UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: NBCUNIVERSAL MEDIA, LLC and NEWSGUILD OF NEW YORK, LOCAL 31003, TNG/CWA	Case 02-CA-262640

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Dated: March 12, 2021

Respectfully submitted,

Nick Rowe, Counsel
NBCUniversal Media, LLC
30 Rockefeller Plaza, Suite 4752E-A
New York, NY 10112
(212) 664-7464
nick.rowe@nbcuni.com

Attorney for NBCUniversal Media, LLC

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I. INTRODUCTION

This case involves Respondent's decision, in mid-2020, to roll back the salary increases of a subset of high-earning employees that participated in the annual merit planning process ("Rollback"). The Administrative Law Judge ("ALJ") issued the underlying decision ("Decision") finding that the Rollback was a violation of 8(a)(5). The Decision is flawed in a number of respects, but most importantly it errs by not adequately accounting for the weight of recent and past Board cases establishing that an employer's unilateral action which involves the exercise of discretion does not require bargaining if it is similar to past employer actions which also involved the exercise of discretion. For that reason, and because the Charging Party waived its right to bargain over the contested action, the underlying complaint must be dismissed.

II. STATEMENT OF FACTS

Respondent is a large multinational corporation which is made up of, in part, numerous business units. Jt. Ex. 1, Stip. 1. The NBC News Group is one of those business units and is composed of subunits including the News Digital subunit. Id. In December 2019, Charging Party was certified as the exclusive bargaining representative for the following unit of employees employed within Respondent's the NBC News Group News Digital subunit:

> Included: All full-time and regular part-time editorial employees employed by NBC News Digital to create editorial content for initial distribution on NBC News Digital platforms (currently nbcnews.com, TODAY.com, msnbc.com, NBC News Now, and Stay Tuned), including editors, reporters, producers, writers, production assistants, editorial designers, animators, and graphic artists.

Excluded: All other employees, including employees based outside the United States, independent contractors, confidential employees, managerial employees, temporary employees, guards, and supervisors as defined under the National Labor Relations Act. GC Ex. 2.

A. Respondent's Annual Merit Planning Process:

Since at least 2015 and continuing annually, certain of Respondent's business units and/or subunits, including News Digital, participated and continue to participate in an annual merit planning process in which management of the business unit and/or subunit determine, at their discretion, whether individual employees should receive an annual salary increase based on merit and, if so, how much the increase will be. Jt. Ex. 1, Stips. 2, 3, 6, 8. The total amount that may be spent by a business unit or subunit is the "merit budget figure." Jt. Ex. 1, Stip. 3. The merit budget figure is not determined by individual business units or subunits, but instead is determined on a corporatewide basis by Respondent's corporate Compensation group. Jt. Ex. 1, Stips. 3, 4, 8. On an annual basis during the period January 2015 through July 2020, Respondent's corporate Compensation group designated a three (3%) percent merit budget figure, which represents a dollar amount equivalent to three percent of the combined salaries of employees that are eligible to participate in the annual merit planning process. Id. Although the merit budget figure as determined by the corporate Compensation group during that period was three (3%) percent annually, there is no requirement that the Compensation group designate three (3%) percent as the merit budget figure, such figure could be lower than three (3%) percent, and employees are not guaranteed any specific increase amount and may get no increase at all regardless of what the Compensation group designates as the merit budget figure. Jt. Ex. 1, Stips. 4, 6. During that same period, (1) neither the News Group business unit nor the News Digital subunit had a role in the

determination of the merit budget figure, and (2) News Digital utilized, on an annual basis, the merit budget figures as determined annually by Respondent's corporate Compensation group. Jt. Ex. 1, Stips. 4, 5, 7. Also during that same period, some News Digital employees that participated in the merit planning process received salary increases of less than three (3%) percent, as determined by News Digital management. Jt. Ex. 1, Stip. 9.

