

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEW YORK PARTY
SHUTTLE, LLC
Petitioner,

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and

Case No. _____

NATIONAL LABOR
RELATIONS BOARD,
Respondent.

**PETITION FOR REVIEW OF NATIONAL LABOR RELATIONS
BOARD ORDER IN COMPLIANCE PROCEEDING**

Petitioners New York Party Shuttle, LLC (“NYPS”), Washington DC Party Shuttle, LLC, OnBoard Las Vegas Tours, LLC, NYC Guided Tours, LLC, and Party Shuttle Tours, LLC, challenge the Supplemental Decision and Order entered by the National Labor Relations Board on September 16, 2020, and prior included decisions of the Board and Administrative Law Judge, in *New York Party Shuttle, LLC, d/b/a Onboard Tours, Washington DC Party Shuttle, LLC, d/b/a Onboard Tours, Onboard Las Vegas Tours, LLC, d/b/a Onboard Tours, NYC Guided Tours, LLC, and Party Shuttle Tours, LLC, and New York Party Shuttle, LLC, d/b/a Onboard Tours and Its Alter Ego and/or Golden State Successor, NYC Guided Tours, LLC and Fred Pflantzer, Cause No. 02-CA-073340*. A copy of the Decision and Order is attached hereto as

Exhibit A.¹ The Order was received by Petitioners after regular business hours on September 16, 2020.

Petitioners request that this Court set aside the Board's Supplemental Decision and Order and instruct the Board to reverse the decision of the Administrative Law Judge in the compliance proceeding and award zero dollars in backpay and zero damages in frontpay, or in the alternative, order a new compliance hearing.

As required by 29 C.F.R. § 101.14 Petitioners will serve a file-stamped copy of this petition on National Labor Relations Board Appellate Court Branch Deputy Associate General Counsel Ruth Burdick, by electronic mail.

Dated: November 16, 2020

Respectfully submitted,

SCHMIDT LAW FIRM, PLLC

By: _____



C. Thomas Schmidt
Texas Bar No. 00797386
Email: firm@schmidtfirm.com
7880 San Felipe, Suite 210
Houston, Texas 77063
Tel: 713-568-4898
Fax: 815-301-9000

ATTORNEYS FOR PETITIONERS

¹ Petitioners have not received a signed copy of the Order, but assume one exists, as the Order was provided to Petitioners electronically by the NLRB because of the COVID pandemic.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on all parties listed below on the 16th day of November 2020 in the manner indicated below:

Ruth E. Burdick
Acting Appellate Court Branch Deputy
Associate General Counsel
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570-0001

By email to ruth.burdick@nlrb.gov

John J. Walsh
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3
New York, NY 10278-0104

By email to Jack.Walsh@nlrb.gov

Fred Pflantzer
309 West 43rd Street, Apt 5D
New York, NY 10036

By email: nyseetours@gmail.com



C. Thomas Schmidt

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

New York Party Shuttle, LLC, d/b/a Onboard Tours, Washington DC Party Shuttle, LLC, d/b/a Onboard Tours, Onboard Las Vegas Tours, LLC, d/b/a Onboard Tours, NYC Guided Tours, LLC, and Party Shuttle Tours, LLC, and New York Party Shuttle, LLC, d/b/a Onboard Tours and Its Alter Ego and/or Golden State Successor, NYC Guided Tours, LLC and Fred Pflantzer.
Case 02–CA–073340

September 16, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On July 9, 2019, Administrative Law Judge Kenneth W. Chu issued the attached supplemental decision. The Respondents filed exceptions, a supporting brief, a request for oral argument,¹ an answering brief to the General Counsel's cross-exception, and a reply brief. The General Counsel filed a limited cross-exception with supporting

¹ The Respondents' request for oral argument is denied as the record, exceptions, cross-exception, and briefs adequately present the issues and positions of the parties.

² The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his decision, the judge inadvertently stated that labor relations policies and procedures dealing with customer service, conduct, and behavior were uniform between and among New York Party Shuttle, LLC (NYPS), OnBoard Las Vegas Tours, LLC (OBLV), and NYC Guided Tours, LLC (NYCGT). In fact, such were uniform between and among NYPS, OBLV, and Washington DC Party Shuttle, LLC (DCPS). The judge also inadvertently stated that the backpay period began on February 12, 2011, rather than February 12, 2012. We have corrected these errors, which do not affect our disposition of this case.

We affirm the judge's finding that Respondents NYPS, DCPS, OBLV, NYCGT, and Party Shuttle Tours, LLC (PST), are a single employer and, consequently, are jointly and severally liable for the unfair labor practice committed by NYPS. We therefore find it unnecessary to pass on the judge's additional findings that NYCGT is liable as an alter ego of NYPS and as a successor to NYPS under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), as such findings would be cumulative and would not affect the remedy.

In adopting the judge's single-employer finding, we do not rely on the judge's statement that repayments of loans from NYPS to PST from 2012 to 2015 show a lack of arm's-length relationship and an effort by NYPS to deplete its assets.

We find no merit in the Respondents' argument that the Respondents other than NYPS were deprived of the opportunity to assert that the

argument and an answering brief to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New York Party Shuttle, LLC, d/b/a OnBoard Tours, Washington DC Party Shuttle, LLC, d/b/a OnBoard Tours, OnBoard Las Vegas Tours, LLC, d/b/a OnBoard Tours, NYC Guided Tours, LLC, and Party Shuttle Tours, LLC, a Single Employer, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 16, 2020

John F. Ring,

Chairman

underlying Board Order is unconstitutional under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *affd.* in part 573 U.S. 513 (2014). The Board previously considered and rejected this argument in 2017, when it granted the General Counsel's Motion for Partial Summary Judgment against all of the Respondents in this proceeding. *New York Party Shuttle, LLC d/b/a Onboard Tours, Washington D.C. Party Shuttle LLC*, 365 NLRB No. 147. In that decision, the Board observed that "the Fifth Circuit's judgment enforcing the Board's underlying Order became final prior to the Supreme Court's decision in *Noel Canning*." *Id.*, slip op. at 2. The Board concluded that "in these circumstances, it regarded the matters finally resolved by the court of appeals as *res judicata* in this proceeding." *Id.*

We also find no merit in the Respondents' contention that the judge erred by finding that the Board has jurisdiction over the Respondents other than NYPS. In addition to the reasons stated by the judge, those Respondents are also subject to our jurisdiction in this proceeding because they constitute a single employer with NYPS. *Precision Industries*, 320 NLRB 661, 667 (1996).

Contrary to the General Counsel's cross-exception, the judge did not err by not ordering the Respondents to reinstate Charging Party Fred Pflantzer. This remedy has already been ordered by the Board and enforced by the court of appeals. Thus, it was unnecessary for the judge to reorder the remedy. *Kentucky River Medical Center*, 354 NLRB 329, 329 fn. 4 (2009), *reaffirmed* and incorporated by reference 355 NLRB 594 (2010), *enfd.* 669 F.3d 784 (6th Cir. 2012).

³ In adopting the judge's findings regarding Pflantzer's backpay, we are not unmindful of Pflantzer's acknowledgement that he failed to report his tip income on his tax returns. Therefore, consistent with *Airport Park Hotel*, 306 NLRB 857 (1992), and *Hacienda Hotel & Casino*, 279 NLRB 601 (1986), we shall furnish a copy of this supplemental decision to the Internal Revenue Service.

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nicole Lancia, Esq. and *Eric Brooks, Esq.*, for the General Counsel.

C. Thomas Schmidt, Esq., for the Respondent *New York Party Shuttle, LLC*.

James M. Felix, Esq., for Respondents *Washington DC Party Shuttle, LLC*, *NYC Guided Tours, LLC*, *OnBoard Las Vegas Tours, LLC*; and *Party Shuttle Tours, LLC*.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This supplemental proceeding was tried before me in New York, New York, on May 9–11, May 16–18, May 29–31, and June 26–28, 2018, pursuant to a compliance specification and notice of hearing issued on February 29, 2016 (GC Exh. 1(D)).¹ The compliance specification alleges the amount of backpay due under the terms of the Board’s decision and order dated May 2, 2013 (*New York Party Shuttle, LLC*, 359 NLRB 1046 (2013)), which found Respondent New York Party Shuttle, LLC (hereinafter, NYP Shuttle) violated Section 8(a)(3) of the National Labor Relations Act (Act) by discharging employee Fred Pflantzer (GC Exh. 1(A)).

Among other things, the Board ordered New York Party Shuttle, LLC to offer Pflantzer full reinstatement to his former position or, if that job was no longer available, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges previously enjoyed. The Board also ordered Respondent New York Party Shuttle, LLC to make whole any loss of earnings and other benefits suffered by Pflantzer resulting from his unlawful discharge, less any net interim earnings, plus interest compounded daily.

¹ The General Counsel exhibits are identified as “GC Exh.” The Respondents’ exhibits are identified as “R. Exh.” and joint exhibits are identified as “Jt. Exh.” The posthearing briefs for the GC and Respondents are identified as “GC Br.” and “R. Br.” The Transcript testimony is noted as “Tr.” On September 18, 2018, the counsel for the General Counsel moved to correct the transcript is granted herein.

² The new caption reads as “NEW YORK PARTY SHUTTLE, LLC, d/b/a ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC, d/b/a ONBOARD TOURS, ONBOARD LAS VEGAS TOURS, LLC, d/b/a ONBOARD TOURS, NYC GUIDED TOURS, LLC, and PARTY SHUTTLE TOURS, LLC, a Single Employer.”

³ In the motion for partial summary judgment before the Board, the counsel for the General Counsel addressed in fn. 1, the contentions of NYPS’ answer, that the non-NYPS Respondents objected to the lack of service and lack of an opportunity to challenge the factual allegations in

The Board’s decision was enforced by the U.S. Court of Appeals for the 5th Circuit on November 19, 2013 (*New York Party Shuttle, LLC v. NLRB*, No. 13-60364 (5th Cir. 2013)) (entering default judgment) (GC Exh. 1(B) and (C)).

The Respondent New York Party Shuttle, LLC (hereinafter, NYPS) reinstated Pflantzer on July 28, 2014, but terminated him on August 13, 2014. The Respondent contend that Pflantzer was reinstated but after being warned that operating a competing business was grounds for termination, was discharged when he failed to cease his competitive activities.

Procedural Background

On March 31, 2017, the Regional Director issued an amended compliance specification, and alleged that Respondents listed in the case caption constitute a single employer (GC Exh. 1(F)).² On May 24, 2017, the Regional Director issued a second amendment to the compliance specification (GC Exh. 1(K)). On June 20, 2017, counsel for the General Counsel filed a motion for partial summary judgment before the Board and the motion was granted on November 16, 2017, in a Supplemental Decision and Order (GC Exh. 1(AA)). The Board found, among other things, that the Respondents were inappropriately attempting to relitigate a valid underlying Board order issued on November 19, 2013, that found Respondent NYPS violated Section 8(a)(3) of the Act by discharging Pflantzer. The Board further rejected the Respondents’ contention that reinstatement is not warranted because Pflantzer was operating a competing tour business when NYPS was again attempting to relitigate an issue that was decided in the underlying unfair labor practice proceeding.³

The Regional Director issued a third amendment to the compliance specification on January 12, 2018, to add in para. 2 that Party Shuttle Tours, LLC (PST) with an office and place of business in Houston, Texas is a holding company for NYPS, Washington DC Party Shuttle, LLC (DCPS) and OnBoard Las Vegas Tours, LLC (OBLV) and to update the backpay calculations (GC Exh. 1(BB)).

On January 25, 2018, the counsel for the General Counsel moved for a partial summary judgment before the administrative law judge for failure of the Respondents to timely file an answer to the third amendment to the compliance specification and that the only factual dispute that now remains is the issue of the Respondents as a single employer (GC Exh. 1(EE)). The Respondents filed an opposition to the motion (GC Exh. 1(GG)) and the counsel for the General Counsel filed a reply to the opposition

the compliance specification. The Respondents subsequently maintained that they received service, but the service was untimely. The counsel for the General Counsel moved for the Board to strike those allegations from the NYPS’ answer to the complaint. The Board denied the motion to strike and instructed that these matters be addressed at the compliance hearing (Supplemental Decision and Order at GC Exh. 1(AA) fn. 2). Upon my review, I find that the service was timely. It is the burden of the Respondents to show that service was untimely. They did not. Further, through this proceeding, the Respondents had ample opportunities to challenge the specifications and also on the issue as to whether the Respondents are joint employers, alter egos and/or a *Golden State* successor. The issue of finding liability on New York Party Shuttle, LLC when it discharged Fred Pflantzer has already been decided and cannot be challenged at the compliance proceeding, as attempted by the Respondents.

on February 1, 2018 (GC Exh. 1 (HH)). On February 12, I issued an order denying the General Counsel's motion for partial summary judgment, stating the Respondents' answer was timely filed based upon the extension of time for filing on account of the federal government shutdown (GC Exh. 1(II)).

A fourth amendment to the compliance specification was issued by the Regional Director on April 12, 2018 to further reflect updates on the backpay calculations and interim employment of Pflantzer (GC Exh. 1(JJ)).⁴ The same objection to the lack of service and the same contentions made by NYPS before the Board and previously decided by the Board in its Supplemental Decision and Order was again made by NYPS in its answer to the fourth amendment on May 2, 2018, to the compliance specifications (GC Exh. 1(NN)).

On May 3, the counsel for the General Counsel moved to strike portions of the Respondents' answer to the fourth amendment to the compliance specifications that challenge the underlying Board Supplemental Decision and Order (GC Exh. 1(SS)).⁵ The record opened on May 8, 2018 and the motion to strike was addressed by the administrative law judge. In agreeing with the counsel for the General Counsel, I decided not to hear and will exclude any evidence regarding the contentions of the Respondents in paras. a, c, d, 7, 8, 11, 29, 31, 40, 41, and 42 of its answer (Tr. 8).⁶

FINDINGS OF FACT

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

Upon the entire record, including my observation of the demeanor of the witnesses and corroborating their testimony with the objective findings in the record and after considering the arguments and briefs submitted by the parties, I make the following

FINDINGS AND CONCLUSIONS ON THE BACKPAY AWARD

a. Backpay standard of review

In *Cobb Mechanical Contractors, Inc.*, 333 NLRB 1168, 1168 (2001), the Board defined the purpose of a backpay proceeding as follows:

⁴ The Respondents collectively filed a motion for summary judgment before the Board on April 11, 2018, and the Board dismissed the motion in a 1-page order dated May 8, 2018 (GC Exh. 1(OO)).

⁵ The counsel for the General Counsel inadvertently omitted the motion to strike from the formal papers and included the motion to strike in the posthearing briefs. The Respondents did not oppose the inclusion of

In compliance proceedings, the Board attempts to reconstruct, "as nearly as possible," the economic life of each claimant and place him in the same financial position he would have enjoyed "but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Consequently, a backpay award "is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

The Board's well-settled policy is that "[a backpay] formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." *La Favorita, Inc.*, 313 NLRB 902 (1994). Further, it is also well settled that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. See *Ryder/P*I*E* Nationwide*, 297 NLRB 454, 457 (1989), *enfd.* in relevant part 923 F.2d 506 (7th Cir. 1991).

In determining the amount of backpay owed a discriminatee, the Board may use any formula that will approximate what the discriminatee would have earned absent the discrimination, if the formula is not unreasonable or arbitrary in the circumstances. *Performance Friction Corp.*, 335 NLRB 1117 (2001) (and cases cited therein). As such, the General Counsel has discretion in selecting a formula that will closely approximate the amount due. It is significant to note that the General Counsel need not find the exact amount due nor adopt a different and equally valid formula that may yield a somewhat different result. See *NLRB v. Overseas Motors*, 818 F.2d 517 (6th Cir. 1987); *Kansas City Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), *enfd.* 683 F.2d 1296 (10th Cir. 1982).

If a respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

b. Backpay calculations

The General Counsel seeks backpay plus interest for Pflantzer based upon the earnings of a comparable employee, reduced by his admitted interim earnings. The counsel for the General Counsel maintains that Pflantzer is entitled to backpay with interest from the date of his unlawful discharge by NYPS on February 12, 2012, through March 31, 2018. The General Counsel does not seek expenses or collateral losses.

In a backpay proceeding, the burden to prove a reasonable amount of gross backpay is on the General Counsel. The gross backpay is then reduced by Pflantzer's interim earnings from the time of his discharge through March 31, 2018. The Respondents have the burden to establish facts that reduce the amount due for

the motion to strike (GC Br. at fn. 5). I have identified the motion to strike in the formal papers as GC Exh. 1(SS).

⁶ In deciding to strike the answers but not to actually redact the referenced paras. from the Respondents' answer, I attempted to preserve the record in the event that Respondents decide to appeal my ruling (Tr. 8–10).

gross backpay. Here, the Respondents contend that Pflantzer unreasonably failed to apply for jobs within the relevant geographic area. In such a situation, it is the General Counsel's burden to show some competent evidence of the discriminatee's efforts at job search.

The Respondents also maintain that it never acquired any obligation for backpay because Pflantzer earned more than if he had continued his employment with NYPS. However, there is an established governing principle as the Board explained in *Cobb Mechanical Contractors*, above:

[A]t the heart of the Respondent's exceptions is the argument that, with minor exceptions, the discriminatees are entitled to no backpay. It is axiomatic, however, that the finding of an unfair labor practice is presumptive proof that some backpay is owed. [Citation omitted.]

See also *La Favorita, Inc.*, above ("well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed"). As indicated, to the extent that the Respondents claim that it should escape any liability for backpay, it must rebut the presumption that some amount of monetary compensation is required to remedy its unlawful conduct.

Here, I find that the formula and calculation proposed by the Region accurately reflects the wages that the discriminatee Pflantzer would have been paid by the Respondents had he not been discharged unlawfully. I have considered Respondents' arguments that Pflantzer should be denied any backpay and reject them.

c. The testimony of Fred Pflantzer

Fred Pflantzer has been a tour guide for over 10 years in New York City. Pflantzer was employed by NYPS in about October 11, 2011. Pflantzer would conduct guided tours on a 24-passenger bus. He was paid by NYPS of \$20 dollars per hour and worked on tips, which he testified was \$35. Pflantzer would conduct one tour per day and about 3 or 4 tours per week. Each tour would take 5.5 to 6 hour per day (Tr. 1221, 1407). Pflantzer did not work on weekends for NYPS (Tr. 1385). Prior to and during his employment with NYPS, Pflantzer had his own company named New York See Tours (NYST) (Tr. 1219–1222). Pflantzer was the sole proprietor of NYST, which he started in 2010. Pflantzer would work one tour each Saturday for NYST (Tr. 1254, 1337). Pflantzer had no other outside or "moonlighting" jobs prior to and during his employment with NYPS except with his Saturday tours for his own company (Tr. 1337).

Pflantzer testified that he did not seek work during the slow period between January and March 2012 because he was still employed by NYPS and expected the company to grow in the future. He also believed he was not getting work from NYPS because that period was just prior to his termination on February 12 (Tr. 1339–1341). Pflantzer was discharged by NYPS on February 12, 2012. After his discharge on February 12, 2012, Pflantzer stated he sought employment from various sources. Initially, in order to replace his lost earnings, Pflantzer immediately attempted to booster the business in his own company. Pflantzer hired a consultant to enhance the visibility of his

company when customers are searching on the internet for tour operators (Tr. 1366, 1367).

Pflantzer also employed the use of Groupons, which gave discounts for customers if they decide to use the Groupons for NYST. Pflantzer said that Groupon would take 50 percent of the ticket price and stated that if a tour is advertised as \$100 tour, the use of a Groupon would be \$50 for the tour and Pflantzer's company would receive \$25. During this time, Pflantzer also produced brochures for his company and distributed the brochures at various NYC hotels.

Pflantzer testified that the use of Groupons had increased the business for NYST. He stated that in 2012, he did one tour per week. In 2013 because of Groupon, NYST did 30–40 tours for the year and about 20 in 2014. Pflantzer would rent the tour bus for 4-hour tour at \$500 dollars. Pflantzer would use a 12 or 6 passenger tour bus to conduct his tours. He would tip the driver \$40 for each tour.⁷ Pflantzer said he would receive tips in the range of \$40–50 dollars. He would always give \$40 to the bus driver, so his tip minus the standard \$40 to the driver would be between \$5–10 dollars. Pflantzer recall telling the Region's compliance officer that he split his tips with the driver and that the average tip at NYPS was \$35 and with all other subsequent employers (Tr. 1633–1635). Pflantzer did not deposit his tips in a bank account and did not report the tip amounts in his tax returns (Tr. 1381, 1382, 1394, 1395, 1439).

When Pflantzer needed help at NYST, he would hire additional tour guides at \$25 per hour. In 2013, Pflantzer did 10 percent of the tours because he needed to focus on managing the tours due to the high volume from Groupon sales (Tr. 1267, 1268, HT 1372, 1374). He explained the need to hire tour guides in 2013 because that was the Groupon year and the tours were concentrated during a particular busy time of the year (Tr. 1269). Pflantzer did not work for any other companies in 2013 (Tr. 1418).

In 2014, Pflantzer became disappointed with Groupon because of the 50 percent share of profits taken by Groupon. Pflantzer attempted to negotiate with Groupon for a reduction but was unsuccessful (Tr. 1368, 1374). Pflantzer stopped using Groupons and reduced his tours to walking tours with occasional bus tours under NYST. Pflantzer stopped altogether his NYST operations in mid-2014 and sought employment with other tour companies at that time. Pflantzer was hired by Go New York (GONY) and conducted tours on a double-decker bus with on-off options for the customers on a prescribed route. There usually 55 passengers on the tour bus. Each tour was approximately 2 to 3 hours. Pflantzer received \$15 per hour and tips were prohibited by GONY (Tr. 1223–1228).

In 2014, Pflantzer was briefly reinstated by NYPS on July 27 and again terminated on August 13. Pflantzer also worked at another tour company called High Quality in late 2014 and early 2015 (Tr. 1226).

Pflantzer worked at GONY starting on July 4, 2014 until he was discharged about January 16, 2015 (Tr. 1343, 1493). Pflantzer did not work tours on Saturday for his own company during this time because he worked on GONY tours on the

⁷ Fred Moskowitz, former president of NYPS, testified that there was no written policy at NYPS of paying a flat tip to driver of \$40 or \$50 (Tr.

