

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

**NEW CONCEPTS FOR LIVING, INC.**

**and**

**CASES            22-CA-187407  
                      22-CA-195819  
                      22-CA-197088  
                      22-CA-205843  
                      22-CA-208390**

**COMMUNICATIONS WORKERS LOCAL 1040**

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IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Dated at Newark, New Jersey  
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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... vi

I. STATEMENT OF THE CASE.....1

II. INTRODUCTION .....2

III. ISSUES .....2

IV. FACTS .....4

    A. CHRONOLOGY OF EVENTS .....5

        1. Fall 2015: The Union Reconnects with Members .....5

        2. April 7, 2016: The Union Requests Bargaining.....6

        3. May 2016: Respondent Denies Union Access to its Facilities .....6

        4. June and July 2016: First Bargaining Session is Scheduled.....6

        5. August 2016: Respondent Uses its Own Authorization  
           For Payroll Deduction of Union Dues .....7

        6. August 30, 2016 and September 28, 2016: First and  
           Second Bargaining Sessions .....8

            a. The Union’s first proposal .....8

            b. Respondent’s first proposal.....9

            c. The Union’s responses to Respondent’s first proposal.....10

        7. October 18, 2016: Setteducati Meets with River Vale  
           Employees.....11

        8. October 2016: Setteducati Questions Williams About  
           The Decertification Petition.....13

        9. October 20, 2016: The Decertification Petition is Filed. ....14

        10. October 21, 2016: Respondent Suspends Bargaining.....15

11.	October 31, 2016 and November 2016: The Union Files the Charge in Case 22-CA-187407 and the Election is Blocked; Union Meets with Members .....	15
12.	December 1, 2016: Marshall Withdraws the Decertification Petition .....	16
13.	December 2016 through Winter of 2017: The Union Continues Outreach.....	16
14.	December 2016: Respondent Changes Counsel; Marshall Files the Charge in Case 22-CB-189628 .....	18
15.	December 21, 2016: Respondent Again Denies the Union Access to its Facilities to Meet with Members .....	19
16.	December 22 through 30, 2016: Respondent Solicits Employees to Resign From the Union and Revoke their Dues Deduction Authorization.....	20
17.	January 12, 2017: The Third Bargaining Session.....	22
18.	January 13, 2017: The Fourth Bargaining Session .....	26
19.	January 19, 2017: The Union Informs Respondent that it Suspended Dues for All Bargaining-Union Employees .....	28
20.	February 1, 2017: The Fifth Bargaining Session.....	28
21.	February 2017: Respondent Stops Providing Employees’ Addresses to the Union .....	31
22.	March 7, 2017: The Sixth Bargaining Session .....	32
23.	March 17 – May 12, 2017: Complaint Issued and More Charges Filed .....	35
24.	June 16, 2017: The Seventh Bargaining Session.....	36
25.	July 18, 2017: The Eighth Bargaining Session.....	38
26.	August 15, 2017: Respondent Distributes a Memorandum To Employees Regarding Dues .....	39
27.	August 29, 2017: The Ninth Bargaining Session.....	40

28.	Respondent’s Alleged Bargaining Strategy and Goals.....	41
29.	September 7, 2017: Respondent Notifies Union it Will Conduct an “Election.” .....	43
30.	September 8, 2017: The Union Files the Charge in Case 22-CA-205843.....	44
31.	September 8 and 11, 2017: Respondent Sends the Union its List of Employees Eligible to Vote in the Election.....	44
32.	September 13, 2017: Respondent Holds Mandatory Meeting for Employees Regarding the Union .....	44
33.	Respondent’s Pre-Election Propaganda and Notices of Election.....	47
34.	September 15 and 18, 2017: Communication Between Respondent and Union Regarding the Poll.....	48
35.	September 19, 2017: Respondent Notifies Union of “Pre-Election Conference.” .....	48
36.	September 20, 2017: Setteducati Emails Bargaining-Unit Employees About the Election and Attaches Cusack’s September 18 Letter to Wade and Pinarski.....	49
37.	September 21, 2017: Respondent Holds its Poll.....	50
38.	September 24, 2017: Scancarella Notifies the Union of the Election Results .....	53
39.	October 4, 2017: Respondent Withdraws Recognition.....	54
V.	CREDIBILITY .....	54
VI.	ARGUMENT .....	59
A.	Respondent Violated Section 8(a)(1) and (5) of the Act by Engaging in Overall Bad-Faith Bargaining that was Designed To Thwart the Collective-Bargaining Process and Undermine The Union as the Exclusive Collective-Bargaining Representative .....	59

1.	Respondent Violated Section 8(a)(1) of the Act by Encouraging and Soliciting Employee Support for the Filing of a Decertification Petition .....	60
2.	Respondent Violated Section 8(a)(1) of the Act by Soliciting Employees to Sign Letters Resigning Their Union Membership and Withdrawing Authorization of Dues Deduction.....	63
3.	Respondent Violated Section 8(a)(1) and (5) of the Act by Refusing to Provide Financial Information.....	67
4.	Respondent’s Regressive Proposals Are Evidence of Bad Faith.....	75
	a. Respondent’s proposal for a wage freeze and a wage reopener conditioned on future funding secured by the Union was regressive .....	76
	b. Respondent’s proposal that dues checkoff and union shop be removed from the successor contract was regressive .....	78
	c. Respondent’s proposal to remove arbitration from the contract was regressive .....	83
5.	Respondent’s Offer to Reconsider Union Shop if the Union Agreed to Poll the Bargaining Unit is Evidence of Bad Faith .....	86
6.	Respondent’s Removal of Employees’ Addresses From the Monthly List of Unit Members is Evidence of Bad Faith .....	87
7.	Respondent Violated Section 8(a)(1) of the Act by Distributing the August 15, 2017 Memorandum to Employees.....	88
8.	Respondent Violated Section 8(a)(1) of the Act During the September 2017 Staff Meeting by Informing Employees That It Would Be Futile For Them to Select The Union as Their Bargaining Representative.....	90
	a. Statements made during the staff meeting were coercive .....	90

b.	Statements in Setteducati’s September 12, 2017 letter were coercive .....	91
B.	Respondent Violated Section 8(a)(1) of the Act by Conducting a Poll to Determine Whether Employees Wanted the Union to be Their Exclusive Collective-Bargaining Representative.....	93
1.	Respondent Did Not Establish Good-Faith Doubt.....	93
2.	The Poll was Unlawful Due to Respondent’s Unfair Labor Practices .....	94
3.	The Poll Did Not Satisfy <i>Struksnes</i> ’ Procedural Safeguards.....	94
C.	Respondent Violated Section 8(a)(1) and (5) of the Act by Withdrawing its Recognition of the Union as the Exclusive Collective-Bargaining Representative of the Unit .....	96
V.	Conclusion .....	100

## TABLE OF AUTHORITIES

### NLRB Cases

<i>A-1 King Size Sandwiches</i> , 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984) .....	60
<i>Albert Einstein Medical Center</i> , 316 NLRB 1040 (1995) .....	92
<i>Allegheny Ludlum Corp.</i> , 333 NLRB 732 (2001), enfd. 301 F.3d 167 (3d Cir. 2002).....	65
<i>Altorfer Machinery Co.</i> , 332 NLRB 130 (2000).....	60, 63
<i>American Baptist Homes of the West d/b/a Piedmont Gardens</i> , 362 NLRB No. 139 (June 26, 2015), enfd. 858 F.3d 612 (D.C. Cir. 2017) .....	74
<i>American Polystyrene Corp.</i> , 341 NLRB 508 (2004), remanded 447 F.3d 1153 (9th Cir. 2006) .....	72, 73
<i>Anderson Ent. d/b/a Royal Motor Sales</i> , 329 NLRB 760 (1999), enfd. 2 Fed.Appx. 1 (D.C. Cir. 2001).....	98
<i>Apogee Retail NY, LLC d/b/a Unique Thrift Store</i> , 363 NLRB No. 122 (Feb. 17, 2016). .....	79, 81
<i>AT Systems West, Inc.</i> , 341 NLRB 57 (2004) .....	97
<i>Bethlehem Steel</i> , 136 NLRB 1500 (1962), enfd. den. 320 F.2d 615 (3d Cir. 1963).....	67
<i>Beverly Health and Rehabilitation Services, Inc.</i> , 346 NLRB 1319 (2006).....	93, 94, 97
<i>Billion Motors, Inc. d/b/a Billion Oldsmobile-Toyota</i> , 260 NLRB 745 (1982), enfd. 700 F.2d 454 (8th Cir. 1983).....	91, 92
<i>Bridgestone/Firestone, Inc.</i> , 332 NLRB 575 (2000), enfd. in rel. part sub nom. <i>Teamsters v. NLRB</i> , 47 Fed.Appx. 449 (9th Cir. 2002).....	97, 99
<i>Caldwell Manufacturing Co.</i> , 346 NLRB 1159 (2006) .....	68
<i>Central Washington Health Services Assoc. d/b/a Central Washington Hospital</i> , 279 NLRB 60 (1986), affd. 815 F.2d 1493 (9th Cir. 1987) .....	61

<i>Chester County Hosp.</i> , 320 NLRB 604 (1995), enfd. 115 F.3d 469 (3d Cir. 1997).....	82
<i>Children's Center for Behavioral Development</i> , 347 NLRB 35 (2006) .....	91
<i>CJC Holdings, Inc.</i> , 320 NLRB 1047 (1996), enfd. 116 F.3d 469 (3d Cir. 1997) .....	80, 81
<i>Collyer Insulated Wire</i> , 192 NLRB 837 (1971).....	85
<i>ConAgra, Inc.</i> , 321 NLRB 944 (1996), enf. den. 117 F.3d 1435 (D.C. Cir. 1997).....	69, 72
<i>Day Automotive Resources, Inc., d/b/a Day Automotive Group and Centennial Chevrolet, Inc.</i> , 348 NLRB 1257 (2006).....	68
<i>E.S. Sutton Realty</i> , 336 NLRB 405 (2001) .....	55
<i>El Rancho Market</i> , 235 NLRB 468 (1978).....	55, 56
<i>Electrical Contractors, Inc.</i> , 331 NLRB 839 (2000), enfd. 245 F.3d 109 (2d Cir. 2001).....	65, 89
<i>Escada (USA), Inc.</i> 304 NLRB 845 (1991), enfd. 970 F.2d 898 (3d Cir. 1992) .....	67, 88
<i>Facet Enterprises, Inc.</i> , 290 NLRB 152 (1988), enfd. in rel. part 907 F.2d 963 (10th Cir. 1990) .....	69
<i>Foothills Food, Inc. d/b/a Erickson's Sentry of Bend</i> , 273 NLRB 63 (1984) .....	66, 89
<i>Goya Foods of Florida</i> , 347 NLRB 1118 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008).....	98
<i>Grenada Stamping and Assembly, Inc.</i> , 351 NLRB 1152, enfd. 322 Fed.Appx. 404 (5th Cir. 2009).....	93
<i>H.K. Porter, Co., Inc.</i> , 153 NLRB 1370 (1965), enfd. 363 F.2d 272 (D.C. Cir. 1966), cert. denied 383 U.S. 851 (1966), 385 U.S. 1066 (1987).....	81
<i>Hardesty Co., Inc. d/b/a Mid-Continent Concrete</i> , 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).....	59, 60, 75, 76
<i>Harding Glass Co., Inc.</i> , 316 NLRB 985 (1995), enfd. in part 80 F.3d 7 (1st Cir. 1996).....	61
<i>Hatteras Yachts, AMF Inc.</i> , 207 NLRB 1043 (1973) .....	65

<i>Hearst Corp. San Antonio Light Div.</i> , 281 NLRB 764 (1986), affd. 837 F.2d 1088 (5th Cir. 1988) .....	99
<i>Heck’s Inc.</i> , 174 NLRB 951 (1969) .....	93
<i>Hendrickson Trucking Co.</i> , 365 NLRB No. 139 (Oct. 11, 2017) .....	84
<i>Homestead Nursing &amp; Rehabilitation Center</i> , 310 NLRB 678 (1993) .....	83
<i>Horizons Hotel Corp. d/b/a Carib Inn of San Juan</i> , 312 NLRB 1212 (1993), enfd. 49 F. C3d 795 (1st Cir. 1995) .....	92
<i>Hospitality Motor Inn, Inc.</i> , 249 NLRB 1036 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982) .....	82, 86
<i>House of the Good Samaritan d/b/a Samaritan Medical Center</i> , 319 NLRB 392 (1995) .....	100
<i>Humes Electric, Inc.</i> , 263 NLRB 1238 (1982) .....	55
<i>Kentucky Fried Chicken, Caribbean Holdings, Inc.</i> , 341 NLRB 69 (2004) .....	61, 62, 89
<i>King Soopers, Inc.</i> , 344 NLRB 842 (2005), enfd. 476 F.3d 843 (10th Cir. 2007). .....	74
<i>Langston Cos., Inc.</i> , 304 NLRB 1022 (1991) .....	80
<i>LaVerdiere’s Enterprises</i> , 297 NLRB 484, enfd. in part 349 F.3d 175 (4 <sup>th</sup> Cir. 2003) .....	94
<i>Lee Lumber &amp; Building Material Corp.</i> , 306 NLRB 408 (1992), affd. in rel. part 117 F.3d 1454 (D.C Cir. 1997) .....	61, 96
<i>Levitz Furniture Co. of the Pacific, Inc.</i> , 333 NLRB 717 (2001) .....	96
<i>Master Slack Corp.</i> , 271 NLRB 78 (1984) .....	97
<i>Mickey’s Linen &amp; Towel Supply, Inc.</i> , 349 NLRB 790 (2007) .....	60, 62
<i>Mohawk Industries, Inc.</i> , 334 NLRB 1170 (2001) .....	64, 67
<i>National Propane Partner, L.P.</i> , 337 NLRB 1006 (2002) .....	90

<i>Nielsen Lithographing, Co.</i> , 305 NLRB 697, affd. sub nom <i>Graphic Communications Local 508 v. NLRB</i> , 977 F.2d 1168 (7th Cir. 1992).....	68, 69
<i>Noah’s Arc Processors LLC d/b/a WR Reserve</i> , 370 NLRB No. 74 (Jan. 27, 2021).....	64, 67
<i>Overnite Transportation Co.</i> , 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).....	59
<i>Penn Tank Lines, Inc.</i> 336 NLRB 1066 (2001).....	98
<i>Peoples Gas System</i> , 275 NLRB 505 (1985).....	66
<i>Perkins Machine Co.</i> , 141 NLRB 697 (1963).....	66
<i>Permaneer Corp.</i> , 214 NLRB 367 (1974).....	58
<i>Phelps Dodge Specialty Copper Products Co.</i> , 337 NLRB 455 (2002).....	81, 82
<i>Placke Toyota, Inc.</i> , 215 NLRB 395 (1974).....	61, 63
<i>Preterm, Inc.</i> , 240 NLRB 654 (1979).....	80
<i>Public Service Co. of Oklahoma (PSO)</i> , 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).....	59, 60
<i>Regency House of Wallingford, Inc.</i> , 356 NLRB 563 (2011).....	91, 92
<i>Regency Service Carts, Inc.</i> , 345 NLRB 671 (2005).....	60, 85
<i>Rock-Tenn Co.</i> , 238 NLRB 403 (1978), enfd. 594 F.2d862 (5 <sup>th</sup> Cir. 1979).....	88
<i>S-B Mfg. Co., Ltd.</i> , 270 NLRB 485 (1984).....	74
<i>Shell Co. (Puerto Rico) Ltd.</i> , 313 NLRB 133 (1993).....	70
<i>Shoppers Food Warehouse Corp.</i> , 315 NLRB 258 (1994).....	68
<i>Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R. a/k/a Hospital Espanol Auxilio Mutuo de Puerto Rico, Inc.</i> , 342 NLRB 458 (2004), enfd. 414 F.3d 158 (1 <sup>st</sup> Cir. 2005).....	63
<i>South Carolina Baptist Ministries</i> , 310 NLRB 156 (1993).....	60

<i>Space Needle, LLC</i> , 362 NLRB 35 (2015), enfd. 692 Fed.Appx. 462 (9th Cir. 2017)....	64, 65, 66, 67, 88, 89
<i>Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget</i> , 298 NLRB 524 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992).....	60
<i>St. George Warehouse, Inc.</i> , 341 NLRB 904 (2004), enfd. 430 F.3d 294 (3d Cir. 2005).....	91
<i>Stevens Creek Chrysler Jeep Dodge, Inc.</i> , 357 NLRB 633 (2011), enfd. 498 Fed.Appx. 45 (D.C. Cir. 2021).....	55, 56
<i>Storer Communications, Inc.</i> , 297 NLRB 296 (1989).....	93
<i>Stroehmann Bakeries, Inc.</i> , 318 NLRB 1069 (1995), enf. den. 95 F.3d 218 (2d Cir. 1996).....	74
<i>Strucknes Constr. Co.</i> , 165 NLRB 1062 (1967).....	48
<i>Struksnes Construction Co., Inc.</i> , 165 NLRB 1062 (1967).....	93, 94
<i>Suffield Academy</i> , 336 NLRB 659 (2001).....	83
<i>Tegna, Inc. d/b/a KGW-TV</i> , 367 NLRB No. 71 (Jan. 17, 2019).....	68
<i>Telescope Casual Furniture, Inc.</i> , 326 NLRB 588 (1998).....	75
<i>Teneco Automotive, Inc.</i> , 357 NLRB 953 (2011), revd. 716 F.3d 640 (D.C. Cir. 2013).....	98
<i>Texaco, Inc.</i> , 264 NLRB 1132 (1982), enfd. 722 F.2d 1226 (5 <sup>th</sup> Cir. 1984).....	63
<i>Times-Herald, Inc.</i> , 253 NLRB 524 (1980).....	61
<i>Tomco Communications, Inc.</i> , 220 NLRB 636 (1975), enf. denied 567 F.2d 871 (9th Cir. 1978).....	82
<i>Toyota of San Francisco</i> , 280 NLRB 784 (1986).....	99
<i>Transpersonnel, Inc.</i> , 336 NLRB 486 (2001).....	94
<i>U.S. Ecology Corp.</i> , 331 NLRB 223 (2000), enfd. 26 Fed.Appx. 435 (6th Cir. 2001).....	75, 76

<i>United Aircraft Corp.</i> , 199 NLRB 658 (1972), enf. denied in rel. part 490 F.2d 1105 (2d Cir. 1973).....	92
<i>Universal Fuel, Inc.</i> , 58 NLRB 1504 (2012).....	76, 79, 80, 83
<i>Valley Central Emergency Veterinary Hospital</i> , 349 NLRB 1126 (2007).....	83
<i>Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center</i> , 368 NLRB No. 139 (Dec, 16, 2019). ....	67
<i>Vanguard Fire &amp; Supply Co., Inc.</i> , 345 NLRB 1016 (2005), enfd. 468 F.3d 952 (6 <sup>th</sup> Cir. 2006).....	99
<i>Vestal Nursing Center</i> , 328 NLRB 87 (1999) .....	64
<i>Whitesell Corp.</i> , 357 NLRB 1119 (2011).....	76
<i>Wiers International Trucks, Inc.</i> , 353 NLRB 475 (2008).....	91
<i>Winn-Dixie Stores, Inc.</i> , 128 NLRB 574 (1960).....	64, 67
<i>Wisconsin Porcelain Co., Inc.</i> , 349 NLRB 151 (2007) .....	93, 94
<i>Yale New Haven Hospital</i> , 309 NLRB 363 (1992).....	91

## **Federal Cases**

<i>NLRB v. Harvstone Mfg. Corp.</i> , 785 F.2d 570 (7th Cir. 1986), cert. denied 479 U.S. 821 (1986) .....	68
<i>NLRB v. Herman Sausage Co.</i> , 275 F.2d 231 (5th Cir. 1960).....	59
<i>NLRB v. Reed &amp; Prince Mfg. Co.</i> , 205 F.2d 131 (1st Cir. 1953 .....	59
<i>NLRB v. Wonder State Mfg. Co.</i> , 344 F.2d 210 (8th Cir. 1965).....	59
<i>SDBC Holdings, Inc. v. NLRB</i> , 711 F.3d. 281 (2d Cir. 2013).....	73

## Supreme Court Cases

<i>Allentown Mack Sales and Service, Inc.</i> , 522 U.S. 359 (1988) .....	86, 93, 94
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	68
<i>NLRB v. Exchange Parts Co.</i> , 375 U.S. 405 (1964).....	62
<i>NLRB v. Gissel Packing Co., Inc.</i> , 395 U.S. 575 (1969) .....	90
<i>NLRB v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956).....	68
<i>Textile Workers Union of America v. Darlington Mfg. Co.</i> , 380 U.S. 263 (1965).....	90
<i>United Steelworkers of America v. Warrior &amp; Gulf Nav. Co.</i> , 363 U.S. 574 (1960) .....	85

## I. STATEMENT OF THE CASE

On May 29, 2018, the Regional Director for Region 22 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Complaint”) in the above-captioned cases, alleging that New Concepts for Living, Inc. (“Respondent” or “NCFL”) had committed numerous unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (“the Act”), through its ongoing efforts to relieve itself from its obligation to recognize and bargain with the Communication Workers of America Local 1040 (“Union”), and its ultimate withdrawal of recognition.<sup>1</sup> GC 1(t). In its Answer and Affirmative Defenses to Consolidated Complaint (“Answer”), Respondent denied the alleged unfair labor practices. GC 1(v).

Respondent filed a Motion for Summary Judgment on August 21, 2018, General Counsel filed an Opposition to Respondent’s Motion for Summary Judgment on August 28, 2018, and the Board issued an Order denying Respondent’s motion on September 20, 2018. GC 1(y), (z), (bb).

A hearing before Administrative Law Judge Jeffrey Gardner was held on September 26, 27 and 28, October 18, 19, 22, 25 and November 19 and 20, 2018. On November 20, General Counsel moved to strike and redact certain portions of Respondent’s Motion for Summary Judgment and Respondent’s Sixth Affirmative Defense. Judge Gardner granted the motion and ordered Respondent’s original Motion for Summary Judgment and Answer replaced by redacted versions. Tr. 1377-1379. In his Decision dated January 8, 2021, Judge Gardner dismissed the Complaint, finding that Respondent had not violated the Act in any manner alleged therein.

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<sup>1</sup> References to the Administrative Law Judge’s Decision and the official transcript are designated as “ALJD” and “Tr.,” respectively, followed by the page number. References to the General Counsel, Respondent Employer and Respondent Union exhibits will be referred to as “GC,” and “R,” and “U,” respectively, followed by the exhibit number.

## II. INTRODUCTION

The overwhelming credible evidence in this case shows that Respondent engaged in a year-long effort to cause employee disaffection with the Union and rid itself of its obligation to bargain. This is an extraordinary case where the ALJ omitted numerous key facts, recast other facts, and made conclusions without providing their factual basis, resulting in a narrative that does not reflect the record evidence. Because many of the ALJ's conclusions of law are based on these errors, those conclusions are also incorrect. In several instances, the ALJ also misapplied the law and failed to address legal arguments put forth by General Counsel.

The evidence simply does not support the ALJ's core theory that the Union's inaction caused the loss of support and majority status, rather than Respondent's unfair labor practices. The credible evidence supports each alleged violation and shows that Respondent's unlawful conduct was widespread and calculated to block the Union from organizing its members, while simultaneously working to erode Union support. Respondent's unlawful conduct began when the Union requested bargaining for a successor contract and continued over more than a year, finally culminating in its unlawful imitation NLRB election that was the basis of its withdrawal of recognition.