B. 2020 Merit Planning Process as Impacted by COVID-19:

On or around January 13, 2020, Respondent representative Jason Laks spoke with Charging Party representative Ben Dictor and notified Charging Party that it intended to include Charging Party's unit members in the annual merit planning process for 2020. GC Ex. 5. Dictor responded by email dated January 17, 2020 and indicated that Charging Party "is agreeable to having the Company proceed with its annual evaluation and compensation changes as it would in the usual course of business." Id. As described above, News Digital for its 2020 merit planning process utilized the three (3%) percent merit budget figure as determined by the corporate Compensation group and in March 2020 implemented salary increases in various amounts to unit members as determined by News Digital management within the three (3%) percent merit budget figure through the merit planning process. Jt. Ex. 1, Stips. 4, 7, 8.

On May 5, 2020, in response to the worldwide COVID-19 outbreak, Respondent CEO Jeff Shell sent an email to employees explaining that COVID-19 has had a significant impact on the company's financial performance. GC Ex. 19. In that email Shell stated

> At NBCU, there is no question that the current environment is having a significant impact on our company's performance. While many parts of our television operation are enjoying increased ratings, most segments of the company are

> operating in a very difficult environment. Our theme parks are closed, most of our scripted film and television productions have ceased, sports programming (including the 2020 Olympics) has been delayed, and advertising revenue is starting to fall.

The company's approach in responding to the COVID-19 impact included, among other things, an intent to "address our expense base, but do so in a way that is logical, fair and equitable across each of the businesses[.]" GC Ex. 19 at 2. The email went on further to explain that

> in order to deal with the depth of this crisis and its effect on our company we need to also address our cost base. As you may know, I have asked my leadership team to work with finance and human resources to find cost savings in each of their respective businesses. Some of the options are straightforward, like cutting travel and entertainment budgets or outside consultants, while others will be more challenging.
>
> And while we do not believe in a one-size-fits-all approach, we do plan to take a couple of actions across the entire company. As a first step, the senior leaders who comprise the Executive Committee have volunteered to take a 20% reduction to their salaries. We also plan to roll back the most recent salary increases for our exempt employees who have salaries in excess of $100,000. For the vast majority of you, this means reversing the recent merit increase that just went into effect in early March. This rollback will be implemented in early June on a go-forward basis. It does not include our Parks employees, as they have already taken salary reduction actions. Because there are nuances based on the terms of your employment and country location, all employees will receive follow-up information as we get closer

> to June. In the meantime, please review this Q&A and connect with your managers and HR representatives if you have further questions. We know that these changes are difficult, and hopefully we can get to the other side of this crisis as fast as possible so that we can resume our growth.

GC Ex. 19. Thus, Respondent's decision to roll back the 2020 merit increases, which was implemented in June 2020, was part of a *corporatewide* initiative determined at the corporate level. GC Ex. 19; Jt. Ex. 1, Stip. 10. The Rollback initiative was not limited to the NBC News Group business unit or the News Digital subunit but instead was applied to *all salaried employees* across NBCUniversal Media, LLC that made over $100,000 annually and participated in the merit planning process. GC Ex. 13; Jt. Ex. 1, Stip. 1. The Rollback also was not a wholesale rescission of the merit planning process but instead was merely a reversal of the 2020 salary increases for the above-referenced subset of high-earning employees that participated in the merit planning process. GC Ex. 19. Further, in light of the eligibility criteria for the Rollback outlined in Jeff Shell's email, the Rollback only impacted some employees that participated in the Respondent's merit planning process. GC Ex. 8; Tr. 69 (e.g., only 42 of 166 News Digital employees that were members of Charging Party's unit were impacted by the Rollback). Neither the NBC News Group business unit nor the News Digital subunit had the ability to change the corporatewide merit increase roll-back decision. Jt. Ex. 1, Stip. 10. In conversations Respondent representative Laks had with Charging Party representative Dictor and others subsequent to the May 5, 2020 Rollback announcement, Respondent took the position that it did not have to bargain over the Rollback decision because the merit planning process itself was discretionary and the Rollback was part of that process as indicated by CEO Shell. Tr. 57.