1731). As such, Pflantzer's decision to tip \$40 to the bus driver was not unreasonable since it was up to him as to the amount to tip.

weekends. He stated that he may have also conducted a couple of tours under NYST during this time from July through December 2014 (Tr. 1392, 1393). His employment with GONY ended with a NLRB charge and a settlement of that charge in 2015 (GC Exh. 169). Pflantzer received a backpay award with a W-2 of \$15,687, which he reported in the appropriate year for the backpay. He also received a W-2 from GONY which he reported on his tax return (1225–1227, 1451).⁸ The checks from GONY went into Pflantzer's personal bank account. Pflantzer considered wages received with a W-2 was personal and revenues received with a 1099 was business and deposited into his NYST bank account (Tr. 1454).⁹ For the 2014 tax year, Pflantzer admitted that there was no Schedule C (business income) for his company, NYST, and did not recall if he had any business income. Pflantzer's 2014 tax return also showed wages at \$10,149, but he could not recall where the income came from (GC Exh. 3(C); Tr. 1586, 1587).

In 2015 and after his discharge from GONY, Pflantzer made several attempts to seek employment. He contacted Real New York Tours; he interviewed for a guide position on a boat tour called Circle Line, which he did a couple of tours hoping to be hired, but was not; he attended an open house for Big Bus Tours; use his colleagues and associates in the tour industry for potential job offers; search for tour jobs on Craigslist and Trip Advisor; and pursued other avenues of employment without real success. Pflantzer also admitted that he did not apply for jobs at particular tour companies (Tr. 1285–1303, 1351–1359).¹⁰

Pflantzer was briefly employed by USA Guided Tours for 3 months (1st quarter of 2015) and conducted 2–3 bus tours per week at 5–6 hours per tour and received \$19 per hour and \$20–35 in tips, which he split with the bus driver. Pflantzer believed he received either an employer W-2 or an IRS form 1099 from USA Guided Tours. He stopped working with Guided Tours after one of his payroll checks was not honored by his bank. Pflantzer testified that he would not work in a company that had not honored his paycheck¹¹ (Tr. 1249–1253, 1311).

Pflantzer also worked with a start-up tour company named High Quality (HQ) in late 2014 and early 2015 on an intermittently basis. He was hired on a "as needed" basis (Tr. 1350, 1351). Pflantzer said the tours conducted were similar to NYPS. The tours were by bus, the tour guide stays with the passengers; there were specific stops and a brief guided tour at each stop. HQ also had a boat ride component. He said there were usually 24 passengers. He was paid \$25 dollars per hour for one or two tours per week. Each tour took 5-6 hours. Pflantzer would receive \$35 in tips, which he split with the driver. Pflantzer worked 3 to 5 days per month when he was contacted to work. He received more offers to work in 2016, about 4, 5 times per

month. Pflantzer was also in partnership with HQ but only during the Christmas seasons in 2015 and 2016. Pflantzer discontinued his partnership with HQ and he stopped working at HQ towards the end of December 2016 because of a disagreement over the holiday tours (Tr. 1226–1230, 1309, 1429, 1430). Pflantzer testified he received \$1,500 from HQ in 2015 and 2016 (Tr. 1459, 1472).

Pflantzer testified that he also worked as a tour guide for Uncle Sam's in 2015, but it could have been in 2016 (Tr. 1343). He said the company conducted only walking tours. He recalled working at Uncle Sam's through December 31, 2017. He worked 2 or 3 tours per week, usually about 2 hours per tour. He was paid \$30 per hour and received \$20 in tips (Tr. 1230, 1231–1234). Pflantzer testified that he is still employed with Uncle Sam's at the time of the trial (Tr. 1309). Pflantzer did not receive a 1099 or a W-2 form from Uncle Sam's. He could not recall if he reported his income from Uncle Sam's on his tax returns in 2015, 2016, or 2017 (Tr. 1434, 1435, 1475).

Pflantzer worked briefly for a tour group called Open Loop/RSDL in summer 2015 (Tr. 1343, 1344). He conducted 2 open bus tours and received a W-2 of \$107 dollars. He complained of receiving little or no tips (Tr. 1246–1248). Pflantzer also worked for a tour company named Maxim also during summer 2015 and conducted 5 or 6 guided tours and earned \$1200 to \$1400 dollars. Pflantzer testified that the money earned from Maxim went into his NYST bank account and reported on his tax returns. As a company policy, Pflantzer received no tips from Maxim. Pflantzer said that Maxim did not offer him any other tour jobs after summer 2015 (Tr. 1453–1457).

Pflantzer testified to the seasonal nature of the tour industry and said there was very few tours after Christmas until St. Patrick's Day. He said that from March to Christmas is the busiest time for the tours. He stated that during the busy season, he would conduct 2 or 3 hours per week. Pflantzer stated that he did no walking tours for Uncle Sam's in 2018 (January through the time of this trial) because the tour business was in its slow season (Tr. 1231, 1232).

In addition to Uncle Sam's, Pflantzer worked at New York Tours One (NYTO), which was also known as the Wall Street Experience (WSE), in 2015 (Tr. 1235, 1389, 1343). He stated that NYTO (aka Wall Street Experience) kept him busy and he spent less time on his own company during this period (Tr. 1364, 1365). He said NYTO conducted walking tours and during the busy season, he would do 5 or 6 tours per week. He said that the tours varied in duration from 5 to 9-hour tours depending on the tour route. Some tours were short (the Ground Zero Tour) and he could do 2 tours per day or 6–10 tours per week. Some tours were up to 6 hours (the Statue of Liberty) and he was only able

⁸ Pflantzer waived reinstatement as part of his settlement with GONY. Pflantzer testified that GONY terminated all tour guides in early 2015 so even if he had accepted reinstatement, he would have been subsequently terminated again (Tr. 1423, 1424).

⁹ I would note that Pflantzer's wages for 2015 was only \$112 dollars, as represented in his 2015 tax return. Pflantzer testified that the \$112 in wages noted on his 2015 tax return was from employer Open Loop (Tr. 1506). The NLRB backpay settlement was received 2016 and that amount was included in his W-2 wages for 2015 by the compliance officer (GC Exh. 3(D), (C)).

¹⁰ As an example, Pflantzer testified he did not apply for a job at New York Shuttle Tours because Tom Schmidt, former CEO of NYPS, was also a partner in that company and he did not apply for a job at Locations Tours because those tours were movie-oriented locations and he was not knowledgeable in that area (Tr. 1356–1358).

¹¹ Pflantzer never had a payroll check not honored by NYPS and therefore, he would not have a problem returning to NYPS as an employee (Tr. 1328).

to conduct 10 of those tours for the entire year in 2016. Pflantzer believed he received a 1099 form for \$18,000 from WSE in 2016.

Pflantzer stopped conducting the 6-hour tours in 2017. Pflantzer also conducted 9-hour tours and some private tours. He conducted about 10 9-hour tours and about the same number of private tours. Pflantzer received \$40 per hour for the two 4-hour tours and received \$25 per hour for the six, 9 hour and private tours. He would average \$20 in tips for his tours and would receive a designated amount of \$40–50 in tips for the private tours. In 2017, Pflantzer worked almost exclusively the Ground Zero Tours for NYTO. He recalled doing three Ground Zero tours and two Statute of Liberty tours. Pflantzer believed he received an employer 1099 for his work at NYTO in 2016, which he reported on his tax returns (Tr. 1236–1244). Pflantzer continues to work for NYTO after December 31, 2017, but was discharged about January 8, 2018 (Tr. 1309, 1310, 1436).

In 2017, Pflantzer also worked at One on One Tour, starting on September 11 (Tr. 1244, 1351). This was a bus and walking tour that is scheduled only once a year. Pflantzer worked 4 hours per tour and was paid for the day of \$1753. The money received was also used to paid for the bus, which cost him \$750 per day and a \$100 tip to the driver. Pflantzer would receive a \$100 tip directly from the employer (Tr. 1246). Pflantzer continues to work this tour every year since 2017 (Tr. 1310, 1311).

Throughout 2016 and 2017, Pflantzer also resumed tours under his own company NYST. He conducted walking and private tours and believed he did 10 walking tours in 2016 until he started to work for NYTO (Wall Street Experience) in May, where he spent most of his work time (Tr. 1278, 1279, 1445). Pflantzer testified that he made an average of \$25 dollars in tips doing tours for NYTO and NYST in 2016 (Tr. 1446).

d. The compliance officer's backpay calculations

Rachel Kurtzleben (Kurtzleben) has been the compliance officer for Region 2 since June 2016 and was the acting officer since 2015. Kurtzleben testified to the calculations that she had prepared as reflected in the fourth amendment to the compliance specification (GC Exh. 1(JJ)(a-c)). She testified that the backpay period was from February 12, 2012, to July 27, 2014. At that point, Pflantzer was reinstated by NYPS, but subsequently discharged a second time. The backpay period resumed on August 14, 2014, after Pflantzer was discharged to March 31, 2018, and continuing because Pflantzer had not received a valid offer of reinstatement (Tr. 133).

I credit Kurtzleben's testimony regarding the preparation of the compliance specification, the source of factual information on which the specification is based and the rationale for the methods applied to compute backpay. The compliance officer's backpay formulation is a standard calendar quarterly computation provided for in *F. W. Woolworth*, 90 NLRB 289 (1950), with offsets for net interim earnings. Regarding interim earnings and mitigation efforts, the compliance officer utilized reports prepared by the employer, Pflantzer's taxpayer returns, his 1099s, W2s, and responses from her own investigatory interviews of the discriminatee.

For backpay purposes, I note that Pflantzer did not have regular set hours when he was employed as a tour guide with NYPS.

His work hours were based upon the time spent while conducting tours as a guide. As such, it cannot be definitely established how many hours per day that Pflantzer would have worked had he not been discharged. In addition, Pflantzer received tips as a tour guide and the tips were not reported in NYPS' payroll records. I believe that Kurtzleben performed a laudable task in determining Pflantzer's backpay under such circumstances.

Kurtzleben testified that she developed a spread sheet for her backpay calculations with columns that listed the following: calendar year, yearly quarters, end date of each week, regular hour worked, overtime worked, hourly rate, gross backpay, any quarterly interim earnings, net backpay, interim expenses, medical expenses, and net backpay and expenses (GC Exh. 1(JJ)(a)).

e. The comparator method

For the "regular hours" worked column in GC Exh. 1(JJ)(a), Kurtzleben testified that those would have been the hours Pflantzer worked had he not been discharged. Kurtzleben stated that she determined the hours Pflantzer would have worked by reviewing the hours of a comparator employee. Kurtzleben first looked at Pflantzer's work hours during a full week when he was reinstated at NYPS in 2014 and then averaged his hours for the remaining pay periods in 2014 after Pflantzer was discharged in August 2014. Kurtzleben then looked at other tour guides at NYPS with similar hours during the same period as Pflantzer and concluded that Edwin Jorge (Jorge) had similar hours to Pflantzer in 2014. Kurtzleben then used Jorge's hours of work from February 18, 2012, to October 20, 2014 (Tr. 139). Kurtzleben explained she used Jorge as a comparator to determine average hours worked because he best reflected the changes in the hours worked during the slow and busy seasons and one who also reflects bonuses received.

Kurtzleben noted some gaps in Jorge's employment history with NYPS in 2013. Kurtzleben looked at other tour guides to make sure that they did not also have significant gaps of non-work hours during the same period as Jorge and then went back to Jorge's earlier work weeks during the same quarter to review his weekly hour worked, average out those hours and apply the hours to Pflantzer's hours when there were missing periods of employment in Jorge's hours (Tr. 141, 142).

Kurtzleben testified that the "hourly rate" column was \$20 dollars and based upon NYPS payroll records. She testified that the "gross backpay" column is the hours worked multiplied by \$20 dollars per hour plus tips to determine Pflantzer's interim earnings for each calendar quarter.

Kurtzleben stated that there was no information on tour guide hours after October 20, 2014. Kurtzleben determined the hours by using Jorge's hours during the last full pay year from October 2013 to October 2014 and repeated the same hours for subsequent years in 2015, 2016, 2017, and 2018 to arrive at the gross pay. For example, in the week ending August 8, 2015, the gross pay (not including tips) was \$738. The \$738 is reflected in August 13, 2016, and August 12, 2017 (GC Exh. 1(JJ)(a)).

Kurtzleben testified that she then added tips and bonuses to the gross backpay because Pflantzer would have received tips from his tour service. Tips were not reflected in the payroll records of the tour guides. Kurtzleben determined Pflantzer's tips based upon his representations that he received tips for each tour

of an amount ranging from \$20–50 dollars. Kurtzleben took a middle point of \$35 in tips for each tour. As I noted above, the regular hours worked are based upon the length of each tour, Kurtzleben accepted Pflantzer's representation that each tour was from 5 to 6 hours. Kurtzleben used a midpoint of 5.5 hours as an average for each tour (GC Exh. 1(JJ)(b)).¹² Kurtzleben testified that bonuses were intermittent and attributed the bonuses received by Jorge to Pflantzer when earned by Jorge (Tr. 138–*140).

Kurtzleben testified that the weekly tips during the backpay calculation period was determined by taking the hours worked per week and dividing the hours by 5.5 and then multiplying the tip amount of \$35 to arrive at the weekly tip amount (Tr. 135–137). My own review of Kurtzleben's calculations for the gross backpay substantiates her testimony. For example, for the week ending February 18, 2012, the hours worked was 19.60 (based upon Jorge as a comparator employee) and the hourly rate was \$20 (based on payroll records), giving Pflantzer a gross backpay of \$392 for that week (GC Exh. JJ(a)). In addition, the tips for that same week would have been the hours worked (19.60) divided by the estimated hour for each tour (5.5) multiplied by \$35 dollars to reach a weekly tip of \$124.73 (GC Exh. 1(JJ)(b)). The amount of the weekly tip (\$125) was added to the backpay of \$392 for a total gross backpay of \$517 for the week ending February 18, 2012.

f. Pflantzer's interim earnings

Kurtzleben testified that gross backpay was offset by any interim earnings received by Pflantzer. Kurtzleben reviewed Pflantzer's tax returns from 2012 to 2017; a 1099 (earnings statement) from one employer in 2016, a settlement in another NLRB complaint, his own business, and information provided by him on tips and wages not reported in his tax returns. Kurtzleben reviewed the same information of wages/salaries, and business income (or loss) from the Schedule C of each year that reflects profits and loss from his business for each tax year (Tr. 144–149) (GC Exh. 3(A-F)). Kurtzleben provided testimony as to her calculations of the backpay period from February 12, 2012, through March 31, 2018.

2012- Pflantzer had no wages or tips but had \$27,503 in business income.

2013- Pflantzer had no wages or tips but had \$14,538 in business income.

2014- Pflantzer had \$10,149 in earnings.

2015- Pflantzer received wages of \$112 and business income of \$8341.

2016- Pflantzer received wages of \$15,687 with a Schedule C business income of \$2,555. Kurtzleben stated that the 2016 tax return contained two schedule C and the second Schedule C indicated business income of \$19,535. Kurtzleben testified that Pflantzer explained to her that the second Schedule C was actually wages received from employer HQ. Kurtzleben considered the second Schedule C as wages.

¹² Ron White, operations manager for NYPS, credibly testified that the "New York See It All" tours usually are scheduled for 5.5 hours, but the guides would work for 6 to 6.5 hours because there would be preparation time before the tour and questions asked by the tourists after the

2017- Pflantzer again had two Schedule C forms. Kurtzleben accepted the first Schedule C as a business loss of \$9,222 but the second schedule C filed with the 2017 tax return had \$2,3760 business income, which Kurtzleben accepted as wages after Pflantzer explained that the income was actually wages.

Kurtzleben also explained that Pflantzer had his own tour business while employed at NYPS and this amount was not calculated in his interim earnings. Kurtzleben testified that the \$335 was Pflantzer's moonlighting business when he was conducting tours on one Saturday every week at NYST, which was not interim earnings because Pflantzer received those earnings while working at NYPS.

Kurtzleben explained how she arrived at the average earnings per tour that Pflantzer generated in his own business. Kurtzleben testified that she took the amount Pflantzer earned in his own business for 2012, 2013, and 2014¹³ and divided the profits by the estimated number of tours that he conducted for his own business during the same time period (Tr. 151). Kurtzleben said that Pflantzer informed her that his tips ranged from \$40 to \$50. Kurtzleben then took a midpoint of \$45 and took off \$40 because Pflantzer explained to her that \$40 was given the bus driver, leaving Pflantzer with a \$5-dollar tip per tour. The profits Pflantzer received from his own tours were subtracted from his weekly interim earnings because that would have been income he would have received and would continue to receive in operating his own business while employed by NYPS (Tr. 151, 152).

In verifying the accuracy of Kurtzleben's yearly calculations, I calculated Pflantzer's interim earnings in 2012 by applying the formula used by Kurtzleben and arrived at the following information:

2012: Pflantzer's only source of income was his own business. Kurtzleben applied Pflantzer's total earnings in 2012 (\$27,503) as noted in his tax return and added the tips (\$5) per tour (Pflantzer had represented to Kurtzleben that he conducted 60 tours), which equal \$300 for 2012. That amount was added to the income reported on his 2012 tax return (\$27,503+\$300=\$27,803), and I subtracted \$1,7420 (\$335 for moonlighting while working at NYPS, multiplied by 52 weeks) (not calculated in earnings); and divide that number (\$10,383) by 46 weeks (the number of weeks in the 2012 pay period). This would equal Pflantzer's interim earnings of \$226 per week in 2012.

My calculations for Pflantzer's interim earnings of \$226 per week in 2012 and for 2013 is consistent with and confirmed the calculations performed by Kurtzleben (GC Exh. 1JJ(a); Tr. 152, 153).

Kurtzleben continued with her narration in calculating the Pflantzer's income for 2014. She testified that the first 2 quarters for 2014 were solely his own income from his business and he informed Kurtzleben that the amount was \$4100 for both quarters. Kurtzleben then added his tips (\$5 tip for 30 tours) from his own business and subtracted the aforementioned \$335 in tips for

tours that took additional time (Tr. 937, 938). As such, his testimony confirms Pflantzer's assertion that a most of his tours were under 6 hours, but some lasted 6 hours (Tr. 1395).

¹³ Pflantzer stopped conducting his Saturday bus tours after 2014.

his moonlighting tours for the 2 quarters, which would give Kurtzleben the weekly interim earnings for the first half of 2014. Kurtzleben testified that Pflantzer had no quarterly interim earnings for 2013 and the first half of 2014 (GC Exh. 1(JJ) Exh. A at 2–4)) because his moonlighting of \$335 exceeded his interim earnings of \$226 per week (Tr. 153–155).

In the second half of 2014, Pflantzer's earnings reflected from his tax return was divided by 23 weeks. No tips were included in the earnings because Pflantzer informed Kurtzleben that his earnings were solely from his work at Go New York Tours and tipping was prohibited by that company. Kurtzleben was also informed that Pflantzer did not do any moonlighting because he was not operating his business while working with Go New York Tours (Tr. 155). Kurtzleben then divided his 2014 earnings of \$10,149 (GC Exh. 3(C): Pflantzer's 2014 tax return) by 23 weeks to arrive at his weekly interim earnings of \$441 for the second half of 2014. Kurtzleben said the period was 23 weeks and not 26 weeks because Pflantzer had worked 3 weeks for NYPS in the second half of 2014 (Tr. 156).

Kurtzleben used the same formula of total weekly earnings less total weekly moonlight work for calculating earnings for 2015 through 2018 even though Pflantzer had a series of different employers.

In 2015, Pflantzer worked in his own business; with the Open Loop tour company; received a NLRB settlement from Go New York Tours; and worked at USA Guided Tours and Uncle Sam's. There were no earnings in the first 2 weeks in 2015 because moonlighting exceeded total weekly earnings. Kurtzleben calculated the weekly earnings by totaling earnings from Pflantzer's own business and Open Loop for the first quarter of 2015. Pflantzer informed Kurtzleben that there were no tips from his own business because he changed from bus tours to walking tours and received no tips. The GONY NLRB settlement was received in 2016 but covered pay weeks in 2015 and it was calculated as backwages for 2015 by Kurtzleben. She then took Pflantzer's settlement amount divided over the backpay period in 2015, which resulted in \$257 per week. Kurtzleben stated that the USA Guided Tours income was not reported by Pflantzer. Kurtzleben accepted Pflantzer's representation that he the tours he worked per week, wage rate and tips amounted to \$107 per week. Kurtzleben said that she included the tips told Pflantzer told her. US Sam income was not included in the tax returns but Pflantzer informed Kurtzleben, in similar fashion like USA Guide Tours, the number of tours, wage rate and tips (GC Exh. 1(JJ) at 5, 6); Tr. 157–160).

In 2016, Pflantzer's income came from his own business; part of the Go New Tours settlement, and employment with High Quality, Uncle Sam's, and Wall Street Experience. Pflantzer also included two schedule C (business profit and loss) in 2016. Kurtzleben considered the second schedule C as income from wages (\$19,535) and not as business income and did not deduct the business expenses in the second schedule C to determine interim earnings (GC Exh. 3E). Kurtzleben also included \$200 in tips that Pflantzer received for his employment at Wall Street

Experience (Tr. 161–164).

In 2017, Pflantzer worked at his own company, Uncle Sam's, Wall Street Experience and One-on-One Tours. Kurtzleben again discovered that Pflantzer had filed two Schedule C with ins 2017 returns. Kurtzleben was informed by Pflantzer that the first Schedule C was from his own business and suffered a loss of \$9222. Based upon this explanation, Kurtzleben determined that Pflantzer had no interim earnings from his own business in 2018 (GC Exh. 1(3(F)). Kurtzleben also considered the amount of \$23,760 from the second Schedule C as income from Wall Street Experience and not business expenses. Kurtzleben also included \$200 that Pflantzer received from tips at Wall Street Experience. For One-on-One Tours, Kurtzleben was informed that Pflantzer only worked one tour and he received \$1,000 in wages and \$100 in tips. Kurtzleben continued to subtract out Pflantzer' moonlight work (Tr. 163–165; GC Exh. 1(JJ) at 6)).

Finally, in 2018, Kurtzleben included Pflantzer's income from his own business, one tour for Wall Street Experience and his work at Uncle Sam's. At the time of the backpay calculations, Pflantzer's 2018 tax return was not yet filed so she received estimates from Pflantzer. It was represented that Pflantzer earned \$13,000 in the first quarter from his own business and Kurtzleben divided that amount by 13 weeks in the quarter. Income from Wall Street Experience was based upon Pflantzer's previous years working at that company. Pflantzer only worked one tour at Uncle Sam's during the first quarter, so it was estimated that he earned \$60 in wages and \$50 in tips for that one tour (Tr. 165–167).

