

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

**PRO CUSTOM SOLAR LLC D/B/A MOMENTUM  
SOLAR**

**And**

**Case 22-CA-254647**

**TALIYAH AVENT, SEYNABOU FALL, HOWARD  
KNIGHT, JR., MOHAMMED NAIM<sup>1</sup>, KENNY  
NGUYEN, MAXZIM WONG AND YOSELIN  
ZAMORA, AS INDIVIDUALS**

**COUNSEL FOR ACTING GENERAL COUNSEL'S  
BRIEF TO ADMINISTRATIVE LAW JUDGE**

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<sup>1</sup> The Complaint names Charging Party Mohammed Naim as Naim Mohammed. This is incorrect. His proper name is Mohammed Naim and it is corrected herein.

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## **PROCEDURAL BACKGROUND**

On February 1, 2021, pursuant to Section *102.35(a)(9)* of the Board's Rules and Regulations, all parties to this case submitted to Administrative Law Judge Lauren Esposito a Joint Motion to Waive Hearing and Seek Decision on the Papers ("Motion). The Motion was submitted in conjunction with a Stipulated Record that includes (a) the Formal Papers, (b) Statement of Issues Presented, (c) Joint Stipulation of Facts and Exhibits ("Joint Stipulation") and (d) the Parties' Statements of Position.

Administrative Law Judge Esposito granted the Motion on February 4, 2021 and directed that Briefs be submitted no later than March 4, 2021.

## **STATEMENT OF THE CASE**

This case cuts to the very heart of employees' Section 7 rights to engage in protected concerted activity. After Respondent announced to employees a new pay structure, the employees came together to discuss their concerns about the changes. Respondent got word of this protected concerted activity and immediately tried to stamp it out by interrogating an employee about the activity, threatening to fire or demote employees if the activity continued, and implying that Respondent was surveilling these protected concerted activities. It then abruptly fired Mohammed Naim ("Naim"), one of employees most vocal about their collective concerns for reason that Respondent admits were related to his involvement in these protected concerted activities. After the remaining employees decided to protest Naim's unlawful discharge and the changes to the pay structure by engaging in a work stoppage on January 4, Respondent fired all seventeen (17) of the employees present on January 4, immediately and without reservation. It hired back several of these employees in subsequent days after those employees disavowed the work stoppage.

Respondent admits every single one of these facts in the Joint Stipulation. It also admits that its manager's coercive statements and Naim's discharge violated Section 8(a)(1) of the Act. What Respondent does not admit – perhaps because it misunderstands the law or because it believes that it is above the law – is that the employees were entitled to the Act's protection when they decided to withhold their work in protest of the terms and conditions of their employment. In fact, this work stoppage is a textbook example of the protected concerted activity that Section 7 was designed to protect.

Whether or not Respondent could lawfully discharge its employees for engaging in a protected concerted work stoppage is the singular substantive issue before Your Honor.

### **STATEMENT OF FACTS**

Respondent is engaged in the business of selling and performing home improvements, including the sales and installation of residential solar power systems. [Joint Stipulation (“JS” ¶ 2.] It employs a team of canvassing employees whose primary job responsibility was to sell Respondent's products and services by door-to-door solicitation. [JS ¶¶ 6-7.] These canvassing employees, and no other employees, are the subjects of the instant case.

In late-2019 into the early days of 2020, the canvassing team was composed of the following nineteen (19) canvassing employees:

Charging Party Wong	Ejahanna Banks
Charging Party Avent	Gykeese Bosenan
Elijah Byrd	Malcom Cotton
Charging Party Fall	Manuel Fernandez
Charging Party Knight	Steven Mercedes
Charging Party Naim	Charging Party Nguyen
Mariah Robinson	Bryan Rodriguez
Erik Sapp	Miles Scott
Lisabeth Senvage	Zhane Taylor
Charging Party Zamora	

These canvassing employees worked in subteams of about five (5) or six (6). [JS ¶ 8.] Each subteam covered a different geographic canvassing area each day and traveled to their assigned area in vans provided by Respondent. [JS ¶¶ 5, 8.] The vans were driven by a designated canvassing employee who also served as team leader. [JS ¶ 8.]