III. ARGUMENT

As an initial matter, the ALJ erroneously reframed Respondent's defenses a number of times throughout his Decision. See Exceptions 1, 11, 12. Respondent has contended throughout this matter that there was no legal obligation to bargain regarding the Rollback pursuant to the principles of past practice articulated in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) and *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (2019), et al. Pursuant to the *Raytheon* past practice line of cases and *NLRB v. Katz*, 369 U.S. 736 (1962) and progeny, Respondent argued that the Rollback did not constitute a "change" to employee terms and conditions which triggers a bargaining obligation under Board law. Further, the ALJ failed to mention or address anywhere in his Decision Respondent's critical argument that News Digital's action of comporting with the budget-based corporatewide Rollback initiative and applying the Rollback to employees within the News Digital business unit was similar in kind and degree to News Digital's prior actions of comporting with and applying corporatewide budget based decisions regarding the merit planning process, i.e., the annual merit budget figure determinations made by the corporate Compensation group for application across Respondent's entire business. Based on this, the Rollback satisfies the *Raytheon* and *Mike-Sells* similarity standard and thus is in line with past practice and triggers no bargaining obligation.

In addition, regardless of whether the Rollback is found to meet the *Raytheon* and *Mike-Sells* similarity standard with respect to past corporatewide budget based decisions regarding the merit planning process as described above, it would meet the similarity standard when compared against News Digital management's historical retention and exercise of discretion in determining the amounts of increases granted to employees that participated in the merit planning process, including the discretion to give no increases to participating employees. In other words, the Rollback was not a wholesale discontinuance of the merit planning process but instead was

tantamount to an action, exercised at the discretion of the News Digital business unit with respect to merit planning process increases, to give *no increase* to some employees that fell within a fixed set of eligibility criteria. As such, it was merely a continuation of the existing practice of exercise of management discretion in determining salary increases and thus is not a "change" requiring bargaining. See *800 River Road Operating Co.*, 369 NLRB No. 109 (2020) (no bargaining obligation when an action that involves the exercise of employer discretion is in accordance with an established policy or practice).

A. The ALJ Failed to Analyze or Properly Consider Respondent's Defenses that the Rollback Met the Past Practice Similarity Standard as Compared Against Prior Respondent Actions, Leading to Erroneous Findings of Fact and Law (Relates to Exceptions 7, 10, 13-25)

The ALJ in this matter found that Respondent's annual merit planning process was a longstanding past practice. Respondent does not except to this finding. With respect to a past practice defense, the question then becomes whether the disputed action was "similar in kind and degree" to the actions that constitute the established past practice. *Mike-Sells Potato Chip*, 368 NLRB No. 145 at *5 (Dec. 16, 2019). Here, Respondent argues that the Rollback of certain Charging Party unit members' 2020 annual increase was "similar in kind and degree" to actions involved in the merit planning process in two separate respects: (1) News Digital's application of the corporatewide Rollback initiative to its employee group was similar to its annual past practice of comporting with and applying corporatewide annual merit planning process budget figure determinations made by the corporate Compensation group and (2) News Digital's determination that its employees falling within certain fixed criteria would not ultimately get annual salary increases as part of the 2020 merit planning process was in line with the scope of discretion News Digital management exercised annually in determining whether and how much of a salary increase employees would get as part of the merit planning process.

To demonstrate conformity with an established past practice, a party need *not* show that the underlying reason for its action was exactly the same or that it relied on consistent criteria to make the decision. In *Raytheon*, 365 NLRB No. 161 at *2, the Board found that the employer did not make any "change" when it unilaterally modified healthcare packages without giving the Union prior notice and opportunity to bargain. There, the changes varied: "some changes were intermittent, while others, such as the portion and amount of health care premiums . . . changed annually." *Id*. (Members Pearce and McFerran, dissenting). These changes were based on "significant discretion":

> Respondent gave its health benefits professionals "free rein to come up with whatever benefits they think is best" for employees. What they came up with and what was unilaterally implemented by the Respondent during the terms of successive contracts from 2001-2012 included increases to employee copayments for emergency room treatment, outpatient surgeries, and specialist visits, as well as increases to deductibles and other out-of-pocket expenses. The Respondent also added plan options, eliminated others, changed eligibility requirements, and merged some plans. Additionally, increases to medical premiums were made every year, without any fixed percentage ratio, starting in 2002 with the Respondent paying 85 percent of the premiums to employees' 15 percent, culminating in a 75 percent to 25 percent employer-to-employee ratio by the end of the 2009-2012 contract.