Kurtzleben testified that net backpay is the gross backpay less interim earnings, which she calculated on a quarterly basis from January 1, 2012, to March 31, 2018, as \$92,474 (GC Exh. 1-JJ(c)). In addition, Kurtzleben noted that Pflantzer would be entitled to the daily compound interest accruing on the backpay amount and the excess tax liability on the backpay because Pflantzer would have a tax liability (\$4657) on the lump sum backpay award as oppose if he had paid taxes when he earned his pay during the course of the backpay period. Kurtzleben's calculation of Pflantzer's excess tax was based upon his rates and taxes with the IRS and New York State for each given year. Of course, Pflantzer would be liable for the incremental taxes on the excess tax liability (\$6656) (Tr. 169, 170; GC Exh. 1(JJ)).¹⁴

Discussions and Analysis

A. *Backpay Calculations were Reasonable and Appropriate for Computation of the Backpay Award*

With respect to the use of various backpay formulas, the Board does not need to obtain a perfect calculation; but needs only to use a reasonable formula that would have a probability of determining the lost earnings of discriminates. *American Armored Card, Ltd.*, 342 NLRB 528 (2004). In *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963), the Court stated inter alia

Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay, which should be

¹⁴ The Respondents' answer to the compliance specification denied that Pflantzer was a statutory employee under the Act, but rather, he worked as an independent contractor. This argument has been previously

decided by the Board and rejected it (*New York Party Shuttle, LLC.*, above). No further discussion of this nonmeritorious claim is necessary.

awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations We have held that with respect to the formula for arriving at back pay rates or amounts which the Board may deem necessary to devise in a particular situation, “our inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved.” [Case citations omitted.]

Kurtzleben testified that the backpay award started on February 12, 2012, through the present time. The Respondents questioned Kurtzleben on her method in calculating the backpay and the use of Edwin Jorge as a comparator. The Respondents raise several areas in attacking Kurtzleben’s methodology in calculating the backpay award and using Jorge as a comparator in the calculations. Kurtzleben does not dispute the Respondents’ contention that she did not have any documentary evidence to show the number of tours Pflantzer worked while at GONY, Open Tours or any other subsequent employers. The number of tours and hours worked by Pflantzer at the other companies were based upon his representations to Kurtzleben. It is also clear that there were inconsistencies in the Pflantzer’s testimony as to his interim earnings that were not reflected in his tax returns. For example, inconsistencies in Pflantzer’s testimony included the tip amounts he had received from his employers and not mentioning other employers, such as Maxim, HQ, Uncle Sam’s, and New York Water Tours, to Kurtzleben where he had earned wages. On this point, I would also note that Pflantzer testified on cross-examination that his earnings from Maxim and HQ were mistakenly included in his gross business income (as opposed to wages), which was reflected in his tax return for 2015 and considered by Kurtzleben (Tr. 156–160).

I find that Kurtzleben’s backpay calculation was reasonable and attempted to capture the interim earnings under trying circumstances of uncorroborated testimony, lack of documentary evidence and faulty memory. I agree with the counsel for the General Counsel that Pflantzer’s poor record keeping or uncertainty as to memory do not automatically disqualify him from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966).

B. Edwin Jorge is a Valid Comparator Employee

I also credit Kurtzleben’s justification of her use of a comparator employee in calculating the backpay award. Kurtzleben understood that the tour guide business was seasonal work and she needed to reflect the changes in hours that occur throughout the year, as opposed to other types of work, such as factory work, where there is a steady number of hours of work per week. She stated that is the reason for using comparator employee method to reflect the slow and busy hours of a seasonal business (Tr. 192, 196). The comparator employee was used to determine the average number of hours worked because Pflantzer had only worked from mid-October 2011 to mid-February 2012 at NYPS (Tr. 147, 192, 296). Kurtzleben decided to use Edwin Jorge as a comparator (Tr. 197) because

He had hours similar on average to Fred Pflantzer, but then also had hours spanning across all the payroll data we had. So that’s why I chose (that) Jorge.

In contrast, Fred Moskowitz, former president of NYPS, testified that Jorge was not a good comparator because he had more seniority than Pflantzer, was bilingual and an asset with Spanish-speaking tourists, he was outstanding and a reliable tour guide and therefore, he would have received more tours than Pflantzer (Tr. 1707–1708). However, Moskowitz also admitted that Jorge did not work nights, so he had less hours during the evening/nights holiday tours than Pflantzer (Tr. 1708).

Kurtzleben had used the payroll data provided by Respondent NYPS to determine the hours worked by Jorge (GC Exh. 2(A)-(D)). Kurtzleben noted that she used Pflantzer’s hourly rate of \$20 and not Jorge’s rate, which was \$2 more (Tr.189). Kurtzleben also noted that Pflantzer had no work at NYPS from January 1 to February 12, 2012. When questioned that Jorge worked and Pflantzer did not during this time period, Kurtzleben credibly responded that the comparator employee method is for average hours and wanted to use this method throughout the backpay period, rather than to “. . . switch up the method because that would be inconsistent” (Tr. 212, 213).

Indeed, as pointed out by the Respondents, there may be occasions when the comparator may have worked and Pflantzer did not work (Tr. 209).¹⁵ At the same time, the reverse would be equally true that Jorge was not working while Pflantzer did work. However, those situations would be rare since NYPS had employed over 30 tour guides and there was nothing meritoriously suggested by the Respondents that Pflantzer would have only gotten half the hours worked by Jorge or that Pflantzer did not work when Jorge worked. The Respondents also suggest that Jorge received larger bonuses or had worked more tours because of his seniority; was a better tour guide; or had a special niche with the Spanish-speaking only tourists (Tr. 1829, 1917).

Initially, I would note, as the Respondents pointed out in the cross-examination of Pflantzer, that Jorge had worked more hours than Pflantzer on some weeks. Pflantzer agreed that he had 23.5 hours for pay period October 15, 2011, while Jorge had 51.5 hours for the same week. Pflantzer also agreed that he had 36.75 work hours for pay period ending October 29, 2011, while Jorge at 46.5 work hours. However, correspondently, the same records showed that on another week, Pflantzer had 44 hours worked while Jorge had 35 hours (Tr. 1646–1651; GC Exh. 2(A)(B); R. Exh. 10).

Using the comparator model is not an exact science in determining backpay awards. It is only an average. But, absent an alternative method to calculate backpay proffered by the Respondents, the use of a comparator employee is the best method to address the average hours worked during seasonal changes in the tour industry. While the Respondents did not directly challenge the comparator employee model, they did assert that Jorge

¹⁵ For example, Pflantzer’s 2012 tax return (GC Exh. 3(A) showed no income from NYPS, although he recalled receiving a W-2 from

NYPS. Pflantzer also had no work NYPS work in January 2012 while Jorge was working (Tr. 1652–1655).

was not the best comparator.¹⁶ However, the Respondents did not offer its own set of comparable employees nor did they calculate the earnings for such a set of comparators. As no alternative has been offered, my analysis is necessarily limited to a review of the reasonableness and appropriateness of the choice made by the compliance officer in calculating the amount that Pflantzer would have been expected to earn if he had been retained on the payroll. As the Board explained in *Parts Deport, Inc.*, 348 NLRB 152, 153 (2006), enf. 260 Fed. Appx. 607 (4th Cir. 2008), “it is the General Counsel’s burden to establish gross backpay amounts that are reasonable and not arbitrary.”

In evaluating the General Counsel’s approach, I begin by noting that the underlying methodology chosen is one that is regularly employed by the Board. In fact, it is listed as one of three “basic methods” in the Casehandling Manual, Part Three, Sec. 10540.1. Sec. 10540.3 of the manual outlines the entire process, noting that, with this approach, backpay is calculated based on the actual earnings of “another employee or group of employees, whose work, earnings, and other conditions of employment were comparable to those of the discriminatee both before and after the unlawful action.”

The manual’s approach is consistent with the Board’s jurisprudence regarding the use of comparable employees. As the Board once explained, “[w]e find no merit in the Respondent’s general attack on the comparable employee formula and adopt the judge’s finding that the comparable or representative employee approach is an accepted methodology, and appropriate here.” See, *Performance Friction Corp.*, 335 NLRB 1117 (2001).

With respect to the use of various backpay formulas, the Board does not need to obtain a perfect calculation; but needs only to use a reasonable formula that would have a probability of determining the lost earnings of discriminatees. *NLRB v. Brown & Root, Inc.*, above.

I agree with Kurtzleben that Edwin Jorge was the most viable of the NYPS tour guides to use as a comparator for backpay purposes. A review of the payroll record (GC Exh. 2(A)-(D)) show Jorge as a viable comparator employee with similar hours as Pflantzer before his discharge. As Kurtzleben testified, Jorge’s work hours were similar to Pflantzer during the period of October 2011 to October 2014. Kurtzleben based Pflantzer’s gross backpay on Jorge’s weekly hours multiplied by Pflantzer’s hourly rate for the period of February 12, 2012, through October 20, 2014. Because there were no payroll records provided the Respondent NYPS after October 20, 2014, Kurtzleben utilized Jorge’s work hours between October 2013 through October 20, 2014, and applied those hours and for each subsequent year to Pflantzer. Kurtzleben also calculated bonuses for Pflantzer when Jorge received a bonus.

The Respondents presented two significant counter-arguments for not using Jorge as a comparator. First, they assert that Pflantzer never worked between January 1, 2012, and February

12, 2012, but Jorge did work during that time and, second, the Respondents argue that it is unreasonable to use Jorge’s hours from October 2013 to September 2014 and apply those same hours to Pflantzer’s entire backpay period from October 2014 through 2018 (R. Br. at 12).

First, it is pure speculation that Pflantzer would consistently not have worked from January 1 to February 12, 2012. Admittedly, while this is a slow period for the tourist industry in the New York City area, it does not mean that Pflantzer would have never worked any hours during that period or that only Jorge worked to the detriment of Pflantzer. I note that NYPS consistently have over 30 tour guides on its payroll and there is no reason why Pflantzer could not have worked those weeks for each year after 2012. In addition, as I noted in the hearing record, Kurtzleben’s calculation in using Jorge’s work hours is an average and not exact (Tr. 184–185).

Second, while it seems unfair to Respondent NYPS that Kurtzleben used Jorge’s work hours for the last complete year (October 2013-2014) and applied those earnings through 2018 when NYPS was closing its operations by 2014, it is reminded that it was Respondent NYPS that violated the Act when it twice discharged Pflantzer and it is grossly more unfair that Pflantzer has not been remedied for the unlawful discharges.

Further, the Respondents has also not shown with any credible evidence other than the testimony of Schmidt and Moskowitz that bonuses or work hours offered to Jorge were somehow based upon Jorge’s seniority, foreign language skills or expertise as a tour guide. NYPS proffered no company policy that performance factors were used in awarding bonuses or that work was based upon seniority or language skills of a tour guide.

C. Pflantzer’s Representation of his Tips was Reasonable and Appropriate

The Respondents argue that there is “zero documentary evidence to support” for the amount of tips calculated by Kurtzleben. Kurtzleben does not dispute that her inclusion of Pflantzer’s tips for his services on the various tours was based upon Pflantzer’s representations to her as to the tips he earned. Kurtzleben testified that it was customary for a NLRB compliance officer to base calculating back pay, including the unreported tips, on the oral conversations with the discriminatee (Tr. 296).

Kurtzleben noted that Pflantzer’s tips were not included in his tax returns but I find that she correctly ensured that the tips were captured in the backpay calculation (Tr. 176, 177, 297). When questioned why it would be reasonable to include the tips in the backpay calculations when the tips were not evident in Pflantzer’s tax returns (or anywhere else), Kurtzleben replied because it would be unreasonable not to include the tips (Tr. 180):

I think so, because generally, as a tour guide, you earn tips, and he earned tips at his interim employers. He reported to me that he earned tips at New York Party Shuttle, and I think it would

¹⁶ Indeed, while arguing that Jorge was not a valid comparator, the Respondents simultaneously urged that I should accept that Pflantzer worked only 71 percent of comparator Jorge’s hours while they were both working at NYPS and apply that reduction to gross backpay (R. Br. at 12). Obviously, the Respondents did not proffer an alternative method

to calculate backpay but only sought to object that Jorge was a valid comparator in calculating backpay. The Respondents did not proffer another comparator employee at NYPS that they believe would be more align with Pflantzer’s work hours.

be less reasonable for me not to include them in the calculation since he reported to me that he was earning them.

It is a well-settled principle that, where there has been a finding of an unfair labor practice, and back pay is owed, it is the back pay claimant that “should receive the benefit of any doubt rather than the Respondent.” *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986).

However, this presumption in favor of the employee has proven to be difficult to implement where the employee has failed to accurately report their tip income to the Internal Revenue Service (IRS) during the backpay period. While the presence of unclean hands in a backpay determination may complicate matters, the Board has held that “that an admission of underreporting tips to the Internal Revenue Service (IRS) does not preclude such tips from being considered and included in a backpay award.” *Atlantic Limousine, Inc.*, 328 NLRB 257, 258 (1999). The Board has reasoned that precluding tip income on the basis of an employee’s accuracy in completing tax returns would frustrate the purpose of the Act, as it would allow the wrongdoer to benefit. *Id.*

While it is clear that a discriminatee that has inaccurately reported or failed to report tip income on their Federal income taxes is still entitled to a backpay award that reflects this tip income, the law is less definitive on how these tips should be factored into the final calculation. In some situations, great deference is given to the testimony of the discriminatee, even if this evidence is entirely uncorroborated. In *Harran Transportation Co., Inc.* and *John Cantidate*, 330 NLRB 369 (1999), the Board affirmed the administrative Law Judge’s finding of \$180 in weekly tips, which was calculated entirely from the discriminatee’s own statements. The judge reasoned that the witness was credible and that the testimony appealed to common sense. *Id.* at 373. The judge found that even though the discriminatee’s testimony was made in contradiction to information he had given to governmental authorities, it was a reasonable approximation. *Id.* The rationale for such an approach lies in the fact that discriminatees’ are aware that they were testifying under oath and that their statements are a matter of public record that could subject them to possible prosecution and penalties for failing to report their full income to the IRS. *Lee Hotel Corp.*, 306 NLRB 857, 860 (1992). Thus, not only is the discriminatees’ own testimony a good starting point for determining whether a gross back pay formula is appropriate, it may in some cases be the only point of reference.

Based on prevailing precedent, Pflantzer is entitled to a backpay calculation that includes tip income notwithstanding the fact that he failed to disclose this income on his Federal tax returns and he was the only source for the dollar amount of tips received. The Board in such situations has taken a position of leniency and has found that it is better for the Treasury to deal with such issues. Further, it appears that where it is impossible to ascertain the exact tip amounts, the Board will still give great weight to the discriminatee testimony on the matter where the amount seems like a reasonable approximation.

The Respondents argued that there is no basis for Kurtzleben

to take the Pflantzer’s representation that he earned a range of \$25 to \$50 per tour at NYPS and that her use of a midpoint amount of \$35 tip per tour grossly overestimated his earnings if Pflantzer had only received \$25 per tour. However, the Respondents have not proffered an alternative method of calculating Pflantzer’s tips.

The Respondents may contend that Pflantzer received more tips than he told the NLRB or that it was unreasonable for him to give all or part of his tips to the bus driver or, perhaps, Pflantzer received no tips when he said he did. In my opinion, it is pure speculation as to whether Pflantzer would have only received \$25 per tour as represented by the Respondents since that amount is equally uncorroborated as the testimony provided by Pflantzer as to tips earned. Also, it may be true that Pflantzer earned \$50 in each tour. However, I find that Kurtzleben appropriately took the high monetary amount of Pflantzer’s representation of his tip and use the midpoint of the \$25 to \$50 range so as to not allow Pflantzer to fully benefit from not reporting his tips to the IRS. The midpoint methodology in calculating Pflantzer’s tips also addresses Respondents’ contentions that Pflantzer made more tips as a NYST guide but he chose to give a fixed amount of \$40 to his bus driver before the tour started (R. Br. at 10).¹⁷ Although Pflantzer testified that his policy was \$40 for the driver (which is technically a business expense), he also testified that his amount of tips after the tour was \$45 and he sometimes received \$60 in tips and on other occasions, only \$20 (Tr. 1439). Consequently, by appropriately using a midpoint amount of \$35, Kurtzleben was able to average out the high and low amounts.

D. Pflantzer’s Moonlighting Business was Appropriately Excluded from Interim Earnings

The compliance officer calculated Pflantzer’s earnings from his own company, NYST, from the tours he conducted on weekends. As mentioned, Pflantzer only worked for his own company on Saturdays during the time he was employed by Respondent NYPS. Pflantzer conducted one tour for NYST. The question is whether his earnings of \$335 is from “moonlighting” and was properly excluded from his interim earnings.

In my opinion, it is appropriate to exclude from interim earnings that portion which reflects earnings from a job held prior to Pflantzer’s discharge. The law is settled that moneys earned during the period of discrimination from a supplemental job which a discriminatee also held during his or her employment with a respondent employer are not deductible from gross backpay as interim earnings. See, *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 fn. 4 (1965); also, *Kansas Refined Helium Co.*, above. In the instant case, prior to his unlawful discharge, Pflantzer earned supplemental self-employment income from the operation of NYST during his nonworking hours and Kurtzleben appropriately excluded the amount of \$335 from his interim earnings.

I find that the amount calculated as Pflantzer’s moonlighting business was reasonable. As noted above, Kurtzleben totaled the combined earnings at NYST for 2012, 2013, and 2014 as

¹⁷ Pflantzer testified “No. That’s not quite correct. The \$40 I would give him was not from tip that I collected. That was what I gave him from

my pocket. Prior to the tour starting I would pay them and then whatever I collected in tips would be mine (Tr. 1439).

reported in Pflantzer's tax returns and divided that figure by the estimated tours told to her. Kurtzleben added \$5 in tip to that amount, arriving at \$335. While this amount is only an estimate, it would make sense to me to use this method.

The Compliance Officer Appropriately Relied on Pflantzer's Tax Returns

Kurtzleben relied on Pflantzer's tax returns and the information provided to her in several investigatory interviews. I find this method of calculating interim earning as reasonable and appropriate.

The Respondents contend that the actual tax returns filed by Pflantzer may reflect different income and earnings because the compliance officer only used the tax return transcripts and the TurboTax software in some years, like for 2012 and 2017. The Respondents argued that having the actual tax returns would show discrepancies in the compliance officer's reliance on the tax return transcripts and the tax software. During the hearing, Respondent request approval from me for a subpoena of Pflantzer's New York State tax returns and for the actual Federal tax returns. I approved the subpoena over the opposition of the counsel for the General Counsel (Tr. 605–621). Upon submission of the subpoena tax documents into the record and upon review of those documents, I find little or no inconsistency between the Federal and state tax returns (compared R. Exhs. 9(a)-(g) and GC Exhs. 3(a)-(f)).

I find no reason to disturb the proper calculation of Pflantzer's net interim earnings by the compliance officer that was based upon Pflantzer's tax returns and the adjustments made by Kurtzleben based upon her investigative interviews of him on those returns. For example, the Respondents note that Pflantzer testified that his company's use of Groupons went full stream in 2013, but his tax return shows that his company generated the most revenue from Groupons in 2012 (R. Br. at 2). Pflantzer stated that 2013 was NOT the year of the Groupon when he was operating his own business (Tr. 1597).

While Pflantzer's memory may be faulted from events that happened over 6 years ago, his tax returns properly included his business earnings for 2012 as over \$165,000.00 (with the use of Groupons) that was reflected in his earnings and taken into consideration by the compliance officer. So, while Pflantzer may have been mistaken as to the year of the Groupons, the interim earnings generated by his business were nevertheless reflected in the backpay calculations.

The Board has long recognized the value of utilizing social security records and income tax returns in determining interim income, and has found that "poor recordkeeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), *enfd.* 395 F.2d 241 (1st Cir. 1968). Through the use of Pflantzer's income tax returns, and additional evidence adduced at the hearing, it is possible to arrive at a "reasonable approximation" of interim earnings, which is all that the Board and Courts require. Further, I find that the Respondents have not shown that Pflantzer deliberately withheld or

destroyed records to prevent a review by the Respondents or to deceive the Board. In *Bagel Bakers Council of Greater New York and its Employer Members*, 226 NLRB 622, 626 (1976), the Administrative Law Judge, affirmed by the Board, noted that the lapse of time between the backpay period and current proceeding necessarily had the effect of limiting the evidence and memory available. I also note that some of the limitation in the evidence was due to the significant lapse in time in the Respondents' refusal to comply with Board orders. See, *W. C. Nabors Co.*, 134 NLRB 1078 *fn.* 3 (1961) (where the Board noted a delay attributable to respondent's refusal to comply with the Board's Order as enforced by the court of appeals until contempt proceedings were commenced).¹⁸

E. Pflantzer's Self-Employment Earnings were Appropriately Considered

As is set forth above, a portion of Pflantzer's earnings during the backpay period came from self-employment, which the Second Circuit Court of Appeals held in *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (1968), "is an adequate and a proper way for an employee to attempt to mitigate his loss of wages. Self-employment should be treated like any other interim employment in measuring backpay liability." Further, contrary to the Respondents' assertions that Pflantzer could have had more earnings if not for the time he spent on his own company, "the principle of mitigation of damages does not require success; it only requires an honest good-faith effort." *NLRB v. Cashman Auto Co. and Red Cab Co.*, 223 F.2d 832, 836 (1st Cir. 1955); See also, *Lloyd's Ornamental and Steel Fabricators, Inc.*, 211 NLRB 217 (1974).

Kurtzleben testified that she offset interim expenses in computing interim earnings from Pflantzer's self-employment. In calculating that portion of the time Pflantzer had interim earnings, Kurtzleben used his Federal tax returns (Schedule C) to determine both his earnings and his operating expenses. The correct method for calculating backpay when an employee has been engaged in self-employment is to offset the backpay owed with the net earnings (the profits) of the newly formed business as opposed to using gross income. This is a standard method in calculating interim earnings from self-employment. NLRB Casehandling Manual, Part Three, Compliance Proceedings, Section 10541.3. When there are no profits found from the business of the employee there is no value to offset the backpay that is awarded to the employee. NLRB Casehandling Manual, Part 3, Compliance Proceedings, Section 10552.3

In *Re California Gas Transport*, 355 NLRB 465, 468. (2010), the Board held what has been the proper method in calculating damages. The principle issue was the correct amount of interim earnings to be used to offset against gross backpay owed to the discriminatees. *Id.* The Board rejected respondent's argument that since the board used gross income to determine gross backpay that gross income (gross receipts without expenses) should be used to determining the interim earnings of the employees to offset the backpay owed. *Id.* The Board held that the appropriate

¹⁸ I note that bank statements were not used by the compliance officer's calculation of backpay (Tr. 1645). Consequently, the Respondents' demand for Pflantzer's bank records is not relevant and, in any

event, the Respondents had an opportunity to subpoena Pflantzer's bank records but did not.

measurement for measuring an employee's earnings during the interim period is their net earnings when engaged in self-employment. So, the correct formula when using a business's value is to use gross revenue minus expenses, which is known as the net earnings.