The canvassing employees' typical workday went as follows: All of the canvassing employees reported to Respondent's South Plainfield facility between 9:00 am and 10:00 am.<sup>2</sup> [JS ¶ 11.] At 10:00 am, all of the canvassing employees together attended a mandatory one-hour team meeting with Respondent supervisors and managers, during which they discussed performance, goals and plans for the day. As soon as the meeting ended, each subteam piled into its respective van and left Respondent's facility. [JS ¶ 12.] Often, and as Respondent's managers were well-aware, all of the subteams stopped at the nearby Menlo Park Mall where the canvassing employees took lunch together before proceeding on to their assigned canvassing areas. [JS ¶¶ 12-13.] Each subteam worked in its assigned area for the remainder of the workday.<sup>3</sup>

For the relevant period before January 1, 2020,<sup>4</sup> the canvassing employees earned a base salary of \$500/week, plus bonuses; the canvassing employees who also served as team leaders received an approximate additional \$250/week. [JS ¶ 14.] The bonuses available to canvassing employees, including team leaders, under this earlier compensation plan were \$50 bonuses for each demo,<sup>5</sup> \$150 bonuses for each sale eventually secured, and additional bonuses based on performance. [JS ¶ 14.]

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<sup>2</sup> The canvassing employees who also served as team leaders reported at 9:00 am; the others reported at 10:00 am.

<sup>3</sup> The Joint Stipulation is silent about the typical end to the workday but reason dictates that the team leaders returned the vans to Respondent's facility at the end of each workday. Presumably, other canvassing employees also returned in the vans to the facility to retrieve their personal vehicles or to catch other transportation.

<sup>4</sup> Unless otherwise noted, all facts herein occurred in 2020.

<sup>5</sup> The Joint Stipulation does not define "demo" but for the purposes of judicial notice, "demo" refers to "sales demo" which is the process of demonstrating a product or service for a prospective client.

On January 1, Respondent changed the pay structure of the canvassing employees, including the team leaders. [JS ¶ 16.] Though they continued to earn the same base salaries as before, the new pay structure eliminated bonuses for individual demos and sales, implemented new requirements for weekly and monthly bonuses, and introduced a quarterly bonus. [JS ¶¶ 16-18.] Specifically, the new pay structure required the canvassing employees to secure a minimum of four demos to receive a weekly bonus, twelve demos to receive a monthly bonus and a minimum of \$100,000 in volume to receive the quarterly bonus. [JS ¶¶ 16-18.]

Respondent, by its National Director of Canvassing Kenneth DiLeo (“DiLeo”), announced the new pay structure to the canvassing employees at the January 2 team meeting. [JS ¶ 17.] At this meeting, several of the employees, including Mohammed Naim, expressed concerns and raised questions about the changes to the compensation plan, which DiLeo answered. [JS ¶ 18.] After the meeting, the canvassing employees met at Menlo Park Mall as per usual and gathered in the food court. Over their lunch break, they discussed the new pay structure, and the concerns and questions they had about it.

DiLeo somehow got word of this discussion and, while the canvassing employees were still gathered in the food court, he called one of the canvassing employees present on his cell phone. During this phone call, DiLeo and the employee discussed the employees’ collective concerns about the new pay structure, including the employees’ need for clarification. [JS ¶ 19.] DiLeo proceeded to interrogate this employee about the employees’ protected concerted activities described above. He then threatened them with demotion and discharge if they continue to engage in these protected concerted activities and implied that their protected concerted activities were under surveillance. [JS ¶ 19.] Respondent admits DiLeo’s interrogation, threat and implication of surveillance violated Section 8(a)(1) of the Act. [JS ¶ 20.]

