

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

SAMESUN OF VERMONT

and

Case No. 03-CA-262602

JONATHAN DICKEN KIRSCHTEN,  
An Individual

*Jessica Cacaccio and Alicia E. Pender, Esqs.*, for the General Counsel.  
Marlene Lederman Allen and Philip Allen, Pro Se, (Rutland, Vermont),  
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was heard via Zoom video technology on December 1, 2020. Jonathan Kirschten filed the charge giving rise to this matter on July 6, 2020. The General Counsel issued a complaint on October 13, 2020.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent designs and installs solar panels from its office in Rutland, Vermont. Annually, Respondent purchases and receives goods valued in excess of \$50,000 directly from points outside of the State of Vermont. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

## II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent, Same Sun, violated Section 8(a)(1) of the Act by discharging the Charging Party, Jonathan Kirschten on June 17, 2020, Respondent contends that it discharged Kirschten on that date for non-discriminatory reasons.

Jonathan Kirschten began working for Respondent, installing solar panels in March or April 2019. In November or December of 2019, he took several weeks off from working for Respondent, apparently to work on a job in California. When he returned to work for Respondent in January 2020, he was given a raise from \$17 per hour to \$20 per hour.

In early June 2020, one of Respondent's foreman, Matt Cooper, let Respondent know that he no longer wanted to be a foreman. Respondent offered the position of interim foreman to the Charging Party at a meeting on Friday, June 5. In that meeting Kirschten informed Marlene and Philip Allen, Respondent's owners and Khanti Munro, Respondent's vice-president, that he disapproved of Tyler, Respondent's project manager, and did not think he could work for him. Nevertheless, Respondent offered Kirschten the position of interim foreman and he accepted the position. Same Sun increased Kirschten's hourly wage rate from \$20 per hour to \$24 per hour.

During this meeting, Khanti Munro suggested that Kirschten meet with Tyler to resolve their differences. They met the next day, Saturday, June 6. According to Kirschten that meeting went well. This is confirmed by Khanti Munro, Tr. 114.

Almost immediately after getting a raise, Kirschten told another foreman, Joshua Jones, that he had received a raise and that Jones should ask for one as well.<sup>1</sup> Either that day or a few days later, he spoke with Erin Ballantine, Same Sun's service manager, with whom he was personally friendly. Kirschten told her that he and others had gotten a raise. Kirschten also told her that he did not think it fair that he earned more than she did (\$42,000 a year or about \$20 per hour for a 40-hour week) and that she should also ask for a raise. On Wednesday, June 10, Ballantine asked Khanti Munro to set up a meeting to discuss her pay.

On Thursday, June 11, Kirschten and VP Munro had a disagreement via text message on WhatsApp, about how to handle an installer who had made a costly mistake, General Counsel Exhibit 3. It appears that Kirschten thought Munro was being too harsh. Kirschten and Munro spoke briefly the next morning, Friday, June 12. According to Kirschten, the two resolved their differences in this matter, with Kirschten admitting he had overreacted. There was no further discussion of this incident after June 12. Also, on Friday, June 12, Philip Allen, one of Same Sun's owners, called Erin Ballantine and scheduled a meeting with her for Wednesday, June 17 at 11:00 a.m.

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<sup>1</sup> Jones did not testify in this proceeding. There is no evidence that Jones told the Allens that Kirschten had encouraged Jones to ask for a raise. However, this does not matter, since they did know he encouraged Erin Ballantine to ask for a raise. It appears from attachments to Respondent's brief that it raised Jones' wages on about June 10 to match those of Kirschten.

On the morning of June 17, Kirschten had a disagreement with another foreman who wanted to borrow an employee who was working for Kirschten. While it is unclear whether Khanti Munro knew of this incident, it appears he would have supported Kirschten.

5 On the 17<sup>th</sup>, Ballantine met with owners Philip and Marlene Allen and Munro at 11:00 a.m. She told them that she should be paid more and that Kirschten, who was supposed to be her assistant, had just gotten a raise and had told her that he was making more than she was. Philip Allen appeared to get angry. He turned to Munro and said, "I told you so," and asked Ballantine to leave the room.<sup>2</sup> After a few minutes, Ballantine was summoned back to the meeting. Philip  
10 Allen told her that he was too upset to continue and that they would have to reschedule their meeting.

After Ballantine left, Khanti Munro contacted Kirschten and told him to come to the Same Sun office at 12:30 p.m. When he walked into the room in which the Allens and Munro  
15 were present, he was immediately terminated. Kirschten asked for a reason and was not given one. On the way out, he asked Munro if he was still employed as an installer. Munro shook his head.

Ballantine met again with the Allens on Friday, June 19. On Monday, June 22,  
20 Respondent increased her salary from \$42,000 per year to \$50,000 per year (about \$24 per hour for a 40-hour week). After giving 2-weeks' notice, for which she was paid, Ballantine resigned voluntarily from Same Sun on October 9, 2020. She left the company on good terms with the Allens. They gave her a farewell greeting card and a \$2,000 severance bonus.

### 25 *Credibility Resolutions*

This case requires resolution of conflicting testimony between the General Counsel's witnesses and that of Khanti Munro, Respondent's only witness. While I have considered witness demeanor, I have not relied upon it in making any credibility determinations. Instead, I  
30 have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989).

Munro's testimony, in many respects, is supportive of Erin Ballantine's account of her  
35 June 17 meeting with him and the Allens.

I remember her kind of catching us off guard because it was a -- it was a -- it was kind of a disappointing way to start a meeting with, you know, I want more money. And when -- when it was hashed out a little more, I think Philip said, well, why -- what makes  
40 you feel that you need more money? Because we hadn't -- we hadn't put forth the more formal proposal of her leading the division formally. And I think the first thing she said was along the lines of well, I -- I know that -- I know that other people make more than -- make more money than I do.

And that soured the mood in the room pretty quick. Philip was visibly not thrilled with  
45 how she led off at the meeting and asked her to leave the room so we could discuss

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<sup>2</sup> I reach no conclusion as to what this remark referred to.

5 postponing it so we could have the meeting in a more qualitative way. So she left the room for a few minutes, five minutes max. We discussed our -- our disappointment that that was how she was promoting her request. And we were hoping to do it in more of a qualitative, opportunistic way. And Philip said that, you know, he was upset and didn't feel like he could have that meeting at this moment because of how she presented herself. And that we -- he wanted to reschedule the meeting so that we could try again.

Tr. 84.

10 Munro also confirmed that Ballantine told him and the Allens that Kirschten had told her that he was making more money than she was, Tr. 96.

15 VP Munro offered several reasons for Kirschten's termination, apart from telling Ballantine about his raise and encouraging her to seek a raise for herself. None of these explanations withstand scrutiny. First of all, Munro admitted that Kirschten is a talented tradesman and offered no reason for the termination of Kirschten, as opposed to simply removing him from his position as interim foreman. The reasons Munro gave for his reservations about promoting Kirschten to interim foreman are the following:

20 Flight risk: based on his leaving for a month in November 2019 and assumedly the possibility that Kirschten would do something similar again;

Leaving early one day without adequate notice on a date unspecified;

25 The WhatsApp text message exchange on June 11.

With regard to the WhatsApp message, Munro testified as follows at Tr. 115-117:

30 I went to the job site -- I want to say it was the 15th -- because I was concerned about Jon's response regarding my interest in doing a training to -- kind of a teaching moment for the younger guys. And I did not like how he questioned my judgment and -- and said I was going to throw somebody under the bus, which I've never done. So I took it a little personally. And I thought instead of, you know, doing anything I would later regret, I  
35 thought I'd talk to Jon one-on-one. So I pulled him aside. I believe it was on the 15th. And I tried to ex -- to reason with him and -- and explain that, you know, he's still new at the company and I know he doesn't like Tyler but I know they had a meeting or were having a meeting. And he needed to give the company the benefit of the doubt and work with us.

40 We had no intention of making his life hard or -- you know, we're a good small company. I tried to reason with him. He was very agitated, very still not happy with Tyler. And he had a lot of criticism that we don't do this right, we don't do that right, and we make mistakes, and we do this. And he offered nothing tangible to fix it.

45 And I -- I -- I took offense to that because I've worked really hard to develop the policies and the products that we use. And I finally had to say you know what, I guess we're going to leave it here and we'll have to continue this conversation. I -- I im -- I implore you to please give the company the benefit of the doubt. And that was kind of the final straw for

me. And upon talking to the Allens when I got back and looking at, you know, the past, I think that was -- that was the moment we knew it was no longer going to fit.

Q. BY MR. ALLEN: So less than two weeks after he received this promotion and had this meeting with Tyler, asking not to

5 throw the company under the bus or take the benefit of the doubt, you felt he was already exhibiting that he was not going to --

MS. CACACCIO: Objection. Leading.

JUDGE AMCHAN: Well, it's sustained. You are leading.

MR. ALLEN: Exactly.

10 Q. BY MR. ALLEN: So in a -- in a very short period of time, did you feel that Jon was appearing --

MS. CACACCIO: Objection. Leading.

JUDGE AMCHAN: Yeah. I mean --

15 Q. BY MR ALLEN:<sup>3</sup> Khanti Munro, with what -- what was agreed to on June 5th with Jon's promotion? Did he adhere to that -- those agreed-to -- to the agreement of the promotion?

MS. CACACCIO: Objection. Asked and answered.

JUDGE AMCHAN: Overruled. You can answer.

MR. ALLEN: Thank you.

20 A. Jon was beginning to fulfill his logistical duties as running one of the two crews. But within the few weeks, he was not fulfilling the other aspects of -- of a -- of a crew leader. And just continued to express dissent and disrespect for Tyler.

25 However, I credit Jonathan Kirschten's testimony that his only discussion with Munro about the WhatsApp exchange was on Friday, June 12; not Monday, June 15. Indeed, Munro's testimony at Tr. 89 enhances the credibility of Kirschten's testimony that his only conversation with Munro about the WhatsApp exchange occurred on the morning of Friday, June 12:

30 Jon had questioned my approach to a teaching moment regarding a mistake that was made on a job prior to the high school that -- that almost cost us a lot of both money and reputation because it was a real -- it was a real error. And it was caught and I believe we had a few new people on our crew. So before that error could be repeated, I sent out a WhatsApp message -- which is what I was referring to and looking to see if you had --

35 saying, you know, before anybody makes these connections again, please stop. And myself or Tyler are going to -- are going to come and -- and discuss the error and see if we can train everybody a little bit or do a refresher on what -- what went wrong and how to prevent it.

Which he -- Jon responded, you know, I need more information. And I said well, we'll discuss it tomorrow.

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Finally, Munro's testimony at Tr. 113 makes clear that he did not decide to terminate Jonathan Kirschten, but merely did not object to the decision made by the Allens:

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<sup>3</sup> The transcript at page 117, line 11 erroneously attributes this question to Ms. Cacaccio. It is obvious from the context that the question was asked by Mr. Allen.

I was concerned that Jon's track record and clear unwillingness to work with our most experienced employee in Tyler, our project manager, would not bode well and would set a dangerous precedent for the younger guys that were trying to -- grow with the company. So, I did not stand in the way of the firing decision.

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### *Analysis*

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging or otherwise discriminating against employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... (Emphasis added)"

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line*, 251 NLRB 1083 (1980). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>4</sup>

Jonathan Kirschten engaged in protected activity by telling Erin Ballantine and others that he had received a raise and by encouraging them to do likewise. Assisting other employees affected by the employer's action or inaction falls within the Act's "mutual aid and protection" clause of Section 7, even if the assisting employee is not personally affected, *American Medical Response of the Mid-Atlantic*, 369 No. 125 (2020); *Richboro Community Mental Health Council*, 242 NLRB 1267, 1267-1268 (1979); *Delta Health Center*, 310 NLRB 26, 43 (1993); *Butler Medical Transport, LLC*, 365 NLRB No. 112 (2017).

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<sup>4</sup> In cases in which the employer's motive for allegedly discriminatory discipline is at issue, the *Wright Line* test applies regardless of whether the employee was engaged in union activity or other protected concerted activity, *Hoodview Vending Co.*, 362 NLRB 690 (2015); 359 NLRB 355 (2012).

Respondent was aware that Kirschten had discussed wages with Erin Ballantine and, as established by Ballantine and Munro's testimony, bore animus towards Kirschten as a result. The timing of Kirschten's discharge, at a previously unscheduled meeting, which followed the Allens' meeting with Ballantine immediately, satisfies the General Counsel's burden with respect to animus and a causal relationship between his discharge and protected activity, *Case Farms of North Carolina*, 353 NLRB 257 (2008). Notably, there was no intervening event that suggests a credible alternative explanation for the discharge. Thus, Respondent has not met its burden of demonstrating that it would have discharged Kirschten in the absence of his protected activity.<sup>5</sup>

#### Conclusion of Law

Respondent, Same Sun of Vermont, violated Section 8(a)(1) of the Act by discharging Jonathan Kirschten on June 17, 2020.

#### REMEDY

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also compensate Jonathan Kirschten for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on his Social Security earnings record. To this end, Respondent shall file with the Regional Director for Region 3, 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

<sup>5</sup> An employer violates Section 8(a)(1) by promulgating a rule, or otherwise prohibiting employees from discussing their wages, if it is settled that an employer violates Section 8(a)(1) when it tells its employees by published rule or *ad hoc* declaration that they can't tell each other how much they are being paid or the terms under which they are being paid. See, e.g., *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), citing *Triana Industries*, 245 NLRB 1258 (1979), and *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1986).

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the

## Order

Respondent, Same Sun of Vermont, its officers, agents, successors, and assigns, shall

5 1) Cease and desist from

10 (a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including but not limited to discussing their wages with other employees and encouraging other employees to seek a raise in wages.

15 (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

20 (a) Within 14 days from the date of the Board's Order, offer Jonathan Kirschten full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

25 (b) Make Jonathan Kirschten whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Jonathan Kirschten for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

30 (d) Compensate Jonathan Kirschten for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, 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.

35 (e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Jonathan Kirschten in writing that this has been done and that the discharge will not be used against him in any way.

40 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (g) Within 14 days after service by the Region, post at its Rutland, Vermont facility copies of the attached notice marked "Appendix".<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2020.<sup>8</sup>
- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 7, 2021




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Arthur J. Amchan  
Administrative Law Judge

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<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>8</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including discussing your wages with other employees and encouraging them to seek an increase in their wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jonathan Kirschten full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jonathan Kirschten whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Jonathan Kirschten for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 3 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Jonathan Kirschten for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jonathan Kirschten, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SAMESUN OF VERMONT

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(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387  
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/03-CA-262602](http://www.nlr.gov/case/03-CA-262602) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.