## III. ISSUES

1. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act by encouraging and soliciting employee support for the filing of a decertification petition? (Complaint ¶ 15-16)
2. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act by soliciting employees to sign letters resigning their Union membership and withdrawing authorization of Union dues deduction? (Complaint ¶ 17)
3. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act by informing employees that it would be futile for them to selection the Union as their bargaining representative? (Complaint ¶ 20)

4. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union information that was relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the unit? (Complaint ¶ 22-24)
5. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in bad faith bargaining through the following conduct:
  - a) failing and refusing to include employees' addresses on a monthly list of bargaining unit members given to the Union;
  - b) failing and refusing to provide the Union with relevant and necessary information;
  - c) making a regressive bargaining proposal by withdrawing its initial wage proposal and proposing a wage freeze;
  - d) making a regressive bargaining proposal by withdrawing its initial proposal regarding arbitration and thereafter proposing that the successor contract not contain an arbitration provision;
  - e) making a regressive bargaining proposal by withdrawing its initial proposal regarding dues checkoff and thereafter proposing that the successor contract not contain a dues checkoff provision;
  - f) making a regressive bargaining proposal by withdrawing its initial proposal regarding a Union shop and thereafter proposing that the successor contract not contain a Union shop provision; and
  - g) offering to withdraw its regressive proposal to remove the Union shop provision from the successor contract only if the Union agreed to poll bargaining unit members to confirm that the Union had majority support? (Complaint ¶ 25-27)
6. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act by distributing a memo to employees that:
  - a) informed them of the amount of Union dues they had paid the previous year, instructed them that since the Union contract had expired, they had no legal obligation to pay Union dues, and informed them that over 95 percent of Respondent's employees had chosen not to pay Union dues? (Complaint ¶ 18)
  - b) polled employees about their Union support, through the instruction: "If you want to START or resume paying Union Dues: complete and sign the attached form...If you do not want to start paying Union dues, you don't have to do anything?"(Complaint ¶19)

7. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act by conducting a poll to determine whether employees wanted the Union to be their exclusive bargaining representative? (Complaint ¶ 21)
8. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit? (Complaint ¶ 28)

#### **IV. FACTS**

Respondent is a non-profit corporation that provides various services for individuals with developmental disabilities. ALJD 2; Tr. 34; GC 1(t), ¶6; GC 1(v), ¶6. It operates group homes at several locations in New Jersey and a day program in its Rochelle Park, New Jersey location, which is also its headquarters. ALJD 2; Tr. 34, 39, 1151, 1161-1162; GC 1(t), ¶ 6; GC 1(v), ¶6.

For numerous years, the Union had been certified to represent a unit of Respondent's drivers, direct care counselors, day program counselors, residential counselors, maintenance staff, and secretary/receptionists. ALJD 3; Tr. 1002. Most of the unit members work at Respondent's day program and Respondent's group homes. Tr. 34, 49, 1151. The most-recent collective-bargaining agreement expired on November 30, 2011, and it was extended to June 30, 2014 by a memorandum of agreement. ALJD 3; Tr. 1002-4; GC 2 and 3. No further extensions or agreements were executed by the parties. ALJD 3; Tr. 1005.

Carolyn Wade has been the Union's elected president since 1990. ALJD 3; Tr. 1001. Adrian Taylor was the Union's representative for its NCFL members from about December 2014 through the fall of 2015. Tr. 52-53, 409-410, 1008. In the fall of 2015, when Wade discovered that a successor contract had not been executed, she assigned Donna Ingram to service the NCFL unit. ALJD 3, 4; Tr. 1008. Ingram's mission was to find out why the contract had lapsed, to engage with the members and improve the Union's relationship with them. ALJD 4; Tr. 360, 1009.

## **A. CHRONOLOGY OF EVENTS**

### **1. Fall 2015: The Union Reconnects with Members.**

In the fall of 2015 Ingram found that members had been dissatisfied with Taylor's enforcement of the contract and lack of communication. ALJD 4; Tr. 360, 410. At that time, Ingram began reaching out to members by telephone and by sending them information about Union membership. Tr. 361. She met with employees at the Rochelle Park library. Tr. 361.

Ingram also sought to meet with members at work. Shortly after she was assigned to service the NCFL unit, Ingram secured permission from Respondent's associate director Adam Fishman to contact the supervisors at each group home directly to schedule time to meet with members. Tr. 361. Ingram then proceeded to meet with members at various group homes and in the day program after their monthly staff meetings. Tr. 361, 424-425. She always sought and received permission to have these meetings from the necessary supervisor or manager. Tr. 361, 425-425.

In contrast, Fishman testified that he denied Ingram's request for access to the group homes to meet with employees. Tr. 1138, 1141. He stated that instead, he allowed her to meet with members outside the homes during their unpaid breaks, if she called the manager ahead of time.<sup>2</sup> Tr. 1138.

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<sup>2</sup> Fishman also testified that in the fall of 2016, one year later, employees told him that they were uncomfortable with the Union coming to the group homes, so Respondent responded by not allowing the Union to come around the homes. Tr. 1141. This implies that, contrary to Fishman's testimony, Union representatives were given access to the homes sometime before the fall of 2016. Fishman did not provide details regarding employees' discomfort with Union representatives visiting the group homes. Tr. 1141.

**2. April 7, 2016: The Union Requests Bargaining.**

By letter dated April 7, 2016, Wade notified Respondent chief executive officer Steve Setteducati of the Union's desire to negotiate a successor contract, and she asked Setteducati to contact Ingram to offer dates and times to bargain. Tr. 613; R 7, CWA1040-1.

**3. May 2016: Respondent Denies the Union Access to its Facilities.<sup>3</sup>**

Ingram testified that she met with human resources manager Janice Hoyda on May 20, 2016, to ask Hoyda to let her know when new employee orientation sessions were scheduled, so that she could meet with new employees and give them information about the Union. Tr. 365; GC 23. Ingram also told Hoyda that she wanted to visit the Rochelle Park office to drop off Union membership and dues authorization cards. Tr. 368. Ingram sent an email to Hoyda on May 23, summarizing her requests during the May 20 meeting.<sup>4</sup> Tr. 363; GC 27.

When Ingram arrived at the Rochelle Park office to drop off the cards, she was directed to meet with Setteducati, rather than Hoyda. Tr. 367. During this short meeting, Setteducati told Ingram that he did not want her to attend any orientation sessions or visit Respondent's group homes. Tr. 368. Consequently, Ingram never attended an orientation meeting and was no longer allowed to meet with members after monthly meetings as she had in the past. Tr. 366-368.

**4. June and July 2016: First Bargaining Session is Scheduled.**

Setteducati did not respond to Wade's April 7 letter seeking bargaining dates until June 7. ALJD 4; R 7. After some back and forth, the parties eventually agreed to meet on August 30. ALJD 4; Tr. 1014-1015; R 7. Wade assigned staff representative Robert Yaeger to

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<sup>3</sup> The ALJ did not make any findings regarding Ingram's attempts to organize during this time period, her contacts with Fishman, Hoyda, and Setteducati, or Respondent's refusal to allow the Union access to its facilities.

<sup>4</sup> Hoyda did not testify about this meeting or the subsequent email.

handle negotiations for the successor agreement. Tr. 1014-1015.

**5. August 2016: Respondent Uses its Own Authorization Forms for Payroll Deduction of Union Dues.<sup>5</sup>**

Between August 1 and 19, 2016, Respondent distributed and collected its own form authorizing the payroll deduction of Union dues. GC 66. Thirty-eight of these authorization forms were executed during this time period. GC 66. Three were executed in October and November 2016. GC 66. Some of the employees who signed these forms were long-term employees, and only ten of them had worked for Respondent fewer than six months. GC 33, 66.

There is no record testimony explaining why Respondent decided to create its own form rather than distribute Union cards. The form is markedly different from a Union card in several respects. First, a Union card provides for membership in the Union in addition to dues deduction authorization, whereas Respondent's form merely provides authorization for dues deduction. GC 66; R 12. Second, Respondent's authorization form designates that Union dues are limited to 1.3 percent of the employee's total pay, whereas the Union card does not limit or designate the amount of dues to be deducted.<sup>6</sup> GC 66; R 12. Finally, Respondent's form contains a clause allowing the signatory to revoke authorization at any time, subject to contract requirements. GC 66. The Union card, however, provides that notice of revocation of dues will not become effective until the July 1<sup>st</sup> or January 1<sup>st</sup> following the date the notice is filed. R 12.

Although Cusack did not represent Respondent at the time it began using these forms, he testified that these forms were handed out to "catch up." Tr. 722. He said the company wanted some form of authorization from employees in order to withhold their money, as required by

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<sup>5</sup> The ALJ did not make any findings regarding Respondent's distribution of dues authorization forms rather than Union authorization cards.

<sup>6</sup> The expired contract merely provides that dues are "fixed by the Union." GC 2, p. 9.

law. Tr. 722, 723.

**6. August 30, 2016 and September 28, 2016: First and Second Bargaining Sessions<sup>7</sup>**

The parties' first bargaining session took place on August 30, 2016. Yaeger and Ingram attended for the Union. ALJD 4; Tr. 371. Counsel George Corliss, Fishman and Hoyda attended for Respondent.<sup>8</sup> ALJD 4. It is undisputed that during these two sessions, three proposals were exchanged and reviewed: The Union's first proposal, mailed to Setteducati on August 24, Respondent's first proposal, handed to the Union at the August 30 session, and the Union's response to Respondent's proposal, which Yaeger mailed to Corliss on September 26. ALJD 4; Tr. 60-62, 64, 69, 371, 373, 951-953. 956-957, 1134-1136; GC 4, 6, 8, 24, 58; R 17.

**a. The Union's first proposal**

Arbitration:<sup>9</sup> The Union proposed that, "The Union and the Employer shall share the cost of arbitration and proceedings." GC 4. The expired contract provided that the party that lost the arbitration would bear the full cost of the arbitrator's fee. Tr. 370; GC 2.

Wages:<sup>10</sup> The Union's first proposal sought to increase to \$13.00 per hour the wages of all employees earning less than that amount, with a \$1.00 per hour increase for all bargaining unit employees on January 1, 2017, January 1, 2018, and January 1, 2019. Tr. 1134; GC 4. The

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<sup>7</sup> The ALJ did not make any findings regarding the content of the proposals exchanged between the parties in the fall of 2016, including Respondent's initial proposals regarding wages, Union security and dues checkoff, and arbitration, which are the specific proposals the Complaint alleges are the basis for Respondent's regressive bargaining. ALJD 4.

<sup>8</sup> The record contains a conflict regarding Respondent's third participant. Yaeger, Ingram assert that Janice Hoyda attended the first two bargaining sessions, while Respondent witnesses Hoyda, O'Reilly and Fishman assert that it was O'Reilly who attended these sessions. Tr. 60, 371, 201-202, 448-449, 874-876, 1128-1129, 1166-1167. The ALJ found that Hoyda attended these sessions, apparently crediting the testimony of Yaeger and Ingram over Hoyda, O'Reilly and Fishman.

<sup>9</sup> Article IV – Grievance Procedure

<sup>10</sup> Article XXIII – Wages and Appendix A

expired memorandum of agreement provided a \$.50 per hour increase in all bargaining-unit members' base rate of pay. GC 3. Therefore, with some exceptions, most unit employees were earning between \$9.25 and \$10.25 per hour. GC 2, 3.

Union Security and Dues Checkoff:<sup>11</sup> The Union did not propose any changes to this Article.

**b. Respondent's first proposal**

Wages: In its first proposal, Respondent sought merit pay, which was not in the expired contract. Tr. 373, 953, 1134. Specifically, Respondent proposed adding a new section to Article XXIII - Wages, which provided that, "Management will implement a Merit Pay System at its discretion on or after January 1, 2017. Merit increases in any amount may be awarded to good performers. Performance shall be determined exclusively by management. Poor performers will not receive a merit increase." GC 6.

Arbitration: Respondent proposed, "The parties shall split the cost of the Arbitrator's fees and expenses and all other costs of the arbitration hearing... Each party shall pay their own Attorneys/representative's fees." Tr. 370, 372; 957; GC 4. This proposal, nearly identical to the Union's, indicated that the parties agreed on this issue.<sup>12</sup> Respondent also proposed a permanent panel of arbitrators, in lieu of using the Federal Mediation and Conciliation Service ("FMCS"), as the expired contract provided. Tr. 956; GC 6, p. 2.

Union Security and Dues Checkoff: Respondent's first proposal regarding dues checkoff sought only a slight change the conditions employees needed to fulfill prior to becoming eligible for dues deductions. Tr. 125; GC 6, p. 2. It proposed that dues deduction start the first pay period

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<sup>11</sup> Article IX – Dues Check-Off

<sup>12</sup> Despite this, Adam Fishman testified that Respondent did not make any proposals regarding arbitration at this time. Tr. 1135.

after the successful completion of the initial 120-day training period and of the employee's 180-day initial review period, per Article XII. GC 6, p. 3.

The expired contract also contained a "Union Shop" clause, which required all employees to maintain their membership in the Union in good standing as a condition of continued employment. GC 2. Respondent proposed only to change the definition of an agency fee under paragraph 4, from 100% of Union dues to the percentage of Union dues directly used for collective bargaining and Union representation. GC 6.

**c. The Union's responses to Respondent's first proposal**

Arbitration: The Union agreed to Respondent's proposal regarding splitting the costs of arbitration. Tr. 137; GC 8. With the Union's acceptance of Respondent's specific language regarding arbitration costs, a clear agreement on this issue was reached. The Union did not agree to Respondent's proposal to replace the FMCS with a permanent panel of arbitrators. Tr. 137; GC 8.

Union Security and Dues Checkoff: The Union rejected Respondent's proposal to change conditions that needed to be met prior to implementing dues deduction. GC 8.

Wages: The Union requested further discussions regarding a merit pay system, and it also referred Respondent to its August 30, 2016 wage proposal. GC 8. Respondent's bargaining notes reflected the Union's request for more specifics regarding Respondent's merit pay proposal. GC 58, p. 2; R 17, 9/28/16.<sup>13</sup>

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<sup>13</sup> Respondent's typed bargaining notes document, "Union requesting a Merit Pay Policy...", and Respondent's hand-written notes merely document the Union seeking more information and definition about such a plan. GC 58, p. 2; R 17, 9/28/16.

**7. October 18, 2016: Setteducati Meets with River Vale Employees.**

Setteducati met with employees at the River Vale group homes twice on October 18, 2016, to discuss decertifying the Union. ALJD 4, 5; Tr. 223, 228-232, 1273-1274, 1279.

Setteducati's first meeting with the full staff: Baldicanas gave un rebutted testimony that Setteducati spoke to the entire staff at the River Vale group home directly after a monthly staff meeting. ALJD 4; Tr. 228-231. Setteducati started by telling the group that he was there to talk about the decertification window closing. ALJD 4; Tr. 230. Setteducati said that there was a window of time to decertify a Union. ALJD 4; Tr. 230-231. Setteducati also told the group that if there was no Union, he would be able to give merit raises to those who worked harder than others, which the Union would not let him do. Tr. 231.

Setteducati's later meeting with Baldicanas and Martin: The ALJ found that Williams called Setteducati after the first meeting, to ask him to return to River Vale to answer questions that Baldicanas had about the Union.<sup>14</sup> ALJD 5; Tr. 1273-1274. The ALJ's findings regarding

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<sup>14</sup> The ALJ found that "After that initial meeting, River Vale manager Williams called Setteducati on the phone and asked him to return to the facility to answer questions that Baldicanas had about the Union," and "Baldicanas recorded one side of this phone call between Williams and Setteducati while standing in or about the doorway to Williams' office. That recording was the subject of a Motion to Strike which I denied on the record. After post-trial briefs had been submitted, Respondent renewed its Motion to Strike, which I am now denying for the reasons stated during the hearing, and specifically because I find that Baldicanas was within his rights to make the recording." ALJD 5, 5, n. 6.

The ALJ's finding that Baldicanas recorded this phone conversation and his description of the post-hearing motion to strike are incorrect, for the following reasons: First, there is no record testimony that Baldicanas recorded a telephone conversation between Williams and Setteducati on October 18<sup>th</sup>. Baldicanas did record the second meeting with Setteducati at the River Vale home the evening of October 18<sup>th</sup>, and the recording and transcript of that meeting were entered into evidence as GC 15 and 16, respectively. Second, although Setteducati testified that he had a phone conversation with Williams between the two meetings on October 18<sup>th</sup>, he did not testify that it was recorded. The recording that the ALJ refers to on ALJD 5 was neither offered nor entered into evidence. However, as the ALJ noted, despite the fact that the recording was not in the record, Respondent attached it to its first motion to strike, relied on it as support to strike GC 15 and 16, and moved to strike both recordings. The ALJ's description of Respondent's post-

Setteducati's statements during this meeting omit glaring details.<sup>15</sup> The ALJ found "Setteducati then repeated that there was a specific window of time for decertifying a union and that it was closing. He told them that negotiations for a new contract were about to start, and once that happened, they would not be able to get rid of the union." ALJD 5. The ALJ omitted that Setteducati repeated throughout the meeting that negotiations were going to start the new week. GC 15, 16, p. 2-3, 4-5, 10, 13. At the hearing, Setteducati acknowledged that he gave incorrect information, and he provided the conflicting excuses of being a novice and receiving incorrect advice from Respondent's former counsel, George Corliss. Tr. 1280. Since the parties' contract had expired, in reality there was no deadline for filing a decertification petition. ALJD 5.

The ALJ also failed to find that Setteducati next said, "what it's called is a decertification. You're decertifying the union...If you put in a petition you're not getting rid of the union, you're just bringing it up to the membership so they can vote on it." GC 15, GC 16, p. 2-3. The ALJ also did not find that Setteducati testified that by the end of the meeting, Baldicanas and Martin understood the decertification process, which "really is not all that complicated" due to his very explicit description of it. Tr. 1276. Setteducati further admitted that he had several similar meetings with other staff. Tr. 1283.

The ALJ also found that:

[Setteducati] asked them why they would want to keep the Union, stating that the Union had not done anything about multiple employees who had been terminated and noting

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hearing motion in ALJD 5, n. 6 is incorrect, because that motion sought to strike GC 15 and 16, not the recording that is not in evidence, although in its brief in support of the motion, Respondent did again rely on the recording that is not in evidence and argue that it should be stricken from the record. ALJD 5, n. 6. However, the ALJ properly described, and denied, Respondent's post-hearing motion in footnote 2. ALJD 2, n. 2.

<sup>15</sup> There are no direct conflicts in testimony regarding the meeting. Baldicanas testified about the meeting and his recording of the meeting was entered into evidence. Setteducati testified about the second meeting, but not the first. Martin also testified, although it is unclear which meeting he described. Tr. 1244.

that the contract had long ago expired and the Union had not done anything about it. Setteducati told them the Union was just taking money out of their paychecks, and all they had ever done in ten years was get employees a 50-cent raise. ALJD 5.

Here again, the ALJ's findings minimize the record, which shows that Setteducati said that Respondent had fired 50 people over the previous 8 years, and the Union hadn't saved one job. GC 15, 16 p. 4-5, 9-10. Setteducati repeated that without the Union, he would be able to give merit raises, which the Union would not let him do. ALJD 5. Throughout the meeting, Setteducati told Baldicanas and Williams that the Union was filling their heads with lies, and he repeatedly said: "Where has the Union been for the past 8 years?" "What have they done for you?" "Have they saved any jobs?" "How many meetings have they held?"<sup>16</sup> GC 15, GC 16, p. 11-17. The ALJ did not make any of these findings.

Baldicanas testified that during this time, a sheet of paper was posted next to the TV stand in the living room of the River Vale group home. Tr. 252-253. He said that employees who wanted to decertify the Union were supposed to sign this sheet, and he remembered seeing one signature on it. Tr. 252-253. Martin also testified that he saw a letter asking employees to sign the decertification petition posted to the wall at the River Vale group home, where he punched in.<sup>17</sup> Tr. 1242.

#### **8. October 2016: Setteducati Questions Williams About the Decertification Petition.**

Baldicanas testified that during this time period, he overheard a 5-10-minute telephone conversation between River Vale group home manager Levander Williams and Setteducati while

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<sup>16</sup> The ALJ erred in finding that Setteducati told employees that if a decertification petition was not filed, Respondent would continue bargaining with the Union. ALJD 9. There is no record evidence that he made such a statement.

<sup>17</sup> In contrast, the ALJ found that there was no evidence any employee signatures were elicited from the River Vale group home in support of the decertification petition following Setteducati's appearance there is incorrect. ALJD 9.

standing just outside Williams' office. Tr. 254-255. He heard both sides of the conversation because the door was open, and Williams was using a speaker phone. Tr. 254-255. Baldicanas testified that during this conversation, Setteducati asked Williams where the petition was, meaning the signature sheet that had been left next to the TV. Tr. 255. Williams answered that he did not know where it was.<sup>18</sup> Tr. 255.

#### **9. October 20, 2016: The Decertification Petition is Filed**

Direct care counselor Andre Marshall filed the decertification petition in Case 22-RD-186653 on October 20, 2016. ALJD 5; GC 34. Pursuant to a stipulated election agreement, an election was scheduled to take place on November 15, 2016. ALJD 5; GC 35, 59, 60. Marshall, direct care counselor ShellyAnn Burke, and supervisor Andrew Pickett all testified that an employee named Nester started the decertification campaign. ALJD 4; Tr. 1187, 1197-1120, 1232. Marshall stated that Nester asked him to take over the decertification campaign, and after some contemplation, Marshall agreed. ALJD 4; Tr. 1200. Nester told him, "This is what is going to stop them from taking the money out of your guys' checks." Tr. 1196. Nester resigned two weeks after Marshall took over the decertification campaign.<sup>19</sup> ALJD 4; Tr. 1200.

Marshall stated that he went to the group homes to solicit fellow members to sign the petition, which was a piece of paper with names on it. Tr. 1197,1200-1201, 1219. He was helped mostly by a co-worker named Jacob, but also by ShellyAnn Burke. Tr. 1200. Marshall and his supervisor spoke about getting signatures on the petition, and the supervisor counseled him that he could not talk about it during work time. ALJD 4; Tr. 1201. Mirroring Setteducati's

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<sup>18</sup> The ALJ did not make any findings regarding this conversation. Baldicanas did not testify that he recorded this conversation, and there is no record evidence to suggest that he did.

<sup>19</sup> Burke testified that Nester was a director in the day program, although Marshall and Pickett testified that he was a direct care counselor. Tr. 1175, 1218, 1236.

statements to employees, Marshall testified that he asked his co-workers what the Union had done for them, and that they had been making \$10.00 per hour for a long time. Tr. 1208.

Marshall testified that anti-Union sentiment was not unanimous, but “like a see-saw” -- some of his co-workers wanted to keep the Union and others did not. ALJD 4; Tr. 1200,1209, 1223.

ShellyAnn Burke testified that she got signatures at the two Mahwah group homes, and the River Vale and Teaneck homes. ALJD 4; Tr. 1178. Burke spoke to her co-workers while they were at work. Tr. 1178. Burke testified that rather than collecting signatures on a sheet of paper, she asked her co-workers to sign cards that she got from Marshall. Tr. 1176, 1180, 1190-1191.

There was no testimony establishing when Nestor, Marshall or Burke began soliciting signatures for the certification petition or how long they spent collecting signatures before filing the decertification petition.<sup>20</sup>

#### **10. October 21, 2016: Respondent Suspends Bargaining**

By email on October 21, 2016, Respondent counsel George Corliss informed the Union that he believed a majority of the bargaining-unit members had signed the petition supporting decertification. ALJD 5; GC 9. Corliss asserted that this information created good faith doubt as to whether the Union represented a majority of the unit employees, and he therefore suspended bargaining, including the session scheduled for October 25, 2016. ALJD 5; GC 9.

#### **11. October 31, 2016 and November 2016: The Union Files the Charge in Case 22-CA-187407 and the Election is Blocked; Union Meets with Members**

On October 31, 2016, the Union filed the charge in Case 22-CA-187407, which alleged that Respondent violated Section 8(a)(1) of the Act by encouraging and soliciting employee support for the filing of the decertification petition. ALJD 5; GC 1(a). Shortly thereafter, an

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<sup>20</sup> Despite this lack of information, the ALJ found that the decertification effort was a process of “at least weeks” that began “well before October 2016.” ALJD 4.

Order was issued indefinitely postponing the election. ALJD 5; GC 35.