At the January 3 team meeting, the canvassing employees collectively vocalized their complaints and concerns about the new compensation plan directly to Respondent’s managers. [JS ¶¶ 22, 26.] Managers responded by conducting an informal poll to gauge who preferred the new pay structure versus who preferred the old. [JS ¶ 23.] A majority of the canvassing employees indicated their preference for the old pay structure. [JS ¶¶ 24-25.] Managers ended the meeting without any resolution with regard to employees’ concerns and the new pay structure remained in place. [JS ¶ 16, 25.]

The next day, January 4, Naim reported to work at 9:00 am and was promptly discharged. [JS ¶ 27.] Respondent admits that he was discharged in part because “he concertedly complained to [Respondent] regarding the new compensation plan implemented” for canvassing employees. *Id.* It also admits that Naim’s discharge violated Section 8(a)(1) of the Act. [JS ¶ 28.]

Before leaving Respondent’s facility, Naim walked into the team meeting and announced to the other canvassing employees working that day – seventeen (17) in total – that he had been fired. [JS ¶ 30.] After the team meeting ended, the other canvassing employees got in their vans and as they normally did, met at Menlo Park Mall. [JS ¶ 31.] Gathered together in the food court, the other canvassing employees discussed their concerns about Naim’s discharge and the new pay structure, effectively strategizing about ways in which to address what they perceived to be unfair and unjust working conditions. [JS ¶ 31.] They collectively decided that they would refuse to return to work for the remainder of the day in protest of Naim’s discharge and the new pay structure. [JS ¶ 31.]

Meanwhile, Respondent’s Regional Canvassing Manager David McGinnis (“McGinnis”) received a text message from a canvassing employee named Zhane Taylor (“Taylor”), who was not present at the mall with the other canvassing employees because she was off of work that

day. [JS ¶ 34.] Taylor told McGinnis that her brother Miles Scott, who was also a canvassing employee and who was present in the food court that day with the others, told her that the canvassing employees were planning not to return to work that afternoon. [JS ¶ 34.] McGinnis jumped in his car and drove to the mall to meet with the canvassing employees. [JS ¶¶ 35-36.] When he arrived, he asked the canvassing employees present – seventeen (17) in total – whether they planned to return to work for the day. [JS ¶ 37.] They collectively told him that they were not returning to work that day and that they “had a lot to talk about.” [JS ¶ 38.] McGinnis understood, based on his observation of their activities, that the canvassing employees were continuing to debate among themselves about the compensation plans. [JS ¶ 38.]

McGinnis then asked the team leaders directly if the canvassing employees were going to return to work for the day and threatened to discharge the employees if they did not. [JS ¶ 40.] Both the team leaders and the other canvassing employees told McGinnis again that they would not be returning to work for the rest of the day, confirming their intention to engage in a work stoppage. [JS ¶ 41.] At no point during this interaction at the mall did even one canvassing employee present tell McGinnis that he or she wished to return to work or otherwise not participate in the work stoppage. [JS ¶ 41.]

McGinnis then demanded the team leaders return the key to Respondents’ van and told all seventeen (17) of the canvassing employees present that they were fired for insubordination and for failing to perform their job duties. [JS ¶ 42.] The names of those seventeen (17) employees are as follows:

Charging Party Wong	Ejahanna Banks
Charging Party Avent	Gykeese Bosenan
Elijah Byrd	Malcom Cotton
Charging Party Fall	Manuel Fernandez
Charging Party Knight	Steven Mercedes
Charging Party Nguyen	Mariah Robinson
Bryan Rodriguez	Erik Sapp

Miles Scott  
Charging Party Zamora

Lisabeth Senvage

McGinnis took the keys to the vans and left the mall, leaving the canvassing employees stranded without transportation back to Respondent's facility where, presumably, at least some of the employees had left their personal vehicles.<sup>6</sup> [JS ¶ 42.]