I find that the application of this standard method in calculating interim earnings for self-employment by the compliance officer as appropriate. *Velocity Express, Inc.*, 342 NLRB 888 (2004). For each year, Kurtzleben calculated interim earnings from self-employment using Pflantzer's tax returns and his answers to her investigatory inquiries. Indeed, Kurtzleben did not merely accept the information on the tax returns provided by Pflantzer for 2016 and 2017. Kurtzleben testified that there were 2 Schedule Cs in 2016 and 2017. Kurtzleben determined to use one Schedule C for business profit and loss and the second Schedule C solely as income with no corresponding offset of business expense. In 2016, Kurtzleben took the higher gross receipts from the two Schedule Cs (\$19,535) as income without deducting any business expenses. Kurtzleben did the same in 2017. As a consequence, Pflantzer's interim earnings were greater in 2016 and 2017 without the offset for business expenses. In my opinion, this shows that the compliance officer was conscientiously adjusting the standard model when calculating self-employment earnings to meet the unique situations in 2016 and 2017.

F. Pflantzer's Efforts to Search for Work was Reasonable

Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings. *St. George Warehouse*, 351 NLRB 961, 963 (2007) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d, 170, 175 (2d Cir. 1965)). A claim that a discriminatee did not make reasonable efforts to find interim employment, and thus failed to mitigate damages, is an affirmative defense for which the employer bears the ultimate burden of proof. *St. George Warehouse*, 351 NLRB 961, 961 (2007). The Board has noted that "[t]he term 'burden of proof' typically encompasses two separate burdens: (1) producing evidence, satisfactory to the trier of fact, of a particular fact at issue—referred to as the 'burden of production;' and (2) the burden of persuading the trier of fact that the alleged fact is true—referred to as 'the burden of persuasion.'" Id. at 963. In *St. George Warehouse*, the Board set forth a burden shifting standard regarding the issue of mitigation, noting that "[t]he contention that a discriminatee has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area,²³ and (2) the discriminatee unreasonably failed to apply for these jobs." 351 NLRB at 961. The respondent-employer has the burden of going forward with evidence to show that there were substantially equivalent jobs within the geographic area. Id. If the respondent satisfies this burden, then "the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search." Id. at 967.

The General Counsel may meet this burden by producing the discriminatee to testify as to his efforts at seeking employment, or by introducing other competent evidence regarding the

discriminatee's job search. In *St. George Warehouse*, the Board "modif[ied] the principles governing the issue of willful loss of earnings in one respect only." Id. at 964. "When a respondent raises a job search defense to its backpay liability and produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period . . . the General Counsel [has] the burden of producing evidence concerning the discriminatee's job search." Id. at 964.

Regarding a discriminatee's job search, in trying to secure comparable employment, a wrongfully discharged "worker is not held to the highest standard of diligence." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3d Cir. 2001). Instead, "reasonable exertions" are sufficient. Id. The Board did not make any changes to the ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; "the burden remains on the respondent to prove that the discriminatee did not mitigate his damages 'by using reasonable diligence in seeking alternate employment.'" Id. at 964 (citing *Mastro Plastics*, 354 F.2d 170, 175 (2d Cir. 1965)).

The Respondents assert that Pflantzer is entitled to no backpay, because among other things, he failed to mitigate damages throughout the backpay period February 2012 through mid-2014 by seeking employment as a tour guide, but instead, he decided to engage in self-employment or reject job offers not to his liking (R. Br. at 5).

Applying the burden-shifting framework set forth in *St. George Warehouse*, I find that the credible evidence shows otherwise. Respondent has failed to satisfy its ultimate burden of showing that Pflantzer failed to mitigate damages. Respondent met its initial burden by presenting "evidence that there were substantially equivalent jobs within the relevant geographic area available for [McCallum] during the backpay period." *St. George Warehouse*, 351 NLRB at 964. As such, the burden shifted to the General Counsel to produce competent evidence showing the reasonableness of Pflantzer's job search.

Pflantzer worked at GONY starting on July 4, 2014, until he was discharged about January 16, 2015. His employment with GONY ended with a NLRB charge and a settlement of that charge in 2015. After his discharge from GONY, Pflantzer made several attempts to seek employment. He contacted Real New York Tours; he interviewed for a guide position on a boat tour called Circle Line, which he did a couple of tours hoping to be hired, but was not; he attended an open house for Big Bus Tours; use his colleagues and associates in the tour industry for potential job offers; search for tour jobs on Craigslist and Trip Advisor; and pursued other avenues of employment without real success (Tr. 1285–1303, 1351–1359).

Pflantzer was briefly employed by USA Guided Tours for 3 months (1st quarter of 2015) and conducted 2–3 bus tours per week at 5–6 hours per tour. He stopped working with Guided Tours after one of his payroll checks was not honored by his bank. Pflantzer testified that he would not work in a company that had not honored his paycheck (Tr. 1249–1253, 1311). I find this to be a reasonable concern for Pflantzer to not work for that company.

Pflantzer worked with a start-up tour company named High Quality (HQ) in late 2014 and early 2015 on an intermittently

basis. He was hired on a “as needed” basis (Tr. 1350, 1351). Pflantzer also worked as a tour guide for Uncle Sam’s in 2015, but it could have been in 2016 (Tr. 1343). He conducted only walking tours. He recalled working at Uncle Sam’s through December 31, 2017. He worked 2 or 3 tours per week, usually about 2 hours per tour. Pflantzer is still employed with Uncle Sam’s at the time of the trial (Tr. 1309). Pflantzer worked briefly for a tour group called Open Loop/RSDL in summer 2015 (Tr. 1343, 1344). Pflantzer also worked for Maxim during summer 2015 and conducted 5 or 6 guided tours.

Pflantzer testified to the seasonal nature of the tour industry and said there was very few tours after Christmas until St. Patrick’s Day. He said that from March to Christmas is the busiest time for the tour industry. He stated that during the busy season, he would conduct 2 or 3 tours per week.

In addition to Uncle Sam’s, Pflantzer worked at New York Tours One (NYTO), which was also known as the Wall Street Experience (WSE), in 2015 (Tr. 1235, 1389, 1343). He stated that NYTO (aka Wall Street Experience) kept him busy and he spent less time on his own company during this period (Tr. 1364, 1365). Pflantzer continues to work for NYTO after December 31, 2017. In 2017, Pflantzer also worked at One on One Tour, starting on September 11 (Tr. 1244, 1351). This was a bus and walking tour that is scheduled only once a year. Pflantzer continues to work this tour every year since 2017 (Tr. 1310, 1311). Throughout 2016 and 2017, Pflantzer also resumed tours under his own company NYST. He conducted walking and private tours and believed he did 10 walking tours in 2016 until he started to work for NYTO (Wall Street Experience) in May, where he spent most of his work time (Tr. 1278, 1279, 1445).

I find that the General Counsel met the burden of producing evidence concerning the discriminatee’s job search. *M.D. Miller Trucking & Topsoil, Inc.*, 365 NLRB No. 57 (2017). The evidence presented by the counsel for the General Counsel showed that Pflantzer was actively engaged in searching for work and did work after his 2012 and 2014 discharges. Although, Pflantzer focused on his own self-employment, the record shows through his testimony and tax returns, that Pflantzer had mitigated the amount of backpay through his active search to increase his interim earnings.

Findings and Conclusions on Single Employer, Alter Ego and/or Golden State Successor

The counsel for the General Counsel alleges that New York Party Shuttle (NYPS), Washington DC Party Shuttle (WDCPS), Party Shuttle Tours (PST), OnBoard Las Vegas (OBLV) and New York City Guided Tours (NYCGT) are a single employer. It is further contended by the General Counsel that NYCGT is

an alter ego to NYPS and/or that NYCGT is a *Golden State* successor to NYPS.¹⁹ Extensive testimony and evidence was taken as to the inter-relationship among the companies by the counsel for the General Counsel to establish single employer, alter ego and/or successorship relationship. This was necessary because NYPS, although not formally dissolved, no longer has any valuable assets to remedy a backpay award to Pflantzer.²⁰ At the same time, the Respondents deny that they operated as a single employer or that NYCGT is an alter ego to NYPS and/or a successor to NYPS.²¹

I. INTER-RELATIONSHIP AMONG NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, ONBOARD LAS VEGAS TOURS, LLC, D/B/A ONBOARD TOURS, NYC GUIDED TOURS, LLC, AND PARTY SHUTTLE TOURS, LLC,

a. Party Shuttle Tours, LLC, d/b/a OnBoard Tours

Party Shuttle Tours, LLC (PST) was incorporated on December 19, 2006. Charles Thomas Schmidt (Schmidt) is one of three managing members and designated CEO of PST since its inception in 20016 (GC Exh. 45; Tr. 100, 101, 338, 339). The PST prospectus in May 2012 states that PST is doing business as (d/b/a) OnBoard Tours. Schmidt explained that PST created the OnBoard tours brand, which then licensed the intellectual property of the brand to Washington DC Party Shuttle, LLC (DCPS); New York City Guided Tours, LLC (NYCGT); OnBoard Las Vegas Tours, LLC (OBLV); and other entities, including NYPS (Tr. 364). The 2012 PST prospectus had plans to expand into Las Vegas as OnBoard Las Vegas (OBLV) as well as in NYC, DC, San Francisco, New Orleans, Chicago, Boston, and several other cities. PST d/b/a OnBoard Tours represented to the investors that it has offices in New York City as OnBoard New York, in Washington DC as OnBoard Washington DC and OnBoard Tours in Houston Texas. The websites listed in the PST prospectus included, among others, onboardlasvegastours.com; washingtonpartyshuttle.com; newyorkpartyschuttle.com; and onboardtours.com (GC Exh. 49(A)). The OnBoard website listed the tours conducted by NYPS, DCPS and OBLV with specific timeframes and schedules for the tours. Customers may select the tours for any of the three cities linked to the OnBoard website (GC Exh. 163).

The amendment to the May 2012 prospectus noted that PST is the holding company for NYPS, DCPS, Baltimore Party Shuttle, OnBoard America Tours, OBLV, and among others. Schmidt is listed as Manager, Chair and CEO, Shawn Mengel (Mengel) as vice-president of operations. Mengel is further identified as the managing director of OBLV effective 2011 and was promoted to vice-president of operations of OBLV in

¹⁹ On May 31, 2018, the counsel for the General Counsel moved to amend the caption and paragraph six of the amended compliance specification. After providing the Respondents an opportunity to respond, I granted the motion of the General Counsel to amend, specifically to allege that NYCGT is an alter ego and/or a Golden State successor to NYPS (GC Exh. 1(RR)).

²⁰ In its answers, the Respondents dispute jurisdiction and/or that they are engaged in commerce. It had already been determined by the Board that New York Party Shuttle, LLC was engaged in commerce within the meaning of the Act. Also, as discussed below, PST owns the majority

share of NYPS and DCPS and is the sole owner of OBLV and NYCGT. Each Respondent has transferred over \$50,000 annually to each other and each company are in 3 different states and the District of Columbia. The Respondents’ gross and combined revenue is expected to exceed \$10 million dollars in 2017 (GC Exh. 51). As such, I find that the Respondents are engaged in commerce and within the retail jurisdiction under the Act.

²¹ Charles Thomas Schmidt represented New York Party Shuttle. James M. Felix represented the remaining Respondents (Tr. 7).

January 2012. Jerry Abshire is listed as vice-president of sales and marketing (GC Exh. 49(B) at 001205, 0001296).

The PST prospectus supplement and amendments to its prospectus in March 1 and August 1, 2017 stated PST is the holding company for NYPS, DCPS, OBLV, NYGCT, Creativerse Internet System, Baltimore Party Shuttle, LLC, OnBoard America Tours, LLC, and City Info Experts, LLC. As the holding company, PST owns 100 percent of OBLV; 98.87 percent of DCPS; and, 92.46 percent of NYPS. NYCGT and OBLV are wholly owned by PST (GC Exhs. 48, 51). The remaining 9.5 percent of NYPS is owned by Mark D'Andrea, who also has 1.13 percent ownership of DCPS (Tr. 346–348).

Schmidt testified that he believed the PST 2017 prospectus (GC Exh. 51) was just a draft even though it had updated information from the 2012 prospectus. He insisted that the \$10 million-dollar revenue generated by PST was “just an expectation” (Tr. 632–636).

PST is partially owned by Infinity Trade Capital, LLC at 70.79 percent in March 31, 2013. Schmidt owns almost 70 percent in Infinity Trade Capital, LLC. Charles Fridge is the other owner at 30.56 percent (Tr. 342–344). 41 other individuals own 5 percent or less with 3 owning at least 15 percent in PST (Tr. 345–346; GC Exh. 44). The PST 2012 prospectus confirmed that Infinity Trade Capital, LLC owned 80.70 percent of PST as of May 15, 2012, and Schmidt as an individual, owned .07 percent of PST (GC Exh. 44(B)).

Schmidt testified that PST never hired any tour guides (Tr. 532). Schmidt also denied that he is involved in day to day operations of any of the companies owned by PST (Tr. 353).

b. OnBoard Las Vegas Tours, LLC, d/b/a OnBoard Tours

Schmidt is also the CEO of OnBoard Las Vegas Tours (OBLV) since 2011 (Tr. 89). OBLV was approved as a limited-liability company by the State of Nevada about January 2011 (GC Exh. 57). Schmidt identified Mengel as the director of operations for OBLV and stated that Mengel was terminated at OBLV but hired in a similar position by DCPS in mid-2016. Mengel was replaced by Paul Rosenthal as managing director at OBLV and held this position until OBLV stopped operations in early 2018 (Tr. 90, 91). Rosenthal was eventually replaced at OBLV by Nathan Waldschmidt (Tr. 541, 541).

Schmidt testified that Mengel was also an investor with “some money” in PST, but really didn’t recall. He said that Mengel worked for 2 years in OBLV and was then moved to DCPS for about one year. He said that Mengel was moved to DC because Schmidt needed a salesperson for OBLV. He said that Rosenthal was hired to generate sales in Las Vegas. Schmidt believe that Mengel may have had a role in hiring Rosenthal (Tr. 586, 597). Schmidt said that Mengel did not want to leave Las Vegas but ended up going when Tyree Cook (below), as the managing director of DCPS, left the company (Tr. 583–584).

OBLV was engaged initially to conduct bus tours. Credible testimony from Ron White (NYPS supervisor) indicated that a NYPS bus was driven out to Las Vegas by two NYPS employees for use by OBLV. White was not aware of any financial arrangement or lease agreement for this transaction. The NYPS was in service in Las Vegas for approximately 1 year when it was driven to Washington, D.C. for use by DCPS. OBLV was unable to

continue conducting bus tours because either the State of Nevada or Las Vegas prohibited the use of buses for tours.

Documents subpoenaed by the counsel for the General Counsel reveal that OBLV had financial transactions with DCPS, PST, OBLV, NYPS, and NYCGT, from January 1, 2012, through January 1, 2017. OBLV would engage in various loan and repayment transactions between itself and the other companies. There is no indication of any loan agreements or fees/interest rates associated with these loan transactions (GC Exh. 72; Tr. 651–659).

c. Washington DC Party Shuttle, LLC, d/b/a OnBoard Tours

Schmidt testified that he is also the CEO for Washington DC Party Shuttle (DCPS). As noted above, PST owns 98.87 percent of DCPS in 2013. He identified Larry Lockhart as the managing director and vice-president of DCPS, who had since left DCPS by 2015 (Tr. 60, 63, 64). DCPS conduct bus tours to various attractions in the Washington D.C. area. DCPS also provided buses to transport customers from designated hotels to the pickup point for the DCPS tours.

Lawrence Lockhart was hired by Tyree Cook (Cook). Schmidt insisted he did not want to hire Lockhart but Cook insisted and Lockhart was hired as a sales person and later promoted to acting managing director and then as a permanent manager. Schmidt denied that he had hired Cook (Tr. 357–359). Despite Schmidt’s alleged reluctance to hire Lockhart, Lockhart is listed as the vice-president of sales and marketing for PST in the August 2017 prospectus (GC Exh. 51 at PST001240). In addition, Schmidt testified that Lockhart was promoted because he resolved problems with picking up customers at the hotels in order to transport them to the designated location for the tour. Schmidt was involved in making sure the buses arrived on time at the hotels. Schmidt was aware of this issue at DCPS because he intervened on the discipline of a bus driver who was not on time in picking up customers at the DC hotels (Tr. 553–557). As such, I find it clear that Schmidt was instrumental in bringing Lockhart to and promoting him at DCPS.

Cook was hired at DCPS in 2008 as a customer service ambassador at the Gaylord Hotel, located at the National Harbor, MD; to a site supervisor at the Gaylord Hotel; to director of sales in 2009 and then to managing director of DCPS in 2011. Schmidt did not participate but was present when Cook was interviewed for the job. Cook was informed that the decision to promote him to the various positions was made by Schmidt although the interviews were done by his supervisor, “Latoya” (Tr. 1050, 1051, 1093). Cook left DCPS in 2012. Cook was sued by DCPS, PST and Creativerse Internet in March 2012 when Cook and other employees organized a competing tour business in the alleged violation of their non-compete agreements (GC Exh. 25).

As managing director of DCPS, Cook understood DCPS was also known as OnBoard Tours. He described OnBoard Tours as DCPS “customer-facing” brand for marketing purposes. He was aware that OnBoard Tours also operated in New York City and Las Vegas during the time he was the managing director of DCPS (Tr. 1048). He believed that OnBoard started operating in Las Vegas as early as 2010. Cook was responsible for the day-to-day operations of DCPS, including managing the staff, schedules of the tour guides, bus drivers, interfaced with customers,

vendors, various hotels. He always reported to Schmidt and believe him to be the CEO and founder of DCPS and PST (Tr. 1045–1051). Lawrence Lockhart testified that DCPS had an office that included an “OnBoardDC.com” sign with a DCPS sign until DCPS physically left that office (Tr. 1543).

Cook testified that Schmidt was involved in raises, promotions, and discipline. He specifically recalled that a bus driver for DCPS named driver Lattimore was discharged after Cook recommended to Schmidt to discharge her. In other instances, Cook would independently make the decision to discipline. He recalled that a bus driver named “Keith” was suspended for drinking alcohol and subsequently terminated by him. Schmidt was not involved in that discipline (Tr. 1052–1065). On other occasions, Schmidt made the decisions to discipline the DCPS employees. Cook testified that he recommended that employees “Jephree” and “Germaine” be suspended but Schmidt, instead, said to discharge both employees (Tr.1066).²² Both employees were subsequently rehired by Schmidt a few months later (Tr. 1067–1069).

Cook testified that he would receive emails from Schmidt that were also sent to Vincent Ford, Ron White, who were managers at NYPS, regarding uniform policies and procedures for DCPS, NYPS, and OBLV. Cook understood that some procedures will be placed in all offices, while some emails may pertain to only one company, but all the managers were nevertheless informed as to what was happening in other companies. He said that Scott Wilson was hired by Schmidt as a consultant for DCPS, but he also ended up as a consultant to NYPS and OBLV (Tr. 1069–1073). The record substantiates Cook’s testimony, to wit:

1-By email dated April 13, 2011, Schmidt sent out uniform hiring and training procedures for “OnBoard Drivers” in New York, D.C., and Las Vegas. The email was directed to Cook, Ron White (NYPS) and others (GC Exh. 85).

2-By email dated July 28, 2011, Schmidt directed an email to Ron White, Cook, Lockhart, Vincent Ford (NYPS) and Mengel (OBLV) informing everyone some of the problems and issues with DCPS. From this email, Schmidt was intimately involved in the operations of the DCPS office (GC Exh. 86).

3-By email dated January 9, 2011, Abshire informs Ford and Cook as to a standardized employment application for all OBT (Onboard Tours) employees. Schmidt replied that all should use this employment application for all new hires (GC Exh. 87).

4-By email dated June 18, 2012, Schmidt discussed with Abshire, John Cabral (formerly of DCPS), Moskowitz in New York and Mengel in Las Vegas of the need to have uniform company shirts and baseball caps and that there would be no excuse for a guide not to wear a uniformed shirt (GC Exh. 89).

5-By email dated April 24, 2011, Schmidt directly informed all employees at NYPS, DCPS and OBLV that the “company policy” is to have all customer emails responded to within one hour of receipt (GC Exh. 90).

Lawrence Lockhart (Lockhart) testified that he was the managing director and vice president of sales of DCPS. He was initially hired in 2010 for a sales manager position and took over the sales responsibilities as vice-president of sales in 2013 (Tr. 1527–1530). Lockhart said that Cook was the managing director at the time he was hired, and Cook had Lockhart work on several projects to drum up the DC tour business at several hotels. At the time, Raul Shakir was a co-equal with Lockhart as a sales manager. Their job was to visit hotel concierges and encourage them to sell the DCPS tours. Lockhart helped to start a concierge desk at hotels to provide a source for tour business in the north-west and southwest DC areas (Tr. 1531).²³ At the time, there were six hotels with concierge desks and this business model is unique to DCPS. Lockhart said there are no concierge desks in NYC, greater NY areas, Nevada or in Texas. Lockhart is aware of the operations at NYPS. He denied that NYPS and OBLV have concierge desks (Tr. 1536).

The money from the sales of the concierge tours goes directly to DCPS. He stated that the hotel concierges receive a commission and an hourly wage in directing business to DCPS. Lockhart said that hotels with no DCPS concierge desks receive a commission for selling DCPS tours (Tr. 1533). Lockhart did the hiring and training of the concierges and denied that Cook did any of the hiring (Tr. 1533, 1534).