On October 31, the Union held a meeting with unit members at the Rochelle Park library, to provide information about the Union and the status of bargaining. Tr 430-431; R8. Ingram testified that the meeting was not well attended, which was typical in those situations.<sup>21</sup> Tr. 431.

### **12. December 1, 2016: Marshall Withdraws Decertification Petition**

Respondent attorney James Cusack testified that he spoke with Marshall as “co-charged parties.” Tr. 718-719. Cusack states that during these discussions, he learned that Marshall and another employee had gathered 60 signed cards from employees wanting to get out of the Union. Tr. 720. Cusack counseled Marshall to withdraw the petition, and Marshall complied.<sup>22</sup> Tr. 718-720, 723-725. Cusack testified that at this time, Respondent was in the process of changing labor counsel. Tr. 720. On December 1, 2016, the Regional Director for Region 22 of the Board issued an order approving Marshall’s request to withdraw the decertification petition. ALJD 5; GC 35.

### **13. December 2016 through Winter of 2017: The Union Continues Outreach**

After the decertification petition was withdrawn, the Union made even more effort to meet personally with bargaining unit members. ALJD 6. Yaeger, Ingram and Wade emphasized that the purpose of this effort was to provide members with information about Union membership and to give them updates on the status of bargaining. Tr. 76, 79, 383, 107-115, 187, 1032. Both national and local Union representatives waited outside the group homes and the day program to speak with members as they started and ended their shifts and hand them information about the Union. ALJD 6; Tr. 75-80, 106, 116-118, 381-385, 1-29-1030. Yaeger and Ingram

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<sup>21</sup> The ALJ incorrectly found that it was a December 2016 meeting that was sparsely attended. ALJD 6. Although there was a meeting in December, there is no testimony regarding the level of attendance.

<sup>22</sup> Marshall provided no testimony about his conversations with Cusack.

testified that members they spoke to were interested in the Union, and they accepted the information that was offered to them.<sup>23</sup> Tr. 79, 383-385. Yaeger testified that employees at one of the Mahwah group homes invited him and Leroy Baylor to speak with them inside for a few minutes. Tr. 79, 117-118. Yaeger testified that the meeting was without incident and they left the home voluntarily, without being asked. Tr. 79-80.

Respondent later argued that Union representatives had harassed and intimidated employees during their visits to Respondent's group homes and employees' residences, yet there is no evidence to support this claim. Direct care counselor Angienna Gayle testified that a man and a woman came to the Emerson group home to speak to staff, and she told them that they needed to leave. Tr. 1323. She testified that they did not want to leave, so she called Setteducati. Tr. 1323-1324. The representatives were no longer at the facility when Setteducati arrived at the home. Tr. 1323. Gayle did not state that the Union representatives went inside the home, or that they said anything offensive. Employee Tristin Allen<sup>24</sup> testified that a woman from the Union handed her an envelope while she was walking to her car. Tr. 1358.

Union representatives also visited employees' personal homes during this time period. Tr. 80-81, 386-387, 422-423. They spoke with employees and family members. Again, there is no evidence that the Union representatives acted inappropriately. Tr. 80-81, 386-387, 422-423. Gayle testified that Union representatives knocked on her door and said they wanted to talk to her. Tr. 1320. "I told them I didn't want to talk. They still insisted, and I had to get a little bit rough. I came out the door and [they] went away." Tr. 1320. Gayle did not testify that she told

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<sup>23</sup> In contrast, the ALJ found that Ingram acknowledged that employees' reception of the Union was not positive. ALJD 6. The ALJ also found that the Union's efforts at reviving support were mostly unsuccessful. ALJD 6. This finding is contrary to Ingram and Wade's testimony. Tr. 380-388, 422-441; 1026-1032.

<sup>24</sup> Allen was promised to supervisor in April 2017. Tr. 1363-1364.

anyone in management about this incident at the time it occurred. Tr. 1320.

Gayle is the only employee who testified that she turned away Union representatives from a group home and her own residence. The ALJ's finding that the Union was turned away by employees on multiple occasions both at employee facilities and from employees' individual residents is an error. ALJD 6. Since Respondent had denied the Union access to its facilities, with the one exception noted above, Union representatives were meeting with employees outside the homes, rather than attempting to enter them. Tr. 427-427.

In anticipation of resuming bargaining, the Union held a membership meeting on December 12, 2016 at the Rochelle Park Library. ALJD 6; Tr. 430-431; R. 8. Members were informed of the meeting by a December 2, 2016 letter from Wade. Tr. 431; R. 8. The Union also kept members informed through regular mailings. Tr. 432, 434-440; R 8. A monthly flyer called "The Informer" was mailed to members between December 2016 and September 2017, and again in March 2018. Tr. 432, 434-440; R8. These flyers provided members detailed information about the status of bargaining, proposals made by the parties, communication between the parties, and the status of unfair labor practice investigations. Tr. 432, 434-440; R 8.

**14. December 2016: Respondent Changes Counsel; Marshall Files the Charge in Case 22-CA-189628.**

By email on December 2, 2016, Corliss advised the Union that he no longer represented Respondent, and James Cusack advised the Union that he had replaced Corliss as Respondent's counsel. ALJD 6; GC 11, 12. On December 9, 2016, Marshall filed the charge in Case 22-CB-189628, alleging that the Union violated Section 8(b)(1)A) of the Act by intimidating and coercing employees and using harassing, racially offensive, and threatening language to create an atmosphere of fear and intimidation to chill the Section 7 rights of employees to decertify the Union. ALJD 6, n. 7; GC 36. This charge was dismissed on March 24, 2017 due to Marshall's

lack of cooperation in the investigation. ALJD 6, n. 7; GC 37.

**15. December 21, 2016: Respondent Again Denies the Union Access to its Facilities to Meet with Members<sup>25</sup>**

By letter to Setteducati dated December 12, 2016, Ingram requested access to Respondent's group homes and day program to meet with members to obtain signed membership cards. Tr. 387-388; GC 25. In this letter, Ingram noted that she previously had authorization to meet with members for this purpose, referring to the authorization given to her by Fishman the prior year. Tr. 377-388; GC 25. Ingram testified that, in addition to getting membership cards, she wanted to meet with members to introduce herself to them. Tr. 429.

On December 21, 2016, Setteducati responded with a lengthy letter full of unsubstantiated accusations and vitriol. Setteducati asserted that the previous week, a Union representative, "barged into one of our homes without permission, startling an NCFL employee who subsequently had to direct them to leave." GC 26. He asked Ingram to speak with the appropriate Union personnel regarding this incident, yet he provided no specifics that would allow it to be addressed, such as the name of the representative involved or the location. GC 26. Respondent provided no evidence at the hearing regarding such an incident either.

Setteducati wrote that since the Union security clause had expired with the contract, "**employees have no continuing obligation to pay you a dime** in order to keep their job." GC. 26 (emphasis in original). Setteducati asked Ingram, "There is no longer an obligation for NCFL employees to sign a membership card or to pay you dues if they do not wish to, therefore why would I let you into our homes to tell NCFL employees that they must pay dues, when that is just false? ... I frankly find it incredibly ironic that you say that our employees don't make enough

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<sup>25</sup> The ALJ did not make any factual findings regarding Respondent's refusal to allow the Union access.

money, but then you seek to come and take money from their paycheck even when they now no longer have an obligation to pay you. We'll call it 'irony' because it sounds so much less cynical than 'hypocrisy,' but ultimately our employees must be the judge of that." GC 26.

**16. December 22 through 30, 2016: Respondent Solicits Employees to Resign from the Union and Revoke their Dues Deduction Authorization**

Respondent has admitted that it distributed to bargaining-unit employees a memorandum dated December 28, 2016 regarding Union membership and dues, along with a form letter entitled "RESIGNATION/DUES REVOCATION LETTER."<sup>26</sup> ALJD 10; GC 1 (t),(v) and (z). It is undisputed that Respondent collected the 80 signed resignation/dues revocation forms from employees and forwarded them to the Union.<sup>27</sup> ALJD 10. O'Reilly testified that the executed forms were submitted to the office, and then they were faxed to Carolyn Wade, and perhaps mailed to her as well. Tr. 979. At about 4:30 p.m. on December 30, Respondent faxed 79 executed forms to the Union, in four parts. Tr. 392-393, 395-396, 1033; GC 27, 28. Setteducati sent an additional executed letter to the Union by email on December 31, and in August 2017, Respondent sent two more executed letters to the Union by mail. GC 29, 30. At the end of December 2016, there were 93 members in the unit. GC 33.

Setteducati wrote in his December 28 memorandum that he was providing employees information in response to questions he had received regarding payroll deduction for payment of dues. GC 12 (Exhibit B). The memo told employees, in part, that:

- No one at NCFL is obligated to pay Union Dues to keep their job right now. The

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<sup>26</sup> Although the Complaint only alleges that Respondent's supervisors Janet Booker and Caroline Frazier distributed this memorandum to employees at its Haledon and Clifton group homes, Respondent also admitted that it distributed the memorandum to employees at all of its group homes and the day program. ALJD 10; Tr. 37-38, 727-731; GC 1(y), p. 3-4, Aff. of Cheryl O'Reilly, ¶3.

<sup>27</sup> Although the resignation/dues revocation forms are addressed to both the Union and Respondent, the Union did not receive any of these forms directly from employees. GC 1033.

contract expired 2 ½ years ago;

- You have the right to resign from membership in the Union and paying dues at any time, BUT the Union may take the position that you can only revoke your Union Dues payroll deduction authorizations twice a year: **By December 31<sup>st</sup> and June 30<sup>th</sup>. If you do not revoke by December 30<sup>th</sup>, you may be forced to pay Union Dues for another 6 months;** and
- There is no reward for stopping Union Dues or punishment for continuing to pay Union Dues.

GC (v) (emphasis in original). Respondent's representation that there was a requirement to revoke dues authorization before December 31<sup>st</sup> is incorrect, because more than half of the bargaining unit had not signed Union membership and checkoff cards; rather they had signed Respondent's dues authorization form, which allowed withdrawal of dues deduction authorization at any time.<sup>28</sup> GC 66. The expired contract also did not provide for a specific window for revoking dues authorization. GC 2.

The form resignation/dues deduction letter is four paragraphs long, it cites caselaw, and it contains blank lines for the employee's signature, printed name and date. GC 27. The first paragraph of the letter contains a statement that the employee resigns membership in "CWA Local 1040 and all of its affiliated unions." GC 27. The letter further contains statements asserting that the employee is no longer required to pay dues, and therefore revokes his/her dues checkoff authorization. GC 27.

Cusack testified that Respondent distributed the resignation/dues revocation forms to determine whether or not continuing dues checkoff was in furtherance of employees' interests. Tr. 728, 729. He said that three factors established the need to establish what employees wanted:

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<sup>28</sup> An email from Hoyda dated November 21, 2016 shows that at that time, Respondent was still giving members its own dues authorization form instead of the Union checkoff forms. GC 64, p. 4-5.

1) the Union's checkoff cards allowed revocation of dues deduction only twice a year, so employees would have to pay dues for six more months if they did not revoke authorization by December 30; 2) Respondent had information that 60 employees had signed the showing of interest for the decertification petition; 3) when managers and Setteducati visited the group homes, employees told them that they wanted to leave the Union. Tr. 727-729.

Respondent stopped deducting Union dues from all of the employees who submitted signed resignation/dues revocation letters. GC 64.

### **17. January 12, 2017: The Third Bargaining Session**

The parties resumed bargaining on January 12, 2017.<sup>29</sup> ALJD 7. Annmarie Pinarski was the Union's lead negotiator for the remaining bargaining sessions. ALJD 6; Tr. 81, 1074.

National Union representative Ruth Barrett, Ingram, and Union representative Duwaine Walker also attended all of the remaining bargaining sessions. Tr. 496. Baldicanas attended one or two of the sessions in January, as did another unit member. Tr. 255, 496. Respondent's bargaining team throughout the remaining bargaining sessions consisted of Cusack as lead negotiator, O'Reilly and Fishman. ALJD 6; Tr. 82, 497.

Pinarski testified that at the beginning of the session, she suggested they review the outstanding proposals, but they followed Cusack's suggestion and reviewed the expired contract article-by-article. Tr. 498, 561. Yaeger testified that Cusack announced that whatever had been

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<sup>29</sup> Union bargaining team participants Pinarski, Yaeger, Ingram and Barrett testified about bargaining. Pinarski, as lead negotiator for the Union, testified about each bargaining session. Yaeger, Ingram and Barrett provided supplemental testimony. Cusack, O'Reilly and Fishman, the three members of Respondent's bargaining team, also testified about bargaining. However, they provided no testimony about what happened at each negotiation session, and they provided very little testimony about what Cusack actually said during the negotiations. Rather, most of their testimony concerned instructions provided by Setteducati, their end-goals, and their strategy.

negotiated and agreed to in the past was off the table; the parties were starting from scratch. Tr. 83, 153, 206, 208.

The Union's January 11 information request: Anticipating the resumption of bargaining, on January 11, 2017, Union counsel Annmarie Pinarski sent Cusack an information request. Tr. 495; GC 38. Pinarski testified that she ultimately received most of the documents. Tr. 495. Item number one of this request sought Respondent's Form 990 for 2015. GC 38. Pinarski testified that Respondent eventually produced all of the documents that they had in response to this information request, although the information was provided piecemeal, over the course of time. Tr. 609-610. Pinarski's and Respondent's bargaining notes show that the 2017 contract with DHS, Respondent's only funding source, was not produced until sometime after the June 16, 2017 bargaining session. Tr. 609; GC 58, p. 12; R 17, p. The bargaining notes all reveal that Cusack refused to produce the 2015 Form 990 requested by the Union until the parties started discussing economics.<sup>30</sup> GC 13, 51(a) 58, p. 8; R 17, R 20. The Union objected to this position

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<sup>30</sup> O'Reilly testified that she was the sole note-taker for Respondent. Tr. 877. General Counsel requested Respondent's bargaining notes in a pre-trial subpoena. Tr. 882. Respondent initially produced only typed versions of these notes. Tr. 882. When O'Reilly testified on the sixth day of the hearing, she testified that the notes dated April 3, 2017 are actually the combined notes from the two January 2017 bargaining sessions. Tr. 878-883. O'Reilly also revealed at that time that she had created the typed version of her notes in the summer of 2017. Tr. 880. Respondent counsel Yessin claimed that he thought the typed notes were all Respondent possessed. Tr. 883. Because Respondent had failed to produce the original hand-written notes, as requested by the subpoena, the hearing was postponed, and Respondent was ordered to produce those notes the next morning. Tr. 894. Judge Gardner instructed O'Reilly to assemble the hand-written notes without reviewing them. Tr. 894. Respondent produced the notes as ordered, and O'Reilly resumed her testimony on the seventh day of the hearing. Tr. 944-945. At that time, O'Reilly testified that, contrary to Judge Gardner's instructions, she had reviewed the hand-written notes and compared them to the typed notes. Tr. 945, 989. She said that her review revealed only two discrepancies between the two sets of notes: the typed notes omitted a comment that Cusack was sleeping at one point and a comment that Pinarski was getting heated with Cusack. Tr. 945. O'Reilly also testified that she had discussed her testimony with counsel during the break. Tr. 994.

and Pinarski pressed for production of the Form 990 before economics discussions began. GC 13, 51(a) 58, p. 8; R 17, R 20.

Arbitration: According to Pinarski and Yaeger, Cusack said that Respondent did not want arbitration in the contract. Tr. 83, 499. Pinarski testified that she pointed out that in the previous bargaining sessions, the parties had already agreed to split the cost of arbitration. Tr. 499. Cusack did not respond. Tr. 499.

Union Security and Dues Checkoff: According to Pinarski, Cusack said that Respondent would propose to remove union shop and dues deduction from the contract and the company did not believe in union shop and dues checkoff. Tr. 500. Pinarski testified that Cusack added that since the Union did not have majority support, Respondent would not collect dues for it. Tr. 500. Cusack said that Respondent was not a collection agency for the Union. Tr. 500.

Yaeger testified that Cusack said that the Union did not represent the employees; it just collected dues. Tr. 84. Cusack also said that Respondent would not do the Union's clerical work – it can collect its own dues. Tr. 84.

Pinarski's notes document that Cusack said, "not favorably disposed to dues checkoff." GC 51(a), p. 5. Her notes further document that Cusack said, "We are not a collection agency. We don't want to force people" and "We'll give access to homes to collect dues." GC 51(a), p. 7-8. Barrett's notes show, "We. No going to collect dues. Check off: Article 9 be removed from contract," "No Dues Check Off or Union Shop," and "Will give access to the homes to collect dues." R 20, p. 3-4. Yaeger's notes show, "Raises a whole issue. I don't believe in it and so does mgt. here. Not will [sic] collect dues. We won't do your clerical work. 80% of employees don't support the Union. Come up with something to collect your own dues. Adverse to continuation of checkoff. Remove the art. From contract... Remove Union shop – Should not be required to

pay dues.” GC 13, p. 2. His notes further document, “We’ve got 80% data that employees want out of the Union. We won’t fire employees for not electing to be in the Union. Won’t do your collections for you.” GC 13, p. 2. Yaeger’s notes later show that Cusack said, “Employees don’t want to be in the Union. I’ll negotiate with you until you’re blue in the face.” GC 13, p. 4.

In contrast, Cusack testified that he would never say that Respondent would not collect money for the Union, because “that is unsophisticated language. I would have said we will not check off dues without authorization. That has always been our position.”<sup>31</sup> Tr. 790. Yet Respondent’s bargaining notes document Cusack stating, “NCFL not favorably disposed to any checkoff, not going to be going around. Unconscionable for us to take their dues. We are not going to do their clerical work. NCFL adverse to checkoff and adverse to checkoff in any contract. Remove Article IX, dues check off.” GC 58, p. 9; R 17. Respondent’s notes further document that after a break, Cusack again said, “Not agreeing to Union shop.” GC 58, p. 9; R 17. Respondent’s notes further document that Cusack said Respondent had a good faith doubt that the employees wanted the Union, and that Respondent, “would possibly give limited access to our homes to collect the dues.” GC 58, p. 9; R 17.

Wages: Cusack testified that although he initially stated that he wanted to defer economics until later, that did not happen. Tr. 764. The bargaining notes of Pinarski, Barrett, Yaeger, and Respondent concur that Cusack said he wanted to defer economics.

During this session, Pinarski repeated the Union’s original proposal regarding wages. Tr. 502. Pinarski testified that Cusack said there might need to be a reduction in wages and that the

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<sup>31</sup> In its Answer, Respondent admits that it, “proposed to allow employees a choice as to whether to pay dues to keep their job ... and propos[ed] to eliminate the language unless the union could demonstrate majority status.” GC 1(v), ¶ 26(f). Respondent also denies that there was any initial proposal made. GC 1(v), ¶ 26(f). In its Answer to paragraph 26(g) of the Complaint, Respondent again admits that it proposed eliminating union security from the contract. GC 1(v), ¶ 26(g).

company's financial situation was not good. Tr. 502. He said there had been no increase in funding from the State and costs had gone up. Tr. 502. Pinarski's bargaining notes corroborate her testimony. GC 51(a), p. 11. Pinarski's notes also note, "reduction in wages," "deterioration of our economic position," "only one source of State revenue," and "No increases in terms of wages." GC 51(a), p.12.

Yaeger testified that Cusack said there would be a wage freeze, due to financial problems. Tr. 84. According to Yaeger, Cusack added that if there was a wage reopener, it would be predicated on additional funding from the State. Tr. 84-85. Cusack urged the Union to go to Trenton to lobby for funds. Tr. 84-85. Yaeger's notes document, "Reduction in wages and benefits. Deterioration of our economic situation and remuneration decline from the State. We're in survival mode. Rational, reasonable. Don't expect an increase." GC 13, p. 4.

Barrett's bargaining notes reflect that Cusack said, "Economic[s] are not good here. Not increases from the State in 5 years. Will be looking for reductions in wages and benefits." The notes further document that Cusack said, "Have contract with DDD now. No contracts with ARC. No other sources of revenue. Diminution of wages because of funding." R 20, p. 7.

Respondent's bargaining notes document only that Respondent was deferring wages until the parties discussed economics.<sup>32</sup> GC 1, p.8; R 17 (1/12/17), p. 1.

## **18. January 13, 2017: The Fourth Bargaining Session**

Arbitration: Pinarski testified that Cusack proposed to remove arbitration from the contract and replace it with a provision allowing the Union to go to Bergen County Court to enforce the contract or appeal grievance decisions. Tr. 504. Cusack did not mention costs of

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<sup>32</sup> In its Answer, Respondent admitted that it "proposed a wage freeze until this grant funded non-profit received an increase in funding from the state." GC 1(v), ¶ 26(c).

arbitration as the basis for this proposal. Tr. 608. The Union rejected this proposal because court is costly, due to discovery and attorney fees, which are significant, whereas with arbitration costs are limited to the cost of the arbitrator, because the Union representatives conduct arbitrations. Tr. 607. All of the bargaining notes reflect Cusack's opposition to arbitration, while only Pinarski's notes reflect the proposal to go to court in lieu of arbitration. GC 51(b), p. 3, 5; GC 13, p. 6-7; GC 58, p. 11; R. 17, p. 8; R 20, p. 10.

Union Security and Dues Checkoff: According to Pinarski, Cusack said Respondent wanted to remove union shop and dues deduction from the contract. Tr. 504. Cusack added that if the Union could show majority status, then they might revisit union shop. Tr. 504. Yaeger testified that Cusack discussed eliminating dues deduction. Tr. 85.

Pinarski and Yaeger's bargaining notes corroborate the testimony. GC 13, p. 7; GC 51(b), p. 5. Yaeger's notes document, "Elimination of Dues Check off and Union Shop. There's a good faith doubt of Union majority status. Have in our possession a mandate from the employees to do away with dues checkoff and Union shop. If the Union shows that it is doing good work for the folks, we would consider resurrecting dues checkoff and Union shop in a future contract." GC 13, p.7. Respondent's notes also corroborate Pinarski's testimony: "Union gains majority support, we could resurrect Union check off." GC 58, p. 11; R 17, p. 10.

Wages: Pinarski and Yaeger testified that Cusack stated that there would be a wage freeze and the level of benefits would remain the same. Tr. 86, 504, 643. Pinarski added that Cusack also proposed a wage reopener if funding from the State increased at any point. Tr. 504, 643. All of the bargaining notes, including Respondent's, corroborate Pinarski and Yaeger's testimony. GC 13, p. 6; GC 51(b), p. 2; GC 58, p. 10; R 17, p. 8; R 20, p. 9.

**19. January 19, 2017: The Union Suspends Dues for All Bargaining-Unit Employees**

Union president Carolyn Wade and New Jersey CWA Director Hetty Rosenstein sent a letter dated January 19, 2017 to Setteducati informing him that the Union had decided to suspend the collection of dues from all bargaining-unit employees, including those who did not sign the resignation/dues revocation letter. Tr. 401, 791, 803, 1040-1041, GC 30. The letter informed Setteducati that Respondent's effort to persuade Union members that the Union was only interested in their dues was an intentional effort to damage the relationship between the Union and its members. GC 30. It noted that in bargaining Respondent had been unwilling to agree to any across-the-board wage increases and had in fact proposed no increases. GC 30. The letter is copied to all bargaining-unit members. GC 30. Wade testified that bargaining-unit members retained their membership by virtue of the Union suspending dues payment. Tr. 1041-1042. Cusack testified that after receiving this letter, Respondent continued to deduct dues from the pay of employees who had not signed the resignation/dues revocation letter. Tr. 803.

**20. February 1, 2017: The Fifth Bargaining Session**

Yaeger's bargaining notes reflect that during this session, Cusack said, "[Y]our people have been visiting the homes. Employees are being harassed at night. They will be charged with trespassing and locked up." GC 13, p. 9. The record contained no support for Cusack's assertion.

Wages: Pinarski testified that there was an initial discussion about wages, during which Cusack again said there would be no wage increase. Tr. 501. Yaeger testified that Cusack again also said that there was no money available for wage increases, but there might be if Respondent received more funding. Tr. 176-177, 180. Yaeger's, Barrett's and Respondent's bargaining notes corroborate Yaeger's testimony. GC 13, p. 8; GC 58, p. 4; R 17 (2/1/17), p. 1.

The Union's February 1, 2017 information request: Pinarski presented an information request to Respondent. GC 1(f). The documents sought in this request are primarily financial records. GC 1(t), Exhibit A. Pinarski made this request due to Cusack's assertion that Respondent's financial situation would not allow for any wage increases. Tr. 623, 627, 629. She testified that all of the records listed in Items 1-5, and 8-12 were relevant and necessary, because they would help the Union understand Respondent's financial state, to allow them to effectively bargain the contract. Tr. 513-518, 624. Pinarski also said that if the Union could understand Respondent's bigger financial picture, it possibly could have modified its wage proposal. Tr. 625-626. Budgets for 2016 to the present were specifically necessary for comparison purposes, to see if Respondent was in a worse position at that time than in previous years and if costs had increased. Tr. 624. Barrett's notes further document that Pinarski said, "Show us the financial status so that we can talk to our employees. We need to see what the status is." R 20, p. 14.

Pinarski recalled that Cusack said that most of the requests were irrelevant, but there was no in-depth discussion. Tr. 510-511. Barrett's and Yaeger's bargaining notes corroborate Pinarski's testimony that Cusack asserted that most requests were not relevant, but that Cusack agreed that the Union was entitled to information about longevity bonuses, requested in Item 12. GC 13, p. 8; R 20, p. 13-14. Yaeger's notes also show that Cusack said, "I suppose you're saying that we shouldn't pay the mortgage and give the money to the employees. You would suppose that we turn the lights out. Right?" GC 13, p. 8. Barrett's notes and Respondent's notes also show that Cusack made this comment. GC 58, p. 4; R 17 (2/1/17), p.2; R 20, p.14.

Respondent's bargaining notes show that regarding Item 1, Cusack said he would find out the status of the 2017 budget. GC 58, p. 4; R 17 (2/1/17), p.2. Cusack said he would review Items 2 and 3. GC 58, p. 4; R 17 (2/1/17), p.2. Regarding Item 4, he refused to provide salary

information regarding non-bargaining-unit employees, but he would provide that information for bargaining-unit employees. GC 58, p.4; R 17 (2/1/17), p.2. The notes also show that Cusack asserted that the Union was not entitled to Items 8-11, but it was entitled to Item 12, information regarding longevity bonuses. GC 58, p. 4; R 17 (2/1/17), p.2. Regarding Item 10, information concerning the monthly costs for rents on properties for 2016 to the present, Respondent's notes document, "Union wants to know where the money is going." GC 58, p. 4; R 17 (2/1/17), p.2.

Union Security and Dues Checkoff: Pinarski testified that Cusack again said he wanted to withdraw Union shop from the contract. He suggested that the Union conduct a poll, and if the Union succeeded in showing majority status, they might revisit Union shop. Tr. 510. Pinarski's bargaining notes concur with her testimony. GC 51(c), p. 5. Respondent's bargaining notes, both versions, document that Cusack said, "Let me say again, Not Union Shop, No Union Check Off, No arbitration." GC 58, p. 5; R 17 (2/1/17), p. 4. These bargaining notes also corroborate Pinarski's testimony regarding Union shop. GC 58, p. 5; R 17 (2/1/17), p. 4.

Arbitration: Pinarski testified that she told Cusack she wanted to review Respondent's proposals from August and September 2016. Tr. 511. Cusack replied that nothing that had been said during those bargaining sessions was binding. Tr. 511. Respondent's bargaining notes corroborate Pinarski's testimony regarding her comments about the 2016 proposals and contradict Cusack's. GC 58, p. 4; R17 (2/1/17), p. 3. O'Reilly wrote, "Back in September – NFCL presented Union with written proposals," and "We are in a disadvantage dealing with arbitrators. Arbitration – bring it to court." R17 (2/1/17), p. 3. She next wrote, "Any prior proposals and agreements back in August or September – No arbitration! Put it in pencil is final." R17 (2/1/17), p. 3.

**21. February 2017: Respondent Stops Providing Employees' Addresses to the Union**

Respondent historically sent a monthly list to the Union that included employees' names, addresses, seniority, department, and hire date. ALJD, 12. Tr. 405, 959; GC 33. Ingram testified that she received these lists around the second week of each month. Tr. 405. In February 2017, however, Respondent stopped including addresses on the monthly lists. Tr. 405, 407, 959, 1142-1143; GC 33. Since the Union also was denied access to Respondent's facilities, the lack of addresses on the monthly list severely impacted the Union's ability to reach new members. Due to high turnover, this was a significant portion of the bargaining unit. Forty-nine of the 93 employees on the November monthly list (52%), had been hired in the previous twelve months, and 34 (36.5%) had been hired in six months since the Union was first denied access. GC 33.

O'Reilly testified that Respondent stopped providing employees' addresses to the Union because employees did not want their home addresses given out any longer, and because the contract did not require it. Tr. 959; GC 2, p. 10. She said some employees felt harassed or at least intimidated by the Union visiting their homes. Tr. 959. O'Reilly testified without detail that she received 3 or 4 complaints herself.<sup>33</sup> Tr. 959. Fishman testified that Respondent stopped giving the Union employees' addresses because multiple employees went to human resources and said they were fearful of people coming to their homes. Tr. 1142-1143. Fishman did not receive any complaints directly. Tr. 1142-1143. Notably, Janice Hoyda, the manager of human resources, did not testify about any such employee complaints. Tr. 1165-1169.

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<sup>33</sup> O'Reilly did not name Angeanna Gayle, whose testimony is discussed earlier.

## **22. March 7, 2017: The Sixth Bargaining Session**

The Union's February 1, 2017 information request: Pinarski started by asking for documents responsive to the information request she made the previous bargaining session. Tr. 512. Cusack said, "We have not plead poverty." Tr. 641. He also said, "It's not that we can't pay, it's that we won't pay until you get us some relief from your funding source," and "We won't pay until you get us some relief from your funding source." Tr. 642; GC 51(d), p. 2. Cusack also said the Union should use its best efforts, by increasing the remuneration Respondent received from DHS. Tr. p. 642. Pinarski's notes corroborate her testimony. GC 51(d), p. 1-2. Barrett's bargaining notes also corroborate Pinarski's testimony. In addition, Barrett's notes document that Cusack said, "Not claiming poverty. Funding source frozen from several years." R 20, p. 17.

They went through each item on the information request individually. Tr. 512-520. Pinarski testified that Cusack claimed that Items 1-5 and 8-11 were all irrelevant, but he did not have an objection to providing information regarding unit members' longevity bonuses, sought in Item 12. Tr. 513-518. Respondent did not provide any documents responsive to any of these requests. Tr. 513-518. Pinarski's notes reflect that in response to Item 8, Cusack said, "No, /c we won't foreclose on properties ..." and in response to Item 9, he said, "No – we won't turn lights out to pay 44%." GC 51(d), p. 4-5. Regarding Item 12, Pinarski's notes document Cusack stating, "At some point – we don't have them today." GC 51(d), p. 3. Barrett's notes also document that Cusack said, regarding Item 8: "Not going to let our properties go into foreclosure for your 44 percent increase." R 17, p.17.

At the hearing, Cusack added that there was only one source of income, which is from the State, and there had been no increase of that income. Tr. 791-792. He further stated that it was Respondent's choice as to how to allocate that income and they refused to reallocate assets to

give raises. Tr. 791-792.

Cusack testified Respondent's Form 990 contained all of the information the Union sought in its February 1 information request. Tr. 766; R 21. He said that Respondent had produced the 2015 Form 990, which the Union had specifically requested in its earlier information request, and Respondent's Form 990s from other years were available online. Tr. 766, 773-774, 786-787. Cusack added, however, that the 2016 Form 990 was not yet available online. Tr. 787. In discussion with the ALJ, Respondent's counsel confirmed this. Tr. 787.

In contrast, Fishman testified that the Union was given Respondent's 990s for the years 2014, 2015 and 2016. Tr. 1153-1154. Fishman's testimony was not corroborated by any witness or by Respondent's counsel. Tr. 786-788. The only information the Union sought from 2014 was Respondent's yearly audit. GC 1(t).

Respondent's 2015 Form 990 does not provide the information sought by the Union in its February 1, 2016 request. GC 1(t); GC 21. Requests number 3 through 8 sought exclusively information for the year 2016. GC 1(t) Request 1 sought the yearly budget for 2015, 2016 and 2017, and Request 2 sought the yearly audits for 2014, 2015 and 2016. GC 1(t). Request number 9 sought the amount of longevity bonus issued to each bargaining unit member in 2015 and 2016. GC 1(t). The Form 990 does not provide any of this information.<sup>34</sup> R21.

Respondent's March 7, 2016 proposal: Respondent presented a full draft contract during this session. Tr. 520-521; GC 41. These proposals mirrored Cusack's statements in the previous bargaining sessions. GC 41.

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<sup>34</sup> Nonetheless, the ALJ found that "Respondent did provide 3 years of Form 990s containing the bulk of the financial information which the Union maintained it was seeking, yet the Union acknowledged that it had not reviewed that information, calling into question whether the Union even believed it needed that financial information." ALJD 13.

Arbitration: The March proposal eliminated arbitration. GC 41, p. 5. Instead, it provided that the Union will, “refer any unresolved grievances to the appropriate court in Bergen County New Jersey. The employer will waive discovery and proceed to trial on an immediate basis in order to expedite the matter and contain costs.” GC 41, p. 5. According to Pinarski, Cusack said that arbitration was burdensome and costly. Tr. 522. He did not explain the basis for this assertion. This was the first time Cusack had claimed cost was a factor in Respondent’s proposal to eliminate arbitration. Pinarski pointed out to Cusack that there had not been any arbitrations, and that going to court is more costly than arbitration. Tr. 522.

Union Security and Dues Checkoff: The March proposal eliminated dues checkoff and the union security provision, changing its title to “Dues Check Off/No Union Shop.” GC 41, p. 8. In lieu of dues deduction, Respondent proposed, “The Union will be granted access to [Respondent’s] facilities on payday at reasonable times with reasonable notice for collecting dues from any employees who feel inclined to make payments.” GC 41, p. 8. In lieu of union security, Respondent proposed, “New Concept for Living employees will not be required to join or maintain membership in the Union.” GC41, p. 8. The Union rejected this proposal and reiterated its position that dues checkoff and union shop should remain in the contract. Tr. 523.

Wages: Respondent’s proposed to keep the rates set forth in the expired contract, with a \$.50 raise as provided by the memorandum of agreement, but decrease the base wage rates for day program counselors. GC 2, 3, and 41, p. 27. Under the memorandum of agreement, their base wage rates had been \$9.25 per hour, but the March proposal set forth a base wage rate of \$9.00 per hour. GC 2, 3 and 41, p. 27. Respondent also proposed, “Union will use its best efforts with the State of New Jersey to secure an increase in the remuneration received by the employer. At such time that the Union is successful in these efforts on behalf of the employees, there will

be a ‘wage reopener.’” GC 41, p. 27; Tr. 523.

Remarkably, Respondent eliminated its August 30, 2016 proposal to create a new Section 4 to Article XXIII, which would provide for a merit pay system. GC 41, p. 21-23. The March proposal contains no language regarding merit pay. GC 41, p. 21-23, 27.

**23. March 17, 2017 through May 12, 2017: Complaint Issued and Charges Filed**

The initial Complaint in Case 22-CA-187407 issued on March 17, 2017, alleging that Respondent, by Setteducati, violated Section 8(a)(1) of the Act on or about October 18, 2016, through encouraging and soliciting employee support for the filing of a decertification petition by telling employees that without the Union, Respondent would be able to grant merit wage increases and bonuses. GC 1(c).

The Union filed the charge in Case 22-CA-195819 on March 30, 2017, alleging that Respondent violated Section 8(a)(1) of the Act by providing unlawful assistance and support to its employees about resigning their Union membership and withdrawing their authorizations of Union dues deductions. GC 1(l). The Union filed the charge in Case 22-CA-197088 on April 18, 2017, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by, *inter alia*, engaging bad-faith bargaining through making regressive proposals, failing to provide relevant and necessary economic information requested by the Union, and excluding employee addresses from the monthly list of employees. GC 1(n).

Respondent filed the charge in Case 22-CB-198760 on May 12, 2017. GC 44, alleging that the Union violated Section 8(b)(5) of the Act. The charge was dismissed on April 27, 2018, because the investigation revealed no evidence to support any of the allegations and several of the allegations did not on their face state violations of any Section of the Act. GC 45.

## 24. June 16, 2017: The Seventh Bargaining Session

Respondent presented another full contract proposal during the June bargaining session.

<sup>35</sup> Tr. 533; GC 47.

Arbitration: The June proposal added a single sentence to Step 5 of the grievance procedure: “Employer and Union may opt for arbitration on an ad hock [sic] basis, the cost of which shall be shared equally.” GC 47, p. 5; Tr. 535. Pinarski testified that Cusack explained that this meant that arbitration was available only if the company agreed to it. Tr. 535.

Pinarski testified that Cusack further explained that there would be a permanent arbitrator, and that arbitration would occur the day after the grievance was filed, similar to what happens with Disney. Tr. 608, 609. Cusack added that if the company did not agree to arbitrate a grievance, then the Union would have to go to court. Tr. 608. Cusack did not discuss costs when he explained this proposal.<sup>36</sup> Tr. 608.

Pinarski responded that since all authority to arbitrate still remained with the company, in effect the Union did not have arbitration as an option. Tr. 536.

Union Security and Dues Checkoff: The June proposal also added just one sentence to the end of the dues checkoff section of this article: “If employees opt to pay union dues, they may opt to pay an agency fee as a percent of union dues used for collective bargaining and union representation.” GC 47, p. 8. Pinarski responded that this sentence did not restore dues checkoff and union shop to the contract, and the Union still wanted both. Tr. 536.

All bargaining notes document that Cusack again said that he did not think the Union had

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<sup>35</sup> See also GC 61(a), Respondent’s position statement in Case 22-CA-197088.

<sup>36</sup> In its Answer, Respondent admitted that it proposed “Disney Arbitration.” GC 1(v), ¶ 26(d). It also denied that any initial proposal or tentative agreement was withdrawn. GC 1(v), ¶ 26(d). This denial contradicts all record evidence, including the testimony of Respondent’s witnesses.

majority support, and if the Union agreed to poll employees, Respondent would agree to reopen consideration of Union shop. GC 14, p. 1; GC 51(c), p. 9; R 17 (6/16/17) p. 6; R 20, p. 28.

Wages and the Union's February 1, 2017 information request: In Appendix A, Respondent retained the sentence it added in its March proposal, conditioning a wage reopener on the Union successfully lobbying the State of New Jersey to provide more funds for Respondent. GC 47, p. 27. Here as well, a single sentence was added: "Pay increases will be based on merit." GC 47, p. 27.

According to Pinarski, there was discussion about a merit system, but no details were fleshed out. Tr. 537. She testified that Cusack repeated that there would be no wage increases, "not that the company can't pay; they won't pay." Tr. 537. Barrett's bargaining notes document that Cusack said, "Abundantly clear. We are not taking the position that we can't make increases, but we won't do it. We could burn down [] one of the facilities and pay you the insurance. We are not pleading that we are broke. We won't give 44%. Not that they can't but they won't. Not in their best interest to give 44%. Not economically feasible because the people's representatives have done nothing to get additional remuneration from the State... It is the Union's obligation to go to Trenton." R 17, p. 24-25. Respondent's bargaining notes are similar, and they also note that Cusack said, "We won't shut off electric – asking for utility bills – see how irrelevant this is?" GC 58, p. 12; R 20 (6/17/17), p. 2-3.

At this point, Respondent had not yet given its 2017 DHS contract to the Union. GC 51(e), p. 3; GC 58, p 12; R 20 (6/16/17), p. 2.

In his June 19, 2017 position statement, Cusack wrote, "It is interesting to note that the union has increased its request by 1 dollar per hour for 2017 for a new demand of 57 percent." GC 61(a). There is no evidence to support this assertion. In fact, at the hearing, Cusack only

testified that at some point in either June or July 2017, the Union “might have” increased its wage proposal by \$1.00 per hour. Tr. 752. Pinarski maintains that the Union’s wage proposal did not change, and the bargaining notes corroborate her testimony. Tr. 456-457.

Barrett’s notes show that during that session, Cusack first referred to the Union’s proposal as a 44% increase. R 17, p. 24. Cusack said, “No on Union’s proposal. Not necessary to counter your ridiculous proposal.” Pinarski asked, “Do you think it’s ridiculous for employees here to make \$14.00 per hour?”<sup>37</sup> R. 17, p. 25. Cusack replied, “You are asking for 57.7% more. We won’t give a 57% raise especially to people who won’t try to get remuneration.” R 17, p. 25. Respondent’s notes from the June session document that the Union’s proposal was “\$13 + \$1 per year.” GC 58, p. 12; R 20, (6/16/17) p. 3. Respondent’s notes from the July session document that Cusack referred to the Union’s wage offer as a 57% increase, but there is no reference to a new proposal. GC 58, p. 15; R 20 (7/18/18), p. 1.

## **25. July 18, 2017: The Eighth Bargaining Session**

The July 18 bargaining session started with the Union asking how fee for services would work. Tr. 540, 643. Fishman gave a lengthy explanation of the changes, which in summary were that the company would have to bill the State monthly for the services they provided, rather than retain a yearly contract for a certain amount of funding. Tr. 540. NCFL would be required to document the services being provided. Tr. 540. The effect on Respondent’s income from the State was unknown. Tr. 643-644.

Arbitration: The Union rejected Respondent’s arbitration proposal. Tr. 539.

Union Security and Dues Checkoff: The Union also rejected Respondent’s union shop

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<sup>37</sup> Since the Union’s proposal was \$13.00 per hour in 2016, with a \$1.00 per hour increase on January 1 of 2017, 2018, and 2019, perhaps the \$14.00 was referring to the wage rate that would have been in effect on that date, had the proposal been accepted.

and dues deduction proposal. Pinarski testified that Cusack said that Respondent does not believe in union shop. Tr. 539. Cusack also repeated that if the Union polled employees, Respondent might agree to union shop. Tr. 540.

Wages: Pinarski testified that Cusack again asserted that Respondent was not pleading poverty. Yaeger testified that Cusack again asked the Union to help Respondent get increased funding. Tr. 197. Respondent's bargaining notes document that Cusack repeated that Respondent would not offer wage increases, but he proposed a wage reopener on June 30, 2018. GC 58, p. 15; R 17 (7/18/17), p. 3. The notes also document that Cusack reported that the fee-for-service rates are set for all organizations, and the Union cannot lobby to change them. GC 58, p. 15; R 17 (7/18/17), p. 3.

**26. August 15, 2017: Respondent Distributes a Memorandum to Employees Regarding Union Dues**

On August 15, 2017, Respondent distributed a memorandum to employees entitled "Voluntary Deduction of Union Dues."<sup>38</sup> GC 1 (v), (y). Setteducati began the memorandum by stating that in the previous year, he had received numerous questions from employees about payroll deductions of Union dues. GC 1(v), (y). He told employees that after he notified them in late 2016 that they were not legally required to pay dues over 95 percent of the NCFL, they had chosen not to pay Union dues. GC 1(v), (y). He also wrote that the Union complained that he had coerced employees into not paying dues, which was not true. GC 1(v), (y).

The letter asserted that to prove to the Union that it had not coerced employees to sign the resignation/dues revocation letters it distributed in December 2016, it was offering them the same choice again. GC 1(v), (y). It instructed them how to begin paying Union dues, with

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<sup>38</sup> Respondent admitted to distributing this letter in its Answer and its Motion for Summary Judgment. GC 1(v), (y).

commentary in bold type and underlined: “**No one at NCFL is required to pay Union dues,**” “**Union dues are your money,**” and “**No one should tell you what to do with your money.**”

GC 1(v), (y).

With this letter, Respondent distributed Union authorization cards, rather than its own dues authorization form, which it had been distributing for the previous year. GC 1(v), (y).

Although the Union authorization card is a postcard, and one side of it is addressed to the Union, the memorandum instructed employees to return the completed authorization card to Human Resources if they wanted to pay dues. GC 1(v), (y). This memorandum did not mention Union membership or inform employees that the Union authorization card is also an application for membership. GC 1(v), (y). It did not provide employees assurances that they would not be punished for joining the Union. In fact, the memorandum referred to the card as a “Union Dues Authorization for Payroll Deduction Form.” GC 1(v), (y). In its communication to the Union in September 2017, Respondent wrote that none of the employees had returned an executed Union authorization card. GC 52, 57.

## **27. August 29, 2017: The Ninth Bargaining Session**

During the August bargaining session, the parties reviewed a document O’Reilly created, which purported to summarize the agreements and concessions Respondent had made over the course of bargaining.<sup>39</sup> Tr. 545, 645, 877; GC 50. Pinarski corrected some mistakes she saw, such as the notation that Respondent had agreed to add # 3 to Article X on March 7, 2017, which had already been in the contract. Tr. 546-547. She also pointed out that the Union did not agree

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<sup>39</sup> O’Reilly testified that the list of Union meeting dates on this document is incorrect, because it does not include the two dates in January, but mistakenly includes an April 3, 2017 date that did not take place. Tr. 897-898. The notation regarding an agreement on April 3, 2017 actually refers to an agreement made in January. Tr. 879.

to a dues collection box. Tr. 548.

Pinarski testified that she maintained that the Union kept the same wage proposal from August 2016. Tr. 456-457. She also testified that the Union never increased its wage proposal. Tr. 598. She testified that the Union did not want to make another wage offer until it received a meaningful wage proposal from Respondent, and she asked for Cusack to provide one. Tr. 595. Respondent's bargaining notes show that Pinarski again asked for all of the requested financial information. R 17 (8/29/17), p. 1. Respondent's bargaining notes document that Pinarski said she would not bargain against herself. GC 58, p. 17; R 17 (8/29/17), p. 1. Respondent's notes also document that Cusack said he was sticking with Respondent's most-recent Appendix A proposal. GC 58, p. 17; R 17 (8/29/17), p. 3.

Pinarski testified that Cusack mentioned a letter Respondent had distributed to unit employees regarding dues deduction. Tr. 549. Pinarski had not seen the letter, so she asked for a copy of it, which she received after the bargaining session. Tr. 549-550. Pinarski's notes reflect that Cusack told them that the letter was mailed to each unit employee. GC 51(g), p. 5.

## **28. Respondent's Alleged Bargaining Strategy and Goals**

Cusack, Setteducati and Fishman universally testified that merit pay was the most important item to secure in a final contract. Tr. 721, 1131, 1266, 1273. They all uniformly testified that merit pay was necessary due to the fee-for-service system that was coming, which would change the nature of the business. Tr. 747, 1132. Setteducati added that they needed merit pay, because they needed good employees, who would be diligent and eager to learn. Tr. 1269.

Cusack testified that initially, union security had not been important to Setteducati. Tr. 732. However, Cusack said, after Respondent received the resignation/dues deduction letters at the end of December 2016, Setteducati decided that the Union needed to prove that it represented

a majority of the bargaining unit in order for Respondent to agree to union security and dues deduction.<sup>40</sup> Tr. 732, 745, 754, 790. Cusack repeatedly testified that Respondent would only agree to union security and dues checkoff if the Union provided proof of majority status. Tr. 732, 745, 746, 754, 790. Cusack again changed course and testified that if the Union had agreed to merit pay, Respondent would have agreed to the Union's other outstanding positions. Tr. 795. Cusack also testified that if the Union had agreed to merit pay, he would have settled the contract, "with the caveat that they would need additional funds from the state, and we requested their help and they never assisted us." Tr. 762-763.

Contradicting all of Cusack's testimony, Setteducati testified that he did not agree to keep union security, "the forced dues clause of the contract," because if he had, the members would never have ratified the contract. Tr. 1273. He said it was very clear to him that the employees did not want the Union. Tr. 1273. Yet Setteducati also said that dues checkoff was a neutral issue for him, and he held it back in bargaining as a last chip to give in negotiations in exchange for merit pay. Tr. 1273.

Regarding arbitration, Cusack testified that Setteducati ultimately was amenable to arbitration with split costs. Tr. 755. Setteducati only testified that he wanted to change arbitration, because he understood it could be very expensive and take a long time. Tr. 1270.

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<sup>40</sup> Cusack testified that he is general counsel for mycheckmychoice.org and Protect My Check, Inc. Tr. 805-815. The mission of both organizations is to assist state and local governments to pass right-to-work legislation. Tr. 805-815. Respondent counsel Yessin is president of mycheckmychoice.org and chairman of Protect My Check, Inc. Tr. 805, 808. Mycheckmychoice.org has worked in Kentucky and New Mexico. Tr. 807. Both organizations were incorporated in September 2014. Tr. 807, 908. Cusack is also the registered agent, and Yessin is president, for an organization called Employee Advocates. Tr. 810. Cusack provided vague testimony about the type of work this organization performs. He said they do business consulting on labor matters and some matters other than labor. Tr. 811-812.

**29. September 7, 2017: Respondent Notifies Union it Will Conduct an “Election.”**

Cusack notified the Union and Pinarski by email on September 7, 2017 that Respondent would conduct an election itself to determine if the majority of the bargaining-unit members supported the Union. GC 52. Cusack asserted that Respondent’s good faith doubt of majority status was based on the following four factors: 1) no unit members had attended most bargaining sessions; 2) since the end of 2016, when employees learned they were no longer required to pay dues to remain employed, approximately 98% of the staff ceased paying or refused to pay union dues; 3) not a single employee had indicated that they wanted to pay Union dues in the three weeks since Respondent sent them dues checkoff cards; and 4) last year, an employee said that roughly half of the employees signed a petition to decertify the Union. GC 52.

Cusack wrote that the election would follow NLRB requirements. GC 52. He announced that the election would take place in the conference room of Respondent’s Rochelle Park facility on September 21, 2017. GC 52. Cusack announced that the election times would be the same as those agreed to by the parties for the decertification election the previous year. GC 52. He wrote that a pre-election conference would take place the day before the election as well. GC 52.

Cusack noted that Respondent had engaged a retired judge to conduct the election and count the votes, to ensure that the process was “just and equitable, just as if an NLRB field agent were conducting it.” GC 52. Cusack offered the Union the opportunity to “observe” the process, “just as they would in an NLRB conducted election.” GC 52.

The Union did not participate in this election. Tr. 553-554, 653. The Union’s position was that they were still the majority representative and due to Respondent’s continued unfair labor practices, the atmosphere was tainted, and the poll was coercive. Tr. 554, 620-621.

**30. September 8, 2017: The Union Files the Charge in Case 22-CA-205843**

The charge in Case 22-CA-205843 alleges that Respondent violated Section 8(a)(1) and (5) by: 1) distributing the August 15, 2017 memorandum; 2) offering to “revisit” its regressive Union shop and dues checkoff proposals if the Union agreed to poll employees; and 3) announcing to the Union that it would hold an election on September 21, 2017 to determine whether it had majority support. GC 1(p).

**31. September 8 and 11, 2017: Respondent Sends the Union its List of Employees Eligible to Vote in the Election**

By email on September 8, O’Reilly sent the Union its “Excelsior List” of employees that Respondent determined were eligible to vote in its September 21 election. GC 1(y). This list was not emailed to the Union’s counsel until September 11. GC 53. There is no record evidence establishing how Respondent determined who was eligible to vote in this election.

**32. September 13, 2017: Respondent Holds Mandatory Meeting for Employees Regarding the Union<sup>41</sup>**

Baldicanas was directed by his manager, Levander Williams, to attend a mandatory meeting in the cafeteria of Respondent’s Rochelle Park office on September 13, 2017. Tr. 257. About 30 other staff attended the meeting, including supervisors and managers. Tr. 258.

Baldicanas said that Setteducati started the meeting by talking about new uniforms. Tr. 258. Setteducati then announced that, because staff had been complaining, he had hired a new cleaning service at the day program, which would clean the facility every day after hours. Tr. 258. Setteducati then introduced Aria Green, who conducted a PowerPoint presentation concerning NLRB rules and guidelines regarding Union dues. Tr. 259. The entire meeting lasted

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<sup>41</sup> The ALJ concluded that none of the statements made during this meeting violated the Act, without making any findings of fact regarding the statements themselves. ALJD 11.

about an hour. Tr. 261.

The recording: Baldicanas recorded the meeting. Tr. 259- 268; GC 18, 19. Setteducati announced that Respondent hired a cleaning service for the day program, which would perform the afternoon day cleaning. Setteducati acknowledged that the afternoon cleaning was a job duty included in the day program staff's job description. GC 19, p. 4. He said that he knew that doing the cleaning had long been a source of contention for the staff, and he knew they were happy to have the work taken away from them. GC 19, p. 4.

Aria Green introduced himself as a consultant who was "brought in to help with the educational process of the National Labor Relations Law." GC 19, p. 5. He passed out a sign-in sheet and a copy of the Basic Guide to the National Labor Relations Act. GC 19, p. 5.

Green then told employees that under the law, Respondent was required to send everyone's contact information to the Union. GC 19, p. 6, 7. He discussed Respondent's contempt for unsolicited harassing visits to employees' homes, which he called "despicable." GC 19, p. 6. He offered employees a non-solicitation form to complete, which would keep the Union from contacting them. GC 19, p. 7.

Green said that once a contract is in place, none of the conditions of employment can change. GC 19, p. 25. Green told the employees that even with a Union, Respondent had the right to lay off or discharge employees for genuine reasons, and a Union cannot protect bad employees. GC 19, p. 27-28. He said that if the company took a downturn and laid off employees, the Union could not help. GC 19, p. 27. Green told them that when a union goes into business, the company's operating costs usually go up, between 5 and 15 percent, and if that happens, the company "may look at going out of business." GC 19, p. 28-29.

Green told them that as the exclusive bargaining representative, the Union had control

over everything in the workplace – benefits, wages, leave time, sick time, health benefits. GC 19, p. 33. He said that a union might bargain away their benefits and wages in order to get a union security and dues checkoff clause. GC 19, p. 34-35. He told them that it would not be in the Union’s interest to sign a contract without a guarantee they will get paid dues. GC 19, p. 6.

Green instructed employees to pick up a letter from Setteducati that was available on a table, which they also received with their paychecks. GC 19, p. 45-46. Setteducati then intervened and pointed out that many of the current employees had never paid Union dues, because they had been hired at the end of 2016. GC 19, p. 46-47. He said, “All but three employees at NCFL revoked their union membership and thus revoked paying their union dues.” GC 19, p. 47.

The handouts: Baldicanas testified that at the meeting, he received three documents in addition to the Basic Guide to the National Labor Relations Act. Tr. 271; GC 20. One handout is a one-page flyer entitled, “FACT OF THE DAY.” GC 20. The first part of this flyer informs employees that Board rules required Respondent to provide the names, addresses and phone numbers of all voters to the Union. GC 20. The flyer notes, “[W]e are bound to follow the NLRB rules even though the election will be conducted by independent arbitrators and election officials.” GC 20. The flyer then provides tips for handling Union representatives who may call or visit them before the election, by telling them that they are not required to answer the phone, text, or speak to them. GC 20. It further instructs employees to fill out a “No Solicitation” form if they feel threatened or harassed by the Union or report the conduct to the NLRB or “the authorities.” GC 20. Baldicanas testified that this flyer was also posted at the River Vale group home. Tr. 320.

Green asked employees to fill out a document entitled “National Labor Relations Act

Training Employee Evaluation.” GC 20. Employees were asked to list three things they learned during the presentation and sign their names. GC 20.

A September 12, 2017 letter from Setteducati to staff was distributed at this meeting. GC 20. In the letter, Setteducati noted the “favorable compensation adjustments” he had given to non-unit workers, and then he wondered what it would be like if they did not have a union, so they could work together to negotiate wages that are fair and equitable. GC 20. Setteducati noted that Respondent had asked the Union to help secure more funding, but “they have never shown an interest in helping us, nor have they made any attempts that we are aware of, or even shown us any results.” GC 20. He wrote, “over the last 10 years, your union representatives have only gotten you a 50 cent per hour raise over all that time – that’s a whopping 5 pennies per year. Compare that to what this same union has done for federal and state workers, and I believe you would be rightfully outraged.” GC 20.

### **33. Respondent’s Pre-Election Propaganda and Notices of Election**

Baldicanas identified two flyers that were kept on the TV stand in the living room at the River Vale group home at least a week before the September 21 election. Tr. 277; GC 21, pp. 2-

3. One flyer, entitled “News Flash,” told employees:

If people paid dues to stop “disciplines or discharges” they didn’t get their money’s worth from the Union. In the 22 years that CWA has been at NCFL collecting your dues, not one discharge or termination was ever reversed... and CWA signed one contract after another giving management the “*sole and exclusive right*” to “*suspend, demote, discharge*” employees. #EmptyPromises. GC 21.

Baldicanas also testified that a “Notice of Secret Ballot Election” was posted in the living room at three group homes for at least a week before the September 21 election. Tr. 276, 277; GC 21, 22. The notice included the date, time and location of the election and showed a sample ballot. GC 21, 22.

**34. September 15 and 18, 2017: Communication Between Respondent and Union Regarding the Poll**

Wade and Pinarski sent Cusack a letter on September 15, informing him that the poll Respondent intended to conduct was unlawful under *Strucknes Constr. Co.*, 165 NLRB 1062 (1967). Tr. p. 55; GC 54. They pointed to the Complaint in Case 22-CA-187407 that had issued and the open unfair labor practice investigation regarding Respondent's unlawful solicitation of the resignation/dues revocation cards. GC 54. Wade and Pinarski asserted that Respondent's poll, conducted in the guise of an election, was yet another unlawful and coercive act intended to intimidate employees and undermine the Union's position as their collective-bargaining representative. GC 54.

In a September 18 letter to Wade and Pinarski, Cusack wrote:

- ***You have demanded that we force NCFL employees to pay you or get fired;***
- ***You refuse to let them vote in an NLRB election and then *complain when they are given the opportunity to vote in an independent poll, so that you can keep them from voting to leave you...****
- ***When your forced dues clause expired, they fled; and***
- ***We will conduct a poll and we – unlike you – will honor the employees' wishes.***

GC 55. He also wrote, "If you had any self-awareness, or objectivity, let alone the *slightest measure of concern for wasting your members' hard-earned money on a fool's errand like trying to force people who clearly have no use for you to give you their money and their fealty when they clearly feel it is undeserved, you would stop this nonsense and claim disinterest.* GC 55.

**35. September 19, 2017: Respondent Notifies the Union of "Pre-Election Conference"**

By email on September 19, O'Reilly notified the Union that a pre-election conference would be held at 6:30 a.m. the next day, at the election location. The email attached an NLRB

Designation of Observer(s) form and instructed the Union that any observers were required to attend the pre-election conference. GC 1(y).

**36. September 20, 2017: Setteducati Emails Bargaining-Unit Employees About the Election and Attaches Cusack's September 18 Letter to Wade and Pinarski**

The evening before Respondent's "election," Setteducati sent an email addressed to "Staff." Tr. 282-283, 316-318.; GC 22. The email starts by Setteducati stating that the Union distributed "yet another inaccurate and misleading flyer."<sup>42</sup> That has forced me to respond in order to protect your right to vote and have your voice heard in tomorrow's election." GC 55. Setteducati listed, in bullet-points, statements he asked employees to consider before voting. GC 22. He asserted the following statements:

- Tomorrow's vote is absolutely **legal**, and backed up by the **United States Supreme Court**;
- The union blocked the NLRB vote last year, taking away your right to choose;
- **The union does not want you to vote**;
- Many long-time employees have expressed their dis-satisfaction with the union, stating that the union was totally absent in all the time that they had been with NCFL;
- The union has cancelled contract negotiations, and has recently refused to set future negotiating dates;
- The union would like NCFL to fire you if you don't want to pay union dues;
- **The union has gotten you a total of 50 cents/hour raise over the last 10 years – That's 5 pennies per year for the last 10 years!**

GC 22. Setteducati attached to his email Cusack's September 18 response to Wade and Pinarski, but he did not attach Wade and Pinarski's email to Cusack. Tr. 282-283, 316-318; GC 22.

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<sup>42</sup> There is no record evidence regarding this alleged flyer.

Baldicanas testified that his manager, Levander Williams, handed him this letter and Cusack's September 18 response. Tr. 282-283.<sup>43</sup>

### **37. September 21, 2017: Respondent Holds its Poll**

Respondent's "election" was held in the conference room of its Rochelle Park headquarters on September 21, 2017, from 7:00 a.m. to 10:30 a.m. and from 2:00 pm to 5:30 p.m. Respondent asserts that the election was conducted by Judge Scancarella. Tr. 798-799. Cusack testified that Judge Scancarella directed the setting up of the voting room, to "replicate in exactly the same way the Board conducts an election," and he "effectively replicated an NLRB-like setting."<sup>44</sup> Tr 798-799. Cusack testified that Judge Scancarella had the NLRB manual as a guide during the election. Tr. 799.

In contrast, Judge Scancarella testified that when he showed up for the election, the room was already set up. Tr. 846. He said the "pre-election conference" the day before the election was just a meeting with Setteducati, and at some point that day or the next morning, he and Setteducati also met with Cusack. Tr. 853. Judge Scancarella testified that when he met with Setteducati and Cusack, they told him what he was supposed to do and when he was supposed to be there. Tr. 854. This was Judge Scancarella's first NLRB-like election. Tr. 854.

Judge Scancarella testified that he and Lorna Williamson, Respondent's observer, were in the polling room during the entire election. Tr. 835. Judge Scancarella identified the ballot sitting on the same side of the conference table, about 18 inches from the ballot box. Tr. 835; R 4. He testified that he and Williamson sat on the opposite side of the table. Tr. 835; R4, R16. He

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<sup>43</sup> The ALJ made no findings of fact regarding the communication between parties or Respondent's communication with employees regarding the poll other than Respondent's September 7 letter to the Union. ALJD 7, 13-14.

<sup>44</sup> Judge Scancarella and Cusack attended law school together. Tr. 870.

testified that Williamson greeted voters as they entered the room, voters walked around the table, took a ballot, walked to the back, marked the ballot, and placed the ballot on the ballot box.<sup>45</sup> Tr. 834, 835, 836, 838-839, 846, 848. Judge Scancarella testified that Williamson marked the person's name on the official list of eligible voters, and he marked the name on his own unofficial list, which he kept in his briefcase. Tr. 840, 869, 870. He testified that at one point, the ballot box was overflowing, so ballots had to be refolded and stuffed back down into the box.<sup>46</sup> Tr. 843, 864-865.

Bryan Baldicanas testified that when he voted, sometime after 3:00 p.m., Williamson and another man in a suit were seated at the table. Tr. 279. Baldicanas testified that the ballots were small white sheets of paper without any words except for "Yes" or "No" boxes. Tr. 280, 305. He said these ballots were laying on the conference table next to the ballot box. Tr. 280, 302. Williamson told Baldicanas to check "Yes" to keep the Union and "No" to decertify. Tr. 279. Baldicanas identified the white ballots as the pile of small sheets directly next to the voting box in R 4. Tr. 302. O'Reilly testified that she did not know what the white papers were near the voting box. Tr. 970. Other employee witnesses were not asked to identify these papers.

Baldicanas testified that the other pile of ballots, to the left of the pile of white sheets, were copies of the sample ballots that were posted in the residence. Tr. 304. O'Reilly and ShellyAnn Burke identified these documents as the ballots. Tr. 969, 1182. Employee witnesses

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<sup>45</sup> Judge Scancarella testified that the ballot that was handed out to each individual voter when they entered the voting area. Tr. 832. However, his later testimony, as well as the layout of the room, with the ballots in a pile across the table from him and Williamson, show that the voters actually picked up their own ballots. Tara Earl also testified that she picked up the ballot from the conference table. Tr. 1309..

<sup>46</sup> Respondent asked Lorna Williamson very few questions about the election. In response to leading questions, she pointed out the voting booth in a picture and testified that of the voters used the booth. Tr. 701.

Tara Earl and Tracey Ogletree were asked to identify the same pile as ballots, but they were unable to do so credibly.<sup>47</sup> Tr. 1308, 1336. Pilar Smith testified that she could not remember how voting took place. Tr. 1353.

Baldicanas testified that when he voted, the room was not set up in the same way as depicted in R4. Tr. 302. Baldicanas did not notice a place to mark the ballot privately, so he marked the ballot on the table, behind his hand. Tr. 280, 306. He thought that the white box at the end of the conference table was simply a box; he did not understand that it was a booth for voting. Tr. 308.

Employee witness testimony does not support a finding that Judge Scancarella remained in the voting room during all voting hours. Burke testified that the only person in the room when she voted was Lorna. Tr. 1183. Tracey Ogletree was shown a picture of Judge Scancarella and she initially said she did not recognize him. Tr. 1336-1337. Respondent counsel later asked if he was present during the election and she said, “yes.” Tr. 1365. Similarly, Tara Earl initially testified that only Lorna was present in the voting room when she voted. Tr. 1310. Respondent counsel then asked her if there was a gentleman in the room as well, and she responded, “Oh yes, there was a judge.” Tr. 1310. On direct examination employee Angieanna Gayle testified that a judge and a secretary were in the voting room with her. Tr. 1320. On cross-examination, Gayle then said that there were two judges in the room, but then she changed her testimony again and said the only person there was the secretary from the main office. Tr. 1327. On re-direct, Respondent counsel showed Gayle a picture of Judge Scancarella sitting in the voting room (R 16, p. 3), and asked if he was in the room when she voted. Tr. 1329. She said, “yes.” Tr. 1329.

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<sup>47</sup> Tara Earl said, “I’m guess the stack is the voting paper. I’m guessing the booth.” Tr. 1308. Tracey Ogletree said, “I guess, not sure.” Tr. 1336.

Andre Williams, the employee who filed the decertification petition, did not remember who was in the voting room. Tr. 1211.

Cusack and O'Reilly were at the voting area before polls opened in the morning. Tr. 968 Between 6:00 and 6:30 a.m., O'Reilly took pictures of the voting room and of the posters hanging outside the room. Tr. 965-966. She testified that a "No Electioneering" sign was posted by the front door." Tr. 1973. In contrast, Williamson did not recall multiple copies of the "Polling Place" sign posted in the office, and she did not remember seeing any "No Electioneering" signs posted. Tr. 702. Scancarella also did not see any "No Electioneering" signs. Tr. 849. Most other employee witnesses who voted were not asked if they saw the signs.

Scancarella testified that he and Williamson counted the ballots. Tr. 861. He did not remember who opened the box or took the ballots out of the box. Tr. 856-857. He does not remember O'Reilly being present in the room for the count, and he is unsure if Cusack was present. Tr. 855. Cusack testified that he attended the count. Tr. 800. O'Reilly testified that Judge Scancarella, Williamson, Fishman, Cusack and Setteducati attended the count. Tr. 977. Cusack and O'Reilly testified that Judge Scancarella did the count. Tr. 800, 973.

Judge Scancarella testified that although he signed the Tally of Ballots, he did not fill it out. Tr. 859, 860; GC 56. In contrast, O'Reilly also said that the judge completed the Tally of Ballots himself and signed it that night. Tr. 973-978. Cusack did not testify about who completed the form. Neither Fishman nor Setteducati provided any testimony about the election.

### **38. September 24, 2017: Scancarella Notifies the Union of the Election Results**

By email on September 24, Judge Scancarella sent the Union an email notifying it of the results of the election and instructing the Union that any objections to the election needed to be filed with him by September 28, 2017. GC 56. Scancarella attached the Tally of Ballots to the

email. GC 56. Although Scancarella sent the email, he did not draft it. Tr. 854. He recalls that either counsel or someone at NCFL drafted it. Tr. 854.

### **39. October 5, 2017: Respondent Withdraws Recognition**

Respondent withdrew recognition on October 5, 2017, by letter from Cusack. ALJD 7-8; Tr. 796-797. GC 57. In the letter, Cusack asserted that Respondent had good faith doubt of the Union's majority status as early as last year, when the decertification petition was filed. ALJD 7-8; GC 57. Cusack noted that since then, 95 percent of the members left the Union, and after Respondent sent out a voluntary dues checkoff card to employees in August, not a single signed card was returned to Respondent. ALJD 7-8; GC 57. Cusack asserted that further evidence of good faith doubt was the Union's inability to get bargaining-unit members to attend bargaining sessions. ALJD 7-8; GC 57. Cusack asserted that the decision to withdraw recognition was based on the results of the election and other "ample additional objective evidence gathered." ALJD 7-8; GC 57.

## **V. CREDIBILITY**

The ALJ's credibility findings do not merit deference by the Board. The ALJ's assertion that his factual findings were based on his observation of witnesses' demeanor is contradicted by the factual findings themselves: in most cases the ALJ made conclusions, without identifying the witnesses or documentary evidence that formed the basis of those conclusions. The ALJ also ignored or misstated much of the relevant record evidence. It is notable that most of the facts in this case are un rebutted and corroborated, which puts in question the need for overall credibility assessments of the witnesses. Therefore, since the ALJ did not rely on his credibility resolutions and they were unnecessary, the ALJ's credibility resolutions served no purpose.

The Board will defer to credibility resolutions that are based primarily on witnesses'

demeanor, unless a preponderance of the evidence shows they are incorrect. *El Rancho Market*, 235 NLRB 468, 470 (1978). However, the Board has found where, as here, the ALJ ignored, misstated, or confused much of the relevant evidence and testimony in a case, the Board will examine the record *de novo* and “make, where appropriate, credibility findings that comport with the record evidence as a whole and with the inferences fairly drawn therefrom.” *El Rancho Market*, 235 NLRB at 470.

Additionally, many of the judge’s credibility findings are contradictory on their face and unclear, and they ignore witnesses’ un rebutted and corroborated testimony and other witnesses’ contradictory testimony. It is well-settled that “demeanor-based credibility findings are not dispositive where the testimony is inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole.” *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 634 (2011), *enfd.* 498 Fed.Appx. 45 (D.C. Cir. 2021) citing *E.S. Sutton Realty*, 336 NLRB 405, 407, n. 9 (2001); *Humes Electric, Inc.*, 263 NLRB 1238 (1982); *El Rancho Market*, 235 NLRB at 470.

The ALJ found Bryan Baldicanas to be “less than credible,” while also finding that Baldicanas did not make any intentionally false statements. ALJD 8. The ALJD did not clarify, at any point in the decision, which of Baldicanas’ statements he believed to be questionable or unintentionally false. Moreover, much of Baldicanas’ testimony was un rebutted or corroborated. For example, the ALJ made findings regarding Setteducati’s statements during his first meeting with employees at the River Vale group home based on Baldicanas’ un rebutted testimony, without discrediting Baldicanas on any point. ALJD 4-5. Baldicanas’ testimony regarding Setteducati’s second meeting that day is corroborated by Martin, Setteducati, and the recording that Baldicanas took of that meeting. Additionally, although the ALJ did not make any findings

regarding statements made during the September 17, 2017 meeting, Baldicanas' testimony regarding that meeting was corroborated by the recording and unrebutted.

Similarly, the ALJ found Robert Yeager to be "less than credible," because he was defensive and seemed evasive, yet the Decision does not reveal when, if ever, the ALJ declined to rely on Yeager's testimony. ALJD 8. In fact, the ALJ did not make many factual findings regarding the issues about which Yeager testified: his visits to Respondents' facilities and members' homes in the fall of 2016 and proposals and statements made during bargaining, most of which were either unrebutted or corroborated by other testimony and documentary evidence. For example, Yeager's testimony regarding proposals made by the parties in the fall of 2016 is unrebutted and corroborated by Donna Ingram's testimony and bargaining notes. Yeager's testimony regarding bargaining beginning in January 2017 is corroborated bargaining notes and by Annmarie Pinarski and Ruth Barrett, whom the ALJ found to be "mostly credible."

The ALJ found that Wade, Barrett, Martin and Pinarski were "mostly credible," which implies something less than fully credible, without defining the term or explaining why they eluded full credibility. Similarly, the ALJ also found Fishman, Hoyda and O'Reilly to have "testified credibly," stating only that they struck him as straightforward. The Board has found that a general reference to demeanor does not indicate that credibility findings were based on this factor. *El Rancho Market*, 235 NLRB at 470; *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB at 635.

Much of Fishman's testimony was contradicted by others. For example, Fishman's testimony that Respondent did not make any proposals regarding arbitration in fall 2016 is contradicted by all of the testimonial and documentary evidence. Tr. 1135. Fishman contradicted himself when testifying about allowing Ingram access to Respondent's facilities before May

2016. His testimony that Respondent gave the Union 3 years of Form 990s was even contradicted by Respondent's counsel.

O'Reilly's testimony regarding bargaining is inherently incredible, because she compared two sets of bargaining notes during a break in the hearing and discussed them with counsel, defying the ALJ's direction not to.

The ALJ's finding that Setteducati was straightforward in answering questions without regard for any particular agenda is indefensible. ALJD 8. The overwhelming evidence in this case, including his unrebutted statements regarding the Union, shows that Setteducati had a particular agenda, which was to get rid of the Union. The ALJ found that Setteducati was clear and unevasive in his testimony. ALJD 8. His testimony regarding his statements during the second meeting with River Vale employees on October 18, 2016 was given after he listened to Baldicanas' testimony and the recording of his meeting. Notably, Setteducati was not asked about his first meeting with employees that day. His testimony that he switched counsel because Corliss told him he would not be able to secure merit pay is also unbelievable, because the Union asked for further discussion on the issue.

The ALJ's finding that Cusack was credible in testifying about his role in bargaining his candor regarding motivations for Respondent's bargaining positions consistently rang true is erroneous. ALJD 8. In fact, Setteducati, Cusack and Fishman's testimony regarding Respondent's bargaining goals is internally contradictory and it is also contradicted by Respondent's bargaining proposals, rendering their testimony implausible. Especially glaring is their assertion that Respondent's highest priority was to secure merit pay in the final contract, when they withdrew the initial merit pay proposal made in the fall of 2016 and insisted on a wage freeze. Much of Cusack's other testimony was contradicted by documentary evidence, such

as his assertion that the Union raised its wage proposal, and that the Union cancelled bargaining three times.<sup>48</sup> His testimony that Scancarella set up the room for the September 21 poll was contradicted by Scancarella, who said that it was set up by Respondent. Moreover, most of Cusack's his testimony was in response to leading questions. ALJD 8; Tr. 744.

The ALJ's finding that Cusack and O'Reilly were "very credible" in their description of the poll set-up and corroborated by the individual employee witnesses' testimony, which was "mostly uncontradicted" and consistent, flies in the face of their actual testimony, discussed above, which is full of contradictions. ALJD 8.

For the above reasons and many, the ALJ's credibility determinations based on demeanor should be examined *do novo* and overturned. The Board has said an ALJ "cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word, 'demeanor.'" *Permaneer Corp.*, 214 NLRB 367, 369 (1974).

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<sup>48</sup> The ALJ's finding that the Union cancelled some bargaining sessions is not supported by credible evidence, which show that the Union cancelled just one session, for good cause. ALJD 6. Pinarski cancelled the April 3, 2017 session due to a death in her family, and she did not remember cancelling any other session. Tr. 546, 599; GC 46. Cusack testified that the Union cancelled three bargaining sessions, but he did specify dates. Tr. 765. Cusack also said that, at the end of each session, the Union refused to set a date for the next session. Tr. 793. The parties' bargaining notes contradict this statement. Cusack also said, "They'd get back to me a month later with a date a month after that." Tr. 794. Since negotiation sessions took place monthly, that statement is clearly incorrect. Finally, Cusack testified that the Union's failure to accept his April 3 proposal to negotiate every Monday and Wednesday at 10:00 a.m. at the Respondent's facility was evidence of their lack of interest in bargaining. Tr. 793. Given the number of people involved, such a schedule was impossible. Tr.600-601. Moreover, Cusack never again suggested such a rigorous schedule.

## VI. ARGUMENT

### A. RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY ENGAGING IN OVERALL BAD-FAITH BARGAINING THAT WAS DESIGNED TO THWART THE COLLECTIVE-BARGAINING PROCESS AND ELIMINATE THE UNION AS ITS EMPLOYEES' COLLECTIVE-BARGAINING REPRESENTATIVE

The duty to bargain in good faith under Section 8(d) of the Act requires the parties to negotiate with a “sincere purpose to find a basis of agreement.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960) The employer is required to make “some reasonable effort in some direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all.” *Id.* citing *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). “[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” *Hardesty Co., Inc. d/b/a Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965).

In determining whether a party has engaged in bad-faith bargaining, the Board looks at the totality of the party’s conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB at 1603. The Board will look at several factors, including the nature of the bargaining demands, unilateral changes, withdrawal of already-agreed-upon provisions or previous proposals without sufficient explanation, failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid-Continent Concrete*, 336 NLRB at 261; *Atlanta Hilton & Tower*, 271 NLRB at 1602. Refusals to budge from an initial bargaining

position, refusals to offer genuine explanations for bargaining proposals, and refusals to make any efforts at compromise are all components of bad-faith bargaining. *Mid-Continent Concrete*, 336 NLRB at 260 citing *Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992). Avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, an employer will violate the Act when its conduct, in its entirety, reflects an intention to avoid reaching an agreement. *Regency Service Carts, Inc.*, 345 NLRB 671, 671–672 (2005) citing *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Additionally, “an inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract.” *PSO*, 334 NLRB at 487-488 citing *A-1 King Size Sandwiches*, 265 NLRB 850, 859-861 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); *South Carolina Baptist Ministries*, 310 NLRB 156, 157 (1993).

**1. Respondent Violated Section 8(a)(1) of the Act by Encouraging and Soliciting Employee Support for the Filing of the Decertification Petition.**

The ALJ erred in failing to conclude that on October 18, 2018, just two days before the decertification petition was filed, Setteducati met with employees at the River Vale group home to encourage them to file a decertification petition, making statements that far surpassed the line of providing lawful ministerial aid.

An employer violates Section 8(a)(1) of the Act by, “actively soliciting, encouraging, promoting or providing assistance in the initiation, signing, or filing of an employee petition to decertify the bargaining representative.” *Mickey’s Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007); *Central Washington Health Services Assoc. d/b/a Central Washington Hospital*, 279

NLRB 60, 64 (1986), *affd.* 815 F.2d 1493 (9th Cir. 1987); *Placke Toyota, Inc.*, 215 NLRB 395 (1974). In determining whether an employer's assistance is unlawful, the appropriate inquiry is whether the Respondent's conduct constitutes more than ministerial aid. *Times-Herald, Inc.*, 253 NLRB 524 (1980). Other than to provide general information about the process in response to employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it. *Harding Glass Co., Inc.*, 316 NLRB 985, 991 (1995), *enfd.* in part 80 F.3d 7 (1st Cir. 1996) citing *Lee Lumber & Building Material Corp.*, 306 NLRB 408 (1992), *affd.* in rel. part 117 F.3d 1454 (D.C Cir. 1997).

It is clear that on October 18, 2016, just two days before the decertification petition was filed, Setteducati actively encouraged employees at the River Vale group home to sign a decertification petition. Setteducati's statements are undisputed. Setteducati's repeated reminder throughout the meeting that employees had just one week to file a decertification petition, a misstatement of Board law, created a false urgency and thus forced employees to make a quick choice to sign the petition. He admittedly blamed the Union for the long-expired contract and for only getting employees a 50-cent raise over the previous 8-10 years, completely ignoring Respondent's equal responsibility for both circumstances. At the same time, Setteducati blamed the Union for failing to secure reinstatement of the 50 people Respondent had terminated, implying that the Union was responsible for their terminations. The Board has held that statements casting blame on the Union in the context of a decertification effort, "tend to coerce employees into withdrawing support for the Union, particularly where the parties are engaged in contract negotiations over a wage increase." *Kentucky Fried Chicken, Caribbean Holdings, Inc.*, 341 NLRB 69, 78 (2004).

By telling employees that without the Union he would be able to give merit raises, which

the Union would not do, he simultaneously blamed the Union the Union for employees' failure to get them raises, while also implying that without the Union they would be forthcoming. Implicit promises of benefit, meant to discourage employees support for the Union, are unlawful. *New England Confectionary Co.*, 356 NLRB 432, 439 (2010); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-210 (1964).

Throughout the meeting, while solely blaming the Union for shared mistakes and for failing to protect the employees Respondent had terminated, Setteducati kept repeating, "What have they done for you?" Here, Setteducati conveyed to employees that their support for the Union is futile. By referring to the Union's past conduct at the same time he is asking employees to sign the decertification petition, he was implying that the Union would be just as ineffective if the decertification petition did not succeed. *See Kentucky Fried Chicken*, 341 NLRB at 78.

The ALJ relied on irrelevant facts in finding that Respondent had not provided unlawful assistance. ALJD 9. Marshall's efforts to secure signatures in support of the decertification petition does not negate Setteducati's encouragement and promotion of the decertification petition to River Vale employees. *See Mickey's Linen & Towel Supply, Inc.*, 349 NLRB at 791 (finding that supervisor's assistance in translating for a unit employee who was asking two other employees to sign a decertification petition, constituted more than ministerial aid, noting that it was immaterial that the petition was initiated by the employee on her own). Similarly misplaced is the ALJ's reliance on the fact that Setteducati did not directly tell employees they should decertify the Union, he did not suggest that he would prevent them from keeping the Union, and he said the choice was solely that of the employees. These facts do not quell the effects of the coercive comments that Setteducati did make during those meetings.

Also, contrary to the ALJ's finding, the unrebutted evidence shows that during that period of time, the sheet that employees needed to sign to show their interest in decertification was posted on the wall in the living room of the River Vale group home, the same room in which Setteducati met with employees. Very little could make Respondent's support of the decertification more obvious. *See Texaco, Inc.*, 264 NLRB 1132, 1132-1133 (1982), *enfd.* 722 F.2d 1226 (5th Cir. 1984); *Placke Toyota, Inc.*, 215 NLRB at 395. Further, the lack of evidence regarding how many employees signed the decertification petition after Setteducati's visit to River Vale is not relevant in determining whether his conduct was unlawful. *See Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R. a/k/a Hospital Espanol Auxilio Mutuo de Puerto Rico, Inc.*, 342 NLRB 458, 459 (2004), *enfd.* 414 F.3d 158 (1<sup>st</sup> Cir. 2005).

Although it is not unlawful for an employer to respond to employees' questions about decertification, an employer cannot shield itself from unlawful statements couched in the answer to a question. *Altorfer Machinery, Co.*, 332 NLRB at 135 ("Employee-initiation of conversations about unions does not provide a justification under the Act for ensuing unlawful statements which supervisors choose to make as such conversations progress").

For these reasons, Setteducati's statements during both meetings at the River Vale house go far beyond providing ministerial aid to the decertification petition.

**2. Respondent Violated Section 8(a)(1) of the Act by Soliciting Employees to Sign Letters Resigning Their Union Membership and Withdrawing Authorization of Dues Deduction.**

An employer may give employees neutral information about how to resign from the union, but it may not provide assistance, attempt to monitor employees' choices, or create a situation where employees would tend to feel period in refraining from resignation or revocation. *Noah's Arc Processors LLC d/b/a WR Reserve*, 370 NLRB No. 74, slip op. at \*18 (Jan. 27,

2021); *Space Needle, LLC*, 362 NLRB 35, 36 (2015), enfd. 692 Fed.Appx. 462 (9th Cir. 2017) citing *Mohawk Industries, Inc.*, 334 NLRB 1170, 1171 (2001). Here, Respondent's conduct went far above providing neutral information regarding the mechanics of resignation and dues revocation, by distributing the forms without request or initiation from employees, by collecting the completed forms; and by submitting the forms to the Union. See *Vestal Nursing Center*, 328 NLRB 87, 102 (1999) (finding unlawful an employer's unsolicited distribution of information regarding how to revoke union cards and sample revocation cards where the employer also "provided envelopes, postage, and on several occasions, actually mailed letters for the employees"); *Winn-Dixie Stores, Inc.*, 128 NLRB 574, 588 (1960) (finding employer provided unlawful assistance in resigning from the union by preparing, addressing and mailing letters of resignation that were nearly identical); cf *WR Reserve*, 370 NLRB No. 74, slip op. at \*2 (finding employer provided only ministerial assistance by providing pre-printed resignation/revocation forms to employees, where employees went to human resources and asked for those forms individually, and employer provided no further assistance).

The credible evidence shows that Respondent initiated the distribution and collection of the forms; they were not distributed in response to employee requests. Cusack's testimony that employees told Setteducati and other managers that they wanted to leave the Union was not corroborated by Setteducati, Fishman or any of the employee witnesses.

Cusack's testimony also confirms that the forms were not distributed to give employees information about how to resign or revoke dues authorization, but to provide Respondent information. Cusack testified that Respondent wanted to determine whether or not continuing dues checkoff was in furtherance of employees' interests. Thus, Respondent's distribution and collection of the form was not for payroll purposes; it was to monitor and analyze their

responses.<sup>49</sup>

By collecting the forms, Respondent also monitored employees' support of the Union. This is confirmed by Respondent's reliance on number of signed resignation/dues revocation forms it received as justification for its refusal to agree to Union shop and dues deduction until the Union proved majority status, and evidence that it had a good faith doubt of the Union's status sufficient to conduct the September 2017 poll.

Respondent's collection of the forms also constituted an unlawful poll. The form itself asserts a resignation of Union membership, not just a revocation of dues authorization; therefore it is reasonable that employees were aware that their decision to submit the form would reveal their preference regarding Union membership to Respondent. The Board has found that putting employees in a position where "they reasonably would feel pressured to make an observable choice that demonstrates their support for or rejection of the Union" is coercive. *Space Needle*, 362 NLRB at 37, citing *Allegheny Ludlum Corp.*, 333 NLRB 732, 739-740 (2001) (internal citations omitted), enfd. 301 F.3d 167 (3d Cir. 2002); *Hatteras Yachts, AMF Inc.*, 207 NLRB 1043, 1043 n. 3 (1973); see also *Electrical Contractors, Inc.*, 331 NLRB 839, 844 (2000), enfd. 245 F.3d 109 (2d Cir. 2001) (finding that an employer unlawfully polled employees by soliciting them to sign form letters to the State Commissioner of Labor, which stated that they were not union members and did not want to be union members). Furthermore, Respondent did not establish a legitimate basis for knowing employees' Union preferences at the time it distributed and collected them, given the lack of any necessary correlation between membership and dues obligations. See *Space Needle, LLC*, 362 NLRB at 38.

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<sup>49</sup> The lack of testimony from the two supervisors named in the Complaint does not affect the finding, since Respondent admitted to distributing the memo and form and collecting the form at all of its facilities. See ALJD 10.

Although the Union's checkoff cards did allow for revocation of dues deduction twice a year, most of the unit employees were not bound by that limitation, because they had signed Respondent's dues authorization form, which allowed for revocation of dues checkoff authorization at any time. Moreover, although the Union authorization card provided such a window, the parties' expired collective-bargaining agreement did not. *See Space Needle* 362 NLRB at 36-37; *Peoples Gas System*, 275 NLRB 505 (1985); *Perkins Machine Co.*, 141 NLRB 697 (1963). Additionally, the December 28 letter does not provide any assurance that employees' would not face retaliation for failing to withdraw from the Union. The only mention of any effect was a single statement regarding revocation of dues authorization: "There is no reward for stopping Union Dues or punishment for continuing to pay Union Dues." *See Space Needle* 362 NLRB at 37; *Peoples Gas System*, 275 NLRB at 508. The Board noted that the absence of such an assurance, while also monitoring responses, "creates a situation where employees would tend to feel peril in refraining from [withdrawing]." *Id.* citing *Foothills Food, Inc. d/b/a Erickson's Sentry of Bend*, 273 NLRB 63, 64 (1984).

Respondent's distribution and collection of the resignation/dues revocation letters were part of its overall unlawful drive to erode employee support for the Union. It followed on the heels of Respondent's meetings with employees during which it solicited support of the decertification petition, criticized the Union, and questioned its usefulness. Respondent's contempt for the Union also is shown through its decision to block Union access to its group homes and day program. The Board has found it unlawful for an employer to provide information to employees about resignation and dues revocation in the context of other unfair

labor practices.<sup>50</sup> *Escada (USA), Inc.* 304 NLRB 845, 849 (1991), enfd. 970 F.2d 898 (3d Cir. 1992).

The ALJ erred in finding that since Respondent lawfully distributed the memo and resignation/dues revocation form simply because it was not obligated to deduct dues. ALJD 10; *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139 (Dec, 16, 2019). An employer's obligation to provide only ministerial or passive aid to employees who wish to withdraw their union membership is not based on an obligation under Board law to deduct dues after contract expiration. *See, for example, WR Reserve*, 370 NLRB No. 74 (decided after *Valley Hospital Medical Center*); *Space Needle, LLC*, 362 NLRB 35 (also decided when employers were not obligated to deduct dues post-contract expiration, under *Bethlehem Steel*, 136 NLRB 1500 (1962)), enf. den. 320 F.2d 615 (3d Cir. 1963); *Mohawk Industries, Inc.*, 334 NLRB 1170, 1171 (2001) (same); *Winn-Dixie Stores, Inc.*, 128 NLRB 574 (decided before *Bethlehem Steele*). Similarly, an employer's obligation to refrain from polling its employees regarding their union preferences is unaffected by its obligation to deduct dues. *Space Needle*, 362 NLRB at 37.

For all of these reasons, Respondent's distribution of the resignation/dues revocation letters and the December 28 memorandum and polling of their responses violated Section 8(a)(1) of the Act.

**3. Respondent Violated Section 8(a)(1) and (5) of the Act by Refusing to Provide Financial Information.**

An employer has a duty to provide the union, upon request, the information that it needs in order to carry out its responsibilities in representing bargaining-unit employees. *NLRB v.*

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<sup>50</sup> Contrary to the ALJ's finding, the lack of evidence that Respondent kept an actual list of those who had withdrawn for purposes beyond payroll processing is of no consequence. ALJD 10.

*Acme Industrial Co.*, 385 U.S. 432 (1967). This duty includes an obligation to provide information that is relevant to contract negotiations. *Day Automotive Resources, Inc., d/b/a Day Automotive Group and Centennial Chevrolet, Inc.*, 348 NLRB 1257 (2006). Information pertaining to the terms and conditions of bargaining-unit employees is presumptively relevant. *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip op. at \*2 (Jan. 17, 2019); *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1159 (2006). However, information outside that realm, such as information regarding non-unit employees, is not presumptively relevant, and the union must demonstrate its relevance. *KGW-TV*, 367 NLRB No. 71, slip op. at \* 2; *Caldwell Manufacturing Co.*, 346 NLRB 1159-1160 citing *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 258-259 (1994).

Information regarding an employer's finances is not presumptively relevant, but it becomes relevant when an employer claims that it has an inability to pay the union's bargaining demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Good faith bargaining requires that the claim be honest; therefore, the employer is required to provide proof to support that claim. *Id.* at 152-153 ("If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy"). Inability to pay" means the employer presently has insufficient assets to pay or it would have insufficient assets during the course of the contract that is being negotiated. *KBW-TV, Inc.*, 367 NLRB No. 71, slip op. at \*3.

In *Nielsen Lithographing*, the Board noted that the difference is between an employer who "cannot pay" and one who "will not pay." 305 NLRB 697, 700, affd. sub nom *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992) citing *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir. 1986), cert. denied 479 U.S. 821 (1986). Where an employer claims a present inability to pay, or an inability to pay over the course of the prospective

contract, the employer “cannot pay.” *Id.* However, if the employer’s claims concern business difficulties, such as competitive disadvantage, that could lead to the business closing in the time period after the expiration of the contract being negotiated, then the employer “will not pay.” *Id.* In *Nielsen*, although the company was losing profits to competitors, it anticipated problems with labor costs at some unspecified time in the future, and it was also still making a profit. *Id.* at 701. Therefore, the Board held that the employer did not claim an inability to pay; it in essence “would not pay,” and was not required to produce financial records to the union. *Id.*

In determining whether an employer has made an inability to pay claim, the Board considers the employer’s statements, “in the context of the particular circumstances in that case.” *Stella D’oro Biscuit Co.*, 355 NLRB at 770 citing *Lakeland Bus Lines*, 335 NLRB at 324. The employer need not use “magic words.” *Wayron, LLC*, 364 NLRB No. 60, slip op. at \*5; *Atlanta Hilton & Tower*, 271 NLRB at 1602; *ConAgra, Inc.*, 321 NLRB 944, 944 (1996), enf. den. 117 F.3d 1435 (D.C. Cir. 1997). Rather, the Board evaluates the substance of the employer’s assertions to determine whether it has “reasonably convey[ed]” that it is unable to pay more than it has offered. *Lakeland Bus Lines*, 335 NLRB at 324. *See also ConAgra, Inc.*, 321 NLRB at 944 (“regardless of the words used, if an employer’s claims can be interpreted either as a present inability to pay or a prospective inability to pay during the contract term, it is obligated to provide the union with data supporting its assertions”); *Facet Enterprises, Inc.*, 290 NLRB 152, 153 (1988), enf. in rel. part 907 F.2d 963 (10th Cir. 1990) (although employer claimed competitive disadvantage, “its words and conduct clearly pleaded an inability to pay existing wages and benefits and was therefore legally obligated to turn over books and records so that the [u]nion could verify that poverty claim”). The Board considers Respondent’s statements and conduct in “the context of the entire factual picture,” “as a reasonable listener would,” relying on

both testimony and the parties' bargaining notes. *Wayron, LLC*, 364 NLRB No. 60, slip op. at \*5 and n. 14.

In *Shell Co. (Puerto Rico) Ltd.*, 313 NLRB 133, 133 (1993), the employer proposed concessions, asserting that they were necessary to remain competitive, and it affirmatively stated that it was not pleading poverty or an inability to pay. However, the Board found that because the employer claimed that its financial circumstances were "bad," that it was "losing business," that it "faced serious regulatory and cost problems," and that "it was a matter of survival," it had effectively stated an inability to pay. The Board further noted that the employer's disclaimer during bargaining of an inability to pay was "not dispositive." *Id.* at n. 7.

In *Lakeland Bus Lines, Inc.*, 335 NLRB 322, the employer requested an extended wage freeze and a modification of rules that would decrease the amount of overtime, asserting they were needed due to a significant loss of customers and revenue. In finding an inability to pay, the Board relied on statements made by the employer in a letter to employees, in which it asked them to accept its final offer, because it was, "trying to bring the bottom line back into the black," acceptance of the offer would allow the employer to retain their jobs and "get back in the black in the short term," and "[t]he future of Lakeland depend[ed] on it." *Id.* at 324-325. The Board also noted that the employer never conveyed to the union that it had an alternate means of paying for wages or that it continued to be profitable. *Id.* at 325.<sup>51</sup>

Here, Cusack's statements during bargaining clearly conveyed that Respondent could not pay for anything beyond a wage freeze. The Union made its February 1, 2017 information

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<sup>51</sup> In denying enforcement, the D.C. Circuit found that Lakeland's repeated written statements that it had not claimed an inability to pay disavowed any impression to the contrary. *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 964 (D.C. Cir. 2003). The Board's reasoning for finding that the employer had not made a retraction is discussed below. Here, Respondent did not make any similar retraction, but continued to make statements implying an inability to pay.

request based on Cusack's representations during the January 12 and 13 bargaining sessions. The testimony and bargaining notes all show that during conversations about wages, Cusack said that Respondent had "financial problems," things were "not good," and "we're in survival mode." Cusack explained that DHS was Respondent's sole source of funding, and funding had remained stagnant for the past five years. During the January 12 session, Cusack said that he would request cuts in wages and benefits, but at the January 13 session, he stated that although benefit levels would not change, Respondent needed a wage freeze, with a wage reopener only if funding from DHS increased. In its Answer, Respondent makes the same admission. During the February 1 session, Cusack said, "I supposed you're saying we shouldn't pay the mortgage and give the money to the employees. You would suppose that we turn the lights out." This suggests that the choice was either paying employees or continuing operations.

Pinarski credibly testified, without rebuttal, that when she made the information request on February 1, she told Cusack that these records were being requested to review Respondent's dire financial status so that the Union could speak to its members about its proposal.

The ALJ erred in finding that it was undisputed that Cusack repeatedly emphasized that it was not the company's position that it can't pay the Union's proposed wages increases but that it won't agree to pay them. In fact, the undisputed evidence shows that Cusack did not begin using this language until the March bargaining session, one month after the information request was made. From that time on, Cusack then repeated the key phrases that Respondent had not "plead poverty" and "It's not that we can't pay, it's that we won't pay."

Other credible testimony and bargaining notes show that these statements were always qualified. For example, Pinarski testified that during the March session, Cusack said, "We won't pay until you get us some relief from your funding source." Barrett's notes from this session

contain the same quote. They also document Cusack saying, “Not claiming poverty. Funding source frozen from [sic] several years.”

Cusack testified that Respondent simply *chose* not to allocate its resources to wage increases. However, beginning with the February session, Cusack stated several times that Respondent refused to turn out the lights or let Respondent’s facilities go into foreclosure to pay the wage increases proposed by the Union. Barrett’s notes from the June session show how Cusack expressed the entire message: “Abundantly clear. We are not taking the position that we can’t make increases, but we won’t do it. We could burn down [ ]one of the facilities and pay you the insurance. We are not broke.” The notes show that Cusack continued to say that increases were, “[n]ot economically feasible because the people’s representatives have done nothing to get additional remuneration from the State ...” Thus, the real meaning conveyed by Cusack was that unless the Union secured additional funding from the State, Respondent could not afford raises without taking immediate drastic measures (including insurance fraud), which would result in foreclosure, loss of utilities, and destruction of its facilities. *See ConAgra, Inc.*, 321 NLRB at 944, 955-956 (finding an inability to pay where employer’s comments were contradictory, or “carefully couched in terms of competitive disadvantage”).

Additionally, Cusack’s assertion in the March bargaining session and thereafter, that he was merely saying Respondent “would not pay,” not that it “could not pay,” cannot be considered retractions of his statements in the earlier bargaining sessions. The Board has found retractions effective only where they are made immediately. *See American Polystyrene Corp.*, 341 NLRB 508, 508-509 (2004), remanded 447 F.3d 1153 (9th Cir. 2006). In *American Polystyrene*, the Board found that the employer’s statement, “I’d go broke,” if required to pay for the union’s proposals amounted to a statement of inability to pay, but the employer effectively

retracted that statement in a letter the next day. *Id.* The Board compared the facts there to those in *Lakeland Bus Lines*, where the employer waited until two weeks after the union made its request for financial information to clarify that it was not asserting an inability to pay, which did not amount to an effective retraction. *Id.* at 509. Similarly, Cusack did not begin claiming that Respondent would not pay until the next bargaining session, one month after the Union made its request for financial records.

Moreover, here Respondent did not make claims of profitability during bargaining, and there is no parent company that can bail it out, which are two facts often cited by the Board and Circuit Courts as indicators that a company is able to pay. *See Wayron, LLC*, 364 NLRB No. 60, slip op. at \* 6, 7 and n. 22, 24, 26 (finding inability to pay where the employer had suffered multiyear losses, represented that it needed concessions to secure a line of credit, and in negotiations connected its financial difficulties with its viability, while noting the absence of statements that the employer was profitable and lack of access to funding from a parent company); *SDBC Holdings, Inc. v. NLRB*, 711 F.3d. 281, 288-289 (2d Cir. 2013).

Despite Respondent's claims that the financial information requested by the Union was not relevant, Respondent agrees that the Form 990s are relevant. However, there is no basis for an assertion that the document summarizing such information is relevant, whereas the underlying records used to create that document are not. Furthermore, it is well-settled that Union's ability to obtain information elsewhere does not excuse Respondent's obligation to provide it.<sup>52</sup>

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<sup>52</sup> The ALJ's finding that Respondent provided three years of Form 990s is not supported by the credible evidence. Fishman testified that Respondent provided the 2014, 2015 and 2016 Form 990s. His testimony is contradicted by Cusack and Respondent's attorney, who both stated that Respondent only produced the 2015 Form 990, and when bargaining was taking place the 2016 Form was not yet available. Moreover, even if it had been produced, the 2014 Form 990 is not responsive to the Union's February 1 information request.

*American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB No. 139, slip op. at \*8 (June 26, 2015), enfd. 858 F.3d 612 (D.C. Cir. 2017); *King Soopers, Inc.*, 344 NLRB 842, 845 (2005), enfd. 476 F.3d 843 (10th Cir. 2007).

Once it has been established that an employer has asserted an inability to pay, it is required to “open its books.” See *Wayron, LLC*, 364 NLRB No. 60, slip op. at \* 6-8 and n. 16 (finding the employer asserted an inability to pay the wage increases proposed by the union and ordering employer to submit to financial audit requested by the union); *Stroehmann Bakeries, Inc.*, 318 NLRB 1069, 1080 (1995), enf. den. 95 F.3d 218 (2d Cir. 1996); see also *S-B Mfg. Co., Ltd.*, 270 NLRB 485, 486, 492 (1984). In *Stroehmann Bakeries*, the Board, adopting the administrative law judge’s decision, ordered the respondent to produce to the union significant financial information requested during bargaining, including, *inter alia*, production or management reports, studies, analyses, accounts payable journals, supplier invoices, general ledger, charts of company accounts, annual reports, auditor reports, filings with the New York Secretary of State, financial statements, balance sheets, applications for loans, lines of credit, mortgages, copies of liens, creditors’ letters, and documents showing expenses and cash flows. *Stroehmann Bakeries, Inc.*, 318 NLRB at 1072, 1080. There, the Board also required respondent to produce the wages and benefits of all non-unit employees employed by respondent over a course of three years. *Id.* The administrative law judge, affirmed by the Board, explained that the non-unit information was relevant, so the union could evaluate, “whether the unit employees were being asked to shoulder a disproportionate share of the sacrifices proposed by the Company, and whether the Company’s proposals were in fact necessary or even likely to improve either the Company’s financial situation or competitive posture.” *Id.* at 1080.

Here, the Union's information request is less broad. The Union did not seek documents beyond what is reasonable to evaluate Respondent's financial status in order to determine if its claim of inability to pay is genuine and, if so, to fashion new wage proposals. It seeks Respondent's budget, audits, bank statements, salaries of non-unit employees, and costs of mortgages, utilities, rents and legal expenses. Although the Union seeks budgets and audits for three years, the other requests only seek information for 2016. The Union further demonstrated that its request for non-bargaining unit wages was relevant to assess Respondent's overall financial status and evaluate whether Respondent's claim that it cannot pay the Union's wage proposal is genuine. Thus, the information sought by the Union is necessary for it to evaluate Respondent's financial situation and compose a new wage proposal, if necessary.<sup>53</sup>

For all of the above reasons, Respondent's refusal to provide financial information to the Union is a violation of Section 8(a)(1) and (5) of the Act and evidence of Respondent's bad-faith bargaining.

#### **4. Respondent's Regressive Proposals Are Evidence of Bad Faith.**

Regressive proposals made with the intent of frustrating bargaining are evidence of bad-faith bargaining. *Mid-Continent Concrete*, 336 NLRB at 260; *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), *enfd.* 26 Fed.Appx. 435 (6th Cir. 2001); *Telescope Casual Furniture, Inc.*, 326 NLRB 588, 589 (1998). Where an explanation for a regressive proposal is offered, the Board

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<sup>53</sup> The ALJ's finding that the Union acknowledged that it had not reviewed the 3 Form 990s produced by Respondent, calling into question whether the Union even believed it needed the financial information, has no support. Carolyn Wade was specifically asked if she reviewed the 2015 Form 990, and her response was "not that I can remember," adding that it is not something she normally does. Tr. 1054. Ruth Barrett testified that reviewing the 990 would be the attorney's responsibility. Tr. 1101. Additionally, the proper analysis is not whether the Union believed it needed the financial information, but whether Respondent asserted an inability to pay and whether the requested documents are relevant, as discussed here.

scrutinizes the validity of the justification to determine if the party was acting in good faith or designed to impede agreement. *Universal Fuel, Inc.*, 58 NLRB 1504, 1521 (2012) (finding that employer's entire course of conduct, including philosophical opposition to union security, established bad-faith bargaining); *U.S. Ecology Corp.*, 331 NLRB at 225-226 (finding bad-faith bargaining where employer's ordinarily legitimate explanation for its regressive proposals was undercut by other evidence). "Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining." *Whitesell Corp.*, 357 NLRB 1119, 1155 (2011) citing *Mid-Continent Concrete*, 336 NLRB at 260.

When bargaining resumed in January 2017, Respondent's bargaining tactics changed drastically. It proposed a wage freeze and to remove three important clauses from the contract: arbitration, union shop and dues deduction. Respondent's explanations for these proposals are pretextual and they show Respondent's intent to avoid any agreement and to eviscerate support for the Union.

**a. Respondent's proposal for a wage freeze and a wage reopener conditioned on future funding secured by the Union was regressive.**

Respondent's withdrawal of its initial proposal for a merit pay plan and replacement of it with a proposal for a wage freeze and reopener conditioned on the Union successfully lobbying the State of New Jersey for more funding is regressive. Even though Respondent's initial merit pay plan did not include any specifics regarding how Respondent would give raises, Respondent did not at that time demand a wage freeze.<sup>54</sup> Withdrawing this offer and replacing it with a wage freeze with a condition that was impossible to meet is regressive, and it was made with the intent

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<sup>54</sup> Contrary to the ALJ's finding, the Union did not dismiss Respondent's merit pay option out of hand – it asked for further discussion.

to impede achieving a contract.

Respondent's explanation for its regressive proposal - that it had not received any increase in funding – is unsubstantiated. As discussed above, Respondent refused to provide any financial documents to justify its stance. Respondent made a regressive proposal regarding wages, explained the wage freeze was necessary due to a lack of funding, but then refused to provide any financial information to justify its reasoning for the regressive proposal. Respondent also did not explain how its finances had changed over the four months since its September 2016 bargaining session, when its merit pay proposal last was discussed.

Other evidence contradicts Respondent's unwavering declarations that a wage freeze was necessary. Most pointedly, Respondent's grant of a very large raise to all bargaining-unit employees shortly after it withdrew recognition belies its claim that funding was stagnant and that it chose not to allocate what funds it had to wages. Fishman also testified that Respondent had been expanding over this period of time and renovating its existing facilities. Yet Respondent told the Union it had no funds, and the Union had no way of knowing about these changes because its ability to contact members was limited by Respondent's refusal to give it employees' addresses and grant access to its facilities.

Respondent's insistence that the Union lobby on its behalf to increase funding was a sham. The anticipated fee-for-service structure, which had fixed rates for services that applied to all organizations, made lobbying for funds an impossibility. The Union did not know how the fee-for-service structure worked until the July 2017 negotiation session, therefore it did not have the ability to question Respondent's insistence that it lobby for this reason.

Respondent's witnesses' testimony that merit pay was their number-one goal in bargaining is wholly contradicted by its conduct. Notably, there was no explanation for why, if

merit pay was the ultimate goal, Respondent withdrew its initial merit pay proposal.

Furthermore, Respondent's explanation that merit pay was needed due to the forthcoming fee-for-service structure is either disingenuous or evidence of Respondent's delay tactics, since fee-for-service was not discussed until July 2017, when initiated by the Union.

Finally, Respondent's inclusion of merit pay in its June 2017 proposal does not cure its regressive offer. The June proposal still included a wage freeze, and a statement conditioning a wage re-opener on the Union's success "on behalf of the employees" in securing an increase in remuneration from the State of New Jersey. Respondent's continual insistence that the Union seek a funding increase, when that was not possible, is nothing short of bad faith. Rather, it evidences Respondent's resistance to securing a contract and its efforts to make the Union seem ineffective to its members when, in the future, they would look for someone to blame when a wage reopener did not occur.

**b. Respondent's proposal that dues checkoff and union shop be removed from the successor contract was regressive.**

Respondent's rescission of its initial dues deduction and Union shop proposal and its subsequent insistence on removing both provisions from the contract cannot be viewed as anything other than sheer obstruction to achieving a contract. It is uncontested that during bargaining, Cusack justified this drastic step on Respondent's good-faith belief that the Union did not have majority support, and he based this stated belief on the overwhelming number of employees who signed the resignation/dues revocation forms Respondent distributed between December 22 and 30, 2016. Since Respondent's conduct in distributing and collecting these forms was coercive and a violation of Section 8(a)(1) of the Act, it is not a legitimate reason for refusing to agree to union security and dues deduction.

Respondent's contradictory testimony regarding its bargaining strategy also shows that it had no legitimate reason for its objection to union security and dues deduction. Cusack's testimony itself was inconsistent. After insisting that Respondent would agree to both clauses if the Union proved it retained majority status, he later testified that even if the Union did prove majority status, Respondent would only agree to deduct the amount of dues necessary for representation.<sup>55</sup> Cusack later testified that Respondent would have settled the contract if the Union had agreed to merit pay, but only if they received additional funds from the State. In contrast, Setteducati testified that he was opposed to the "forced dues clause of the contract" only because he feared the members would not ratify the contract if it were included. He added that he would have given in on union security and dues checkoff if the Union had agreed to merit pay. These justifications are not only inconsistent, but they do not reflect Respondent's conduct during bargaining.

Here, the credible evidence exposes Respondent's ideological opposition to union security and dues deduction. Pinarski and Yaeger credibly testified that Cusack stated clearly that the company did not believe in union security and dues deduction, and that Respondent was not a collection agency. Cusack, however, vaguely denied saying that Respondent refused to collect the Union's money. Pinarski and Yaeger's statements should be credited over Cusack. Cusack's statement is not supported by any other testimony or bargaining notes, whereas the bargaining notes of Pinarski, Yaeger and Barrett all record Cusack's statement that Respondent was not a collection agency.

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<sup>55</sup> This strategy further shows Respondent's lack of good faith. The Board has found that, since the amount of agency fees is a permissive subject of bargaining, insisting on negotiating over them as a condition for an overall agreement is evidence of bad-faith bargaining. *Universal Fuel, Inc.*, 358 NLRB at 1522; see also *Apogee Retail NY, LLC d/b/a Unique Thrift Store*, 363 NLRB No. 122, slip op. at \* 11 (Feb. 17, 2016).

Additionally, Cusack did not deny stating that he was philosophically opposed to Union security and dues deduction. Indeed, his position as general counsel for two organizations that assist state and local governments in passing right-to-work legislation is proof of his ideological opposition to union security and dues deduction at minimum, and at most his antipathy towards unions in general.

The Board has found that, even when an employer presents a legitimate business purpose for refusing to agree to union security and dues deduction clauses, a philosophical objection to these provisions can reveal that those reasons are suspect. *CJC Holdings, Inc.*, 320 NLRB 1041, 1047 (1996), *enfd.* 116 F.3d 469 (3d Cir. 1997) citing *Langston Cos., Inc.*, 304 NLRB 1022, 1050 (1991); *see also Universal Fuel, Inc.*, 358 NLRB at 1504 (finding respondent engaged in overall bad-faith bargaining where, *inter alia*, it opposed the union's proposal on union security for purely philosophical reasons and did not advance a legitimate business reason for its opposition). Thus, the Board has found that an employer's philosophical objection to both union security and dues deduction clauses contributes to a finding of bad-faith bargaining. *See Langston Cos., Inc.*, 304 NLRB at 1050; *Preterm, Inc.*, 240 NLRB 654, 673 (1979) (finding employer's refusal to consider union security evidence of bad faith where it went into bargaining with a fixed mind on the issue and concluding on the basis of employer's overall conduct, that it had engaged in bad-faith bargaining). In *CJC Holdings*, the ALJ, affirmed by the Board, found that the respondent put forth two legitimate reasons for objecting to a dues checkoff clause - that the employer was being blamed by the union and its membership for problems caused by checkoff, and that the employer did not want to know the identity of union members, to prevent discrimination suits. *CJC Holdings, Inc.*, 320 NLRB at 1046. However, the judge found that the employer's fundamental opposition to dues checkoff was not a legitimate business purpose for

refusing to agree to the clause. *Id.* at 1047. The judge also found that the employer's desire to not "be in the dues collection business" was not a legitimate business purpose, since dues deduction does not cause a burden on an employer. *Id.* at 1047 citing *H.K. Porter, Co., Inc.*, 153 NLRB 1370, 1372 (1965), *enfd.* 363 F.2d 272 (D.C. Cir. 1966), *cert. denied* 383 U.S. 851 (1966), 385 U.S. 1066 (1987). The judge also considered the employer's refusal to bend from its proposal that a union steward collect dues at the plant, while knowing that doing so would create friction between the union officials and its membership. *Id.* On balance, the Board found that the employer's fundamental opposition to dues checkoff, rather than its legitimate business reasons, was the real reason for its opposition to the clause, and therefore such opposition was evidence of its bad faith. *Id.*

In comparison, the Board is reluctant to find an employer has engaged in bad-faith bargaining where it has bargained in good faith over other subjects but has remained obstinate about union security and dues deduction due to a philosophical objection. In *Unique Thrift Store*, 363 NLRB No. 122, the Board, affirming the ALJ's decision, found that the employer's overall course of conduct did not establish bad-faith bargaining, where it refused to consider union security and dues checkoff clauses based on a philosophical opposition to union security, but reached agreement on all other issues. *Id.*, slip op. at \*12. There, the judge noted that the respondent had agreed to a contract that included wage increases and a grievance/arbitration procedure, unlike Respondents here. *Id.*

Similarly, in *Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455, 457 (2002), the Board, adopting the ALJ's conclusions, found that the employer had not engaged in bad-faith bargaining where, in the absence of any other bargaining misconduct, the employer refused to bargain about union security and dues checkoff provisions. The Board also noted that the

employer had made concessions during negotiations on wages and other issues. *Id.* at 455, n. 1 and 457. The Board further noted that some employees had informed management that they had objected to joining the Union. *Id.* In *Phelps Dodge*, unlike here, there was no evidence that questioned the veracity of this assertion or that the employer had coerced employees. *Id.* Finally, the judge, finding that the respondent's position could not be considered irrational, noted that respondent took a significant amount of time to discuss its positions on this subject with the union, including 2-to-3 hours during one bargaining session. *Id.* at 456, 457.

The Board has found an employer's proposal of using a shop steward to collect dues as an alternative to dues deduction "virtually useless," where employees worked on three shifts, throughout an entire hospital, and the steward's ability to reach the employees was limited to specific times. *Chester County Hosp.*, 320 NLRB 604, 622 (1995), *enfd.* 115 F.3d 469 (3d Cir. 1997). The Board noted that, "dues checkoff is not simply an accommodation to the Union. It is equally important as a convenience and benefit to the unit employees." *Id.* Similarly, Respondent's offer of allowing the Union representative to collect dues at each home is similarly useless, due to the physical distance between each home and the requirement that the representative seek permission prior to allowing access to collect the dues. It also allows Respondent significant control over the Union's ability to collect its dues, which is a proposal any union would be reluctant to accept. The Board has found that, "[r]igid adherence to proposals which are predictably unacceptable to the union may indicate a predetermination not to reach agreement, or a desire to produce a stalemate, in order to frustrate bargaining and undermine the statutory representative." *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1040 (1980), *enfd.* 667 F.2d 562 (6th Cir. 1982), *cert. denied* 459 U.S. 969 (1982) citing *Tomco Communications, Inc.*, 220 NLRB 636 (1975), *enf. denied* 567 F.2d 871 (9th Cir. 1978).

The evidence here shows that Respondent has presented no legitimate purpose for opposing union security and dues deduction, either during bargaining or through its contradictory testimony at hearing. Rather, Respondent rested its justification on a situation that was created through its own unlawful conduct. The evidence clearly shows that Respondent is philosophically opposed to union security and dues deduction, a position that was the driving force behind its conduct. Thus, Respondent's regressive withdrawal of its initial union shop and dues deduction proposal and insistence on eliminating both from the next contract is clear evidence of bad-faith bargaining. The ALJ's terse finding that Respondent's Union shop and dues checkoff proposals were accompanied by an explanation as to why it was resistant to those clauses, wholly ignores the record evidence and should be overruled.<sup>56</sup>

**c. Respondent's proposal to remove arbitration from the contract was regressive.**

A party's withdrawal of a tentatively agreed-to contract proposal without good cause is also evidence of bad-faith bargaining. *Universal Fuel Inc.*, 58 NLRB 1022; *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007); *Suffield Academy*, 336 NLRB 659, 659 (2001), *enfd.* 322 F.3d 196 (2d Cir. 2003); *Homestead Nursing & Rehabilitation Center*, 310 NLRB 678, 678 (1993). Respondent has not shown good cause for its withdrawal from the tentative agreement to split the costs of arbitration and its proffer of regressive proposals to eliminate arbitration, a provision that is vital to unions and their members. The parties agreed to split the costs of arbitration in September 2016. When bargaining resumed in January 2017, Cusack verbally proposed to remove arbitration from the contract. Respondent's March 2017 written proposal also removed arbitration from the contract and replaced it with

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<sup>56</sup> In the decision, Respondent's explanation for resisting union shop and dues checkoff clauses is a mystery, as the ALJ never described it.

litigation of all disputes as a last step. Respondent's June 2017 proposal then provided for "ad hoc" arbitration, which Cusack defined as arbitration only with Respondent's consent, and in those circumstances, the arbitration would be expedited.<sup>57</sup>

Cusack's avowal that costs were the reasons for Respondent's regressive arbitration proposals is illogical. Markedly, there was no discussion of actual costs or even a discussion of why litigation would be less expensive than arbitration. Given that the parties had not arbitrated a single case in the course of their collective-bargaining relationship, Respondent could not point to a history of expensive and prolonged arbitration to justify its cost concerns.

Cusack also did not explain, either during bargaining or at the hearing, why the parties' initial agreement to split the costs of arbitration did not satisfy its concern about expense. In fact, Cusack testified that Respondent was ultimately amenable to arbitration with split costs – the very agreement achieved in September 2016.

The Board has found that an employer's insistence on taking claims to court, rather than arbitration, is an unreasonable bargaining demand that taints and frustrates the bargaining process. *Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at \* 24, 25 (Oct. 11, 2017).

There, the Board found that the respondent's explanation that such a proposal was less costly and more efficient "defied logic." *Id.* at \*25. It further held that:

[T]he proposal for a trial in court in lieu of arbitration is not only contrary to [r]espondent's goal to control costs, but it goes against generally accepted opinion that it is normally far less costly and expeditious to go to arbitration than to take a dispute into any type of court. The Board has recognized that arbitration usually costs less and is more efficient than litigation, and the Supreme Court and Congress have certainly found arbitration to be the preferred process for settling labor disputes.

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<sup>57</sup> Cusack's testimony that his offer to use court only for "nickel and dime stuff" is not corroborated and should not be credited.

*Id.* citing *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960); *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971).

Cusack's contention that its June 2016 proposal for "ad hoc arbitration" cured the regressive bargaining allegation is erroneous. This final proposal, which gave Respondent the option to arbitrate a grievance, is essentially no different than completely removing arbitration from the contract. Since Respondent has the final determination in all steps of the grievance procedure up to arbitration, Respondent has no motivation to arbitrate. Binding arbitration, available to all parties, is the only mechanism by which the Respondent can be held accountable. It is also one of the most important rights employees have in a contract and an essential service the Union provides its members. *See Regency Service Carts, Inc.*, 345 NLRB at 675.

The ALJ's finding that "it is not clear from the evidence that the parties had reached a firm agreement on an arbitration clause earlier in bargaining," while not supported by the evidence, is also not dispositive. Even if the parties had not tentatively agreed to arbitration and splitting its costs, Respondent's wholesale withdrawal of the proposal is still regressive and proof that Respondent's only intent was frustrate bargaining. Respondent's explanation that arbitration was expensive is not a legitimate reason to oppose it.

**5. Respondent's Offer to Reconsider Union Shop if the Union Agreed to Poll the Bargaining Unit is Evidence of its Bad Faith.**

Respondent's repetitive assertion that it might reconsider its opposition to union security and dues deduction if the Union conducted a poll of unit members and proved it had majority status is both emblematic of Respondent's bad faith and distinct evidence that it never intended to enter into a contract. It would be illogical for the Union to agree to a poll under the circumstances created by Respondent's ongoing unlawful conduct, where the Board had blocked a decertification election due to Respondent's alleged unfair labor practices and issued a

complaint alleging that Respondent had violated the Act by providing more than ministerial support to employees in connection with the decertification petition, and where Respondent solicited 80 bargaining-unit members into signing Union resignation and dues revocation letters. Thus, this is another proposal that was predictably unacceptable to the Union that was intended to create a stalemate and an insurmountable barrier to achieving a contract. *See Hospitality Motor Inn, Inc.*, 249 NLRB at 1040.

Where an employer has legitimate “good-faith reasonable doubt” that a union lacks majority support, it may lawfully poll its employees. *Allentown Mack Sales and Service, Inc.*, 522 U.S. 359 (1988). Here, Respondent did not poll its employees until September 2017, after it sent its August 15, 2017 letter to employees giving them the opportunity to sign Union authorization cards. Respondent asserted that it conducted the September 2017 poll due to a good-faith doubt that the Union had majority status, based, in part, on the fact that none of the employees returned an executed Union authorization card. For reasons discussed below, Respondent’s September 2017 poll was unlawful. However, Respondent’s failure to conduct its own poll prior to September 2017 lends further incredulity to its claim throughout bargaining that it had a good faith doubt that the Union maintained majority status.

Here, the ALJ’s finding that Respondent’s proposal to agree to union shop if the Union agreed to a poll of its members “was evidence of the genuine nature of its explanation as to why it was so resistant to a union shop” is without support and should be overruled.

**6. Respondent’s Removal of Employees’ Addresses From the Monthly List of Unit Members is Evidence of Its Bad Faith.**

Respondent’s refusal to continue providing employee addresses to the Union after January 2017 is strong evidence of its bad-faith bargaining and its overarching goal of causing employee disaffection with the Union. This change is an obvious attempt to keep the Union from

contacting its members, at a crucial time. Bargaining was resuming after a hiatus due to the decertification petition, which Respondent unlawfully encouraged. During that hiatus, Respondent had unlawfully solicited employees to sign the Union resignation and dues revocation forms. Respondent also had been asking new employees to sign its own dues authorization form instead of the Union membership and authorization cards, thus denying employees Union membership and foreclosing the Union from securing members' addresses through the authorization cards. The lack of addresses, especially combined with Respondent's refusal to grant the Union access to its facilities, left the Union with little ability to contact its members.<sup>58</sup>

Respondent's defense that it stopped providing the addresses based on complaints from employees because they had been harassed by Union representatives at their own homes is not supported by the credible evidence. None of Respondent's managerial witnesses provided any specific testimony regarding such complaints. Instead, the testimony was vague and imprecise, and much of it was hearsay. The only employee who testified about some concern with a Union representative visiting her house was Angieanna Gayle, who testified that the Union representative who knocked on her door left before she even opened it. Furthermore, there is no evidence that Gayle told anyone in management about this incident.

The ALJ's finding that Respondent had always provided addresses in the past ignores Respondent's admission that it stopped providing them in February 2017, and the ALJ's finding that employers are not required to provide employees' addresses does not mean that Respondent's sudden refusal to give the Union employees' addresses at that particular time is

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<sup>58</sup> Although not specifically alleged in the Complaint, Respondent's refusal to provide the Union access to its facilities is evidence of its bad faith and its intention to suppress employee support of the Union. *See, for example, Lee Lumber*, 306 NLRB 408.

evidence of its bad-faith bargaining. ALJD 12. The evidence clearly establishes that Respondent's refusal to continue its past practice of providing the Union with its members' home addresses was done in bad faith and with the intent to rid itself of the obligation to bargain with the Union.

**7. Respondent Violated Section 8(a)(1) of the Act by Distributing the August 15, 2017 Memorandum to Employees.**

Similar to the December 28, 2016 letter with the resignation/dues revocation forms, Respondent distributed the August 15, 2017 memorandum and Union authorization card to employees in order to create its asserted justification for conducting the September poll. However, instead of giving employees information about how to stop paying Union dues, this time Respondent provided them information about how to start paying dues. Here again, this memorandum is unlawful, because it monitored employees' union preferences, and it created a situation where employees would tend to feel peril if they submitted a Union card. *See Space Needle, LLC*, 362 NLRB at 36-37. It is also unlawful because it was distributed at a time when numerous other unfair labor practices remained unremedied. *Id.*; *Escada (USA), Inc.*, 304 NLRB at 849.

This letter goes far beyond the line of neutrality, urging employees to refrain from signing and submitting the authorization card. Through informing employees that over 95% of unit employees had elected to not pay Union dues, it appeals to employees to follow the group and advises them that if they choose to sign the authorization card, they will stick out. *See Rock-Tenn Co.*, 238 NLRB 403, 404 (1978), *enfd* 594 F.2d862 (5<sup>th</sup> Cir. 1979). The letter also does not provide employees assurances that they will not face retaliation for joining the Union. *Space Needle, LLC*, 352 NLRB at 37. These statements, which tend to make employees feel peril in submitting a Union authorization form, render the August 15 letter unlawful and a violation of

Section 8(a)(1) of the Act. *See Space Needle, LLC*, 352 NLRB at 36-37; *Erickson's Sentry of Bend*, 273 NLRB at 64; *see also Kentucky Fried Chicken*, 341 NLRB at 78.

By requiring employees to return the Union authorization cards to human resources, Respondent was easily able to monitor not only the number of employees who supported the Union, but also their identities. Respondent's collection of the cards was also an unlawful poll of employees' sentiments about the Union. *Space Needle, LLC*, 362 NLRB at 37; *Electrical Contractors, Inc.*, 331 NLRB at 844. Respondent cited the fact that none of the employees returned an executed Union authorization card as a basis for finding good faith doubt to conduct the September 21, 2017 poll. The letter's failure to notify employees that by signing the authorization card they would also join the Union both hid the true purpose of distributing the card and manipulated the outcome of its poll. Additionally, since at that time the Union had suspended unit members' requirement to pay dues, a fact not mentioned in the letter, it is impossible to determine that Respondent sent the memorandum and solicited employees to sign the Union authorization card for any reason other than to determine the amount of Union support and use the information as a justification for its "election." As with the December 28 letter that the withdrawal/dues revocation form, Respondent established no legitimate reason for knowing employees' Union preferences at that time.

For these reasons, Respondent's distribution of the August 15 memo and solicitation of employees to return the Union authorization card and polling of their responses violated Section 8(a)(1) of the Act.

**8. Respondent Violated Section 8(a)(1) of the Act During the September 2017 Staff Meeting by Informing Employees That It Would Be Futile For Them To Select The Union As Their Bargaining Representative.**

**a. Statements made during the staff meeting were coercive.**

Under Section 8(c) of the Act, an employer's expressions of its views, argument or opinion is not unlawful, unless the statements contain a threat of reprisal or force or promise of benefits. 29 U.S.C. § 158(c). When an employer informs employees about the consequences of unionization, those predictions must be based on objective fact and be carefully phrased to show a reasonable belief that the effects are beyond the employer's control. *National Propane Partner, L.P.*, 337 NLRB 1006, 1018 (2002); see *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969); *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). Without such a showing, then the employer's statements are considered a threat of retaliation based on misrepresentation and coercion, in violation of Section 8(a)(1). *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at \*5.

During the September 13, 2017 mandatory meeting, Respondent's consultant, Aria Green, created fear of the Union by discussing unsubstantiated complaints of harassment and intimidation, gave employees a no solicitation form to complete, and then falsely told them that it was required by the NLRB to give the Union members' contact information before the election. He told employees that as their exclusive bargaining representative, the Union had control over everything in the workplace, including benefits, wages, leave time, sick time, and health benefits. He told them that in order to entice an employer to agree to union security and dues checkoff clauses, the Union might bargain away their benefits and wages. These statements are not based on any objective facts. Therefore, they are unlawful, because they implied that the employees would lose benefits by choosing the Union in the upcoming poll. See *Wiers*

*International Trucks, Inc.*, 353 NLRB 475, 490 (2008) (finding employer's statement that "it can only get worse" with a union an unlawful coercive threat); *Poly-America*, 328 NLRB at 669 (finding unlawful an employer's comment that the union would cause the employer to lower wages, hours and overtime and that job security would suffer).

Respondent's engagement of a cleaning service for the day program, which Setteducati announced at the beginning of this meeting, was an admitted unilateral removal of bargaining unit work. *See St. George Warehouse, Inc.*, 341 NLRB 904 (2004), *enfd.* 430 F.3d 294 (3d Cir. 2005). Although this issue is not alleged in the complaint, it is further evidence of Respondent's bad-faith bargaining and its overall goal of getting rid of the Union and eroding Union support. Since employees were happy about being relieved of this work, it is also akin to a grant of benefits, which would be unlawful if it had been done before an NLRB election, rather than an employer-sponsored poll. *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992) (finding issuance of new uniforms and radios during union organizing campaign unlawful where not in further of or went beyond prior plans).

**b. Statements in Setteducati's September 12, 2017 letter were coercive.**

The Board has stated, "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35 (2006). Thus, an employer violates Section 8(a)(1) of the Act by placing the onus on the union for its own conduct, where it also implies that the Union's actions are futile. *Regency House of Wallingford, Inc.*, 356 NLRB 563 (2011); *Billion Motors, Inc. d/b/a Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982), *enfd.* 700 F.2d 454 (8th Cir. 1983). In *United Aircraft Corp.*, 199 NLRB 658, n. 2 (1972), *enf. denied in rel. part* 490

F.2d 1105 (2d Cir. 1973), the Board found that the respondent violated Section 8(a)(1) when it distributed to unit employees a letter that blamed the union for its own unlawful conduct, specifically its refusal to grant a scheduled wage increase. *See also Regency House of Wallingford, Inc.*, 356 NLRB 563 (finding unlawful the employer's communication to employees that the union was harming its members by demanding the employer to rescind a unilaterally-implemented wage increase); *Albert Einstein Medical Center*, 316 NLRB 1040 (1995) (finding a violation where a supervisor told an employee the union could not help return a discharged employee to work because the union was too weak, it had no money and had a lawyer with Alzheimer's disease, and that the employees should have listened to management in not voting for the union); *Horizons Hotel Corp. d/b/a Carib Inn of San Juan*, 312 NLRB 1212, 1223 (1993), *enfd.* 49 F.3d 795 (1st Cir. 1995) (finding unlawful an employer's statement that the union did not back up employees, that it should have obtained certain money for employees, and that no union could defend them); *Billion Oldsmobile Toyota*, 260 NLRB at 754.

In his September 12 letter, Setteducati blamed the Union for taking away employees' right to vote, when it was Respondent's unfair labor practices that caused the election to be blocked. At the same time, Setteducati again blamed the Union for the small raise employees had received under the Union contract, through direct statements and also indirectly, by telling employees that the Union refused to lobby Trenton for more funds. He compared this to the unexplained work the Union does for other workers it represents. Thus, Setteducati is communicating to employees that the Union just does not care about unit members' welfare and therefore voting for the Union would be futile, in violation of Section 8(a)(1).

**B. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY CONDUCTING A POLL TO DETERMINE WHETHER EMPLOYEES WANTED THE UNION TO BE THEIR EXCLUSIVE COLLECTIVE-BARGAINING REPRESENTATIVE.**

To warrant conducting a poll of employees, an employer must have good-faith reasonable doubt, based on objective considerations, of the Union's majority status. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359; *Wisconsin Porcelain Co., Inc.*, 349 NLRB 151, 151 (2007).

The Board has held that employers must observe the following safeguards when polling employees:

- 1) the purpose of the poll is to determine the truth of a union's claim of majority;
- 2) this purpose is communicated to the employees;
- 3) assurances against reprisals are given;
- 4) the employees are polled by secret ballot; and
- 5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

*Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063 (1967); *see also Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319, 1328 (2006); *Storer Communications, Inc.*, 297 NLRB 296, 299 (1989). A failure to comply with any one of the *Struksnes* safeguards renders the poll unlawful. *Grenada Stamping and Assembly, Inc.*, 351 NLRB 1152, 1152 n. 4 (2007), *enfd.* 322 Fed.Appx. 404 (5th Cir. 2009). The burden is on the employer to establish that the required safeguards are met and the poll is lawful. *Heck's Inc.*, 174 NLRB 951 (1969). Here, Respondent has not met its burden, because it did not comply with four of the *Struksnes* safeguards.

**1. Respondent Did Not Establish Good-Faith Doubt.**

Respondent did not establish good faith doubt that the Union lacked majority status, and therefore was not justified in conducting the poll. *See Wisconsin Porcelain Co., Inc.*, 349 NLRB

151, 152 (2007); *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998) Respondent's unlawful conduct caused employees elected to sign the resignation/dues revocation letters and declined to execute the Union authorization cards in response to its August letter. Respondent also tainted the showing of interest in the decertification petition through its unlawful assistance. An employer is not entitled to rely on the results of its unfair labor practices as proof of good faith doubt. *See Transpersonnel, Inc.*, 336 NLRB 486 (2001); *LaVerdiere's Enterprises*, 297 NLRB 484, 486, *enfd. in part* 349 F.3d 175 (4<sup>th</sup> Cir. 2003).

## **2. The Poll was Unlawful Due to Respondent's Unfair Labor Practices.**

Respondent's unfair labor practices permeated the process and rendered the poll unreliable. An employer may not conduct a poll to assess employee support for a union when it has engaged in unfair labor practices. *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB at 1328; *Struksnes*, 154 NLRB at 1063. Respondent's bad-faith bargaining, including regressive proposals, refusal to provide financial information, refusal to provide the Union employees' addresses, and its unlawful statements during the September 2017 meeting just before the poll, in addition to the unfair labor practices mentioned above, all created a coercive atmosphere that could reasonably have contributed to employees' disaffection for the Union. *Id.* Indeed, that was the purpose. Since Respondent conducted the poll in the wake of its numerous unfair labor practices, it does not satisfy the standards of *Struksnes*, and is therefore a violation of Section 8(a)(1).

## **3. The Poll Did Not Satisfy *Struksnes*' Procedural Safeguards.**

Respondent also did not satisfy *Struksnes*' other safeguards. Although Respondent's stated reason for the poll was to determine whether a majority of the unit members wanted the Union, the true purpose was to create a false justification for withdrawing recognition.

Respondent promoted the poll to be as close to an NLRB election as possible, by using NLRB forms and providing the Union with an “Excelsior List,” while falsely telling employees that it was required to give their addresses to the Union. Yet the conduct of the election, replete with misconduct that would overturn a true NLRB election, demonstrates that Respondent was interested in projecting the appearance of a fair election, rather than having one. The credible testimony shows that employees were left to pick up ballots themselves. Therefore, they could take as many ballots as they wished. Moreover, it is unclear which sheets of paper were used as ballots – the white sheets placed directly next to the ballot box, or the ballots that resembled the sample ballots posted in the group homes, which were placed farther away from the box.

There is significant evidence suggesting that Judge Scancarella did not “run” the election. Respondent’s other witnesses contradicted themselves. As a third party, Judge Scancarella’s testimony should be credited over Respondent’s agents. He testified that Cusack and Setteducati told him what to do, and that he kept his own list of voters, which he hid in his briefcase. He testified that he did not fill out the Tally of Ballots, although he signed it, and that both he and Williamson counted the ballots. Additionally, Scancarella did not draft the email to the Union informing it of the results of the election. Especially troubling is the incident of the overstuffed ballot box, which caused ballots to be pulled out, refolded and returned to the box. This not only indicates that the voting was not well monitored, but it also puts into question the true secrecy of the ballots, undermining the third *Struksnes* safeguard.

Respondent’s coercive communication to employees about the poll also showed that the true purpose of the poll was to create a false justification for withdrawing recognition. As discussed above, Setteducati’s September 12 letter to employees placed unlawful blame on the Union for Respondent’s unfair labor practices, tending to make employees feel that supporting

the Union would be futile. Setteducati's September 20 email to employees, just one the day before the poll, contains some of the same statements, and more. Cusack's September 18 letter to Wade and Pinarski contains similar statements. These letters, which are full of fabrications, are simply rants against the Union, and they have one objective – to convince employees that the Union is ineffective.

There is no evidence that Respondent gave employees assurances against reprisal, thus failing to meet the third *Struksnes* safeguard. The Notice of Secret Ballot Election states that employees are not required to vote and that the poll would be conducted by secret ballot, Setteducati's September 12, 2017 letter to employees notes that the poll will be secret ballot, and Cusack's September 18 letter to the Union states that Respondent will honor employees' wishes. However, contrary to the ALJ's findings, these statements are not assurances against reprisal. None of Respondent's communications to employees contained any language assuring employees that they would not experience reprisal for how they chose to vote.

**C. RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY WITHDRAWING ITS RECOGNITION OF THE UNION AS THE EXCLUSIVE COLLECTIVE-BARGAINING REPRESENTATIVE OF THE UNIT.**

An employer may rebut the continuing presumption of a union's majority status and unilaterally withdraw recognition only on a showing that the union has in fact lost the support of a majority of the employees in the bargaining unit. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 723 (2001). Evidence in support of a withdrawal of recognition must be raised in a context free of unfair labor practices of the sort likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. *Lee Lumber & Building Material Corp.*, 322 NLRB at 177. Not every unfair labor practice, however, will taint evidence of a union's subsequent loss of majority support; there must be specific proof of a

causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. The criteria for determining whether a causal relationship has been established include: (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). Here, Respondent's numerous unfair labor practices caused the employee disaffection and affected the bargaining relationship, satisfying all four prongs of the *Master Slack* criteria. Thus, Respondent's withdrawal of recognition from the Union is unlawful as its conduct is based upon the fruits of Respondent's unfair labor practices.

Respondent's unfair labor practices were ongoing, and they spanned the year preceding its withdrawal of recognition. The earliest alleged unfair labor practice, Respondent's solicitation of employee support for the decertification petition, occurred in October 2016, nearly one year before Respondent's withdrawal of recognition. The Board has held that solicitation of employees to decertify a union tends to have a lasting effect on employees and cause employee disaffection with the union. *AT Systems West, Inc.*, 341 NLRB 57, 60, n. 9 (2004) citing *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000), *enfd. in rel. part sub nom. Teamsters v. NLRB*, 47 Fed.Appx. 449 (9th Cir. 2002) (finding the effect of respondent's unlawful solicitation of signatures for a decertification did not dissipate after 9 months); *see also Beverly Health & Rehabilitation Services*, 346 NLRB at 1329 (employee poll showing loss of majority support was tainted by unlawful conduct that took place 6 - 8 months earlier). Moreover, since Respondent's help with the decertification petition was followed by other unlawful conduct, the effects of its unfair labor practices could not tend to dissipate, but instead accumulate. *See Goya Foods of*

*Florida*, 347 NLRB 1118, 1121 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (finding a temporal nexus between tainted employee “disaffection petitions” and withdrawal of recognition, where “[r]espondent’s widespread and unrelenting pattern of unlawful conduct continued from the beginning until the end of the certification year”).

The nature of Respondent’s remaining unfair labor practices, indeed the very reason for the unfair labor practices, was to cause employee disaffection and loss of union membership. Respondent’s solicitation of the resignation/dues revocation forms was the direct cause of employees to lose their Union membership, a status that did not change before the withdrawal of recognition. Respondent’s regressive proposals were aimed at restricting the Union’s ability to represent its members. Its refusal to provide information to justify its proposals created a stalemate in bargaining. Its refusal to provide addresses to the Union, which, in concert with its refusal to allow the Union access, drastically affected the Union’s ability to contact its members. Finally, Respondent’s coercive statements during the mandatory meeting just before the poll and its September 12, 2017 letter to employees conveyed to employees that their Union was ineffective, which clearly tends to cause employee disaffection. *See Anderson Ent. d/b/a Royal Motor Sales*, 329 NLRB 760, 764 (1999), enfd. 2 Fed.Appx. 1 (D.C. Cir. 2001) (suggesting to employee that he sign a petition to get rid of union and promising him a bonus if he would circulate the petition likely to undermine support for the union); *See Teneco Automotive, Inc.*, 357 NLRB 953, 959 (2011), revd. 716 F.3d 640 (D.C. Cir. 2013) (finding employer’s refusal to give the addresses of permanent replacement employees to the union, thus depriving the union of opportunity to address lingering feelings of disconnect existing after a strike had a lasting detrimental effect on employees’ view of the union); *See Penn Tank Lines, Inc.* 336 NLRB 1066, 1067 (2001) (“[w]here unlawful employer conduct shows employees that their union is irrelevant

in preserving or increasing their wages, the possibility of a detrimental or long lasting effect on employee support for the union is clear.”); *Bridgestone/Firestone*, 332 NLRB at 577 (finding employer’s refusal to provide information impeded the union’s ability to contact employees to prepare for upcoming negotiations, thus reasonably tending to create the impression among employees that the union was ineffectual); *Toyota of San Francisco*, 280 NLRB 784, 804 (1986) (finding bad-faith bargaining and a tainted anti-union petition precluded lawful withdrawal of recognition).

The ALJ’s finding that the Union’s absence caused the lack of support has no basis. Although the Union representative before Ingram was not effective, there is no evidence showing that this was the cause of a loss of majority support. Respondent produced no evidence that employees wanted to decertify the Union before Respondent began blocking the Union’s attempts to organize and committing unfair labor practices. Indeed, Respondent’s anti-Union conduct began right after the Union requested bargaining in April 2016.

The evidence demonstrates that employees were aware of Respondent’s unfair labor practices. Most employees directly experienced Respondent’s unfair labor practices, such as the solicitation of the Union resignation/dues authorization forms, the August 2017 letter, and the September 2017 mandatory meeting. Those employees whose addresses were known by the Union gained knowledge through the Union’s monthly newsletter, the *Informer*. Even so, it is not necessary to prove that employees actually knew about Respondent’s unfair labor practices in order to establish that Respondent’s withdrawal of recognition is unlawful. *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016, 1044 (2005), *enfd.* 468 F.3d 952 (6<sup>th</sup> Cir. 2006) citing *Hearst Corp. San Antonio Light Div.*, 281 NLRB 764, 765 (1986), *affd.* 837 F.2d 1088 (5<sup>th</sup> Cir. 1988) (“[W]e are unwilling to allow the Respondent to enjoy the fruits of its violations by asserting that

certain of its employees did not know of its unlawful behavior, but rather shall hold it responsible for the predictable consequences of its misconduct”). Additionally, when an employer commits unfair labor practices in connection with a decertification effort, the Board does not require proof of the number of employees who were exposed to, or aware of, the employer’s unlawful conduct. *House of the Good Samaritan d/b/a Samaritan Medical Center*, 319 NLRB 392, 396 (1995).

For these reasons, Respondent’s withdrawal of recognition of the Union was a violation of Section 8(a)(1) and (5) of the Act.

## V. CONCLUSISON

The entire record, the credible evidence, and the applicable case law establish that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in the Complaint. Counsel for Acting General Counsel therefore urges the Board to sustain the Exceptions in their entirety and reverse the ALJ’s recommendation to dismiss the Complaint.

Dated at Newark, New Jersey  
This 5th day of March, 2021

Respectfully submitted,

/s Nancy Slahetka

Nancy Slahetka  
Counsel for General Counsel

**CERTIFICATE OF SERVICE**

The undersigned certifies that on March 5, 2021 Exceptions to the Administrative Law Judge's Decision and Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision was served via e-mail upon:

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