companies are an employee's ‘joint employers’ only affects each employer's liability to the employee for their *own* actions, not for each other's actions, as Torres would have us hold.”), quoting *NLRB v. Browning–Ferris Indus., Inc.*, 691 F.2d 1117, 1122–23 (3d Cir.1982) (emphasis in original).

As discussed above, the evidence shows that the members independently made all decisions concerning unit employees in the Member Stores, and there is no evidence that Key Food participated in any of the actions challenged below as unfair labor practices. Therefore, under the authorities cited above, Key Food is not liable for any member’s purported violations of the Act, even if this Court were to affirm the Board’s “joint employer” conclusion.

## CONCLUSION

For the foregoing reasons, the Court should deny enforcement and reverse the Order insofar as it holds that Key Food was a joint employer. If the Court affirms the Order's determination that Key Food was a joint employer, it should hold that Key Food nevertheless is not liable for any violations of the Act by its members.

Dated: November 16, 2020

ROPES & GRAY LLP

By: /s/ Robert S. Fischler

Robert S. Fischler

1211 Avenue of the Americas

New York, N.Y. 10036-8704

(212) 841-0444

robert.fischler@ropesgray.com

*Attorneys for Respondent-Cross-Petitioner Key Food Stores Co-Operative, Inc.*

Of Counsel:

Jenny K. Cooper

ROPES & GRAY LLP

Prudential Tower, 800 Boylston Street

Boston, MA 02199-3600

(617) 951-7048

## CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies that the foregoing opening brief uses a proportionally-spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 6,683 words according to the word count provided by Microsoft Word 2016 word processing.

Dated: November 16, 2020

ROPES & GRAY LLP

By: /s/ Robert S. Fischler

Robert S. Fischler

1211 Avenue of the Americas

New York, N.Y. 10036-8704

(212) 841-0444

[robert.fischler@ropesgray.com](mailto:robert.fischler@ropesgray.com)