Lockhart testified that DCPS conducts bus tours. He notes that some customers are picked up at the hotel while other tourists would meet at a centralized location. He said that it was about 50/50 between tourists coming from hotels and those waiting to board buses at designated areas. Tourists buying tickets for tours online would wait at a designated area. The hotels that sell the tours to hotel guests will get picked up at the hotel by DCPS buses (Tr. 1537)

When Cook left in February 2012, Lockhart took over his duties. He was then promoted to managing director the following year. He said that Schmidt promoted him to managing director and when he became vice-president of sales (Tr.1545). In his position, Lockhart insisted that he was solely responsible for hiring and firing but did ask for advice from Schmidt who was the CEO of DCPS. Lockhart denied having any authority over NYPS, NYCGT, OBLV or that those companies had any involvement in the operations of DCPS (Tr. 1540–1542, 1548, 1549).

Schmidt testified that Jerry Abshire, as vice-president of sales and marketing for PST, had some role in hiring concierge salespersons (one or two) in New York and maybe in Washington D.C. (Tr. 596, 597). The record shows that Lockhart had complained that he did not have any concierges and emailed Abshire and Schmidt of his need to hire. By email on July 31, 2012, Lockhart request from Abshire and Schmidt his need to hire sales persons and that he would do the hiring because Abshire was too busy with the candidates he was interviewing for DCPS. The email addresses for Lockhart, Schmidt and Abshire was “onboardtours.com.” Schmidt responded to Lockhart as to how quick Lockhart can start to interview for sales concierges in DC

²² Jephree was incorrectly transcribed as “Jafrique” and corrected by the counsel for the General Counsel by motion to correct the transcript on September 18, 2018.

²³ Shakir, the co-sales manager, was terminated in 2010 by Schmidt (Tr. 1543).

(GC Exh. 83).

Also, DCPS creates the daily sales reports that are generated three times per day for DCPS, NYPS and OBLV in the past. Lockhart said that the sales numbers for DCPS, NYPS and OBLV were obtained through a booking website (Tr. 1547, 1548). He also provided business advice to OBLV to help with the sales and may have also provided sales advice to Moskowitz at NYCGT (Tr. 1553–1555). Lockhart denied that NYPS or OBLV were on conference calls with Schmidt on cashflow issues involving DCPS but conceded that Moskowitz (also Paul Rosenthal from the OBLV office) would be on the calls involving sales or business advice (Tr. 549, 1550).

Schmidt stated that Abshire was responsible for setting up a call center in Houston. The call center was to receive calls from customers if the call was not first picked up in the individual cities where OBLV, NYPS, and DCPS were located. The same number would ring in the city and at the call center. This was also an attempt by Abshire to monitor the CSAs and provide the necessary sales training to them (Tr. 585–587). Before the implementation of the call center in Houston, Texas, calls for tickets to NYPS or DCPS would be handled by the CSAs in those cities. OBLV was handled by either Mengel or Rosenthal. Calls relating to customer service issues on the east coast when those offices were closed were handled by OBLV because of the time difference (Tr. 588–591).

d. New York Party Shuttle, LLC

Schmidt was the CEO of New York Party Shuttle, LLC (NYPS) in 2014 and 2015. He allegedly resigned as CEO of NYPS in 2015. There is no longer a physical office for NYPS (Tr. 77, 78). Schmidt testified that NYPS grew out of a business called Atlantic City Party Shuttle (a/k/a Jersey Shuttle, LLC) in 2004 that had formerly transported customers from the New York area to Atlantic city. Schmidt was the chair and CEO of Atlantic City Shuttle (Tr. 570–579; GC Exh. 48 at 001194).

Fred Robert Moskowitz (Moskowitz) was the president of NYPS during all material times of the complaint and compliance proceeding. Moskowitz was appointed to that position by Schmidt. Moskowitz was a former sales representative and could not recall when he became president of NYPS. At NYPS, Moskowitz reported to Schmidt and supervised Henry Flores and Ron White (Tr. 957–961). He would meet with Schmidt at the DCPS's office (or somewhere in the Washington D.C. area) and assisted Larry Lockhart once a week for about 3 weeks. During his time in D.C., Moskowitz assisted in training the sales representatives for D.C. Moskowitz also met with Schmidt in Vegas to help start up OBLV. Moskowitz was involved in a "shareholder structuring of the company" meeting in Houston, that involved NYPS, DCPS, Las Vegas and as described by him with "all of those tickets" (Tr. 965–969, 971).

Moskowitz said that Ron White was the director of operations and he hired the tour guides and drivers. Moskowitz assumed that position after White left. White was director of operations (Tr. 973, 1017, 1018). Moskowitz said that Henry Flores did most of the hiring after White left and denied that Schmidt was involved in hiring the NYPS staff (Tr. 1018). Moskowitz denied managing the employees at DCPS or OBLV, but he did give advice, as well as other NYPS managers, to the other companies

(Tr. 1709, 1710).

Ron White (testified) that he started with NYPS in August 2005 as a tour bus driver; became operations manager in 2006, and director of operations in 2012/2103. White was not hired by Schmidt but was promoted by him. As Operations Manager, responsible for hiring tour drives, scheduling, payroll, monitor of work, meeting with vendors, with government officials, and conducting staff meets. White also worked the bus parking lot, cleaned the buses, adjust minor repairs to the buses, swept the buses, and fueled the buses (Tr. 878). White would then board the bus and ride to the designated area to pick up the tourists. He used wireless handheld credit card device for the tourists to pay for tickets on the spot before they could board the buses. White processed the payments. White said that none of the tourists brought tickets for DCPS tours and did not take credit card payments for DCPS tours. He was also not aware that NYPS was accepting tickets purchased by tourists for DCPS tours that were used for NYPS tours (Tr. 882, 943).

With regard to the NYPS buses, White testified that the decals on the buses had NYPS and OnBoard Tours logos. The logos would state "OnBoard Tours New York City" or "OnBoard DC", with the logo NYPS or DCPS directly under DOT license number (Tr. 910, 945). He was responsible for picking up the busses for NYPS from New Jersey and Kansas City. White would confer with Schmidt as to the buses needed for NYPS and Schmidt brought buses in the name of NYPS (Tr. 930, 944).

He recalled driving a NYPS bus to Las Vegas for OBLV in January 2011. He insisted it was one of the NYPS buses and his assignment was directed by Schmidt. He believed that the bus eventually was driven by Chris Scott from Las Vegas to DC (when OBLV realized it could not operate buses in Las Vegas). White was not involved in training any OBLV drivers or tour guides.

Schmidt testified that OBLV couldn't hire drivers in Las Vegas and eventually used third parties to provide the bus transportation. He said that initially OBLV used a bus from NYPS to do the sight-seeing tours for about one year. He said that the bus was then driven to D.C. for DCPS. He believed there were two drivers (Chris Scott and Miller Morris) who had drove the bus to D.C. He said that Scott was a driver for OBLV and then for DCPS and eventually returned to OBLV as a tour guide. Schmidt believed that Morris stayed in DC and ended up working for DCPS (Tr. 579, 581, 582).

White is also aware that five of NYPS' buses were used in D.C. on various high tourist events, such as the cherry blossom time in D.C. and Obama's inauguration. He said that buses were swapped, and the driver drove DC buses back to NY after Obama's Inauguration in January 2009. He said that NYPS buses were used in other tourist events and during USDOT inspections of DCPS buses. He said the buses would return to New York after the DCPS buses came out of the inspection. He said that inspections of buses occurred every six months in D.C. He believed this policy had stopped by 2012 (Tr. 848–853). White is not aware of any lease or rental arrangements when NYPS were used in Las Vegas or in D.C. by the other companies. White said he took 5 to 10 trips to D.C. during his tenure with NYPS either to meet with Schmidt and DCPS managers, attend the USDOT audits, and transporting the buses from NYPS to DCPS

and back (Tr. 926, 928, 933).

Schmidt testified that moving buses between NY to D.C. occurred during the busy times of the year, such as Cherry Blossom week in D.C., but insisted that NYPS was the only company that transported customers to D.C. because NYPS had buses licensed for interstate commerce. He said that NYPS was also the company that sold the tickets to D.C. Schmidt did not recall if NYPS had sent buses down for D.C. specifically for the DCPS tours. He maintained that on those occasions when DCPS needed a bus, DCPS would usually rent a bus from a local third-party vendor for that particularly busy day or week (Tr. 577–780).

Schmidt testified that DCPS stopped using its own buses in the 2013–2014 time frame. He said that DCPS started using leased buses on a 24/7 basis after it stopped owning buses. As such, he was aware that of two buses leased by NYPS to DCPS for 2 years but only for shuttle purposes (to and from the D.C. hotels and DCPS provided as a service to the hotel customers) and not for conducting tours. He said that the leases costed \$4/5000 per month from DCPS to NYPS. He said that the two buses were leased by NYPS because NYPS was not generating revenues from the two buses. Schmidt insisted that the lease arrangement was an “arms-length” negotiation. He believed that White negotiated the lease on behalf of NYPS and Cook did the same for DCPS (Tr. 561–567). Schmidt denied he approved the lease arrangements (Tr. 567, 568).

Schmidt further testified that DCPS eventually stopped using buses because the USDOT revoked the company’s license. He believed there was a total of five DCPS buses (Tr. 569). He said that two or three DCPS buses were then leased to NYPS for at least one year. He believed this occurred in 2015. Schmidt insisted that the lease was at arms length and that there should be a lease document reflecting the transaction. Schmidt said that Lockhart negotiated the deal for DCPS and White for NYPS (Tr. 570, 571).

White said that Schmidt was not involved in hiring but he authorized the hiring. White said he did not hire customer sales agents (CSA)s. He said that was done by Levi June, Howard McKoy, Vincent Ford, Schmidt and Fred Moskowitz at NYPS. Levi June was the Operations Manager when White was hired. He subsequently became the vice-president of NYPS and DCPS. McKoy was identified as the vice-president of NYPS and DCPS. Moskowitz was identified as someone who was at one time or another the NYPS, D.C. and OnBoard Vegas president (Tr. 814–818, 873, 874).

White said that the training of CSAs was done over the phone. He did not participate in the training calls but knew when the training was being conducted in the NYPS office. He knew that Levi June, Howard, Moskowitz and Schmidt participated in the call. White, like Cook at DCPS, believed that Scott Wilson was a consultant for NYPS and involved in the training. White believed that all CSAs from NYPS, DCPS and OBLV were on the call, and on occasions, Lockhart and Cook from DCPS and Paul Rosenthal for OBLV (Tr. 818–821, 905).

Schmidt testified that the CSA training was coordinated by

Scott Wilson and conducted on a weekly basis for approximately two hours. The calls were designed to promote sales and provide customer support training to the CSAs. Schmidt said that NYPS, DCPS, and OBLV were on the calls at various times. He also noted that managers from these respective companies would also join on the conference calls (Tr. 644–646). Schmidt admitted that either Abshire or Scott Wilson did some training in accordance with a script. Scott Wilson was hired by NYPS, but he believed Wilson also did consultant work for DCPS and maybe OBLV (Tr. 593).

Schmidt testified that all three cities were encouraged to have customers look at tours in other cities as a marketing vehicle to drum up sales and emails went out to customers about the services of NYPS, OBLV, and DCPS. He said at suggestion of Scott Wilson, every caller was placed in a database and identified as a prospect or repeat customer (Tr. 599–601).

White testified that he provided input on the training and procedures for the bus drivers in NYPS, DCPS and OBLV (GC Exh. 85). White also attended USDOT audits of DCPS buses in Washington, D.C., attended also by Schmidt, Cook and Lockhart. White helped create the “OnBoard NYS policies and procedures” with McKoy and Schmidt in 2010. He believed that the policies applied to NYPS and DCPS (GC Exh. 14A; Tr. 825–829). White had no role in developing or implementing the driver hiring and training policies and procedures for Las Vegas, D.C., and New York, but was certain that the policies were adopted in New York. White admitted that the policies and procedures were “in draft form.” (GC Exh. 85; Tr. 903.)

White confirmed the testimony of Cook that daily sales updates were sent by DCPS three times per day, and the reports went to DCPS, NYPS, and OBLV. White was not involved in tallying the sales figures (GC Exhs. 143, 144; Tr. 839).

e. New York City Guided Tours, LLC

Schmidt is also the CEO and custodian of records for NYC Guided Tours (NYCGT) (Tr. 41). NYCGT was incorporated in October 2014. Schmidt acts as the CEO, although he is not certain if he was formally appointed as CEO of NYCGT. There is not a physical office in New York City for NYCGT. Schmidt states there are no documents to show owners, director managers, partners, or officers of NYCGT (Tr. 491, 492).

Fred Moskowitz, formerly of NYPS, is the president of NYCGT and was appointed to that position by Schmidt. Moskowitz was informed that NYPS was closing by Schmidt and within four weeks, Schmidt named him president of NYCGT. According to Schmidt, Moskowitz was a co-founder of NYCGT, along with PST and himself (Tr. 335). Moskowitz testified that “I believe that PST owns NYC Guided Tours, LLC.”²⁴ Moskowitz proposed to Schmidt a business model for tours that was different from NYPS. Moskowitz admitted that the discussions with Schmidt were in flux and he could have still been president of NYPS when he made the proposal (Tr. 980). Moskowitz testified that NYPS is still in existence but there are no operations, no activities, and it had not filed for bankruptcy. He denied that NYCGT purchased NYPS (Tr. 1713).

²⁴ When asked directly by the counsel for the General Counsel as to who the owner of NYC Guided Tours is, Moskowitz responded “I believe that Party Shuttle Tours owns NYC Guided Tours, LLC” (Tr. 980).

As noted in previous testimony, Schmidt is a partner at Party Shuttle Tours. Party Shuttle Tours is not a Respondent in this proceeding.

Moskowitz explained that under his business model, NYCGT rented as opposed to owning tour buses and that there are no employees except for himself and correspondingly, no employee benefits, such as health insurance at NYCGT. He said that unlike NYPS, NYCGT did not have levels of management (Vincent Ford, Ron White, Moskowitz at NYPS). He said that NYCGT did not market its tours at hotels. He said that there are no CSAs, and he is the one that takes the calls for tickets (if not purchased online) by the customers (Tr. 1715–1726). Moskowitz essentially insisted that all management and administrative functions at NYCGT were done by him and that Schmidt never did any hiring (Tr. 1727–1729). Moskowitz said his business model was approved by the PST board (Tr. 1743).

Moskowitz said, under this business model, NYCGT would not have any employees (except him). The tour guides would be contracted out, the bus drivers would be part of the rental arrangements when buses are leased and there would be no sales representatives (Tr. 984, 985). Tour tickets would be purchased online or through a telephone arrangement handled by Moskowitz. Moskowitz testified that NYCGT operates tours in New York City and hires guides (as independent contractors) to conduct the tours. NYCGT does not employ drivers for the buses. The buses are rented or leased, and the drivers are part of the bus rentals (Tr. 949–953, 989). Initially, NYCGT used NYPS buses, but now they are all rented out (Tr. 987). Schmidt confirmed that since NYCGT did not own any tour buses, there is no need for an operations manager (Tr. 546–547).

Moskowitz acknowledged that NYCGT honored the tour tickets that were purchased by customers from NYPS. He said that this lasted for about 3 or 4 months and that NYPS buses were leases during the first 30 days because of insurance-related issues (Tr. 1734, 135). He said that the NYCGT visited the same NYC attractions as NYPS (Tr. 1746, 1747), but that the boat tours are different because NYPS rented a hydro-ferry whereas NYCGT uses the Staten Island Ferry, which was free (Tr. 1747, 1748). In terms of sales, Moskowitz stated that NYPS was six to eight times larger than NYCGT (Tr. 1749).

Moskowitz did not recall when he became president of NYCGT. He is responsible for all aspects of NYCGT. Moskowitz is the only employee of NYCGT at this time. However, at the inception of NYCGT, there were four employees (Moskowitz, Joey Cruz, Henry, and Adrian Flores). Moskowitz said that he and Henry Flores did the hiring for NYCGT and Schmidt had no role in hiring employees at NYCGT (Tr. 1020).

In addition to the four employees identified by Moskowitz, the payroll records showed for the years ending on December 31, 2015, and 2016 that NYCGT retained Joseph Cruz as a driver at NYPS and rehired by NYCGT to dismantle and relocate junk buses. Moskowitz also hired Melvin Brewster, who had previously worked at NYPS as a driver. Brewster was a bus operator for NYCGT. Brewster (Driver); Cruz (Driver); Tom Eikard (Tour Guide); Kiernan (Tour Guide); Molin (Driver); David Roffe (Tour Guide); Gregory Boyd (Driver); Stanley Charmin (Driver); Rodney Kelly (Driver); Luis Valencia Espen (driver), all worked at NYPS, and NYCGT (GC Exhs. 148, 149). The NYCGT payroll also shows that Matthew Kiernan was a loader of passengers on the buses and a tour guide at NYCGT and NYPS (Tr. 995). Moskowitz denied that Joseph Cruz was still

employed by NYCGT (Tr. 1738).

II. GALAGO INVESTMENTS, LLC

Galago Investments, LLC (Galago) is wholly owned by Schmidt and provides the bookkeeping, payroll, administration, job applications and hiring for all the Respondents. For example, Moskowitz testified that Galago administrated the job applications for new hires and issued the payroll for NYCGT employees (Tr. 996; 1002–1004). The November 29, 2012, prospectus for PST, LLC (GC Exh. 49(b) at 001228) stated that

PST, NYPS, and DCPS currently utilize the services of Galago Investments, LLC, a company wholly owned by Tom Schmidt, to provide administrative, bookkeeping, and management services for the company. Galago also subleases office space to the Company for its Houston administrative office. Galago is not an operating business, but rather is merely a conduit to allocate expenses between the various operating PST subsidiaries and other businesses affiliated with Mr. Schmidt. Galago bills the companies for its costs plus a 5% management fee to cover administrative expenses. It is expected that Galago Investments, LLC, will provide similar services for any new PST subsidiaries on the same arrangement. Total amounts paid by the Company's subsidiaries total approximately \$35,000 per month. Galago does not intend to generate profits, and in the event that profits are derived from transactions with PST, those profits will be returned to PST.

Shelly Hogan was the bookkeeper at Galago. She was the point person at Galago when there were issues on payroll and hiring (or discharging) employees at NYCGT, DCPS, NYPS, and OBLV (Tr. 57). Galago handled other financial and administrative matters for the named Respondents, including automobile insurance, workers' compensation, other insurance policies and employee medical insurance and information. Galago is located in Houston, Texas (Tr. 58–60).

The administrative and financial services at Galago were also provided by Iryna Matiukhina, who is identified as the Administrator of Galago. In her role, Matiukhina interacted with Respondents' employees in areas such as COBRA and dental insurance, as well as payroll and general inquiries (GC Exh. 126).

III. FINANCIAL TRANSACTIONS AND LOAN ARRANGEMENTS OF THE RESPONDENT ENTITIES

Schmidt testified, and the record shows, that funds are readily transfer between Respondents' accounts for various reasons. Oftentimes, Schmidt would be the individual implementing the transfers (Tr. 1886). On other occasions, Shelly Hogan, had the authority, upon Schmidt's approval, implement the fund transfers up to a certain dollar amount. None of the managers at NYPS, NYCGT, OBLV, or DCPS testified that they had the authority transfer funds to another Respondent company.

Moskowitz testified that he never assisted in the transfer of funds or assets from NYPS to NYCGT and had no knowledge of any outstanding loans owed to NYPS from DCPS or PST (Tr. 980–985). White was a signor for two bank accounts and could deposit and withdraw. White noted that Schmidt was also a signor. White recalled funds were transferred between NYPS and DCPS on at least one occasion due to cash flow problem with DCPS. White said he was not authorized to transfer funds and

only Schmidt could make transfers between Respondents. White is also aware that funds were transferred to NYPS and to OBLV. He does not know how many times or the origin of the funds. White is aware that Schmidt has transferred his own funds to the different Respondents, including NYPS (Tr. 860). The record shows that Schmidt either provided or received monetary funds to and from NYPS, OBLV, DCPS, and NYCGT from 2012 to 2017 (GC Exh. 74).

The evidence of record also reveals monetary loans owed by DCPS, NYCGT, NYPS, OBLV to PST from 2012 to 2016. Loans to DCPS was owed to PST of \$608,746 in 2012; \$750,820 in 2013; \$1,746,327 in 2014; \$1,550,708 in 2015; and \$1,503,577 in 2016. There were loans owed by NYCGT to PST of \$24,240 in 2014; \$105,803 in 2015; and \$497,926 in 2016. Loans paid by NYPS to PST reflect \$85,260 in 2012; \$75,999 in 2013; \$135,889 in 2014; and \$3,338 in 2015. Finally, outstanding loans owed to PST by OBLV showed \$342,795 in 2012; \$570,772 in 2013; \$1,267,568 in 2014; \$1,162,924 in 2015; and \$1,188,157 in 2016 (GC Exh. 73).

The evidence of record reveals numerous transactions between NYPS to DCPS in the form of loans and repayments in 2012 and 2015 (GC Exh. 70). Documents also established numerous financial transactions back and forth between OBLV, DCPS and PST from 2012 to 2017 (GC Exh. 72). The parties stipulated to various and numerous financial transfers to and from the Respondents of at least \$50,000 dollars for each transaction (Jt. Exh. 3).

Schmidt does not deny that particular transactions between Respondents were loan arrangements but insisted that they were at “arms-length” and he was not involved in the transactions (Tr. 651, 652).

Discussion and Legal Analysis

The counsel for the General Counsel alleges that New York Party Shuttle (NYPS), Washington DC Party Shuttle (WDCPS), Party Shuttle Tours (PST), OnBoard Las Vegas (OBLV), and New York City Guided Tours (NYCGT) are a single employer. It is further contended by the General Counsel that NYCGT is an alter ego to NYPS and/or that NYCGT is a Golden State successor to NYPS.²⁵ Extensive testimony and evidence was taken as to the inter-relationship among the companies by the counsel for the General Counsel to establish single employer, alter ego and/or successorship relationship. This was necessary because New York Party Shuttle, although not formally dissolved, no longer has any valuable assets to remedy a backpay award to Pflantzer. At the same time, the Respondents deny that they operated as a single employer or that NYCGT is an alter ego to NYPS and/or a successor to NYPS.

a. NYCGT and NYPS are Alter Egos

The Supreme Court has long-recognized that the operation of a prior enterprise under a different name could, in certain circumstances, constitute a “disguised continuance” binding the new company to the old company’s obligations under the Act. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). An

“alter-ego” analysis is normally reserved for situations in which one entity has gone out of business and has been replaced by another.