Id. The ALJ found that premium shares "changed on an ad hoc basis" such that neither employees nor their Union could predict them. *Id*. "[T]there was no formula or criteria for the changes [, and] they could not be explained by the Union to the bargaining unit." Id. The ALJ also found that changes to specialist co-pays, emergency room co-pays, and prescription costs were "completely random." *Id*.

Despite stipulations that the employer exercised "significant discretion" in modifying benefits and lacked "definable criteria" in doing so, the *Raytheon* Board found that the healthcare changes did not materially vary in kind or degree from one year to the next. The Board thus held

that the changes "constituted a past practice and a term and condition of employment privileging the [employer] to make further changes in costs and/or benefits." *Id*. at *22. The Board also confirmed that actions do not necessarily constitute a change where they involve "discretion." *Id*. at *20. Rather, "an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion." *Id*.

Similarly, in *Shell Oil Co.*, 149 NLRB 283 (1964), the employer had—"on occasion" and for "some years" prior to the labor agreement expiring—subcontracted work that could be performed by unit employees, without notice to or objection by the union. *Id*. at *290. The employer relied on certain contract language that purportedly gave it the right to subcontract unit work, and further considered whether it possessed the necessary equipment, materials, know-how, and/or manpower to do the job in-house. *Id*. at *290-91. No one was laid off as a result of subcontracts entered prior to the labor agreement's expiration. *Id*. at *291. After the labor agreement expired, the employer kept subcontracting without notice to, or bargaining with, the union, and its post-expiration subcontracts resulted in the layoff of 60-unit employees. *Id*. The union filed an unfair labor practice charge, claiming all post-expiration subcontracts were in violation of the NLRA. *Id*.

The *Shell Oil* Board disagreed, finding the employer's "frequently invoked practice . . . while predicated upon observance and implementation of [the expired contract], had also become an established employment practice . . . ." *Id*. at *287. The post-expiration subcontracts "did not materially vary in kind or degree from what had been customary in the past," despite that the specific work subcontracted, and the reasons therefor, varied significantly. *Id*. at *288, **292-93 (e.g., using an outside firm to: clean boilers because internal attempts to clean the boiler had proved

unsuccessful and time-consuming; repair and replace swimming pool tiles because the company's regular employees were unqualified to set decorative tile; apply acoustic ceiling because it was a difficult task to perform; disposal of garbage and trash because regular employees were out on strike; etc.).

The Board in *Mike-Sells Potato Chip Co.*, 368 NLRB No. 145 (Dec. 16, 2019) and *800 River Road Operating Company*, 369 NLRB No. 109 (Jun. 23, 2020) further extended the principle that there is no "change" under *Katz*, and thus no deviation from the status quo, when a unilateral action that necessarily involved the exercise of discretion is in line with an existing practice or policy that involved the exercise of discretion. In *Mike-Sells*, the employer "exercised broad discretion in determining what, when, and how many route sales to make in accord with operational needs over a 17-year period, but the frequently repeated action taken in each instance was always the sale of a route serviced by a company driver to an independent distributor." 368 NLRB No. 145 at *5. Thus, the contested route sales were found not to require bargaining in part because the employer's practice of route sales was "not meaningfully distinguishable from the discretionary benefit changes made in *Raytheon* or from the subcontracting past practices that the Board found were not materially different in degree and kind in *Westinghouse* and *Shell Oil* despite the fact that the specific work subcontracted out [in those cases] varied significantly." *Id*. Further, the Board in *800 River Road* found lawful an employer's exercise of a discretionary disciplinary action pursuant to an existing policy or practice during the status quo period. This is because, according to the Board, "the correct analysis under *Katz* must focus on whether an employer's individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established policy or practice." 369 NLRB No. 109 at *8.