In the days following the mass discharge, approximately five (5) of the canvassing employees reached out to DiLeo to see about getting their jobs back. [JS ¶¶ 43-44.] Each of these employees disavowed, clearly and unequivocally, the decision of their coworkers to engage in a work stoppage on January 4 and based on this disavowal, DiLeo agreed to rehire all five (5) of them. [JS ¶ 44.]

#### LEGAL ARGUMENT

**Point 1: Respondent Admits that It Committed Several 8(a)(1) Violations, Including a Hallmark Threat and Discharge**

“[T]here is no more vital term and condition of employment than one's wages” and employee complaints and discussions in this regard are clearly Section 7 protected concerted activities. *See Northfield Urgent Care LLC*, 358 NLRB No. 17 at 11 (2012); *Parexel Int'l*, 356 NLRB No. 82, \*4 (2011); *Triana Industries*, 245 NLRB 1258, 1258 (1979).

Upset by Respondent's announcement of the new pay structure, the canvassing employees gathered immediately in the food court of Menlo Park Mall to discuss the way these changes would affect their wages and so, their livelihood. They were concerned and they had questions. Rather than inviting discussion of these concerns and questions, which are clearly protected by Section 7, Respondent immediately and with gusto tried to stamp them out. As soon as it learned about the canvassing employees' protected concerted discussions at the mall on

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<sup>6</sup> *See*, FN 3.

January 2, and while the employees were still gathered at the mall, Respondent's manager DiLeo called one of the employees who was present at the mall and interrogated him about the canvassing employees' protected concerted discussions. DiLeo threatened this employee that if the employee and his coworkers continued their protected concerted discussions, Respondent would fire or demote them. He also implied that Respondent was monitoring their discussions, a point made real by the fact that DiLeo had learned about the discussion in the first place by an employee who was present. Respondent admits that DiLeo's interrogation, threat and implication of surveillance violated Section 8(a)(1) of the Act. *See*, JS ¶ 20.

At the team meeting the following day, the canvassing employees, collectively and in the presence of Respondent's managers, vocalized their questions and concerns about the new pay structure. Naim was among the most vocal of these employees. In response to the employees' protected concerted comments, perhaps in an effort to quiet dissent and/or identify dissidents, Respondent directed the employees to answer publicly whether they preferred the old pay structure or the pay structure that it had announced on January 1. A majority of the canvassing employees made clear that they preferred the old pay structure but Respondent managers did and said nothing to indicate that the majority preference was under consideration. The canvassing employees left this January 3 team meeting with no answers.

Respondent fired Naim the next day immediately after he reported to work. It confesses that it discharged Naim "in part because he concertedly complained to [Respondent] regarding the new compensation plan" and that his discharge "could have the effect of discouraging employees from engaging in these or other concerted activities." *See*, JS ¶ 27. Respondent also admits that Naim's discharge violated Section 8(a)(1) of the Act. *See*, JS ¶ 28.

These admitted 8(a)(1) violations - the interrogation, the threat, the implication of surveillance and Naim's retaliatory discharge – are not only violations unto themselves. *See, e.g., Thore, Inc.*, 296 NLRB 859, 860 (1989) (holding that manager's interrogation of employee about Section 7 activities, when viewed alongside a subsequent mass discharge and employer animus, reasonably tended to coerce employees in violation of 8(a)(1)); *Alton H. Piester, LLC*, 353 NLRB 369, 370 (2008) (holding that threats to discharge employees, either express or implicit, for their protected concerted activity of voicing employment-related complaints are found to violate Section 8(a)(1)); *Nat. Life, Inc. d/b/a Heart & Weight Inst.*, 366 NLRB No. 53 (2018) (find that an employer implies employees' Section 7 activities are under surveillance when it tells employees that it is monitoring them.). They set the stage for Respondent's unlawful discharge of the entire unit of canvassing employees.

To be clear, both DiLeo's threat and Naim's discharge are of the nature that the Board deems "hallmark" violations because of their tendency to remain in the memories of employees long into the future. *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999); *Regency Manor Nursing Home*, 275 NLRB 1261, 1262 (1985) (the coercive effect of hallmark violations "is unlikely ever to be undone.") The hallmark violations also work to undermine any argument by Respondent that it had lawful reasons for eventually discharging the entire unit of canvassing employees. *See, Garvey Marine, Inc.*, 328 NLRB 991. The coercive effect of these hallmark violations, exacerbated by the unlawful interrogation and implication of surveillance, cannot be overstated and must be remedied to the full extent of the law.

**Point 2: Respondent's Mass Discharge of the Canvassing Employees for Engaging in a Section 7-Protected Work Stoppage Violated Section 8(a)(1) of the Act**

In a discharge case of this nature, the applicable framework requires Acting General Counsel to meet an initial burden of presenting evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate them. *Wright Line*, 251 NLRB 1083 (1980), 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Acting General Counsel meets this initial burden by presenting evidence that shows the following: 1) the employees were engaged in protected activity, 2) Respondent knew about that protected concerted activity; 3) Respondent took an adverse employment action against the employees and 4) there was a motivational nexus between the employees' protected activity and the adverse employment action. *Id.*; *Tschiggfrie Properties, LTD*, 368 NLRB No. 120 (2019).

Once Acting General Counsel makes a prima facie showing, the burden of persuasion shifts to Respondent to establish as an affirmative defense that it would have taken the same adverse action regardless of any discriminatory motive that may be proven. *Wright Line*, 251 NLRB at 1083; *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996). Respondent cannot carry this burden merely by showing that it had an alternative legitimate reason for the action but must persuade, by a preponderance of the evidence, that the action would have taken place even absent the employees' protected concerted activities. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If the employer's asserted reasons are found to be false, the Board may infer that the reason for the discharge was unlawful. *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996). The same pretext evidence used to prove discriminatory motive may also show that Respondent has not established that a

viable affirmative defense. *Wright Line*, 251 NLRB at 1091. If an employer fails to satisfy its burden of persuasion, a violation of the Act should be found. *Id.*

Respondent's mass discharge of the canvassing employees is a clear and classic case of 8(a)(1) retaliation. Acting General Counsel, by facts set forth in the Joint Stipulation, establishes without question that Respondent knew about the canvassing employees' protected concerted activities and Respondent was motivated by animus toward these activities to discharge them en masse on January 4. The Joint Stipulation contains no implicit or explicit facts that would support a lawful explanation for the mass discharge and within its four walls, no viable affirmative defense is available to Respondent.

A. Respondent Knew of the Canvassing Employees' Protected Concerted Activities

There is no question that the activities of the canvassing employees between January 2 and January 4 were Section 7 protected concerted activities. *See, Northfield Urgent Care LLC*, 358 NLRB at 11 (“[T]here is no more vital term and condition of employment than one's wages”.) After learning about changes to their pay structure, the employees gathered together during their lunch break to discuss their questions and concerns about these changes and eventually, about Naim's discharge, they concertedly vocalized these concerns to Respondent and then, made a collective decision to engage in a work stoppage in protest of the pay changes and Naim's discharge. Respondent admits that these activities were protected concerted activities. *See, JS ¶¶ 26, 32.*

Nor is there any question that Respondent knew about these protected concerted activities. DiLeo conceded knowledge during his January 2 telephone call with an employee, when he interrogated and threatened the employee about the canvassing employees' protected concerted activities and implied that Respondent was surveilling these activities. At the team

meeting on January 3, the canvassing employees vocalized their concerns about the changes to their pay directly to Respondent managers and by a majority, voted to reject the changes Respondent made to the pay structure. Then, on January 4, after being tipped off to the canvassing employees' continued protected concerted activities at the mall, McGinnis found the canvassing employees gathered together at the mall, discussing their concerns about Naim's discharge and the new compensation plan. They told him that they would not return to work that afternoon because they "had a lot to talk about" and McGinnis understood that they were "still debating among themselves about compensation plans." *See*, JS ¶ 38.

The Canvassing Employees could not have been more clear that the subject of their discussion in the food court on January 4 and the purpose of their work stoppage was their protected concerted concerns about changes to their pay and about Naim's discharge. Given this transparency, any claim by Respondent that it did not know why the canvassing employees collectively decided to withhold their work on the afternoon of January 4 is preposterous and must be rejected.

The record shows unequivocally that Respondent had direct and specific knowledge of the Canvassing Employees' protected concerted activities, including knowledge that their work stoppage was in protest of Naim's discharge and the new pay structure.

**B. Respondent's Mass Layoff of the Canvassing Employees Was Motivated by Animus Toward Their Protected Concerted Activities**

There is not always a case with such clear evidence of animus and unlawful motivation. Respondent articulated its animus toward the canvassing employees' protected concerted activities when DiLeo interrogated and threatened an employee about these protected concerted activities, and implied that they were under surveillance. Respondent put a finer point on its hostility when it discharged Naim in retaliation for his involvement in these protected concerted

activities. As discussed at length above, this admitted 8(a)(1) conduct evidences an environment of hostility toward the 8(a)(1) violations and undermines any lawful justification that Respondent puts forth.

Beyond this evidence of explicit hostility toward the canvassing employees' protected concerted activities, the timing and abruptness of the mass discharge supports a finding of discriminatory motivation. *See, Tubular Corp. of America*, 337 NLRB 99 (2001) (inferring discriminatory motivation from direct or circumstantial evidence and the record as a whole); *Holiday Inn-Glendale*, 277 NLRB 1254 (1985) (finding that prior threats evidence discriminatory motivation); *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000) (finding that timing evidences discriminatory motivation); *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995); *Dynabil Industries*, 330 NLRB 360 (1999) (finding the abruptness of the adverse action to be evidence of discriminatory motive).

Consistent with DiLeo's threat just two days earlier, Respondent fired all seventeen (17) canvassing employees present on January 4 immediately and without reservation after learning that their protected concerted discussions would intensify into a work stoppage. McGinnis invited no discussion or conducted no investigation and after telling all seventeen (17) employees that they were fired, he simply left them stranded at the mall with no transportation. This abrupt decision eliminates any possibility that the mass discharge had to do with something other than their protected concerted activities, and specifically the work stoppage.

The record shows, and Respondent may highlight, that certain canvassing employees wanted to continue working on January 4 but prevented from doing so because of their coworkers' protest. To be clear, on January 4, Respondent was utterly unconcerned that some employees

wanted to continue to work. McGinnis did not stop to investigate this point, or to ask if anyone wanted to return to work. Instead, he attributed the protected concerted activity to every single employee present and fired them all – all seventeen (17) of the canvassing employees present that day – on the spot and without abandon. The fact that Respondent hired back several of these employees the following day *after* and *because* they disavowed the protected concerted activity only strengthens the showing of discriminatory motive.

Based on the foregoing, the record clearly supports an inference that the canvassing employees' protected concerted activities were *the* motivating factor in Respondent's decision to discharge them en masse.

### C. Respondent's Affirmative Defenses Are Pretextual

There is no room inside the four walls of Joint Stipulation for Respondent to find facts that would support any viable affirmative defense.

Again, Respondent does not deny that it discharged the canvassing employees in retaliation for their work stoppage on January 4. Nor does it deny the facts material to establishing a protected concerted work stoppage. Respondent admits that the canvassing employees engaged in protected concerted activity on January 2, January 3 and at the mall on January 4. *See*, JS ¶¶ 26, 32. It admits that McGinnis understood that employees were engaged in discussions about the new pay structure when they announced to him their work stoppage. *See*, JS ¶ 38. There can be no question that the reason Respondent discharged them was because they decided to engage in a protected concerted work stoppage.

Nevertheless, Respondent brings forth the affirmative defenses that the work stoppage was an unprotected partial strike and/or that Respondent's property interest outweighed the

employees' Section 7 rights to engage in a work stoppage, and so it was entitled to discharge the canvassing employees. These defenses hold no water.

“In all of labor’s history,” wrote Justice Douglas of the United States Supreme Court in 1949, “no ‘concerted activity’ has more conspicuous and important than the strike...” *Auto. Workers v. Wisc. Board*, 336 US 245 (1949). The right to strike – or “[t]he spontaneous banding together of employees in the form of a work stoppage as a manifestation of their disagreement with their employer's conduct” – is a fundamental tenet of American labor law and so, protected vigorously by the Act. *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); *General Nutrition Center, Inc.*, 221 NLRB 850 (1975); *Vic. Tanny Int'l*, 232 NLRB 353, 354 (1977), *enfd.* 662 F.2d 237 (6th Cir. 1980); *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982). *enf. granted in part and denied in part, on other grounds* 718, F.2d 269 (8th Cir. 1983) (the unlawful discharge of strikers is a violation of the Act and “leads inexorably to the prolongation of a dispute.”).

The Board does recognize certain limited exceptions to the strike’s protection but no facts here could conceivably push the canvassing employees’ protected concerted work stoppage into the realm of the unprotected. *See, e.g. Audubon Health Care Center*, 268 NLRB 135, 137 (1983) (“A partial strike, in which employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises is a method of striking which is not condoned by the Board.”); *New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973); *Polytech Inc.*, 195 NLRB 695 (1972) (finding employees’ strike to be part of an intermittent action and so unprotected).

Respondent’s argument that the canvassing employees engaged in a partial strike has no basis in fact. Partial strikes (or slowdowns, as they are sometimes know) elude the Act’s

protection because in such circumstances, where employees report for work but refuse collectively to perform certain mandatory aspects of their job, they bring about a condition that is “neither strike nor work.” *Walmart Stores, Inc.*, 368 NLRB No. 24, FN 59 (2019); *National Steel & Shipbuilding Co.*, 324 NLRB 499, 509 (1997); *Audubon Health Care Center*, 268 NLRB at 136. Here, the canvassing employees told McGinnis several times that they would not be doing any work for the “remainder of the day.” His inordinate response – firing them, taking back the keys to the vans and leaving them stranded at the mall – eliminated any possibility that any canvassing employee could do any work for the remainder of the day. Their work stoppage was full and complete, and Respondent may not now rewrite the facts in order to slide into the partial strike exception.

Respondent also justifies its mass discharge of the canvassing employees on the manufactured basis that their work stoppage impeded on Respondent’s property rights. It purports to structure this argument around the balancing test set forth in *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005), a balancing test designed by the Board to protect employers from unreasonable disruptions to the use of their property. *Quietflex* is generally applied in situations where an *on-the-job* work stoppage blocks an employer’s ownership use of their property. The undisputed facts establish that the canvassing employees’ work stoppage took place in a public mall completely disconnected from Respondent’s facility. Respondent offers no facts to the contrary.

To the extent that Respondent claims that the canvassing employees interfered with Respondent’s use and control of its vans, the facts show the opposite. Again, as soon as the canvassing employees informed McGinnis of their intention to engage in a work stoppage, he fired them, effectively putting an end to the work stoppage before it began. He demanded the

team leaders return the keys to the vans and the team leaders obeyed without reservation. There is simply no way to manipulate the facts that would show that the canvassing employees interfered in any way, shape or form, with Respondent's property rights.

Respondent's Answer sets forth a number of other affirmative defenses, including that the Canvassing Employees' damages are the result of their own misconduct and/or actions and/or not proximately caused by Respondent, that lack any substance in fact or law.

### **CONCLUSION**

The entire record, a preponderance of the credible evidence, and the applicable case law prove that Respondent violated Sections 8(a)(1) the Act, as alleged in the Complaint. General Counsel respectfully requests that Your Honor issue a broad order, with all available remedies, and for Respondent to comply with any other remedies requested above and deemed appropriate.