In determining whether an enterprise is a “disguised continuance” or alter ego of another business, the Board examines whether the entities share substantially identical management, business purpose, operation, equipment, customers and supervision. Other factors include common ownership or control, lack of arm’s length dealings between the two entities and whether one entity was formed or used to avoid union obligations under the Act. No one factor is controlling and not all the indicia need be present to find an alter ego relationship. *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), *enfd.* 888 F.2d 125 (2d Cir. 35 1989), and cases there cited; see also *U.S. Reinforcing, Inc.*, 350 NLRB 404, 404–405 (2007). A further consideration is whether the purpose behind creation of an alleged alter ego was legitimate or was to evade responsibilities under the Act, that is, if the second company was created in order to allow the first company to evade its responsibilities under the Act. Not all factors are necessary to an alter ego finding and no single factor is determinative.

There is no doubt in my mind that NYCGT is an alter ego of NYPS based upon the factors of identical management, business purpose, customers, common ownership, and lack of arm’s length dealings between the two entities. Charles Schmidt was the CEO of NYPS and is the CEO NYCGT. Moskowitz was the president of NYPS and became the sole manager of NYCGT when appointed by Schmidt. As such, the management of NYPS and NYCGT is identical, even if the secondary line supervisors, such as Ron White, are no longer employed at NYCGT. I also note that Moskowitz was well aware of the Pflantzer’s unfair labor complaint against NYPS, since he was the president of NYPS at the time. In addition, Moskowitz was involved and had the authority to discuss settlement of the NYPS complaint as president in February 2014. The ongoing litigation and settlement discussions continued even after October 2014 when Moskowitz became president of NYCGT. This authority to discuss settlement with the NLRB was given to him by Schmidt (GC Exh. 152; Tr. 977).

There is also common ownership of NYCGT and NYPS through Schmidt. Schmidt is the CEO of PST and NYCGT is wholly owned by PST. Schmidt has a 70.79 percent ownership in PST through Infinity Trade Capital, LLC, which he owns 69.44 percent of the company as of March 2013 (GC Exhs. 44, 48). Schmidt testified that the PST board approved the creation of NYCGT based upon Moskowitz’s business model. However, there are no corporate minutes of such approval. It is my reasonable opinion that Schmidt simply gave the green light to incorporate NYCGT after his discussions with Moskowitz.

Further, the initial operation and purpose of the two companies are identical. NYPS conducted tours and the New York City area tourists are its customers. NYPS conducted bus tours with tour guides. NYPS hired the bus drivers and tour guides. NYCGT also employed bus drivers and tour guides at least for

²⁵ On May 31, 2018, the counsel for the General Counsel moved to amend the caption and paragraph six of the amended compliance specification. After providing the Respondents an opportunity to respond, I

granted the motion of the General Counsel to amend, specifically to allege that NYCGT is an alter ego and/or a Golden State successor to NYPS (GC Exh. 1(RR)).

the first 4 months of operations. The tours conducted by both companies visit the same major New York City attractions. NYCGT hired a number of former NYPS employees. At the inception of NYCGT, there were four employees (Moskowitz, Joey Cruz, Henry and Adrian Flores). Moskowitz said that he and Henry Flores did the hiring for NYCGT. In addition to the four employees, the payroll records showed for the years ending on December 31, 2015, and 2016 that NYCGT retained Joseph Cruz as a driver at NYPS and rehired by NYCGT. Moskowitz also hired Melvin Brewster, who had previously worked at NYPS as a driver and became a bus operator for NYCGT. Other NYCGT employees included Tom Eikard (Tour Guide); Kiernan (Tour Guide); Molin (Driver); David Roffe (Tour Guide); Gregory Boyd (Driver); Stanley Charmin (Driver); Rodney Kelly (Driver); and Luis Valencia Espen (driver). All had previously worked at NYPS and NYCGT (GC Exhs. 148, 149). The NYCGT payroll also shows that Matthew Kiernan was a loader of passengers on the buses and a tour guide at NYCGT and NYPS (Tr. 995).

The buses initially used by NYCGT were owned by NYPS. Aside from the naked testimony of Schmidt, I find that there are no documents to rebut the position of the General Counsel that the transfer of the bus assets from NYPS to NYCGT was not an “arm’s-length” transaction. Schmidt testified that there should be some leased or rental documents showing the transaction, but none was produced pursuant to the General Counsel’s subpoena and none proffered in the Respondents’ case-in-chief. The counsel for the General Counsel subpoenaed for the rental or lease arrangements for the buses. Schmidt testified, as the custodian of records for NYCGT, that bus leased documents between NYPS and NYCGT should have been produced pursuant to the subpoena but were not and he could not find them (Tr. 472–477). As such, I draw an adverse inference against the Respondents that such lease or rental documents do not exist and that the transfer of the NYPS buses to NYCGT was not at arm’s length.²⁶

NYPS and NYCGT, as alter egos, are responsible for the unfair labor practices against Pflantzer. A change in corporate form that involves no more than a “technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management” may be disregarded and the alter ego “is subject to all of the legal and contractual obligations of the predecessor.” *Howard Johnson Co. v. Hotel & Restaurant Employees Detroit Local Joint Executive Board*, 417 U.S. 249, 259 fn. 5 (1974). Here, there is ownership, management and supervision, business purpose, operations, equipment, and customers that are factors evidenced in both companies and determinative of alter ego status exists. *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976). NYPS and NYCGT had the same managers, supervision, and owners; substantially identical customers, and the same operations. Equipment and assets were transferred from NYPS

to NYCGT without any payment. A number of NYPS employees initially remained the same at NYCGT. There is no indication that these employees had applied for new employment with NYCGT; they were simply transferred to NYCGT and continued to receive their wages through Galago through at least 2016. The Respondents argue that Moskowitz provided sound business reasons for establishing NYCGT. However, the mere fact that there may have been legitimate business reasons to create NYCGT does not distract from the fact that all the factors for an alter ego situation exist here. The finding that the two entities are alter egos is expressly to prevent NYPS, a Respondent, to quickly evade its responsibilities under the Act. There can be no doubt that NYPS and NYCGT constitute alter egos and I so find. See, *American Elevator Corp.*, 362 NLRB 29, 30 (2015).

b. NYPS, WDCPS, PST, OBLV, and NYCGT are a Single Employer

The counsel for the General Counsel alleges that NYPS, DCPS, PST, OBLV, and NYCGT are a single employer.²⁷ The Respondents deny this allegation. Single-employer status is similar to but different from alter ego status. *Johnstown Corp.*, 322 NLRB 818 (1997). The Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965). The Board focuses on four factors in determining whether entities constitute a single employer: (1) interrelations of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007); see also *Rogan Brothers Sanitation*, 362 NLRB 547 (2015), and cases cited therein. All four factors need not be present. *Bolivar-Tees*, above; *Rogan Brothers*, above.

Significantly, in the single employer analysis, there is no requirement that one entity was formed in order to avoid responsibilities under the Act. Here again, however, no one factor is controlling and not all need be present, although the most important is centralized control of labor relations because it tends to demonstrate “operational integration.” The Board has held that the first three factors are more critical than the last, and further that centralized control of labor relations is of particular importance because it tends to demonstrate “operational integration.” See *Denart Coal Co.*, 315 NLRB 850, 851 (1994), enfd. 71 F.3d 486 (4th Cir. 1995).

Single employer status is also characterized by a lack of an arm’s-length relationship. *Hydrolines, Inc.*, 305 NLRB 416, 417–419 (1991); *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995) and cases there cited; see also, *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001). The Board has found that two nominally separate entities constitute a “single employer” when there is an absence of an arm’s-length relationship between them. *Hydrolines, Inc.*, above. The significance of finding two

²⁶ The counsel for the General Counsel that I should sanction the Respondents for failing to provide all documents pursuant to subpoenas. I would decline this request but would sanction the Respondents in reference to specific documents not provided.

²⁷ To be clear, OnBoard Tours is a marketing brand and a public or “customer-facing” entity (as described by Tyree Cook) to generate sales for NYPS, WDCPS, PST, OBLV, and NYCGT (Tr. 1048, 943).

OnBoard Tours as an entity is not an employer under the Act. It is not disputed that OnBoard Tours does not have any statutory employees and merely licensed its name to the other entities. See, *Operating Engineers Local 487 Health & Welfare Trust Fund*, 308 NLRB 805 (1992) (dismissing the complaint because the Fund, the only named Respondent, did not employ any statutory employees).

companies to be a “single employer” is that both are jointly and severally liable for the unfair practices committed and are responsible for remedying them.

In my opinion, I find that all five Respondents is a single employer. In first dealing with common ownership and financial control, there is no question that NYPS, DCPS, OBLV are owned by PST. OBLV and NYCGT are wholly owned by PST. PST owns 92.46 percent of NYPS and almost 99 percent of DCPS. Schmidt, through Infinity Trade Capital, LLC, owns 70.79 percent of PST. Schmidt owns 69.44 percent of Infinity Trade Capital, LLC. Schmidt also exercise almost unfettered control over the financial aspects of all five entities. Schmidt made hundreds of banking transactions and routine expenditures among the companies through PST. A cash flow problem of one company with failing to meet payroll or needing bus repairs was addressed by Schmidt through PST or another Respondent to provide the funds. Moskowitz and White testified that they were not involved in these transactions and were not authorized to transfer funds. Cook also provided similar testimony while as a manager at DCPS. The evidence of record reveals numerous transactions between NYPS to DCPS in the form of loans and repayments in 2012 and 2015 (GC Exh. 70). Documents also established numerous financial transactions back and forth between OBLV, DCPS, and PST from 2012 to 2017 (GC Exh. 72). The parties stipulated to various and numerous financial transfers to and from the Respondents of at least \$50,000 dollars for each transaction (Jt. Exh. 3).

I find as significant the monetary loans owed by DCPS, NYCGT, NYPS, OBLV, to PST from 2012 to 2016. Loans to DCPS was owed to PST of \$608,746 in 2012; \$750,820 in 2013; \$1,746,327 in 2014; \$1,550,708 in 2015; and \$1,503,577 in 2016. There were loans owed by NYCGT to PST of \$24,240 in 2014; \$105,803 in 2015; and \$497,926 in 2016. There is nothing in the record of any loan arrangements, fees and interest paid on these loans, or any other documents to evidence that the loans were negotiated at arm’s-length. In particular, loans repaid by NYPS to PST reflect \$85,260 in 2012; \$75,999 in 2013; \$135,889 in 2014; and \$3,338 in 2015, which in my mind, shows a lack of arm’s-length relationship and an effort of NYPS to deplete its assets by transferring them to PST (GC Exh. 73).

The counsel for the General Counsel subpoenaed financial documents showing any loan agreements, schedule of repayments, fee, interest on the loans and other aspects of fund transactions, but not produced by the Respondents. As such, I draw an adverse inference that such documents did not exist that the funds were transferred at less than arm’s length.

There is also interrelation of operations. All five Respondents are engaged in the tourist industry by providing tours in various cities. Overwhelming evidence showing interrelation of operations to include (1) the credible testimony from Cook and White that company buses from NYPS and DCPS were readily transferred back and forth during the busy tourist season or for special events. NYPS even provided a bus to OBLV, which in turn, sent the bus after 1 year, to DCPS; (2) Jerry Abshire from PST established a call center in Houston that was accepting calls from customers dialing into NYPS, DCPS and OBLV local numbers. When a customer could not reach a sales representative at the local number, the call center system was designed to field those

calls; (3) The call center was also used by Abshire to monitor the customer sales agents and to provide necessary training if needed. The training of sales representatives was an integral necessity to ensure revenue growth at NYPS, DCPS, and OBLV. As such, conference calls of all the sales representatives, along with some of the Respondents’ managers and supervisors were conducted on a weekly basis. These calls would last up to two hours per week; (4) NYPS, DCPS, OBLV, NYCGT, are all included at one time or another, on the OnBoard website for informational purposes and for promoting tours in their individual locations. OnBoard licensed the marketing on behalf of PST. The website included specific tours, schedules and duration for each location in New York, Washington, D.C., and Las Vegas. Advertising and informational brochures included promotions for OBLV, NYPS, DCPS, NYCGT were distributed under the OnBoard sightseeing tours logo (GC Exh. 142); (5) Loans and financial arrangements among the Respondents were regularly transacted with no correspondently secured financial or promissory notes for the loans, evidencing a less than arm’s-length arrangement between the parties; (6) Policies and procedures on employee conduct, behavior and training were an integral part of OBLV, DCPS, and NYPS. Employees of these three Respondents were required to wear the same uniforms; and (7) All the Respondents shared the same bookkeeping company, Galago, which was wholly owned by Schmidt. Indeed, Galago was more than just a bookkeeping company. Galago was used to transfer loans, issue payroll, secure employee health insurance and other benefits, apply for vehicle insurance for OBLV, DCPS, and NYPS, process workers’ compensation claims, prepared tax forms for the Respondents, as well as other financial matters.

I find that there is also common management among the Respondent entities. Indeed, as described by the witnesses, including Schmidt, I find that the management team was readily fungible among the Respondents. Shawn Mengel, who had an investor share in PST, went from OBLV to DCPS. Larry Lockhart, initially hired in OBLV, found his way to DCPS. Lockhart also has a General Power of Attorney for NYCGT (GC Exh. 63 (C)). Levi June was vice-president of NYPS and DCPS. McKoy was also vice-president of NYPS and DCPS. Jerry Abshire was the vice-president of sales and marketing for PST, but he also conducted training and customer support for all the phone sales representatives at NYPS, OBLV, and DCPS. Scott Wilson also conducted training. He was hired by NYPS and did consultant work for DCPS as well as OBLV. Ron White, supervisor in NYPS, helped with the USDOT bus applications and issues and traveled to Washington, D.C. to assist DCPS. White also testified that he helped develop the training policies and procedures for bus drivers that were used in all three cities. Fred Moskowitz helped establish the office in Las Vegas for OBLV and frequent DCPS for meetings with Schmidt and the DCPS management team. Moskowitz was president of NYPS and became sole manager of NYCGT by Schmidt.

There is also centralized control of labor relations. Schmidt was involved in the hiring, promotions and reassignments of managers and supervisors at PST, DCPS, NYPS, OBLV, and NYCGT. On occasions, Schmidt would also be involved in the selection of tour guides and/or drivers. It is conceded that most of the drivers and guides in the respective companies were hired

by the local management team. But is also true that Schmidt was involved in the discipline and rehiring of some of the drivers and guides. Schmidt was instrumental in rehiring Cook in DCPS after he was discharged and in fact subsequently promoted Cook to operations manager. Schmidt promoted Cook, Lockhart, Moskowitz and Mengel. On other occasions, Schmidt would be the advisor to the personnel action before the decision is made. As noted above, labor relations dealing with customer service, conduct and behavior policies and procedures of the drivers and guides were uniform with NYPS, OBLV and DCPS. Some of these policies were developed by a manager in one company but used by all the Respondents. Wilson Scott, who was hired by NYPS, was instrumental in developing a call center sales script that was followed by all the Respondents' sales representatives. Scott also provided consultant advice to DCPS. Abshire, as vice-president of PST, established the call center and provided training to the sales representatives. Training and conduct are clearly labor relations functions.

IV. NYCGT IS A GOLDEN STATE SUCCESSOR TO NYPS

The Supreme Court has held that a bona fide purchaser of a business which has knowledge of the seller's unfair labor practices at the time of the purchase, and who continues the business without interruption or substantial change in operations, employee complement, or supervisory personnel, has joint and several liability for remedying the seller's unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). The Supreme Court held that a "bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor," thus the successor assumes the duty of its predecessor. *Golden State Bottling Co.*, above at 423. Additionally, if the successor had notice of potential unfair labor practice liability, the Board must suppose that the successor had the chance to avoid or mitigate that liability. The successor then has the burden of rebutting that presumption and showing they were not on notice. *Lebanite Corp. &/or R.E. Serv. Co. & W. Council of Indus. Workers, Local 2554, Affiliated with United Bhd. of Carpenters & Joiners of Am. & Oregon Panel Prod., LLC*, 346 NLRB 748, 754 (2006).

These are known as "Golden State successors," and in applying this standard, the Board has observed that these successors are in the best position to remedy the predecessor's liability without unfair hardship, because it can account for any potential liability in the purchase price or secure an indemnity clause in the sales agreement. *D.L. Baker, Inc.*, 351 NLRB 515, 520 (2007).

The purchaser is defined as a *Golden State* successor because it must remedy the unfair labor practices of the predecessor. And, unlike in successorship cases for bargaining purposes, this obligation does not require that a majority of the successor's employees be former employees of the predecessor or even that they be represented by a union. *D. L. Baker, Inc.*, above, 519, 545. In *Baker*, the Board rejected the respondent's contention that the General Counsel must also prove that the predecessor's potential liability be reflected in the purchase price of the business, citing *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enfd. sub nom. U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). Indeed, despite Respondents' arguments that NYCGT was wholly

incorporated and independent and did not purchase NYPS, there is no requirement that a sale or purchase of NYPS is prerequisite to a finding of a *Golden State* successor. *Lebanite*, above, 752.

I find that NYCGT retained NYPS employees and continued NYPS business without interruption. As such, I find that NYCGT is a *Golden State* successor to NYPS. NYPS operated a tour business using buses. NYCGT also operates a tour business and at least, in the initial 3 or 4 months and used the buses owned by NYPS. As noted above, there are no documentary evidence proffered by the Respondents that the buses used by NYCGT were obtained at during arm's-length negotiations. NYCGT, also at its formation, retained a complement of NYPS employees as bus drivers and tour guides. Although supervisory personnel were discharged when NYPS ceased operations, Moskowitz continued as the manager. Moskowitz was president at NYPS. Schmidt, the former CEO of NYPS, became the CEO of NYCGT.

Contrary to Moskowitz' testimony, the documents provided by the Respondents pursuant to subpoena of NYCGT records show that NYCGT had hired employees when it first started operations under Moskowitz. The payroll records for NYCGT shows that Joseph Cruz was a driver at NYPS and rehired by NYCGT to dismantle and relocate junk buses. Moskowitz also hired Melvin Brewster, who had previously worked at NYPS as a driver. Brewster was a bus operator for NYCGT. Brewster (Driver); Cruz (Driver); Tom Eikard (Tour Guide); Kiernan (Tour Guide); Molin (Driver); David Roffe (Tour Guide); Gregory Boyd (Driver); Stanley Charmin (Driver); Rodney Kelly (Driver); Luis Valencia Espen (driver), all worked at NYPS and NYCGT (GC Exhs. 148, 149). Matthew Kiernan was a loader of passengers on the buses and a tour guide at NYCGT and NYPS (Tr. 995).

Upon examination by the counsel for the General Counsel, Moskowitz did not believe that the payroll records were accurate (Tr. 993-995). He denied knowing they worked for NYCGT although the payroll checks for the employees were issued through Galago Investments. Moskowitz believed the checks were issued in error (Tr. 1002-1004).

As noted above, initially, NYCGT hired a number of former NYPS employees. At least seven employees from NYPS were transferred over to NYCGT. All had previously worked at NYPS and NYCGT (GC Exhs. 148, 149). Moskowitz insisted that the documents provided by the Respondents were inaccurate and not authentic because he had testified that NYCGT had no employees except for himself (GC Exhs. 148, 149). However, the payroll records are clearly ordinary business records provided by NYCGT pursuant to the General Counsel's subpoena. None of the Respondents provided other records to rebut or show otherwise that the NYCGT payroll data is inaccurate. What is more telling, when Moskowitz realized his testimony was inconsistent with the objective payroll records and when he was recalled as a witness by the Respondents, Moskowitz testified that he contacted Shelly Hogan. According to Moskowitz, Hogan told him that the employees were on the payroll of NYCGT due to a contractual obligation between NYPS and NYCGT was to continue paying them even after NYPS ceased operations (Tr. 1025, 1026).

Moskowitz then proceeded to discharge all the above-named

employees. He did not testify when he discharged the employees after his discovery that they were still on the NYCGT payroll in May 2018. Moskowitz was questioned as a witness on direct examination by Schmidt (Tr. 1025)

BY MR. SCHMIDT: On that topic, Mr. Moskowitz, I wanted to address the confusion you had about which company employed people at which time. And you testified last week that, to the best of your recollection, NYC Guided Tours, never employed any drivers, and when we looked at Exhibits 148 and 149, which appear to show, not only tour guides, but also drivers employed by the company, after your testimony last -- or two weeks ago, did you go back to determine what the explanation for that confusion was?

By MOSKOWITZ: Yes, I called Shelly Hogan, who was a former long-term employee of Galaga (phonetic), and I said, "Shelly, I didn't know these people were NYC Guided Tours, these drivers, at all. I thought they were all New York Party Shuttle people." And she said that she had switched them over, because of a contract that was done with NYPS and NYC Guided Tours to fulfill the obligations, I think I'm saying it correctly, of NYPS. And that there was a binding contract for them and they—since I didn't see these checks, these checks were sent out directly to people or to my office in sealed envelopes, I had no acknowledgement that they--

I had no idea what, you know, what the company was paying them. No idea. Otherwise I wouldn't be so vehemently sure that they didn't work—

He testified to discharging Stanley Sherman, Annie DeLeon and the other employees resigned "on their own accord" (Tr. 1022). If indeed, NYCGT was obligated to continue paying these employees as told to him by Hogan, Moskowitz could not have lawfully terminated them. In my opinion, this stretches beyond any sense of credibility because it is difficult for me to believe that Moskowitz, as the sole manager of NYCGT, did not realize he had employees at the inception of NYCGT in October 2014 until he testified as a witness at the NLRB hearing on May 18, 2018. It is incredulous that Moskowitz testified he did not know that Joseph Cruz, who came over from NYPS to NYCGT with him, continued to be an employee with NYCGT until Moskowitz allegedly terminated him in 2018. The record of evidence shows that Cruz even possessed a General Power of Attorney authorized by Schmidt in May 2016 (GC Exh. 62(A)). These individuals were employees and not independent contractors.

Further, both NYPS and NYCGT operated bus tours. NYCGT continued to operate tours, like NYPS, under the OnBoard Tour marketing brand. Moskowitz testified that the NYCGT buses were from NYPS. There are no documents, although subpoenaed by the counsel for the General Counsel, to show any financial, rental or lease agreements to reflect the transfers of the buses from NYPS to NYCGT. The NYPS buses were in operation by NYCGT at least for 3 or 4 months and the vehicle insurance policy of the NYPS were carried by NYCGT through October 2015. NYCGT also honored the tour tickets purchased by customers at NYPS before NYPS closed operations for at least 3 months (Tr. 1034, 1035). Schmidt estimated the value of the tickets as over \$1 million (Tr. 1896–1897).