Here, because the Rollback initiative was corporatewide and was intended to be applied across all of Respondent's business units, News Digital management's ability to deviate from that initiative was limited. Jt. Ex. 1, stip. 10 (Rollback "was part of a companywide initiative determined at the corporate level which neither the NBC News Group nor News Digital had the ability to change"). Therefore, the concern raised in, e.g., the *Raytheon* dissent regarding the impact of discretion on a past practice analysis is irrelevant. Nevertheless, even if News Digital's Rollback is found not to satisfy the similarity standard with respect to the past practice regarding corporatewide annual merit planning process budget figure determinations, it is "similar in kind and degree" to News Digital's annual past practice of determining salary increases as part of the merit planning process. Here, as in *Shell Oil*, *Raytheon*, *Mike-Sells* and *800 River Road*, Respondent's News Digital business unit necessarily exercised some discretion in deciding whether and how much of an annual increase its employees would receive as part of the merit planning process. Jt. Ex. 1, stip. 6. But those cases confirm that the exercise of discretion is not fatal to an assertion of a past practice defense and the legal principles articulated in those cases should be applied to situations when an employer has a past practice of exercise of discretion in the adjustment of wages. Thus, because the News Digital Rollback should be understood as tantamount to an exercise of that discretion in determining annual employee salary increases, it does *not* demonstrate a departure from News Digital's established past practice. Rather, as Member Miscimarra explained in *DuPont*:

> Take, for example, an employer that has always painted factory walls blue every summer and green every winter. When doing this painting, the employer exercised discretion: it varied the precise shade of blue and green, and it also varied the precise time when the painting would be done. Summer approaches. If the employer again paints the factory walls blue, will that constitute a "change"? In my view, because this is what the employer has always done, it is not a "change" for the employer to do the same thing again.

E.I. du Pont de Nemours, 364 NLRB No. 113 (2016) at *16 (dissent). The Board endorsed this view in *Raytheon*, recognizing that "employers do not just paint walls. They take all kinds of actions, including many that affect wages, hours, benefits, and other employment terms." 365 NLRB No. 161 at *14. Accordingly, "an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion." *Id*. at *20 (emphasis added) (cites omitted). *Katz* is not incompatible with this principle, as the *Raytheon* Board acknowledged:

> Although the Supreme Court in *Katz* mentioned that the employer's merit increases at issue in that case involved "a large measure of discretion," this was a factual observation made by the Court when contrasting the disputed merit increases (which ranged between $2 and $10 and were awarded only to 20 employees out of approximately 50 employees in the bargaining unit) against "*so-called* 'merit raises'" that, according to the Court, were "in fact simply *automatic* increases."

365 NLRB No. 161 at *20, quoting *Katz*, 369 U.S. 736, 746-747 (1962) (emphasis added). In *Katz*, the past practice of automatic increases was informed by little to no employer discretion whereas the contested action was informed by "a large measure of discretion". Therefore, *Katz* is distinguishable from this matter because here, the contested action, when seen as in effect an exercise of discretion to grant *no increases* for a subset of employees, falls within the scope of Respondent's past practice of exercise of broad discretion in determining merit wages annually. In other words, *Katz* does not prohibit – and *Shell Oil*, *Raytheon*, *Mike-Sells*, and *800 River Road* et al has construed *Katz* to permit – unilateral employer actions during the status quo period that are informed by a measure of discretion when those actions are similar to a past practice of actions which themselves were informed by a measure of discretion. As a result, there is no "change" to the status quo requiring notice and bargaining under Section 8(d) of the Act.

The ALJ also erroneously found that Respondent was required to bargain over the decision to roll back the 2020 merit planning process salary increases upon request by Charging Party regardless of whether such roll back was part of a past practice. Exception 22. However, this principle was overturned in *Mike-Sells Potato Chip Co.*:

> As a final matter, we also reject the judge's conclusion that, irrespective of whether the Respondent had a past practice of unilateral route sales, it had an obligation to bargain with the Union, upon its request, about the decisions to sell Routes 104, 122 and 131. This conclusion was based on certain language that he cited from *Raytheon* at 365 NLRB No. 161, slip op. at 4 fn. 11. To clarify, an employer has no statutory obligation under *Katz* to bargain about a decision to take unilateral action that is consistent with a past practice during the parties' collective-bargaining relationship. That action represents a continuation of the status quo. The language in *Raytheon* was only meant to underscore the separate principle that an employer still has the obligation to bargain, upon the union's request and at times when Section 8(d) requires bargaining, about changing that status quo for the future. That point was clearly stated in *Shell Oil* and unequivocally affirmed in *Raytheon*, 365 NLRB No. 161, slip op. at 7 fn. 31 (a footnote specifically cross-referenced in the language relied on by the judge).

368 NLRB No. 145 at *6. Here, the Rollback was not a "change" to – but instead was a continuation of – the status quo. Because of this, as explained by the Board in *Mike-Sells*, there is no obligation to bargain *even upon the union's request* since there was no bargaining obligation whatsoever under Section 8(d) of the Act.

B. The ALJ Erred in Failing to Find that Charging Party Waived Any Right it May Have Had to Bargain Over Decisions Relating to the Merit Planning Process (Relates to Exceptions 2-6, 8, 9, 23-25)

The ALJ erroneously found that Charging Party did not waive any right it may have had to bargain over the Rollback because that action was not part of the merit planning process and the email "clearly stated in the same email above that any annual evaluation process did not take away the union's right to bargain any proposals the Respondent might make concerning wages or evaluations." Decision at p. 8, lines 7-9. In situations where the parties have not yet concluded their first collective bargaining agreement, the Board decides the issue of waiver on the evidence

of the parties' conduct. *American Diamond Tool, Inc.*, 306 NLRB 570 (1992). Factors to be assessed to determine waiver absent a first collective bargaining agreement include whether the union had actual notice of the issue that was purportedly waived and whether the union had an opportunity to object to the issue that was purportedly waived. *Id*. Here, because Charging Party was given notice of Respondent's intent to include its News Digital unit employees in the merit planning process and it responded that it was agreeable to "having the Company proceed with its annual evaluation and compensation changes as it would in the usual course of business," Charging Party expressly consented to the unit members' inclusion into the merit planning process and the "compensation changes" that went along with it. GC Ex. 5. As such, Charging Party had an opportunity to object to the employees' inclusion in the merit planning process but did not do so and instead acquiesced to their inclusion in the process which establishes union waiver in this instance. Therefore, because Charging Party waived any right it may have had to bargain over the merit planning process, the Rollback does not violate the Act even assuming a bargaining obligation existed in the first instance, which it did not as identified above.

C. The ALJ Erred in Recommending Certain Remedies and Orders that Are Appropriate for a Compliance Proceeding (Relates to Exception 24)

The ALJ cited *AdvoServ for New Jersey*, 363 NLRB No. 143 (2016), to support his recommended remedy regarding submission of a backpay award allocation report to the Regional Director within 21 days of the date the amount of backpay is fixed, that case does not stand for the principle that Respondent is also required to submit W-2 form to the Regional Director on a related timeline. Indeed, the ALJ cited no cases to support this remedy and did not indicate the date of reference with respect to the 21-day deadline period. As a result, this aspect of the proposed remedy, in addition to every other recommended remedy, order and notice, must be set aside.

IV. CONCLUSION

Respondent respectfully urges the Board to dismiss the complaint in its entirety for any or all of the above-stated reasons.

Dated: March 12, 2021

Respectfully Submitted,

Nick Rowe, Counsel
NBCUniversal Media, LLC
30 Rockefeller Plaza, Suite 4752E-A
New York, NY 10112
Telephone: (212) 664-7464
Email: nick.rowe@nbcuni.com

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NBCUNIVERSAL MEDIA, LLC and NEWSGUILD OF NEW YORK, LOCAL 31003, TNG/CWA	Case 02-CA-262640

CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Recommended Order was electronically filed with the Board via the Agency's E-Filing system on March 12, 2021 and pursuant to Sec 102.5(f) of the Board's Rules and Regulations a copy was served electronically via email to the following parties:

Thomas Lamadrid
thomas@eisnerdictor.com

Ruth Weinreb
ruth.weinreb@nlrb.gov

Dated: March 12, 2021

Nick Rowe, Counsel for Respondent
30 Rockefeller Plaza, Suite 4752E-A
New York, NY 10112
Telephone: (212) 664-7464
Email: nick.rowe@nbcuni.com