Finally, both Schmidt and Moskowitz were on notice of the unfair labor practice. As referenced above in my "alter ego" analysis, the CEO for NYPS and NYCGT was Schmidt, who was and is intimately involved in the Pflantzer's unfair labor practice complaint. Moskowitz was also well aware of Pflantzer's complaint against NYPS, since he was the president of NYPS at the time. In addition, Moskowitz was involved and had the authority to discuss settlement of the NYPS complaint as president in February 2014. The ongoing litigation and settlement discussions continued after October 2014 when Moskowitz became president of NYCGT. This authority to discuss settlement with the NLRB was given to him by Schmidt (GC Exh. 152; Tr. 977).

I find that the successor had notice of NYPS's unfair labor practice liability and I must suppose that the successor had the chance to avoid or mitigate that liability. The successor then has the burden of rebutting that presumption and showing they were not on notice. *Lebanite Corp. &/or R.E. Serv. Co. & W. Council of Indus. Workers, Local 2554, Affiliated with United Bhd. of Carpenters & Joiners of Am. & Oregon Panel Prod., LLC*, 346 NLRB 748, 754 (2006). Respondent NYCGT, as successor who knew of the predecessor NYPS' unfair labor practice, has failed in its burden to rebut the presumption it was not on notice and is jointly and severally liable. In *Martin J. Barry Company*, the respondent was held to be a successor who knew of the predecessor's unfair labor practice and was found jointly and severally liable. Therefore, the successor was held liable to the unit employees for losses resulting from the predecessor's refusal to execute the agreed-upon contract. *Martin J. Barry Co.*, 278 NLRB 393, 393 (1986); also, *Harmon Auto Glass*, 354 NLRB 872 (2009).

CONCLUSIONS

1. The Respondents, New York Party Shuttle, LLC, d/b/a OnBoard Tours, Washington DC Party Shuttle, LLC, d/b/a OnBoard Tours, OnBoard Las Vegas Tours, LLC, d/b/a OnBoard Tours, NYC Guided Tours, LLC, and Party Shuttle Tours, LLC, is a Single Employer. New York Party Shuttle, LLC, d/b/a OnBoard Tours and NYC Guided Tours, LLC are alter egos. NYC Guided Tours is a *Golden State* Successor to New York Party Shuttle, LLC.

2. The period for which the Respondents are liable for payment of backpay and benefits commenced on February 12, 2012, to July 27, 2014, and from August 14, 2104, to the present (Attachment 1).

3. The backpay includes the reasonable calculation of Pflantzer's earned tips during this same period (attachment 2).

4. The excess tax on backpay owed to Pflantzer as calculated by the Region's compliance officer was reasonable. The total excess tax on backpay figure depends on when backpay is paid and when Pflantzer is offered a valid reinstatement (attachment 3)

5. The General Counsel has employed a reasonable method of computing the gross and net backpay and benefit obligations incurred by the Respondents and that method is both consistent with the Board's requirements and designed to produce an accurate determination of those obligations.

6. The Respondents have failed to establish that any reduction in the computed backpay and benefit obligations is appropriate.

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The named Respondents above, its officers, agents, successors, and assigns, shall forthwith pay to Fred Pflantzer the sum of \$91,912, plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment and minus tax withholding required by law. In

accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires the Respondents to compensate Fred Pflantzer for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB 1324 (2016).

Dated: Washington, D.C. July 9, 2019

NLRB Backpay Calculation

Case Name:		New York Party Shuttle, LLC							Backpay period:			
Case Number:		02-CA-073340							2/12/2012 - 3/31/18			
Claimant:		Fred Pflantzer										
Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses	
2012	1	1/7				-						
2012	1	1/14				-						
2012	1	1/21				-						
2012	1	1/28				-						
2012	1	2/4				-						
2012	1	2/11				-						
2012	1	2/18	19.60		20.00	517	226					
2012	1	2/25	20.27		20.00	534	226					
2012	1	3/3	24.29		20.00	640	226					
2012	1	3/10	24.29		20.00	640	226					
2012	1	3/17	28.49		20.00	751	226					
2012	1	3/24	28.49		20.00	751	226					
2012	1	3/31	17.08		20.00	450	226					
2012	1	Total				4,284	1,580	2,704	-	-	2,704	
2012	2	4/7	17.08		20.00	450	226					
2012	2	4/14	23.38		20.00	616	226					
2012	2	4/21	25.9		20.00	683	226					
2012	2	4/28	23.37		20.00	616	226					
2012	2	5/5	21.47		20.00	566	226					
2012	2	5/12	23.52		20.00	470	226					
2012	2	5/19	26.25		20.00	692	226					
2012	2	5/26	25.95		20.00	684	226					
2012	2	6/2	24.15		20.00	637	226					
2012	2	6/9	24.15		20.00	662	226					
2012	2	6/16	24.62		20.00	649	226					
2012	2	6/23	24.62		20.00	649	226					
2012	2	6/30	25.73		20.00	678	226					
2012	2	Total				8,053	2,934	5,118	-	-	5,118	
2012	3	7/7	25.92		20.00	683	226					
2012	3	7/14	25.92		20.00	683	226					
2012	3	7/21	13.16		20.00	347	226					
2012	3	7/28	11.03		20.00	291	226					
2012	3	8/4	11.03		20.00	291	226					
2012	3	8/11	11.03		20.00	291	226					
2012	3	8/18	13.13		20.00	346	226					
2012	3	8/25	25.75		20.00	679	226					
2012	3	9/1	25.23		20.00	665	226					
2012	3	9/8	22.13		20.00	583	226					
2012	3	9/15	22		20.00	580	226					
2012	3	9/22	21.25		20.00	560	226					
2012	3	9/29	20.95		20.00	552	226					

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

NLRB Backpay Calculation

2

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:

2/12/2012 - 3/31/18

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2012	3	Total				6,552	2,934	3,617	-	-	3,617
2012	4	10/6	19.13		20.00	529	226				
2012	4	10/13	19.05		20.00	502	226				
2012	4	10/20	18.63		20.00	516	226				
2012	4	10/27	18.34		20.00	483	226				
2012	4	11/3	16.63		20.00	438	226				
2012	4	11/10	15.11		20.00	398	226				
2012	4	11/17	6		20.00	158	226				
2012	4	11/24	6.93		20.00	183	226				
2012	4	12/1	12.5		20.00	355	226				
2012	4	12/8	12.61		20.00	332	226				
2012	4	12/15	13.25		20.00	349	226				
2012	4	12/22	13.59		20.00	383	226				
2012	4	12/29	15.63		20.00	399	226				
2012	4	Total				5,027	2,934	2,093	-	-	2,093
2013	1	1/5	15.18		20.00	400					
2013	1	1/12	12.5		20.00	355					
2013	1	1/19	13.05		20.00	344					
2013	1	1/26	16.38		20.00	457					
2013	1	2/2	16.82		20.00	443					
2013	1	2/9	19.5		20.00	539					
2013	1	2/16	18.63		20.00	491					
2013	1	2/23	13.38		20.00	612					
2013	1	3/2	14.66		20.00	387					
2013	1	3/9	22.38		20.00	590					
2013	1	3/16	23		20.00	606					
2013	1	3/23	26.75		20.00	705					
2013	1	3/30	25.73		20.00	678					
2013	1	Total				6,608		6,608	-	-	6,608
2013	2	4/6	19.63		20.00	517					
2013	2	4/13	19.26		20.00	508					
2013	2	4/20	17.1		20.00	451					
2013	2	4/27	18.32		20.00	483					
2013	2	5/4	25.67		20.00	677					
2013	2	5/11	25.67		20.00	852					
2013	2	5/18	27.13		20.00	715					
2013	2	5/25	27.13		20.00	715					
2013	2	6/1	26.38		20.00	695					
2013	2	6/8	26.38		20.00	695					
2013	2	6/15	23.13		20.00	610					

NLRB Backpay Calculation

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:

2/12/2012 - 3/31/18

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2013	2	6/22	23.13		20.00	610					
2013	2	6/29	24.38		20.00	643					
2013	2	Total				8,170		8,170	-	-	8,170
2013	3	7/6	24.38		20.00	668					
2013	3	7/13	28.54		20.00	752					
2013	3	7/20	28.39		20.00	749					
2013	3	7/27	27.53		20.00	726					
2013	3	8/3	27.53		20.00	726					
2013	3	8/10	24.63		20.00	649					
2013	3	8/17	24.96		20.00	658					
2013	3	8/24	26.88		20.00	709					
2013	3	8/31	26.88		20.00	709					
2013	3	9/7	26.88		20.00	709					
2013	3	9/14	26.88		20.00	709					
2013	3	9/21	26.88		20.00	709					
2013	3	9/28	26.88		20.00	709					
2013	3	Total				9,180		9,180	-	-	9,180
2013	4	10/5	26.88		20.00	709					
2013	4	10/12	14		20.00	369					
2013	4	10/19	13		20.00	343					
2013	4	10/26	11.75		20.00	310					
2013	4	11/2	28		20.00	738					
2013	4	11/9	17.75		20.00	468					
2013	4	11/16	23.75		20.00	626					
2013	4	11/23	21.5		20.00	567					
2013	4	11/30	27.5		20.00	725					
2013	4	12/7	23		20.00	606					
2013	4	12/14	19		20.00	501					
2013	4	12/21	34.25		20.00	903					
2013	4	12/28	39.5		20.00	1,041					
2013	4	Total				7,906		7,906	-	-	7,906
2014	1	1/4	18.75		20.00	494					
2014	1	1/11	33.75		20.00	890					
2014	1	1/18	21.75		20.00	573					
2014	1	1/25	28.25		20.00	745					
2014	1	2/1	21.25		20.00	560					
2014	1	2/8	20.75		20.00	547					
2014	1	2/15	20.5		20.00	540					
2014	1	2/22	14.5		20.00	382					
2014	1	3/1	22.25		20.00	587					

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

NLRB Backpay Calculation

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:

2/12/2012 - 3/31/18

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2014	1	3/8	28.5		20.00	751					
2014	1	3/15	34		20.00	896					
2014	1	3/22	31		20.00	817					
2014	1	3/29	26.25		20.00	692					
2014	1	Total				8,476		8,476	-	-	8,476
2014	2	4/5	28.25		20.00	745					
2014	2	4/12	25.5		20.00	672					
2014	2	4/19	27.5		20.00	725					
2014	2	4/26	27.25		20.00	718					
2014	2	5/3	34		20.00	896					
2014	2	5/10	26.75		20.00	705					
2014	2	5/17	34		20.00	896					
2014	2	5/24	32		20.00	844					
2014	2	5/31	19.25		20.00	508					
2014	2	6/7	30		20.00	791					
2014	2	6/14	28.75		20.00	758					
2014	2	6/21	28		20.00	738					
2014	2	6/28	25.5		20.00	672					
2014	2	Total				9,669		9,669	-	-	9,669
2014	3	7/5	32		20.00	844	441				
2014	3	7/12	27		20.00	712	441				
2014	3	7/19	21.75		20.00	573	441				
2014	3	7/26	21.75		20.00	573	441				
2014	3	8/2	7.25		20.00	191					
2014	3	8/9	0		20.00	-					
2014	3	8/16	14.25		20.00	376					
2014	3	8/23	21.5		20.00	567	441				
2014	3	8/30	28.25		20.00	745	441				
2014	3	9/6	38		20.00	1,002	441				
2014	3	9/13	21		20.00	554	441				
2014	3	9/20	29.5		20.00	778	441				
2014	3	9/27	28.5		20.00	751	441				
2014	3	Total				7,665	4,413	3,253	-	-	3,253
2014	4	10/4	28.5		20.00	751	441				
2014	4	10/11	26.5		20.00	699	441				
2014	4	10/18	29		20.00	765	441				
2014	4	10/25	11.75		20.00	310	441				
2014	4	11/1	28		20.00	738	441				
2014	4	11/8	17.75		20.00	468	441				
2014	4	11/15	23.75		20.00	626	441				

NLRB Backpay Calculation

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:		
2/12/2012 - 3/31/18		

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2014	4	11/22	21.5		20.00	567	441				
2014	4	11/29	27.5		20.00	725	441				
2014	4	12/6	23		20.00	606	441				
2014	4	12/13	19		20.00	501	441				
2014	4	12/20	34.25		20.00	903	441				
2014	4	12/27	39.5		20.00	1,041	441				
2014	4	Total				8,700	5,736	2,964	-	-	2,964
2015	1	1/3	18.75		20.00	494					
2015	1	1/10	33.75		20.00	890					
2015	1	1/17	21.75		20.00	573					
2015	1	1/24	28.25		20.00	745	192				
2015	1	1/31	21.25		20.00	560	192				
2015	1	2/7	20.75		20.00	547	192				
2015	1	2/14	20.5		20.00	540	192				
2015	1	2/21	14.5		20.00	382	192				
2015	1	2/28	22.25		20.00	587	192				
2015	1	3/7	28.5		20.00	751	192				
2015	1	3/14	34		20.00	896	192				
2015	1	3/21	31		20.00	817	192				
2015	1	3/28	26.25		20.00	692	192				
2015	1	Total				8,476	1,920	6,556	-	-	6,556
2015	2	4/4	28.25		20.00	745	424				
2015	2	4/11	25.5		20.00	672	424				
2015	2	4/18	27.5		20.00	725	424				
2015	2	4/25	27.25		20.00	718	424				
2015	2	5/2	34		20.00	896	424				
2015	2	5/9	26.75		20.00	705	424				
2015	2	5/16	34		20.00	896	424				
2015	2	5/23	32		20.00	844	424				
2015	2	5/30	19.25		20.00	508	424				
2015	2	6/6	30		20.00	791	424				
2015	2	6/13	28.75		20.00	758	424				
2015	2	6/20	28		20.00	738	424				
2015	2	6/27	25.5		20.00	672	424				
2015	2	Total				9,669	5,509	4,160	-	-	4,160
2015	3	7/4	32		20.00	844	424				
2015	3	7/11	27		20.00	712	424				
2015	3	7/18	21.75		20.00	573	424				
2015	3	7/25	21.75		20.00	573	424				
2015	3	8/1	31.75		20.00	837	424				

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

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NLRB Backpay Calculation

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Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:

2/12/2012 - 3/31/18

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2015	3	8/8	28		20.00	738	424				
2015	3	8/15	25.25		20.00	666	424				
2015	3	8/22	21.5		20.00	567	424				
2015	3	8/29	28.25		20.00	745	424				
2015	3	9/5	38		20.00	1,002	424				
2015	3	9/12	21		20.00	554	424				
2015	3	9/19	29.5		20.00	778	424				
2015	3	9/26	28.5		20.00	751	424				
2015	3	Total				9,339	5,509	3,830	-	-	3,830
2015	4	10/3	28.5		20.00	751	424				
2015	4	10/10	26.5		20.00	699	424				
2015	4	10/17	29		20.00	765	424				
2015	4	10/24	11.75		20.00	310	424				
2015	4	10/31	28		20.00	738	424				
2015	4	11/7	17.75		20.00	468	424				
2015	4	11/14	23.75		20.00	626	424				
2015	4	11/21	21.5		20.00	567	424				
2015	4	11/28	27.5		20.00	725	424				
2015	4	12/5	23		20.00	606	424				
2015	4	12/12	19		20.00	501	424				
2015	4	12/19	34.25		20.00	903	424				
2015	4	12/26	39.5		20.00	1,041	424				
2015	4	Total				8,700	5,509	3,191	-	-	3,191
2016	1	1/2	18.75		20.00	494	341				
2016	1	1/9	33.75		20.00	890	341				
2016	1	1/16	21.75		20.00	573	341				
2016	1	1/23	28.25		20.00	745	341				
2016	1	1/30	21.25		20.00	560	341				
2016	1	2/6	20.75		20.00	547	341				
2016	1	2/13	20.5		20.00	540	341				
2016	1	2/20	14.5		20.00	382	341				
2016	1	2/27	22.25		20.00	587	341				
2016	1	3/5	28.5		20.00	751	341				
2016	1	3/12	34		20.00	896	341				
2016	1	3/19	31		20.00	817	341				
2016	1	3/26	26.25		20.00	692	84				
2016	1	Total				8,476	4,177	4,299	-	-	4,299
2016	2	4/2	28.25		20.00	745	750				
2016	2	4/9	25.5		20.00	672	750				
2016	2	4/16	27.5		20.00	725	750				

NLRB Backpay Calculation

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Backpay period:

2/12/2012 - 3/31/18

Claimant: Fred Pflantzer

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2016	2	4/23	27.25		20.00	718	750				
2016	2	4/30	34		20.00	896	750				
2016	2	5/7	26.75		20.00	705	750				
2016	2	5/14	34		20.00	896	750				
2016	2	5/21	32		20.00	844	750				
2016	2	5/28	19.25		20.00	508	750				
2016	2	6/4	30		20.00	791	750				
2016	2	6/11	28.75		20.00	758	750				
2016	2	6/18	28		20.00	738	750				
2016	2	6/25	25.5		20.00	672	750				
2016	2	Total				9,669	9,756	-	-	-	-
2016	3	7/2	32		20.00	844	750				
2016	3	7/9	27		20.00	712	750				
2016	3	7/16	21.75		20.00	573	750				
2016	3	7/23	21.75		20.00	573	750				
2016	3	7/30	7.25		20.00	191	750				
2016	3	8/6	31.75		20.00	837	750				
2016	3	8/13	28		20.00	738	750				
2016	3	8/20	25.25		20.00	666	750				
2016	3	8/27	28.25		20.00	745	750				
2016	3	9/3	38		20.00	1,002	750				
2016	3	9/10	21		20.00	554	750				
2016	3	9/17	29.5		20.00	778	750				
2016	3	9/24	28.5		20.00	751	750				
2016	3	Total				8,964	9,756	-	-	-	-
2016	4	10/1	28.5		20.00	751	750				
2016	4	10/8	26.5		20.00	699	750				
2016	4	10/15	29		20.00	765	750				
2016	4	10/22	11.75		20.00	310	750				
2016	4	10/29	28		20.00	738	750				
2016	4	11/5	17.75		20.00	468	750				
2016	4	11/12	23.75		20.00	626	750				
2016	4	11/19	21.5		20.00	567	750				
2016	4	11/26	27.5		20.00	725	750				
2016	4	12/3	23		20.00	606	750				
2016	4	12/10	19		20.00	501	750				
2016	4	12/17	34.25		20.00	903	750				
2016	4	12/24	39.5		20.00	1,041	750				
2016	4	12/31	18.75		20.00	494	750				
2016	4	Total				9,194	10,506	-	-	-	-

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

NLRB Backpay Calculation

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:

2/12/2012 - 3/31/18

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2017	1	1/7	33.75		20.00	890	744				
2017	1	1/14	21.75		20.00	573	744				
2017	1	1/21	28.25		20.00	745	744				
2017	1	1/28	21.25		20.00	560	744				
2017	1	2/4	20.75		20.00	547	744				
2017	1	2/11	20.5		20.00	540	744				
2017	1	2/18	14.5		20.00	382	744				
2017	1	2/25	22.25		20.00	587	744				
2017	1	3/4	28.5		20.00	751	744				
2017	1	3/11	34		20.00	896	744				
2017	1	3/18	31		20.00	817	744				
2017	1	3/25	26.25		20.00	692	744				
2017	1	4/1	28.25		20.00	745	744				
2017	1	Total				8,726	9,672	-	-	-	-
2017	2	4/8	25.5		20.00	672	744				
2017	2	4/15	27.5		20.00	725	744				
2017	2	4/22	27.25		20.00	718	744				
2017	2	4/29	34		20.00	896	744				
2017	2	5/6				-					
2017	2	5/13				-					
2017	2	5/20				-					
2017	2	5/27				-					
2017	2	6/3	30		20.00	791	744				
2017	2	6/10	28.75		20.00	758	744				
2017	2	6/17	28		20.00	738	744				
2017	2	6/24	25.5		20.00	672	744				
2017	2	7/1	32		20.00	844	744				
2017	2	Total				6,815	6,696	119	-	-	119
2017	3	7/8	27		20.00	712	744				
2017	3	7/15	21.75		20.00	573	744				
2017	3	7/22	21.75		20.00	573	744				
2017	3	7/29	7.25		20.00	191	744				
2017	3	8/5	31.75		20.00	837	744				
2017	3	8/12	28		20.00	738	744				
2017	3	8/19	25.25		20.00	666	744				
2017	3	8/26	28.25		20.00	745	744				
2017	3	9/2	38		20.00	1,002	744				
2017	3	9/9	21		20.00	554	744				
2017	3	9/16	29.5		20.00	778	1,844				
2017	3	9/23	28.5		20.00	751	744				
2017	3	9/30	28.5		20.00	751	744				

NLRB Backpay Calculation

Case Name: New York Party Shuttle, LLC

Case Number: 02-CA-073340

Claimant: Fred Pflantzer

Backpay period:

2/12/2012 - 3/31/18

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2017	3	Total				8,871	10,772	-	-	-	-
2017	4	10/7			20.00	-					
2017	4	10/14			20.00	-					
2017	4	10/21			20.00	-					
2017	4	10/28			20.00	-					
2017	4	11/4	17.75		20.00	468	744				
2017	4	11/11	23.75		20.00	626	744				
2017	4	11/18	21.5		20.00	567	744				
2017	4	11/25	27.5		20.00	725	744				
2017	4	12/2	23		20.00	606	744				
2017	4	12/9	19		20.00	501	744				
2017	4	12/16	34.25		20.00	903	744				
2017	4	12/23	39.5		20.00	1,041	744				
2017	4	12/30	18.75		20.00	494	744				
2017	4	Total				5,932	6,696	-	-	-	-
2018	1	1/6	33.75		20.00	890	914				
2018	1	1/13	21.75		20.00	573	783				
2018	1	1/20	28.25		20.00	745	783				
2018	1	1/27	21.25		20.00	560	783				
2018	1	2/3	20.75		20.00	547	783				
2018	1	2/10	20.5		20.00	540	783				
2018	1	2/17	14.5		20.00	382	783				
2018	1	2/24	22.25		20.00	587	783				
2018	1	3/3	28.5		20.00	751	783				
2018	1	3/10	34		20.00	896	783				
2018	1	3/17	31		20.00	817	783				
2018	1	3/24	26.25		20.00	692	783				
2018	1	3/31	28.25		20.00	745	783				
2018	1	Total				8,726	10,306	-	-	-	-
Totals								91,912	-	-	91,912
Net Backpay (Withholdings)								91,912			
Expenses (No Withholdings)								-			

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

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Attachment 2

<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
2/18/2012	19.60	5.5	\$35.00	\$124.73
2/15/2012	20.27	5.5	\$35.00	\$128.99
3/3/2012	24.29	5.5	\$35.00	\$154.57
3/10/2012	24.29	5.5	\$35.00	\$154.57
3/17/2012	28.49	5.5	\$35.00	\$181.30
3/24/2012	28.49	5.5	\$35.00	\$181.30
3/31/2012	17.08	5.5	\$35.00	\$108.69
4/7/2012	17.08	5.5	\$35.00	\$108.69
4/14/2012	23.38	5.5	\$35.00	\$148.78
4/21/2012	25.90	5.5	\$35.00	\$164.82
4/28/2012	23.37	5.5	\$35.00	\$148.70
5/5/2012	21.47	5.5	\$35.00	\$136.61
5/12/2012	23.52	5.5	\$35.00	\$149.65
5/19/2012	26.25	5.5	\$35.00	\$167.05
5/26/2012	25.95	5.5	\$35.00	\$165.14
6/2/2012	24.15	5.5	\$35.00	\$153.68
6/9/2012	24.15	5.5	\$35.00	\$153.68
6/16/2012	24.62	5.5	\$35.00	\$156.65
6/23/2012	24.62	5.5	\$35.00	\$156.65
6/30/2012	25.73	5.5	\$35.00	\$163.74
7/7/2012	25.92	5.5	\$35.00	\$164.92
7/14/2012	25.92	5.5	\$35.00	\$164.92
7/21/2012	13.16	5.5	\$35.00	\$83.73
7/28/2012	11.03	5.5	\$35.00	\$70.19
8/4/2012	11.03	5.5	\$35.00	\$70.19
8/11/2012	11.03	5.5	\$35.00	\$70.19
8/18/2012	13.13	5.5	\$35.00	\$83.57
8/25/2012	25.75	5.5	\$35.00	\$163.86
9/1/2012	25.23	5.5	\$35.00	\$160.57
9/8/2012	22.13	5.5	\$35.00	\$140.80
9/15/2012	22.00	5.5	\$35.00	\$140.00
9/22/2012	21.25	5.5	\$35.00	\$135.23
9/29/2012	20.95	5.5	\$35.00	\$133.30
10/6/2012	19.13	5.5	\$35.00	\$121.70
10/13/2012	19.05	5.5	\$35.00	\$121.25
10/20/2012	18.63	5.5	\$35.00	\$118.52
10/27/2012	18.34	5.5	\$35.00	\$116.70
11/3/2012	16.63	5.5	\$35.00	\$105.80
11/10/2012	15.11	5.5	\$35.00	\$96.14
11/17/2012	6.00	5.5	\$35.00	\$38.18
11/24/2012	6.93	5.5	\$35.00	\$44.10
12/1/2012	12.50	5.5	\$35.00	\$79.55
12/8/2012	12.61	5.5	\$35.00	\$80.23
12/15/2012	13.25	5.5	\$35.00	\$84.32
12/22/2012	13.59	5.5	\$35.00	\$86.48
12/29/2012	15.63	5.5	\$35.00	\$99.43

<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
1/5/2013	15.18	5.5	\$35.00	\$96.59
1/12/2013	12.50	5.5	\$35.00	\$79.55
1/19/2013	13.05	5.5	\$35.00	\$83.07
1/26/2013	16.38	5.5	\$35.00	\$104.20
2/2/2013	16.82	5.5	\$35.00	\$107.05
2/9/2013	19.50	5.5	\$35.00	\$124.09
2/16/2013	18.63	5.5	\$35.00	\$118.52
2/23/2013	13.38	5.5	\$35.00	\$85.11
3/2/2013	14.66	5.5	\$35.00	\$93.30
3/9/2013	22.38	5.5	\$35.00	\$142.39
3/16/2013	23.00	5.5	\$35.00	\$146.36
3/23/2013	26.75	5.5	\$35.00	\$170.23
3/30/2013	25.73	5.5	\$35.00	\$163.75
4/6/2013	19.63	5.5	\$35.00	\$124.89
4/13/2013	19.26	5.5	\$35.00	\$122.59
4/20/2013	17.10	5.5	\$35.00	\$108.79
4/27/2013	18.32	5.5	\$35.00	\$116.59
5/4/2013	25.67	5.5	\$35.00	\$163.33
5/11/2013	25.67	5.5	\$35.00	\$163.33
5/18/2013	27.13	5.5	\$35.00	\$172.61
5/25/2013	27.13	5.5	\$35.00	\$172.61
6/1/2013	26.38	5.5	\$35.00	\$167.84
6/8/2013	26.38	5.5	\$35.00	\$167.84
6/15/2013	23.13	5.5	\$35.00	\$147.16
6/22/2013	23.13	5.5	\$35.00	\$147.16
6/29/2013	24.38	5.5	\$35.00	\$155.11
7/6/2013	24.38	5.5	\$35.00	\$155.11
7/13/2013	28.54	5.5	\$35.00	\$181.61
7/20/2013	28.39	5.5	\$35.00	\$180.69
7/27/2013	27.53	5.5	\$35.00	\$175.21
8/3/2013	27.53	5.5	\$35.00	\$175.21
8/10/2013	24.63	5.5	\$35.00	\$156.77
8/17/2013	24.96	5.5	\$35.00	\$158.81
8/24/2013	26.88	5.5	\$35.00	\$171.05
8/31/2013	26.88	5.5	\$35.00	\$171.05
9/7/2013	26.88	5.5	\$35.00	\$171.05
9/14/2013	26.88	5.5	\$35.00	\$171.05
9/21/2013	26.88	5.5	\$35.00	\$171.05
9/28/2013	26.88	5.5	\$35.00	\$171.05
10/5/2013	26.88	5.5	\$35.00	\$171.05
10/12/2013	14.00	5.5	\$35.00	\$89.09
10/19/2013	13.00	5.5	\$35.00	\$82.73
10/26/2013	11.75	5.5	\$35.00	\$74.77
11/2/2013	28.00	5.5	\$35.00	\$178.18
11/9/2013	17.75	5.5	\$35.00	\$112.95
11/16/2013	23.75	5.5	\$35.00	\$151.14
11/23/2013	21.50	5.5	\$35.00	\$136.82
11/30/2013	27.50	5.5	\$35.00	\$175.00
12/7/2013	23.00	5.5	\$35.00	\$146.36
12/14/2013	19.00	5.5	\$35.00	\$120.91
12/21/2013	34.25	5.5	\$35.00	\$217.95
12/28/2013	39.50	5.5	\$35.00	\$251.36

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

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<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
1/4/2014	18.75	5.5	\$35.00	\$119.32
1/11/2014	33.75	5.5	\$35.00	\$214.77
1/18/2014	21.75	5.5	\$35.00	\$138.41
1/25/2014	28.25	5.5	\$35.00	\$179.77
2/1/2014	21.25	5.5	\$35.00	\$135.23
2/8/2014	20.75	5.5	\$35.00	\$132.05
2/15/2014	20.50	5.5	\$35.00	\$130.45
2/22/2014	14.50	5.5	\$35.00	\$92.27
3/1/2014	22.25	5.5	\$35.00	\$141.59
3/8/2014	28.50	5.5	\$35.00	\$181.36
3/15/2014	34.00	5.5	\$35.00	\$216.36
3/22/2014	31.00	5.5	\$35.00	\$197.27
3/29/2014	26.25	5.5	\$35.00	\$167.05
4/5/2014	28.25	5.5	\$35.00	\$179.77
4/12/2014	25.50	5.5	\$35.00	\$162.27
4/19/2014	27.50	5.5	\$35.00	\$175.00
4/26/2014	27.25	5.5	\$35.00	\$173.41
5/3/2014	34.00	5.5	\$35.00	\$216.36
5/10/2014	26.75	5.5	\$35.00	\$170.23
5/17/2014	34.00	5.5	\$35.00	\$216.36
5/24/2014	32.00	5.5	\$35.00	\$203.64
5/31/2014	19.25	5.5	\$35.00	\$122.50
6/7/2014	30.00	5.5	\$35.00	\$190.91
6/14/2014	28.75	5.5	\$35.00	\$182.95
6/21/2014	28.00	5.5	\$35.00	\$178.18
6/28/2014	25.50	5.5	\$35.00	\$162.27
7/5/2014	32.00	5.5	\$35.00	\$203.64
7/12/2014	27.00	5.5	\$35.00	\$171.82
7/19/2014	21.75	5.5	\$35.00	\$138.41
7/26/2014	21.75	5.5	\$35.00	\$138.41
8/2/2014	7.25	5.5	\$35.00	\$46.14
8/9/2014	0.00	5.5	\$35.00	\$0.00
8/16/2014	14.25	5.5	\$35.00	\$90.68
8/23/2014	21.50	5.5	\$35.00	\$136.82
8/30/2014	28.25	5.5	\$35.00	\$179.77
9/6/2014	38.00	5.5	\$35.00	\$241.82
9/13/2014	21.00	5.5	\$35.00	\$133.64
9/20/2014	29.50	5.5	\$35.00	\$187.73
9/27/2014	28.50	5.5	\$35.00	\$181.36
10/4/2014	28.50	5.5	\$35.00	\$181.36
10/11/2014	26.50	5.5	\$35.00	\$168.64
10/18/2014	29.00	5.5	\$35.00	\$184.55
10/25/2014	11.75	5.5	\$35.00	\$74.77
11/1/2014	28.00	5.5	\$35.00	\$178.18
11/8/2014	17.75	5.5	\$35.00	\$112.95
11/15/2014	23.75	5.5	\$35.00	\$151.14
11/22/2014	21.50	5.5	\$35.00	\$136.82
11/29/2014	27.50	5.5	\$35.00	\$175.00
12/6/2014	23.00	5.5	\$35.00	\$146.36
12/13/2014	19.00	5.5	\$35.00	\$120.91
12/20/2014	34.25	5.5	\$35.00	\$217.95
12/27/2014	39.50	5.5	\$35.00	\$251.36

<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
1/3/2015	18.75	5.5	\$35.00	\$119.32
1/10/2015	33.75	5.5	\$35.00	\$214.77
1/17/2015	21.75	5.5	\$35.00	\$138.41
1/24/2015	28.25	5.5	\$35.00	\$179.77
1/31/2015	21.25	5.5	\$35.00	\$135.23
2/7/2015	20.75	5.5	\$35.00	\$132.05
2/14/2015	20.50	5.5	\$35.00	\$130.45
2/21/2015	14.50	5.5	\$35.00	\$92.27
2/28/2015	22.25	5.5	\$35.00	\$141.59
3/7/2015	28.50	5.5	\$35.00	\$181.36
3/14/2015	34.00	5.5	\$35.00	\$216.36
3/21/2015	31.00	5.5	\$35.00	\$197.27
3/28/2015	26.25	5.5	\$35.00	\$167.05
4/4/2015	28.25	5.5	\$35.00	\$179.77
4/11/2015	25.50	5.5	\$35.00	\$162.27
4/18/2015	27.50	5.5	\$35.00	\$175.00
4/25/2015	27.25	5.5	\$35.00	\$173.41
5/2/2015	34.00	5.5	\$35.00	\$216.36
5/9/2015	26.75	5.5	\$35.00	\$170.23
5/16/2015	34.00	5.5	\$35.00	\$216.36
5/23/2015	32.00	5.5	\$35.00	\$203.64
5/30/2015	19.25	5.5	\$35.00	\$122.50
6/6/2015	30.00	5.5	\$35.00	\$190.91
6/13/2015	28.75	5.5	\$35.00	\$182.95
6/20/2015	28.00	5.5	\$35.00	\$178.18
6/27/2015	25.50	5.5	\$35.00	\$162.27
7/4/2015	32.00	5.5	\$35.00	\$203.64
7/11/2015	27.00	5.5	\$35.00	\$171.82
7/18/2015	21.75	5.5	\$35.00	\$138.41
7/25/2015	21.75	5.5	\$35.00	\$138.41
8/1/2015	31.75	5.5	\$35.00	\$202.05
8/8/2015	28.00	5.5	\$35.00	\$178.18
8/15/2015	25.25	5.5	\$35.00	\$160.68
8/22/2015	21.50	5.5	\$35.00	\$136.82
8/29/2015	28.25	5.5	\$35.00	\$179.77
9/5/2015	38.00	5.5	\$35.00	\$241.82
9/12/2015	21.00	5.5	\$35.00	\$133.64
9/19/2015	29.50	5.5	\$35.00	\$187.73
9/26/2015	28.50	5.5	\$35.00	\$181.36
10/3/2015	28.50	5.5	\$35.00	\$181.36
10/10/2015	26.50	5.5	\$35.00	\$168.64
10/17/2015	29.00	5.5	\$35.00	\$184.55
10/24/2015	11.75	5.5	\$35.00	\$74.77
10/31/2015	28.00	5.5	\$35.00	\$178.18
11/7/2015	17.75	5.5	\$35.00	\$112.95
11/14/2015	23.75	5.5	\$35.00	\$151.14
11/21/2015	21.50	5.5	\$35.00	\$136.82
11/28/2015	27.50	5.5	\$35.00	\$175.00
12/5/2015	23.00	5.5	\$35.00	\$146.36
12/12/2015	19.00	5.5	\$35.00	\$120.91
12/19/2015	34.25	5.5	\$35.00	\$217.95
12/26/2015	39.50	5.5	\$35.00	\$251.36

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

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<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
1/2/2016	18.75	5.5	\$35.00	\$119.32
1/9/2016	33.75	5.5	\$35.00	\$214.77
1/16/2016	21.75	5.5	\$35.00	\$138.41
1/23/2016	28.25	5.5	\$35.00	\$179.77
1/30/2016	21.25	5.5	\$35.00	\$135.23
2/6/2016	20.75	5.5	\$35.00	\$132.05
2/13/2016	20.50	5.5	\$35.00	\$130.45
2/20/2016	14.50	5.5	\$35.00	\$92.27
2/27/2016	22.25	5.5	\$35.00	\$141.59
3/5/2016	28.50	5.5	\$35.00	\$181.36
3/12/2016	34.00	5.5	\$35.00	\$216.36
3/19/2016	31.00	5.5	\$35.00	\$197.27
3/26/2016	26.25	5.5	\$35.00	\$167.05
4/2/2016	28.25	5.5	\$35.00	\$179.77
4/9/2016	25.50	5.5	\$35.00	\$162.27
4/16/2016	27.50	5.5	\$35.00	\$175.00
4/23/2016	27.25	5.5	\$35.00	\$173.41
4/30/2016	34.00	5.5	\$35.00	\$216.36
5/7/2016	26.75	5.5	\$35.00	\$170.23
5/14/2016	34.00	5.5	\$35.00	\$216.36
5/21/2016	32.00	5.5	\$35.00	\$203.64
5/28/2016	19.25	5.5	\$35.00	\$122.50
6/4/2016	30.00	5.5	\$35.00	\$190.91
6/11/2016	28.75	5.5	\$35.00	\$182.95
6/18/2016	28.00	5.5	\$35.00	\$178.18
6/25/2016	25.50	5.5	\$35.00	\$162.27
7/2/2016	32.00	5.5	\$35.00	\$203.64
7/9/2016	27.00	5.5	\$35.00	\$171.82
7/16/2016	21.75	5.5	\$35.00	\$138.41
7/23/2016	21.75	5.5	\$35.00	\$138.41
7/30/2016	7.25	5.5	\$35.00	\$46.14
8/6/2016	31.75	5.5	\$35.00	\$202.05
8/13/2016	28.00	5.5	\$35.00	\$178.18
8/20/2016	25.25	5.5	\$35.00	\$160.68
8/27/2016	28.25	5.5	\$35.00	\$179.77
9/3/2016	38.00	5.5	\$35.00	\$241.82
9/10/2016	21.00	5.5	\$35.00	\$133.64
9/17/2016	29.50	5.5	\$35.00	\$187.73
9/24/2016	28.50	5.5	\$35.00	\$181.36
10/1/2016	28.50	5.5	\$35.00	\$181.36
10/8/2016	26.50	5.5	\$35.00	\$168.64
10/15/2016	29.00	5.5	\$35.00	\$184.55
10/22/2016	11.75	5.5	\$35.00	\$74.77
10/29/2016	28.00	5.5	\$35.00	\$178.18
11/5/2016	17.75	5.5	\$35.00	\$112.95
11/12/2016	23.75	5.5	\$35.00	\$151.14
11/19/2016	21.50	5.5	\$35.00	\$136.82
11/26/2016	27.50	5.5	\$35.00	\$175.00
12/3/2016	23.00	5.5	\$35.00	\$146.36
12/10/2016	19.00	5.5	\$35.00	\$120.91
12/17/2016	34.25	5.5	\$35.00	\$217.95
12/24/2016	39.50	5.5	\$35.00	\$251.36
12/31/2016	18.75	5.5	\$35.00	\$119.32

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DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
1/7/2017	33.75	5.5	\$35.00	\$214.77
1/14/2017	21.75	5.5	\$35.00	\$138.41
1/21/2017	28.25	5.5	\$35.00	\$179.77
1/28/2017	21.25	5.5	\$35.00	\$135.23
2/4/2017	20.75	5.5	\$35.00	\$132.05
2/11/2017	20.50	5.5	\$35.00	\$130.45
2/18/2017	14.50	5.5	\$35.00	\$92.27
2/25/2017	22.25	5.5	\$35.00	\$141.59
3/4/2017	28.50	5.5	\$35.00	\$181.36
3/11/2017	34.00	5.5	\$35.00	\$216.36
3/18/2017	31.00	5.5	\$35.00	\$197.27
3/25/2017	26.25	5.5	\$35.00	\$167.05
4/1/2017	28.25	5.5	\$35.00	\$179.77
4/8/2017	25.50	5.5	\$35.00	\$162.27
4/15/2017	27.50	5.5	\$35.00	\$175.00
4/22/2017	27.25	5.5	\$35.00	\$173.41
4/29/2017	34.00	5.5	\$35.00	\$216.36
5/6/2017	26.75	5.5	\$35.00	\$170.23
5/13/2017	34.00	5.5	\$35.00	\$216.36
5/20/2017	32.00	5.5	\$35.00	\$203.64
5/27/2017	19.25	5.5	\$35.00	\$122.50
6/3/2017	30.00	5.5	\$35.00	\$190.91
6/10/2017	28.75	5.5	\$35.00	\$182.95
6/17/2017	28.00	5.5	\$35.00	\$178.18
6/24/2017	25.50	5.5	\$35.00	\$162.27
7/1/2017	32.00	5.5	\$35.00	\$203.64
7/8/2017	27.00	5.5	\$35.00	\$171.82
7/15/2017	21.75	5.5	\$35.00	\$138.41
7/22/2017	21.75	5.5	\$35.00	\$138.41
7/29/2017	7.25	5.5	\$35.00	\$46.14
8/5/2017	31.75	5.5	\$35.00	\$202.05
8/12/2017	28.00	5.5	\$35.00	\$178.18
8/19/2017	25.25	5.5	\$35.00	\$160.68
8/26/2017	28.25	5.5	\$35.00	\$179.77
9/2/2017	38.00	5.5	\$35.00	\$241.82
9/9/2017	21.00	5.5	\$35.00	\$133.64
9/16/2017	29.50	5.5	\$35.00	\$187.73
9/23/2017	28.50	5.5	\$35.00	\$181.36
9/30/2017	28.50	5.5	\$35.00	\$181.36
10/7/2017	26.50	5.5	\$35.00	\$168.64
10/14/2017	29.00	5.5	\$35.00	\$184.55
10/21/2017	11.75	5.5	\$35.00	\$74.77
10/28/2017	28.00	5.5	\$35.00	\$178.18
11/4/2017	17.75	5.5	\$35.00	\$112.95
11/11/2017	23.75	5.5	\$35.00	\$151.14
11/18/2017	21.50	5.5	\$35.00	\$136.82
11/25/2017	27.50	5.5	\$35.00	\$175.00
12/2/2017	23.00	5.5	\$35.00	\$146.36
12/9/2017	19	5.5	\$35.00	\$120.91
12/16/2017	34.25	5.5	\$35.00	\$217.95
12/23/2017	39.5	5.5	\$35.00	\$251.36
12/30/2017	18.75	5.5	\$35.00	\$119.32

NEW YORK PARTY SHUTTLE, LLC, D/B/A ONBOARD TOURS, WASHINGTON DC PARTY SHUTTLE, LLC

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<u>Week Date</u>	<u>Weekly Hours</u>	<u>Estimated Hours per Tour</u>	<u>Estimated Tips per Tour</u>	<u>Weekly Tips</u>
1/6/2018	33.75	5.5	\$35.00	\$214.77
1/13/2018	21.75	5.5	\$35.00	\$138.41
1/20/2018	28.25	5.5	\$35.00	\$179.77
1/27/2018	21.25	5.5	\$35.00	\$135.23
2/3/2018	20.75	5.5	\$35.00	\$132.05
2/10/2018	20.5	5.5	\$35.00	\$130.45
2/17/2018	14.5	5.5	\$35.00	\$92.27
2/24/2018	22.25	5.5	\$35.00	\$141.59
3/3/2018	28.5	5.5	\$35.00	\$181.36
3/10/2018	34	5.5	\$35.00	\$216.36
3/17/2018	31	5.5	\$35.00	\$197.27
3/24/2018	26.25	5.5	\$35.00	\$167.05
3/31/2018	28.25	5.5	\$35.00	\$179.77

Adjusted Taxes for Lump Sum Backpay

New York Party Shuttle, LLC

02-CA-073340

Year

2012	13,533	Single Filer	NY	1,595	838
2013	31,863	Single Filer	NY	4,333	1,972
2014	24,361	Single Filer	NY	3,200	1,474
2015	17,737	Single Filer	NY	2,199	1,074
2016	4,299	Single Filer	NY	430	260
2017	119	Single Filer	NY	12	7
Taxes Paid:				11,770	5,625
2000 to	(Sum)				
2017	91,912	Single Filer	NY	16,348	5,563

2018: 0

Excess Tax on Backpay:	4,579	0
Incremental Tax on Backpay:		1,967
Total Excess Tax on Backpay:	6,546	

Interest on Backpay:

Tax on Interest:	_____
Incremental Tax on Interest:	_____
Total Excess Tax on Interest:	

Additional Tax Liability:

Total Excess Tax Liability: