UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAZANOVE OPICI WINE GROUP d/b/a OPICI FAMILY DISTRIBUTING OF NEW YORK	§	
Employer,	§	Case No. 29-RC-270372
And	§	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 2D	§	
Petitioner.	§	

THE EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION AND REQUEST TO STAY ELECTION PROCEEDINGS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT PROCEDURAL HISTORY 5

III. STATEMENT OF FACTS 6

IV. LEGAL ARGUMENT 13

A. Legal Standard For A Request For Review Of The Regional Director's Decision and Direction of Election 13

B. The Regional Director Departed From Board Precedent By Concluding That The Petitioned-For Unit Should Exclude the Upstate Group After Making Substantial Factual Findings That Were Erroneous 14

1. The Standard To Evaluate The Petitioned-For Unit And The Employer's Position To Add An Excluded Group Is Set Forth In PCC Structurals, Inc. And Boeing Co. 14

2. The D&DE Turns The Existing Standard On Its Head By Relying On Substantially Erroneous Factual Findings 16

a. Internal Community Of Interests Exist Across New York 16

b. The Differences Of The Excluded Group Do Not Outweigh The Similarities 18

c. Industry Unit Factors 24

d. Summary 24

C. The Board Should Stay Further Processing Of The Petition And Holding The Election Until It Grants The Employer's Request For Review And Determines That The Decision and Direction of Election Was Erroneous 25

V. CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Alamo Rent-A-Car,
330 NLRB 897 (2000) 22

Alaska Fish and Farm Products,
212 NLRB 730 (1974) 25

American Hospital Assn. v. NLRB,
499 U.S. 606 (1991) 14

Audio Visual Servs Grp.,
370 NLRB No. 39 (2020) 19, 22

Bashas Inc.,
337 NLRB 710 (2002) 19, 22

Bergdorf Goodman,
361 NLRB No. 11 (2014) 21

Casa Cavanagh, Inc.,
196 NLRB 1118 (1972) 25

In re J. C. Penney Co.,
86 NLRB 920 (1949) 15

In re J. C. Penney Co.,
86 NLRB 920 (1949) 23

NLRB v. Porter Cnty. Farm Bureau Coop. Ass'n,
314 F.2d 133 (7th Cir. 1963) 15, 24

Panera Bread,
361 NLRB 1236 (2014) 22

PCC Structurals, Inc.,
365 NLRB No. 160 (2017) as clarified by *Boeing Co.,* 368 NLRB No. 67
(2019) ..... *passim*

Stormont-Vail Healthcare, Inc.,
340 NLRB 1205 (2003) 19

U.S. Operations Inc. v *NLRB*,
842 F.3d 784 (2d. Cir. 2016) 16, 24

United Operations, Inc.,
338 NLRB 123 (2002) 15, 24

Verizon Wireless,
341 NLRB 483 (2004) 22

Statutes

29 U.S.C. § 159(a) 14

N.Y. Alcoholic Beverage Control Law § 101-b 8

National Labor Relations Act § 9(a) 14

NLRB § 102.67 1

NLRB § 102.67(d) 14

I. INTRODUCTION

Pursuant to Section 102.67 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York (hereinafter, "Employer" or "Opici") respectfully submits this Request for Review of Regional Director Kathy Drew King's Decision and Direction of Election (hereinafter, the "D&DE") in the above-captioned case.[1] In addition, the Employer believes it is critically important that the Board immediately stay further election proceedings in this matter given that a vote and impound determination would result in two groups of employees in the appropriate bargaining unit voting at different times, a procedure that cannot be countenanced in any situation. Respectfully, the Board's immediate attention is requested, given that mailing of the ballots is set to occur on April 19, 2021, a little more than a week from the filing of this Request for Review. This compressed timeline exists even though the Region took seventy-six (76) days from the close of Hearing to issue a wrongly decided D&DE that plainly restates the current standard to be applied and ignores the indisputable weight of the record facts. The Board will seldom see a more compelling Request for Review or a more flawed D&DE.

Candidly, the D&DE in this matter demonstrates two overarching points: 1) Region 29 actively ignored, refused to accept, and/or failed to comprehend the requirements of *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) as clarified by *Boeing Co.*, 368 NLRB No. 67 (2019); and 2) Region 29 improperly ignored the testimonial and record evidence in the matter when reviewing the facts as applied to the legal standard. In doing so, the D&DE flouts two (2) of the four (4) bases that require overturning the Regional Director's decision. First, the D&DE raises a substantial question of law or policy because it wholly departs from officially reported Board

[1] References herein to the Decision and Direction of Election will be abbreviated as "D&DE (page number)."

precedent. Second, the D&DE repeatedly misstates substantial factual issues, is clearly erroneous based upon the record, and has prejudiced the Employer's rights by attempting to unwind Opici's 2019 reorganization of its New York business. The conclusions reached by the Regional Director are impossible to explain, evaporate after cursory examination, and suggest that the outcome was based upon "something" other than weighing the record facts and the applicable law. Succinctly, that something appears to be the Regional Director's desire to effectuate a veritable re-writing of existing Board precedent. The Regional Director is not directly over-ruling *PCC Structurals* and *Boeing*, a power she does not possess, but instead she is effectively doing so by deciding those cases mean something entirely different or have no meaning at all.

In sum and substance, the Regional Director failed to "consider whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.'" (*Boeing*, slip. op. p.4). Here, the indisputable facts overwhelmingly reveal that the appropriate unit for bargaining in this representation petition filed in Case No. 22-RC-270372 (hereinafter, "Petition") is comprised of all sales representatives ("Reps") in New York given that the similarities between all New York Reps far outweighs any perceived differences from the smaller geographic group urged by the Union. Notably, **<u>the Union requested recognition in writing for all New York Reps</u>**. (Co Ex.-29).[2] The Union agrees that had the Employer accepted that demand it would have bound all Reps in New York. (Tr. 415, 416). The Union later petitioned for only six (6) Regions of Reps working in eight (8) southern counties in New York (the "Metro Group") and argues that the unit should exclude and ignore the

[2] Citations to Employer Exhibits will be noted herein as "Co. Ex." followed by the exhibit number reference. Citations to Board Exhibits will be "Bd. Ex" Followed by the exhibit number reference. ." Citations to Union Exhibits will be noted as "U. Ex." followed by the exhibit number reference. Citations to the Transcript of the Hearing will be noted herein as "Tr." followed by the page number reference. e."

three (3) other Regions of Reps working in the more northern counties of New York (the "Upstate Group").

This case is unusual in that the facts so starkly reveal the D&DE to be flawed. This is so because a great number of the state-wide similarities involved here can be expressed in a ***MATHEMATICAL RATIO OR PERCENTAGE***, unlike we see in many other cases that require subjective weighting. Summarily, the record facts (including the simple math where possible) demonstrate that the two groups have the following overwhelming similarities:

1. The same employing New York entity - 100% similarity. (Tr. 22, 53, 86, 206).

2. Identical structural leadership and common management - 100% similarity. (Tr. 83). As admitted by Union witness Novak, there is no manager who has a title that differentiates between the Metro Group or Upstate Group. (Tr. 265).

3. Each Rep is part of a Region with 8-10 other Reps, reporting to a Regional Manager; there is one such Regional Manager for each of the nine (9) Regions that comprise the Employer's New York operation - 100% similarity except, of course, the Regional Managers are different for each Region. (Co Ex. 1; Tr. 83, 84)

4. Identical commission rates across all goods sold - 100% similarity. (Tr. 248-249, 350, 358).

5. Identical job description, job duties, job training, and regular joint meetings across the State - 100% similarity. (Tr. 33-35,76, 85, 93-94, 97, 123, 124-225, 194, 205, 207, 382). As admitted by Union witness Novak, the Employer's plan is to continue to hold sales meetings among all New York Reps. (Tr. 270).

6. Substantially identical terms and conditions of employment, with one very minor difference (amounting to $100 per person per month) in auto expense allowance and another relating to the timing (but not amount) of vacation - more than 95% similar. (Tr. 102, 107-108, 194, 215-216). As admitted by Union witnesses Young and Novak, terms and conditions of employment for the Reps the Union seeks to exclude from the petitioned-for unit are essentially identical to terms for the Reps included by the Union. (Tr. 271-72, 358, 420).

7. Overwhelmingly similar products sold - the Metro Group regularly sells from an assortment of 3,589 products and the Upstate Group sells from an assortment of 3,359 products - of those products, 3,053 are identical meaning that the Metro Group sells from a list of 85% common products with Upstate, and the Upstate Group sells from a list of 91% common products with Metro. (Tr. 388-389; Co. Ex

31). Union witness Novak admitted the price books share a substantial commonality of products. (Tr. 256-257).

8. Overwhelmingly similar sales quotas (which are required sales and marketing efforts for each Rep across the state) with identical requirements for quota performance. (Tr. 134, 252). Union witness Novak admitted these overwhelming similarities. (Tr. 250, 251, 255, 277-289). Union witness Venezia admitted to a 95% similarity. (Tr. 372). The record demonstrates that in 2020 the commonality of quotas across the Metro Group and the Upstate Group were:

   a. 74% identical in January and February 2020,

   b. 93% identical in March and April 2020,

   c. 86% percent identical in May and June 2020,

   d. 79% identical in July and August 2020,

   e. 96% identical in September and October 2020, and

   f. 96% identical in November and December 2020.

   (Tr. 393-394, Co Ex. 32).

9. Overwhelmingly similar sales incentive programs across the state. Counsel questioned the Union's witnesses (both Reps) on the similarities of the programs (Co Ex. 9 and Co. Ex. 10) between the Metro Group and Upstate Group. (Tr. 151; Co Ex. 9 - Co. Ex. 133). Each Rep (Novak and Venezia) testified that they were the same with very few differences. (Tr. 235-36, 275-276 372).

10. Access to inventory that is regularly shared and interchanged by and between two warehouses - one in Syracuse primarily serving the Upstate Group and one in Glen Rock, New Jersey primarily serving the Metro Group. (Tr. 23-24, 75, 180, 272).

11. A stipulation from the parties in Board Exhibit 1 that there is no history of collective bargaining. (Bd. Ex. 1, par. 6). Although the Regional Director ignored this stipulation and considered wholly irrelevant items in manufacturing an unsupportable holding that there is some history of bargaining, the record also reveals there is no history of bargaining in the Metro Group, although it is clear that (a) the Union demanded recognition in a state-wide unit and (b) this same Union represents all of the Employer's Reps in New Jersey under a state-wide collective bargaining agreement ("NJ CBA"). (Co Ex. 29, Co. Ex. 34; Tr. 21, Tr. 413).

12. <u>Common differences</u> from the Reps in other Regions. Seemingly, the Regional Director relied upon these differences to distinguish the Upstate Group from the Metro Group. In doing so, she fails to acknowledge that the differences exist from Region to Region as well as from Metro to Upstate. In other words, all the Regions

> and all the Reps have unique minor differences based largely upon who their specific customers are. Under the D&DE's tortured logic, there would be no appropriate unit all. Using this same rationale elsewhere, waiters in a restaurant would not share a community of interest if their customers ordered different meals. This is the essence of the micro-unit approach, not *PCC Structurals* and *Boeing*. In the end, each Rep in every one of the 9 Regions (whether in the Metro Group or the Upstate Group) has the following differences from Reps in every other Region:
>
> a. A Regional Manager shared with only 7-10 other Reps,
>
> b. A unique mix of customers,
>
> c. A unique demand for products sold, and
>
> d. A unique geographic density of customers.

Remarkably, the Regional Director concluded from the above summary of indisputable facts that the differences referenced above outweigh the similarities but only when comparing Metro to Upstate.

For these reasons, discussed more fully below, the Board should both stay election proceedings and grant the Employer's Request for Review. To do otherwise, is to unwind *PCC Structurals* and *Boeing*, as is urged by Region 29.

II. RELEVANT PROCEDURAL HISTORY

The Union made a written demand for recognition ("Demand") on December 9, 2020, seeking to represent "***all sales employees working for OPICI New York***." (Co. Ex. 29). The Demand includes all state-wide Reps, exactly as the Employer urges should be included in the bargaining unit. *Id*. However, on December 17, 2020, the Union filed the Petition seeking to represent only the full-time and part-time Reps working in the New York State Counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk and Westchester. (Bd. Ex. 1). On December 31, 2020 and January 6, 2021, the Employer and the Union, respectively, filed position statements as required by the Board's rules.

The Hearing was conducted before Hearing Officer Kareema Alston (hereinafter, "Hearing Officer") via video conference on January 11-13, 2021, to determine whether the appropriate unit for bargaining should include all New York Reps or whether it should be limited to the petitioned-for unit working in only eight (8) counties in New York.

The Employer called the following witnesses at Hearing: Dina Opici (President), Steve Hutchinson (Executive Vice President of Sales for New York State), John Gregory (Director of Portfolio Management for New York State) and Paula Russo (Director of Human Resources and Payroll). The Union called the following witnesses at Hearing: Bonnie Novak (Sales Representative), James Venezia (Sales Representative) and David Young (Trustee for UFCW Local 2-D and Vice President of the United Food and Commercial Workers International Union).

On January 28, 2021, the parties timely filed post-hearing briefs. On March 29, 2021, seventy-six (76) days after the Hearing closed and one-hundred-two (102) days after the Petition was filed, the Regional Director issued the D&DE. The Regional Director found the petitioned-for unit to be an appropriate unit under the Act. The Regional Director ordered an election in the petitioned-for unit to be conducted by United States Mail. The Regional Director directed ballots to be mailed to employees employed in the petitioned-for unit on April 19, 2021 and for ballots to be returned to Region 29 by the close of business on May 17, 2021.

III. STATEMENT OF FACTS

For simplicity, and consistency, the Employer incorporates by reference the facts from its January 28, 2021 Post-Hearing Brief appended as **Appendix A**. In addition, an examination of the stated facts in the D&DE is presented immediately below because the facts are misstated in multiple areas.

Factual Misstatements By The Regional Director

The D&DE makes no mention of the fact that the Employer has another group of Reps in New Jersey, who are represented by this same Union in a state-wide unit covered by a labor agreement. (Tr. 21, Tr. 413; Co. Ex. 34). Like the Reps in New York, the New Jersey Reps receive their products from two warehouses. (Tr. 41).

The D&DE states that "until recently" the Metro Group and the Upstate Group were separately supervised. *See* D&DE at p. 2. The undisputed facts reveal that the Metro Group and the Upstate Group are included within an identically supervised and managed group of New York Reps and have been since 2019. (Tr. 394-95; Co. Ex. 33). They are not separately supervised. The fact that previously they were separately supervised (prior to 2019) does not prove a difference now, it demonstrates uniformity among the two groups. The D&DE uses old facts to draw a meaningless distinction because the current conditions do not suit the Region's desired outcome. This is an egregious misrepresentation of the facts. Moreover, it ignores the very purpose of the Union's Petition, that being they are using the Representation Election process as a means to attempt to break the employer's New York operations apart. Point blank, the intent of the Petition is to reverse the Employer's efforts over the prior two years to integrate a New York state-wide unit of Reps. There is no weight of argument or balancing of the facts compelling a finding that the petitioned-for unit should be separated from New York and the record reflects that indeed New York is one cohesive unit. To approve the Petition would be to undo the managerial prerogatives, organizational planning, and integration that the Employer has undertaken in recent years.

The Regional Director doubles down on this faulty finding of separation stating "[t]the two divisions continue to exist in regard to the Employer's public appearance and its internal operations." *See* D&DE p. 2. In support of this, the D&DE provides public users pay bills through a website that includes "Upstate New York" and "Metro New York" as separate "markets." *Id*. As

was made abundantly clear at Hearing, this is directly related to the fact that there are two customer pricing structures in New York - an Upstate Price Book and a Metro Price Book - which is required by New York State Law. *See* N.Y. Alcoholic Beverage Control Law § 101-b. (Co. Ex. 7, Co. Ex. 8; Tr. 51). Naturally then, customers would pay off of the Price Book from which they order. There is nothing in the law that suggests this belabored point is even a factor to analyze in the context of this case - a vehicle through which customers pay (if this is even accurate) is not a collective bargaining subject. More importantly, and this factor is skipped by the Regional Director, the Metro Group regularly sells from an assortment of 3,589 products and the Upstate Group sells from an assortment of 3,359 products. (Co Ex. 7, Co. Ex. 8; Tr. 388-389). Of those products, 3,053 are identical, meaning that the Metro Group sells 85% common products and Upstate Group sells 91% common products. (Co. Ex. 7, Co. Ex. 8, Co, Ex. 31; Tr. 389). Thus, there is overwhelming commonality which was acknowledged ***and*** admitted by Union witnesses. (Tr. 235, 256-257, 315-316). The Regional Director's primitive analysis is that since the price books have different names, this is a difference for analysis under *Boeing*.

Regarding internal operational distinctions, the Regional Director falsely claims that "the Employer maintains separate quota requirements and separate incentive programs for each division." *See* D&DE p. 2. This statement can only be described as being intentionally false and entirely unsupported by the record. Indeed, the record demonstrates overwhelmingly similar sales quotas with identical requirements for quota performance. (Co. Ex. 5, Co. Ex. 6) The record demonstrates that in 2020 the commonality of quotas across the Metro Group and the Upstate Group were:

a. 74% identical in January and February 2020,

b. 93% identical in March and April 2020,

c. 86% percent identical in May and June 2020,

d. 79% identical in July and August 2020,

e. 96% identical in September and October 2020, and

f. 96% identical in November and December 2020.

(Tr. 393-394, Co Ex. 32).

Union Witness Novak admitted that many of those quotas applied to both the Metro Group and the Upstate Group. Union witness Venezia attempted to bury his head in the sand when asked whether he was aware of the similarities in quotas between the Metro Group and the Upstate Group although he ultimately admitted to the similarities:

> Q. Are you aware that approximately 95 percent of the quotas in New York are across -- they're the same suppliers, basically?
>
> A. I was not aware of -- if -- if that's true. I was not aware of that characterization until this hearing. And I did see a side by side for the first time I think last week of the quotas up and down. I don't receive Upstate quotas. And I don't receive Upstate bonus -- bonus programs.
>
> Q. So when you saw them a week ago, were they very similar across Upstate and Metro?
>
> A. They were. (Tr. 372).

In addition, the Employer maintains overwhelmingly similar sales incentive programs across the state. Counsel questioned the Union's witnesses (both Reps) on the similarities of the programs (Co. Ex. 9 and Co. Ex. -10) between the Metro Group and Upstate Group. Each Rep testified that they were the same with very few differences. (Tr. 235-236, 275-276, 372). The Employer's witnesses detailed that the incentive programs are overwhelmingly similar. (Tr. 151; Co. Exs. 9-13). The Regional Director also cited a difference in business cards and email group lists (s*ee* D&DE pgs. 2-3), but these are trivial and do not impact supervision or terms and conditions of employment. Indeed, the emails presented at Hearing show that all Reps (Upstate

and Metro) were copied on the same messages and it is undeniable that all New York Reps regularly meet together and review common data and training programs at regularly held sales meeting. (Tr. 123-124, 250, 270, 322). It is possible, though infrequent, that the Upstate Group and the Metro Group could meet separately or that there may be a very brief segment of a meeting particular to just one group.

The D&DE finds that the supervision is separate because there are nine (9) Regional Managers reporting into the New York leadership team. *See* D&DE p. 3. The D&DE claims that this is a difference between Metro and Upstate. This is a gross distortion of the record. Indeed, there is no suggestion that the Regional Managers for the six (6) Regions in the petitioned-for unit have different responsibilities or a different reporting structure than the three (3) Regions that the Union excluded. This is because they do not. Their jobs are identical, but their Reps are different people and the Regions covered are all unique.

The Regional Director finds that the Reps job functions are identical. *See* D&DE p.3. The D&DE states that there is, however, a difference in duties that is determined by the variance in geography served and the customer mix and preferences in the area served by a Rep. *Id.* Of course, if this utter nonsense were true it would mean that each and every Rep shares no community of interest with other Reps. The record makes clear that there are differences in customers and density, but this is not a Metro or Upstate issue, it is common sense. Back to the example previously given, customers have their own preferences, like diners in a restaurant, like movie goers, like any other group to which items are sold. Because a customer prefers a Viking refrigerator to a Samsung refrigerator does not differentiate the salesperson. Here each salespersons has roughly 3,500 products to sell from and more than 3,000 of them are identical. (Tr. 388-80; Co. Ex. 7, Co. Ex. 8, Co. Ex. 31). In addition, the testimony of the Union's witnesses

made clear that there are greater similarities in areas and density between Westchester County and areas in excluded Rockland, Putnam and Dutchess county than there are between Westchester and Manhattan. Indeed, Union witness Novak further admitted that the differences in working conditions between NYC and Westchester country are similar to the differences in the working conditions between NYC and Putnam, Duchess or Orange counties. (Tr. 258, 267). The contrary finding in the D&DE is strained beyond belief and was manufactured without record evidence for the purpose of attempting to support exclusion of the Upstate Group.

Similarly, the D&DE remarkably states that the Reps in Metro and Upstate have "two different sets of quotas." *See* D&DE p.3. The Regional Director goes on to say that there is "substantial overlap" of "87%' of all quotas. *Id*. Remarkably, the D&DE inverts this overlap to establish a <u>difference</u> favoring exclusion of the Upstate Group. It is a gross misapplication of the law. It cannot be that an overlap of 87% can be said to provide meaningful differences. This departure from the law underscores the flawed manner in which Region 29 has weighed the factors favoring inclusion and those supporting exclusion. In Region 29's analysis, an 87% similarity of terms indicates that two groups are more different than similar.

The D&DE notes that the Reps perform the "vast majority of their work in the field and, consequently, have very little contact with one another." *See* D&DE p. 4. Moreover, there is no general awareness of the accounts of other Reps. *See* D&DE p. 4. This factor (which shows that all Reps in Metro and Upstate would have these same differences) should favor inclusion of the identically situated Reps that the Union seeks to exclude. Instead, the Regional Director seems to believe this fact warrants exclusion of the Upstate Group. Similarly, the Regional Director notes the integration of the Employer's warehouse facilities, but fails to conclude that such fact favors inclusion of the Upstate Group. The Regional Director tries to draw a distinction that there are

two (2) warehouses. While this is insignificant as a whole, it also ignores that a state-wide unit of Reps in New Jersey also receive their product from two warehouses.

On the subject of interchange, the Regional Director misdirects the record by saying there is no (or little) history of interchange between the Metro Group and the Upstate Group. *See* D&DE p. 4. The truth is that there are presently eleven (11) out of seventy-four (74) Reps that perform services in both the counties included in the Petition and in other New York counties excluded by the Petition. (Co. Ex. 2; Tr. 77-78). This is undisputed. While that is not huge overlap (15%), the record reveals that Reps can sell from both Price Books and have sold from both Price Books and that a regular ongoing feature of selling in the New York area is that there are Reps that sell in both Metro and Upstate. (Tr. 235, 315-16). This is not infrequent, it is constant though relatively small in number. In addition, there is no evidence that the Reps of one Region have material overlap with Reps in other Regions <u>within</u> Metro. (Tr. 273-74). Indeed, Venezia sells almost exclusively in Manhattan and has only a couple of accounts elsewhere, including some historically outside the petitioned for unit of eight (8) counties. (Tr. 247-248, 315-316). In addition, the D&DE curiously references that Union witness Novak contemplated a transfer and opted not to do so. *See* D&DE p. 4. This, of course, makes the point that she could have transferred had she wanted to do so and there is nothing in the record that even remotely suggests this is not permitted. (Tr. 87).

On the issue of terms and conditions of employment, they are almost identical for all New York Reps with only minor differences between the Metro Group and the Upstate Group of approximately $100 relating to travel expenses and to a limited extent the timing of when most Reps take their vacation (but not the amount of vacation time they receive each year). (Tr. 102, 107-108, 194, 215-216). Certainly, even by the Regional Director's definition these facts make clear the similarities between the excluded group and the petitioned-for group far outweigh any

differences. The Regional Director states that a number of factors influence compensation and goes through a quick analysis of items that are almost exactly identical. Of course, the D&DE fails to state that the average compensation for both groups is extremely similar, averaging around $90,000 per representative in both the Upstate Group and the Metro Group. (Tr. 95-96).

The final whopper of a misstatement of the record relates to bargaining history. In this regard, prior to the Hearing, the parties were presented with, reviewed and signed off on a variety of stipulations in Board Exhibit 1. (Bd. Ex. 1). One such stipulation is that there has been and is no history of bargaining in the petitioned-for unit. *Id* at par. 6. This of course determines the fate of the bargaining history factor in this legal test. Nonetheless, the D&DE goes on to examine the issue. *See* D&DE pgs. 6, 10-11. In doing so the Regional Director, ignores that the same Union and this Employer's operation in New Jersey have a state-wide unit there. Like the New York unit, the New Jersey group has minor differences from north to south, but in the end the similarities there suit a state-wide unit exactly as they do here. While the Regional Director did not necessarily need to consider that, she instead goes to great pains to find a level of "almost bargaining history" from the Metro Sales Club. Of course, all of the Union's witnesses agreed that the Sales Club was not certified, does not bargain, is not a representative, and is not a labor organization. (Tr. 347-48, 437). The findings in the D&DE that some weight should be given to any of this is contrary to settled law.

IV. LEGAL ARGUMENT

A. Legal Standard For A Request For Review Of The Regional Director's Decision and Direction of Election

The Board may grant review of a Regional Director's unit determination in certain circumstances. Specifically, review may be granted where:

1. A substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent;
2. The Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party;
3. The conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error, or;
4. There are compelling reasons for reconsideration of an important Board rule or policy.

See NLRB Rules & Regulations § 102.67(d). The Employer's Request for Review in this case is premised on the first two (2) grounds.

B. The Regional Director Departed From Board Precedent By Concluding That The Petitioned-For Unit Should Exclude the Upstate Group After Making Substantial Factual Findings That Were Erroneous

1. *The Standard To Evaluate The Petitioned-For Unit And The Employer's Position To Add An Excluded Group Is Set Forth In PCC Structurals, Inc. And Boeing Co.*

Section 9(a) of the National Labor Relations Act ("NLRA" or "Act") provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." *See* 29 U.S.C. § 159(a). The Supreme Court has explained that Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit." *See American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis omitted from original; citations omitted). Whenever unit appropriateness is questioned, the Board has traditionally determined "whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." *See*

PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 6 (2017). The Board applies a multi-factor test that considers:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

See United Operations, Inc., 338 NLRB 123, 123 (2002). The Board has also "long given substantial weight to prior bargaining history." *See The Boeing Co.*, 368 NLRB No. 67, slip op. at 4 (2019). However, a "history of collective bargaining, not predicated upon a prior Board certification, is not controlling." *In re J. C. Penney Co.*, 86 NLRB. 920, 922 n.11 (1949); *see also NLRB v. Porter Cnty. Farm Bureau Coop. Ass'n*, 314 F.2d 133, 136 (7th Cir. 1963) ("Past history of bargaining, not predicated on a Board certification, is not controlling on the issue of what constitutes an appropriate bargaining unit.").

In *Boeing*, the Board clarified that "*PCC Structurals* contemplates a three-step process for determining an appropriate bargaining unit under our traditional community-of-interest test." *See Boeing*, slip op. at 5. At Step 1, "the proposed unit must share an internal community of interest." *Id.* Next, at Step 2, "the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed." *Id.* The Board explained that at this step, the inquiry must also consider whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that <u>outweigh</u> similarities with unit members." *Id.* (internal citations and quotations omitted, emphasis in original). In this regard, the Board made clear "[t]his inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a different unit might be more appropriate. Instead, as the

court's [Second Circuit] opinion in *Constellation Brands* makes clear, what is required is that the Board analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit. Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation. *Constellation Brands*, [*U.S. Operations Inc.* v *NLRB*, 842 F.3d 784, 794-795 (2d. Cir. 2016)]" *Id*

Finally, at Step 3, "consideration must be given to the Board's decisions on appropriate units in the particular industry involved." *Id*. This factor is not at issue here.

As demonstrated below, the D&DE's factual findings call into question whether the Petition meets Step 1 and the D&DE fails to properly consider Step 2.

2. *The D&DE Turns The Existing Standard On Its Head By Relying On Substantially Erroneous Factual Findings*

The D&DE cites almost exactly to the above legal standards, nearly quoting from the Employer's Post-Hearing brief. *See* D&DE pgs. 6-10. Unfortunately, and as detailed in this Request for Review, the Regional Director did not fairly apply the standards to the facts of this case and improperly ignored the testimonial and record evidence when reviewing the facts as applied to the legal standard. While the Board in *Boeing* provided that distinct interests do not have to outweigh similarities by "any particular margin," the reality is that distinct interest have to outweigh similarities by *some margin*. The record reveals that is simply not the case here. Quite frankly, no other conclusion can be drawn then there must be a state-wide unit.

a. *Internal Community Of Interests Exist Across New York*

The first factor under *Boeing* and *PCC Structurals* requires an analysis of whether the

proposed unit shares "an internal community of interest." Surely, the petitioned-for unit has an internal community of interest and so too does a unit covering all of New York. Having said that, in the Employer's Post-Hearing brief, we noted that the manner in which the Union argued its case (and now as has been adopted by the D&DE), if taken as true, would demonstrate that the same differences Local 2-D urges create a separate Upstate Group and Metro Group would indeed create separate groups for each of the six Regions within the Metro Group. In other words, all of the Reps in New York and all of the Regions in New York have differences in that they have a different Regional Manager, a unique mix of customers, a unique demand for products sold, and a unique geographic density of customers. There are no two Reps or Regions that are precisely the same and the point of this short argument on the first factor was to highlight that the Union's incorrect assertion (as parroted in the D&DE) that these understandable and necessary differences distinguish the Upstate Group from the Metro Group. Indeed, they distinguish them no more than they can be used to distinguish Reps in the "Brooklyn, Queens, Staten Island" Region (for example) from Reps in the "Long Island Suffolk" Region or from the "Westchester Bronx" Region. Stated differently, while the Metro Group would meet this first factor alone, so too does an all New York unit of Reps.

Interestingly, while evaluating this first factor, the D&DE states that the six (6) Regional Managers for the Metro Group Reps all have common supervision and management "by a middle manager, Director of Sales Josh Muska, who reports to Executive Vice President Steven Hutchinson. Thus, a single chain of authority controls the MNY Sales Representative's conditions of employment." *See* D&DE p. 8. Of course, as noted previously, this ignores that the three (3) Regional Managers for the Upstate Group have the identical supervision and management as the other six (6) in Metro. This also ignores that this "single chain of authority" also oversees the

Upstate Group in the exact same fashion as it does the Metro Group, and indeed Metro and Upstate participate in the very same chain of authority together, not separately. Obviously, these facts strongly favor an all New York unit.

b. *The Differences Of The Excluded Group Do Not Outweigh The Similarities*

The second step of *PCC Structurals* and *Boeing* provides for an examination of "the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed." *Boeing*, slip op. at 5. The Board explained that at this step, the inquiry must also consider whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Id*. (internal citations and quotations omitted, emphasis in original). The so-called distinctions cited to in the D&DE (*see* D&DE p. 7-10) are nothing short of baffling and reveal conclusively that the Region has not adhered to the appropriate and controlling legal standard.

The D&DE states that the "excluded UNY Sales Representatives . . . share <u>*some*</u> similar interests with the petitioned for MNY Sales Representatives." (D&DE p. 7, emphasis added). In order for the prior quote to be divined from the record, one would have to change the definition of the word "some" to mean "almost identical." This is not an exaggeration. We hesitate to repeat the facts from page 6 to 13 above, but the record proves there is nearly identical overlap of interests for each of the following factors: the same Employer; identical structural leadership and common management; all are grouped with 8-10 other Reps in a distinct geographical Region; identical commission rates across all goods sold, identical job description, job duties, job training, and regular joint meetings across the State; substantially identical terms and conditions of employment (minor difference in travel expense and timing of vacations), overwhelmingly similar products

sold - 85% Metro and 91% Upstate common products; overwhelmingly similar sales quotas from 74% similar to 96% similar for 2020; overwhelmingly similar sales incentive programs across the state; stipulated no history of bargaining; a statewide bargaining relationship with the same union covering neighboring New Jersey Reps; and common differences among all Reps from Region to Region without regard to being Upstate or Metro.

There is quite simply no possible way that any reader of the record could determine that the differences between the Metro Group and the excluded Upstate Group outweigh their similarities by even the slightest margin. This is because they do not. The D&DE makes a number of flawed findings on alleged differences. This includes matters unrelated to collective bargaining, such as the location on the employers website where customers pay bills or that there are differences in email addresses lists. Even if the findings were accurate, they still would not outweigh the similarities. However, we address these so-called differences below.

The Regional Director states that "the work of MNY and UNY Sales Representatives is confined to separate geographical areas with only relatively rare examples of overlap." *See* D&DE p. 8. As an initial matter, with regard to geographic proximity only, the Board has found that geographic proximity weighs against petitioned-for units when the distances between petitioned-for and excluded facilities are roughly equivalent to the distances between some of the petitioned-for facilities (thus rendering the exclusions somewhat arbitrary. *See Stormont-Vail Healthcare, Inc*., 340 NLRB 1205, 1208 (2003); *see also Bashas', Inc*., 337 NLRB 710,711 (2002); *see also Audio Visual Servs Grp.*, 370 NLRB No. 39 (2020). As an illustration, an Upstate representative can serve an account one mile from Westchester or even in Westchester. Similarly, a Metro representative could serve accounts 90 miles from Westchester in Eastern Long Island. (Tr. 135-36). The Metro unit sought goes as far east as Suffolk County and as far west as Staten Island.

Limiting the Petition to the eight counties requested by the Union would exclude Upstate Reps in Putnam, Dutchess, Rockland, Orange and Albany county, all of whom are closer to Westchester county than Suffolk county. Simply, this is not a multi-location case in any event, instead it is one contiguous territory making up the state of New York.

Geographic proximity issues aside, the Regional Director still misses the point, There are nine (9) selling areas, not just two (2) in Manhattan. The D&DE attempts to paint the picture that the eight (8) covered counties in the Petition are identical. This is completely false and there is nothing in the record to support the notion that the "New York City metropolitan area" has a single, unique set of operational and selling similarities for each of the Reps in the eight (8) counties making up the Petition. To the contrary, the evidence and testimony demonstrates that there are striking similarities between Westchester selling areas (in Metro) and selling areas in Duchess, Putnam, and Rockland County (excluded counties). (Tr. 258, 267). In other words, parts of the so-called Metro Group are more similar with areas in the so-called Upstate Group then they are within Metro.

Additionally, the Regional Director cites to a similarity in the "density of customers." *See* D&DE pgs. 8-9. Of course, as was demonstrated at the Hearing, customer density in Westchester County, Suffolk County and Staten Island differs wildly from customer density in Manhattan. (Tr. 258-261). If indeed this was determinative of anything, only the Manhattan Regions could be paired together. The D&DE wrongly states that this creates the difference in travel expense from Metro to Upstate. There is nothing in the record to support that finding, but one would assume that if the point of the prior argument was that the Upstate geography is more widespread (which the Employer agrees), then how would that create a lower travel expense for Upstate over Metro. The argument makes no sense.

The D&DE also asserts that the Metro Group has far greater sales from on-premises locations then from off-premises. *See* D&DE p. 9. The record reveals this to be exaggerated. Indeed, Company Exhibit 3 indicates the following: (1) the volume of off-premises sales in both the Metro Group and in the excluded Upstate Group exceed on-premises sales (Metro - 61% to 39% and Upstate 86% to 14%); (2) the revenue from off-premises sales in both the Metro Group and in the excluded Upstate Group exceed on-premises sales (Metro - 64% to 36% and Upstate 85% to 15%); and the number of off-premises accounts in both the Metro Group and in the excluded Upstate Group are lower than the number of on-premises accounts (Metro - 36% to 64% and Upstate 46% to 54%). (Co. Ex. 3). These figures readily demonstrate that the similarities between the petitioned-for unit and the excluded Reps are greater than are the differences.

The D&DE finds that "[w]hile there is substantial overlap in" the products sold, the Employer oversimplifies this and there is some undefined lack of product availability that the Employer did not address. *See* D&DE p. 9. This asserted distinction can only be called false. The absolute product overlap is as noted multiple times previously. Roughly 3,000 shared products are identical, representing 85% of what Metro Reps can sell and 91% of what the excluded Upstate Reps can sell. There is no other quantification of this. As for the minor differences, as the Employer noted, they are mostly local wines Upstate and some premium items in Metro. (Tr. 15, 34-36, 55, 92,1376-137) As is obvious from the simple math, those differences are extremely minor. In addition, the assertion that they matter hinges on customer preference, not a difference in community of interest factors. Candidly, this attempt to differentiate is very similar to the now overruled findings for micro units. In *Bergdorf Goodman, 361 NLRB No. 11 (2014)*, the shoe department employees sold shoes and they were found to be different from other salespersons in other departments. Nonetheless, under the current law that Region 29 is seeking to avoid, that

micro unit would not be found to be appropriate. Here, the primary contact among the Reps is within each of the nine (9) Regions. Beyond that, their main contact is as a New York group at sales meetings and through the New York leadership team.

The D&DE also asserts a lack of functional integration between the petitioned-for unit and the excluded group. *See* D&DE pgs. 9-10). First, this asserted factor is odd since the Regional Director found elsewhere in the D&DE that there is virtually no contact between and among any of the Reps. In this regard, the Board has found that the factor of functional integration weighs in favor of a petitioned-for unit where the petitioned-for employees have substantially more contact with each other than they do with excluded employees. *See Verizon Wireless,* 341 NLRB 483, 485, 490 (2004); *see also Panera Bread*, 361 NLRB 1236, 1236 fn. 1 (2014); *see also Audio Visual Servs Grp*., 370 NLRB No. 39 (2000). In contrast, the Board has generally been disinclined to find a unit appropriate when the petitioned-for employees have no more functional interchange with each other than they do with the excluded employees. *See Bashas Inc.*, 337 NLRB at 711 (2002); *see also Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000).

Setting that aside, this finding ignores that there is complete and total interdependence of the Reps across New York. As painstakingly detailed in the Employer's case and by the Employer's witnesses, the whole concept behind the nearly identical quotas, the nearly identical incentive programs, and the overwhelmingly common products sold is that the Employer is providing a consistent and sustained theme for its suppliers across the State. (Tr. 28-29, 53-54, 70, 145-146, 183). Failing to achieve state-wide goals for the suppliers threatens their continuation with Opici. Indeed, the record reveals that failing to achieve state-wide goals has cost the Employer customers and revenue in the past. (Tr. 28-29). Where Reps fail to achieve their quotas, the impacts are felt across the State. It was stated time and again on the record that it is imperative to

the Employer's operations that all Reps are invested in the very same selling programs and goals. That the D&DE does not address that is extremely troubling. The D&DE goes on to state that "the petitioned-for MNY Sales Representatives do not rely upon, coordinate with or communicate frequently with UNY Sales Representatives, or vice versa." *See* D&DE p. 8. Of course, as noted before, the Regional Director already found that none of the Reps across the State have such contact with one another. What they do have are common goals, products, incentives, and regular sales meetings with all of the identical terms referenced above.

The Regional Director also addresses a so-called "lack of interchange and contact between MNY and UNY." *See* D&DE p.10. This finding is a red herring. There is no showing of high interchange or heavy contact within the petitioned-for group, as well. Thus, the fact that there is little interchange between the Metro Group and the Upstate Group only serves to show how similar all the Reps are. Indeed, the Reps are largely on their own, they report in to one (1) of nine (9) Regional Managers. There is regular and consistent selling by eleven (11) Reps in areas both covered by the Petition and excluded by it. All the Reps go to joint sales meetings, have joint trainings, and occasionally go to annual meetings together. The Reps are clearly and unequivocally tied together across the State through the many shared goals referenced above.

Finally, there is the bargaining history analysis and the Regional Director's flawed consideration of this factor. *See* D&DE p.10. In sum, the reality is that the parties stipulated to no bargaining history. That ends the discussion. As noted above, the Regional Director ignored the Region's own exhibit (Bd. Ex. 1) and then entered into a tortured analysis of the "Metro Sales Club" trying to find something. Of course, Board precedent makes clear that such activities are irrelevant to bargaining history in any event. *See In re J. C. Penney Co.*, 86 NLRB. 920, 922 n.11

(1949); *see also NLRB v. Porter Cnty. Farm Bureau Coop. Ass'n*, 314 F.2d 133, 136 (7th Cir. 1963).

c. *Industry Unit Factors*

There are no applicable industry standards, nor did the D&DE find there to be any.

d. *Summary*

In sum, no reader of the record could possibly conclude that part 2 of *Boeing* has been met. It has not been demonstrated that the "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *See Boeing*, slip op. at 5. To the contrary, the D&DE takes what are only very minor differences and finds them sufficient to override the collective similarities, which are overwhelming. In doing so, the Regional Director does not so much as pause for a moment to explain "why the excluded employees have distinct interests in the context of collective bargaining." *See Constellation Brands*, 842 F.3d at 794-795. This is the essence of ignoring, restating, or overruling *PCC Structurals* and *Boeing* by the Regional Director of Region 29. In doing so, Region 29 relies on erroneous and unsubstantiated factual findings. A brief review of the listed factors from *United Operations, Inc.* reveals the following results:

- Organized in separate department - yes, one State comprised of the nine (9) Regions
- Have distinct skills and training - yes, the same
- Have distinct job functions and perform distinct work - no, the same
- Overlap between classifications - fully, it is one (1) classification
- Are functionally integrated - all part of one reporting group
- Have frequent contact with other employees - same, very little across New York
- Interchange with other employees - very little across every Region New York
- Have distinct terms and conditions of employment - identical across New York

- And are separately supervised - same management structure within the nine (9) Regions.

For all these reasons, the D&DE cannot stand.

C. The Board Should Stay Further Processing Of The Petition And Holding The Election Until It Grants The Employer's Request For Review And Determines That The Decision and Direction of Election Was Erroneous

An analysis of the record evidence compels the conclusion that the Regional Director wrongfully determined the petitioned-for unit is appropriate and should exclude the Upstate Reps. It is imperative that the Board stay the further processing of the Petition and the holding of the election until the Board grants the Employer's Request for Review and determines that the Regional Director's D&DE was inaccurately decided. Because such a substantial group of employees would be missing from the Election, it is purely a function of common sense that the election cannot proceed without the Upstate Reps being permitted to vote at the same time. Moreover, when such a substantial group is added in, as here, and it is not clear that the Union can meet its showing of interest requirements or that it will want to proceed in the larger unit, the election should be stayed. *See Casa Cavanagh, Inc.*, 196 NLRB 1118 (1972) (election stayed for purposes of ascertaining whether additional employer locations with covered job classification should be added to petitioned-for unit); *but see also Alaska Fish and Farm Products*, 212 NLRB 730 (1974) (election stayed for purposes of ascertaining whether 3 employees from a different job classification should be included with 10 other employees in covered job classifications).

V. CONCLUSION

The Regional Director erred in finding that the petitioned-for unit of Reps is appropriate and that the Reps working in the Upstate Group should be excluded from the Petition. Accordingly, the Employer respectfully requests that the Board grant its Request for Review and its Request to Stay the Election.

Respectfully submitted,

Dated: April 9, 2021

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CERTIFICATE OF SERVICE

I, Glenn J. Smith, Esq., certify that on this date I caused a copy of the foregoing Employer's Request For Review Of Decision And Direction Of Election And Request To Stay Election to be served via Electronic Filing through the Board's website on the Board and via E-mail and Federal Express Overnight Mail upon:

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Appendix A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 2D, Petitioner, and CAZANOVE OPICI WINE GROUP D/B/A OPICI FAMILY DISTRIBUTING OF NEW YORK. Employer.	Case No. 29-RC-270372

EMPLOYER'S POST-HEARING BRIEF

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

I. BACKGROUND 5

A. The Employer's History 5

B. The Employer's Operations in New York 8

1. Reporting Structure 9

2. Supplier Appointments 10

3. Price Books 11

4. Terms and Conditions of Employment 12

5. Quotas 13

6. Sales Incentive Programs 15

7. Overlap of Sales Territories 16

C. The Employer's Operations Outside of New York 17

II. BRIEF REVIEW OF EACH WITNESS AND GENERAL SUMMARY OF TESTIMONY 17

A. The Employer's Witnesses 17

B. The Union's Witnesses 18

III. LEGAL STANDARD 21

A. The National Labor Relations Act and Appropriate Units 21

IV. ARGUMENT 22

A. The Proposed Unit Standing Alone Contains the Same Differences Among Reps as the Reps the Union Seeks to Exclude 22

B. The Interests of the UNY Sales Representatives are not Meaningfully Distinct from and do not Outweigh Similarities with the Interests of the MNY Sales Representatives 23

1. The MNY Sales Representatives Have a High Degree of Functional Integration with the UNY Sales Representatives 23

2. The Unit Sought Does not Correspond with Any Segment of Opici's Organizational Structure.....24

3. The MNY Sales Representatives do not Perform Distinct Duties or Possess Unique Skills 25

4. The MNY Sales Representatives are not Separately Supervised.....27

5. The Working Conditions Between the UNY and MNY Sales Representatives Are Essentially Identical.....29

6. The MNY Sales Representatives Have Regular Contact with the UNY Sales Representatives 31

7. Geographic Proximity Supports Finding A Statewide Unit Appropriate 32

8. The Bargaining History Between The Employer and the Union Support Finding a Statewide Unit Appropriate.....34

C. No Industry-Specific Guidelines are Applicable 34

D. The Petitioned For Unit Would Inappropriately Fracture the New York Sales Force.....35

V. CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

A. B. Dick Co.,
230 NLRB 257 (1977) 31

Acme Markets,
328 NLRB 1208 (1999) 28

American Hospital Assn. v. NLRB,
499 U.S. 606 (1991) 21

Bashas', Inc.,
337 NLRB 710 (2002) 28

Bergdorf Goodman,
361 NLRB No. 11 (2014) 35, 36

Bud Antle, Inc.,
359 NLRB 1257 (2013), *reaffd*. 361 NLRB 873 (2014) 32

Budget Rent A Car Systems,
337 NLRB 884 (2002) 23

Capital Coors Co.,
309 NLRB 322 (1992) 33

Enel N. Am., Inc.,
No. 32-RC-259399, 2020 WL 7122367 (Dec. 3, 2020) (unpublished) 33

Farmers' Educ. & Coop. Union,
92 NLRB 248 (1950) 32

In re J. C. Penney Co.,
86 NLRB 920 (1949) 21, 34

Lundy Packing Co.,
68 F.3d at 1577 (4th Cir. 1995) 35

NLRB v. Porter Cnty. Farm Bureau Coop. Ass'n,
314 F.2d 133 (7th Cir. 1963) 21

PCC Structurals, Inc.,
365 NLRB No. 160 (2017) 3, 21, 22, 34

Specialty Healthcare,
357 NLRB 934 (2011) 3

The Boeing Co.,
368 NLRB No. 67, slip op. (2019) 21, 22, 34, 35

United Operations, Inc.,
338 NLRB 123 (2002) 21

Statutes

29 U.S.C. § 159(a) 21

29 U.S.C. § 159(c)(5) 35

N.Y. Alcoholic Beverage Control Law § 101-b 11

National Labor Relations Act Section 9(a) 21

Other Authorities

NLRB, Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings at 72 31

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 2D, Petitioner, and CAZANOVE OPICI WINE GROUP D/B/A OPICI FAMILY DISTRIBUTING OF NEW YORK. Employer.	Case No. 29-RC-270372

EMPLOYER'S POST-HEARING BRIEF

Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York ("Employer" or "Opici"), by its attorneys and pursuant to the direction of Hearing Officer Kareema Alston, hereby submits its Post-Hearing Brief in support of its position that the petitioned for unit of sales representatives ("Reps") in eight (8) select New York counties is inappropriate, and that if an election is to occur the unit must encompass all New York Reps.

INTRODUCTION

On December 17, 2020, United Food and Commercial Workers Local 2D ("Union" or "Petitioner") filed a representation petition ("Petition" - Board Exhibit 1[1]) to represent a bargaining unit consisting of Reps who work in eight counties in New York (Kings, Queens, New York, Bronx, Richmond, Westchester, Suffolk, and Nassau). The Petition inexplicably followed a call and letter to the Employer that demanded recognition (Co. Ex. 29) among all Reps in the State of New York. At its core, the Petition artificially separates the rest of New York, including counties

[1] References to exhibits in evidence are shown as Bd. Ex. __for Board exhibits, Co. Ex. ___for Employer exhibits and U. Ex. ___ for Union exhibits.

that directly border counties in the petitioned for unit such as Rockland county, Putnam county and Orange county. The Union's "line in the sand" fractures the Employer's New York sales workforce for reasons that have no support in the law.

Over the course of the three-day Hearing (January 11-13, 2021 - the "Hearing") it became readily apparent that the driving force behind the Union's geographic parsing is the desire of a super minority of Reps to prevent the Employer from applying sales criteria and performance objections across the entire State of New York. Yes, you read that correctly, the purpose of the Petition is to fracture the unit and to prevent uniform imposition of standard terms and conditions. Unfortunately for the Petitioner, such employee desires have no bearing on the Board's community of interest test. Moreover, the actions serve to underscore the illegitimacy of the petitioned for unit. It is worth noting that in the short time since the Hearing, the Union filed a specious charge that makes clear its commitment to this unsupported purpose. In this regard, 29-CA-271554, asserts that the Employer's quota policy announced in 2019 and 2020 and modified as indicated well before the Petition should not be applied to the Reps that the Union asserts are covered by the Petition.

At Hearing, Union witnesses James Venezia ("Venezia"), Bonnie Novak ("Novak"), and Union representative David Young ("Young"), testified clearly that the terms and conditions of employment for the Reps the Union seeks to exclude from the petitioned for unit are essentially identical to terms for the Reps included by the Union. (Tr. 271-72, 358, 420).[2] Similarly, Young admitted that the Reps the Union seeks to exclude from the petitioned for unit have no difference in work duties. (Tr. 420-21). Indeed the only differentiating factor, as provided by Young and alluded to by other Union witnesses, is the territories covered by the Reps. (Tr. 420-21). This point

[2] Transcript references are shown as "Tr.__."

is a red herring given that the geography within the unit sought also differs from itself (Manhattan is different than Suffolk and Westchester is different than Brooklyn).

Beyond that, it became abundantly clear at Hearing that Young has no understanding of the Employer's operations. In this regard, Young testified that Reps in the petitioned for unit perform no work outside the counties listed in the Petition (Tr. 428), which is completely false. It is important to recognize that Reps, like the Union's own witnesses, have sold and still sell in counties included in and excluded from the Petition. Indeed, this applies to eleven of the Employer's New York Reps. (Co. Ex. 2). This undisputed fact perfectly captures the overlap between the Reps in the petitioned for unit with the Reps the Union seeks to improperly exclude. It is ongoing, it has historically occurred, and it is fully known.

The reality of the purpose behind the Petition is that the Union wishes it had a time machine so that it can go back to a time before Specialty Healthcare, 357 NLRB 934 (2011) and before all of the Employer's actions in uniformly addressing Reps in New York, to apply the logic of micro-units, which was overturned. Specialty Healthcare is not the law and in any event it would not be applicable here. Alternatively, the Union wishes it could go back to 2019 to file this Petition and ignore the organizational changes that Opici implemented in the last two years in its effort to create and manage one New York sales force.

It simply cannot be refuted that, at Hearing, the Employer presented an enormous amount of evidence, which was buttressed by testimony adduced, that a statewide unit is the only appropriate unit. While it is questionable whether the Union even satisfies Step 1 of PCC Structurals, Inc., 365 NLRB No. 160 (2017), it undoubtedly fails at Step 2. The interests of the excluded Reps are not meaningfully distinct from and do not outweigh similarities with the interests of the petitioned-for Reps.

An overwhelming majority of the traditional community of interest factors are satisfied: (1) the petitioned-for unit has a high degree of functional integration with the excluded New York Reps; (2) the unit sought does not correspond with any segment of the Employer's organizational structure; (3) there is no basis on which to distinguish the Upstate New York ("UNY) and Metro New York ("MNY") Reps based on their skills and duties[3]; (4) the commission rates and fringe benefits are the same; (5) they are subject to substantially similar terms and conditions of employment, quotas, and sales incentive programs; (6) there is no separate supervision of UNY and MNY Reps; (7) there are eleven Reps who operate in both UNY and MNY; (8) products transfer regularly between UNY and MNY; (9) both areas sell a substantial amount of the same products; (10) all Reps participate in trainings and general sales meetings; and (11) although there is no bargaining history among the New York Reps, there is a statewide Opici unit of Reps with this very same local union in New Jersey (demonstrating the appropriateness of a statewide unit in the industry and same Union).

The intent of the Petition is to thwart the Employer's efforts over the prior two years of integrating a statewide unit of Reps. The Union and its organizers are attempting to undo the entrepreneurial prerogatives of the Employer and they are candidly participating in a false charade. To approve the Petition would be to undo the managerial prerogatives, organizational planning, and integration that Opici has undertaken in recent years. Bargaining units are not based on how select employees or the union want things to be, they are based on how things exist. Here there is no doubt that the statewide unit must be ordered.

[3] For purposes of the brief, "MNY" refers to the five boroughs of New York City, Long Island, and Westchester - the regions included in the Petition. "UNY" generally refers to counties above Westchester, which have been excluded from the Petition. Although there is still a Metro NY email list and an Upstate email list, there is no functional separation as detailed throughout.

I. BACKGROUND

A. The Employer's History

The Employer traces its roots to 1947 when Dina Opici's ("Ms. Opici") great-grandfather purchased "Cazanove Wine Corp," a French wine company based in New York City. (Tr. 26). The Employer grew over the years, expanding to other boroughs, Westchester, Long Island, and even Orange and Rockland counties. (Tr. 27). Around 2007-08, although Opici at the time was a large wholesaler in the state, it was still not a statewide operation. Id. As a result, Opici made the decision to expand the business to be able to service the entire state. Id. As Union witness Novak testified, there was a period of time when Reps were permitted to make sales anywhere in the State; then there was a time when most, but not all, of the upstate territories were serviced by a third party, and; then there is the present where all Reps in New York are again employed by Opici. (Tr. 227-30). To be clear, it is the case that Opici started New York work in Manhattan and that it has expanded from there to cover the entire state.

In mid-2018, Mike Proch, the Vice President of Sales for UNY at the time, approached Ms. Opici about his potential retirement. (Tr. 28). That discussion prompted the Employer to take a step back and reevaluate how they were doing business in New York and to look into structuring the business differently. Id. At that time, the Employer had an Upstate and a Metro division, with a Vice President for each division. (Tr. 30, 45). By January 2019, Opici was still unsure of the direction it was going in, but it worked with an executive search firm to replace Mr. Proch. (Tr. 28). In March 2019, a supplier of CAMUS[4], which represented approximately $1 million of business, terminated its relationship with the Employer because there was a disconnect between the Upstate and Metro groups. (Tr. 28-29). While the Upstate group was performing well, the

[4] The transcript incorrectly spelled the name as "Camu".

Metro group was not. (Tr. 29). A few months later in June 2019, a supplier named Hahn, which represented $3 million of business, terminated its relationship with the Employer because once again, there was a disconnect between the two groups. Id. In contrast to the situation with CAMUS, the Metro group was performing, but not the Upstate group. Id.

These experiences made the Employer realize that it needed to change its approach, and so the Employer made the decision to restructure the organization by replacing the MNY and UNY Vice President positions with one director of sales for the entire state. (Tr. 30). Indeed, Ms. Opici testified "So we pivoted at that point. And we made a decision to restructure the organization and no longer have a Metro New York VP and an Upstate New York VP. And instead, Opici would have a Director of Sales reporting to an Executive VP for the state." (Tr. 30). Finally, in August of 2019, Steve Hutchinson ("Hutchinson") joined Opici as the New York Director of Sales. (Tr. 30). At the time, Opici sent a memorandum to the sales team in New York (which included all representatives) announcing Hutchinson's hire and other changes to the New York sales organization. (Tr. 394-95; C-Ex. 33). Hutchinson would be "responsible for overall sales execution and management of the entire sales force and management team of both Metro and Upstate." Id. The memorandum also explained that starting September 4, 2019, Opici "will be taking the current two division structure that exists in New York and transitioning to a more centralized management of both our route to market and vendor relations." Id. Novak admitted that the Employer was moving to a more centralized management before the Petition was filed. (Tr. 250, 266). Novak further admitted that Hutchinson has previously talked about the importance of commonality and purpose across New York State as one sales division. (Tr. 266).

After this announcement, in 2019, Opici began implementing changes to the manner in which they run their operations. (Tr. 395). One of Hutchison's more immediate initiatives was to

move everything to a virtual, statewide meeting. (Tr. 124-25). Rather than having all the representatives come to one location, Opici requested a quote for equipment to do virtual meetings. (Tr. 395-96). Additionally, because sampling new products is part of the meeting process, Opici would ship the products to the market areas and regional managers would distribute it to the Reps. (Tr. 125). In the meantime, Opici did have sales meetings in the fourth quarter of 2019 and between January and March 2020 where both MNY and UNY Reps attended. (Tr. 123-24). Novak and Venezia admitted that the Employer started having New York wide sales meetings before the Petition was filed by the Union. (Tr. 250, 322). Novak also acknowledged that the Employer's plan is to continue to hold sales meetings among all New York Reps. (Tr. 270).

The COVID-19 pandemic further pushed Opici to a virtual, statewide format, and since March 2020, Opici used both Microsoft Teams and HR Meeting for their statewide sales meetings. (Tr. 124, 396-97). All New York Reps are invited to these meetings, and they typically occur twice a month.[5] (Tr. 94-95). Furthermore, when COVID-19 hit and the Reps were homebound, Opici launched an aggressive educational campaign on wines and spirits for its New York Reps. (Tr. 180-82; Co. Exs. 25-28). Finally, after the pandemic comes to an end, it is undisputed that Opici does not intend to go back to having large scale in-person meetings separated by region in the State of New York. (Tr. 124-25)

In December 2020, the Union reached out to Ms. Opici, asking to have a phone meeting. (Tr. 380). During the phone call, Union representative and witness Young told Ms. Opici that the majority of the workforce in New York wanted to be represented by the Union. Id. After that phone call, the Union sent a demand for recognition letter, which made no reference to MNY or

[5] The first meeting is a General Sales Meeting, and it is followed by a New York focus meeting. (Tr. 76; Co. Ex. 21-24).

UNY. (Tr. 380-81; Co. Ex. 29). In fact, the Union's demand for recognition made clear that the Union was seeking to represent "the sales people of Opici NY." (Co. Ex. 29).[6] However, when the Union filed the Petition with the National Labor Relations Board ("NLRB"), it only listed eight counties, including those in New York City, Westchester, and Long Island while excluding all other New York state counties. (Bd. Ex. 1(a)). Young concedes that the demand for recognition was a binding legal document that if signed would have obligated Opici to bargain with the Union about all NY Reps. (Tr. 431).

B. <u>The Employer's Operations in New York</u>

There are 74 Reps in the State of New York - 27 in the UNY market area and 47 in the MNY market area. (Tr. 67). This number is slightly down in the last year. In both areas, off-premise business accounts for a greater percentage of volume sold and revenue, but on-premise business accounts for a greater percentage of clients. (Tr. 80-81; Co. Ex. 2). The Employer operates warehouse, distribution, and office facilities in Glen Rock, New Jersey, Manhattan, New York, and East Syracuse, New York.[7] (Tr. 23; 74-75). Products are transferred between the Glen Rock and East Syracuse facilities multiple times per week. (Tr. 23-24, 75, 180). The Reps are field positions, which do not require reporting to their facilities any certain number of days. (Tr. 73, 77). Except for new Reps, all Reps are paid on a commission basis by the same corporate entity.[8] (Tr. 22, 53, 86, 206). The commission rates are the same throughout the state. (Tr. 248-

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[6]. Young's assertion that he was seeking recognition on behalf of the sales representatives only in MNY, (Tr. 410), must be discredited since the demand for recognition makes no reference to any specific counties across the State of New York (Tr. 431). According to Mr. Young, he sent the demand for recognition within 48 hours after the call. (Tr. 439). Mr. Young eventually conceded that the letter makes no reference to any specific counties (Tr. 431).

[7] There are also facilities in other states relevant to other operations and these are the locations relevant to the New York Reps.

[8] Sales representatives can also receive a draw against what other commission receivables would be. (Tr. 86).

49). Indeed, all New York State Reps receive a 6.5% commission for wine and a 4% commission for spirits sold off-premise and a 7% commission for wine and a 5% commission for spirits sold on-premise. (Tr. 248-49, 310). Similarly, the overall, average yearly compensation between both UNY and MNY representatives are within a few thousand dollars of each other. (Tr. 95-96).

1. Reporting Structure

Reps are grouped by region with 8-10 Reps per Region. (Co. Ex. 1[9]). The Employer's New York regions are: (1) Brooklyn, Queens, Staten Island; (2) NYC; (3) Long Island Suffolk; (4) Long Island Nassau; (5) Westchester/Bronx; (6) Albany; (7) Syracuse; and (8) Buffalo/Rochester. Id.[10] Reps report to regional managers, and the regional managers report in to the New York State Director of Sales. Id.; (Tr. 83). Sales strategy is driven by Hutchinson and his senior management team (which includes Director of Portfolio Management John Gregory ("Gregory"), Senior Portfolio Manager Bill LoVine, and New York State Director of Sales Josh Muska), and regional managers are expected to execute that strategy. (Tr. 69, 84). The senior management team reviews performance across the State on a weekly basis. (Tr. 84). The decision making is centralized, and it includes everything related to sales. (Tr. 83). There is no separate sales manager in charge of UNY or MNY, and all administrative support is provided on a statewide basis. (Tr. 33-35, 83, 382; Co. Ex. 1).[11] Indeed, as admitted by Novak, there is no sales manager who has a title that differentiates between UNY or MNY. (Tr 265). In fact, as further admitted by

[9] At the time of the Hearing, Hutchinson is now the Executive Vice President of Sales for New York, and Josh Muska is now the Director of Sales for New York. (Tr. 32-33, 66, 83). The organizational chart reflects that Suffolk has 7 Reps but that is because there is a vacancy and the Employer is looking to hire an additional Rep (i.e. total of 8 Reps in Suffolk).

[10] Because there are two "NYC" regions, there is a total of nine regions and corresponding nine regional managers. (Co. Ex. 1).

[11] All of the positions above Regional Manager in the organizational chart are statewide positions. (Co. Ex. 1)

Novak, the last time there was any type of manager who was responsible solely for UNY and/or MNY was at some point in 2019. (Tr. 265).

The overarching goal of centralized management among the New York sales workforce, and when that started to align, was summarized by Hutchinson:

> So to go back to my beginning conversations with -- with Dina and Employer, as I was looking to come on board, the conversation largely centered around this -- this need from the supplier side, and certainly as a Employer, to align around a statewide approach to the business. So even -- even in the early conversations that I started to have before I came on board in August of 2019, those conversations were how -- how do we align ourselves to be in lockstep with our suppliers and -- and drive a strategy that is total state for New York State. (Tr. 69-70).
>
> I think that there's fluidity and understanding of the strategy and the purpose behind it. You know, certainly I think we've -- as we've discussed, you know, the suppliers are the life blood of the business, and if we're not good partners, then as Dina illustrated, I thought quite well, those suppliers can -- can certainly elect to -- to leave. (Tr. 70).

2. <u>Supplier Appointments</u>

The Employer operates in a competitive marketplace where suppliers can make changes whenever they want. (Tr. 38). Suppliers appoint companies like Opici to represent their brands in the State of New York. (Tr. 60, 155-56, Co. Ex. 30). Suppliers can specify in their letter of appointment whether Opici would represent the brand on a statewide basis or specific counties. (Tr. 177-78). Currently, at least 90% of suppliers appoint Opici on a statewide basis. (Tr. 36, 89). Suppliers can view their depletions, their inventory, who is selling new products, and who it is being sold to. (Tr. 38). Any work stoppage in one area of the state would be disruptive to Opici's suppliers. (Tr. 89-90). As quoted above, the interplay between the Employer's push toward centralized management across its New York sales force and its supplier relationship was summarized by Hutchinson. (Tr. 69-70).

3. Price Books

The State of New York does not allow businesses like Opici to offer different prices between rural and urban areas. (Tr. 51); see generally N.Y. Alcoholic Beverage Control Law § 101-b. That is why it is industry standard in New York for wholesalers to have multiple licenses, allowing Opici and others to offer different pricing patterns and discounting options. (Tr. 51). The market's ability to purchase goods at a larger quantity is a big factor in having different pricing options. Id. As a result, Opici has two price books: one for UNY and one for MNY. (Co. Exs. 7 and 8).

In the most recent price books, the UNY book has 3589 items and the MNY book has 3359 items. (Tr. 388-80; Co. Ex. 31). Both books had a commonality of 3053 items, resulting in the MNY book being 85% identical to the UNY book and the UNY book being 91% identical to the MNY book. Id. Indeed, Novak admitted that the price books share a commonality of products. (Tr. 256-257). As Gregory testified:

> But there are 3,589 items filed in New York in our book offered for sale by our sales reps. Not that they're all in stock at any given time. But that is the intention. Of those 3,589 items, there are 3,053 that are also filed on the Syracuse license, representing 85 percent overlap. And a note on the difference, being that 386 of them, or 11 percent are either suppliers that are handled by Metro only. (Tr. 388).
>
> In Upstate, in the Syracuse license, there are 3,359 total items filed for the month of February 2021. And again, it's the same repeat, 3,053 or 91 percent same. As has been testified and observed earlier today and yesterday, the Syracuse warehouse is limited. So many of those items are special order, meaning that they are located in the Glen Rock, New Jersey warehouse. And when ordered by a customer out of the Syracuse price book, those items are transferred up to Syracuse to be delivered to those customers. Again, same thing, there are 170 items that are listed that are New York State products. (Tr. 389).

The notion that MNY sales representative are not familiar with UNY price book and vice-versa has no support in the record. In fact, both Novak and Venezia testified that they were familiar with both price books. (Tr. 235, 315-16). In addition, both Novak and Venezia admitted that they

were permitted to sell out of both price books if warranted by geography and do or have sold out of both price books. (Tr. 235, 315-16). It therefore goes without saying that UNY Reps can sell out of the MNY price book if warranted by geography. Beyond that, the fact that there are different prices or different items is not a difference that warrants separate units. The Reps all sell from books established by the Employer. Whether selling wine XYZ or wine ABC makes no difference to community of interest factors.

4. Terms and Conditions of Employment

Paula Russo ("Russo"), Director of Human Resources, testified that the terms and conditions of employment for Reps across New York State are "the same." (Tr. 194). Indeed, all Reps are field positions with identical work skills. (Tr. 72, 94, 96). In fact, both Novak and Young admitted that the job duties of all New York state Reps are consistent across the state. (Tr. 272, 420-21). In addition, all sales representative across New York state are subject to the same exact job description. (Tr. 93-94; s*ee also* Co. Ex. 4). Essentially, the sales representative job involves going to off-premise and on-premise establishments to sell the product, combined with back of the house work and reporting. (Tr. 72). An off-premise establishment is a retail store or packaged goods business. (Tr. 61-62). An on-premise establishment is a bar, nightclub, restaurant or hotel (Tr. 62). The forms used by the Reps across the state are uniform. (Tr. 95, 99-100). There is no difference in education, training, and experience requirements among the Reps. (Tr. 97). None of the Reps record their hours of work. Id. All Reps receive the same fringe benefits package and seniority is used to determine vacation. Id. Beginning in calendar year 2020, all the meetings were statewide. (Tr. 76). The Reps across the state are subject to the same employee handbook (and employee handbook acknowledgement form), employment payroll and insurance policies and complete identical trainings. (Tr. 194-204; 205-07; Co. Ex. 14-20). Indeed, all New York State Reps (as well as all New York state employees) are paid by the same entity, Cazanove Opici Wine

Corp, from the same bank account. (Tr. 206) In addition, all new hires across New York are subject to the same orientation which is held at the Employer's Glen Rock facility. (Tr. 200). Similarly, employment records for all of the New York Reps are stored and maintained at the Employer's Glen Rock facility.

To the extent that there are any differences in the terms and conditions of employment between the UNY and MNY representatives, they are limited to the existence of shutdown periods related to the Glen Rock warehouse and travel expense reimbursement, which is presently fixed at $650 per month for some and which varies for others based on geography. (Tr. 107-08, 215-16). Regarding shutdown periods, the record made clear that even though the Glen Rock and Syracuse facilities have different shutdown periods, normally they both shutdown during the year. (Tr. 107). Regarding, travel reimbursement compensation, the record made clear that the difference is because MNY Reps have a flat rate, while UNY Reps do not have a flat rate (the difference in dollar amount of the fixed rate and the average variable rate is approximately $62 dollars per month).[12] (Tr. 102).

5. Quotas

Quotas are bi-monthly business objectives. (Tr. 71). As Venezia testified, "quotas are the job." (Tr. 313). Opici identifies a select group of products from a supplier "to put a fixed period of time focus on them so that the activities and results in the market are better than what they would have been had you not put any focus on them." (Tr. 142). Then, after 60 days, Opici resets with a different quota for the Reps. Id. Throughout the year, Opici runs 160 quotas for the State of New York, but they include some that repeat multiple times through the year. Id.

[12] Although not in the record, the fixed rate is $650 and the average of the variable rates is $588.89 among the Reps working in areas outside the petitioned-for unit.

Co. Exs. 5 and 6 provide the history of quota criteria in New York and the current quota criteria for Reps across New York. Indeed, both Employer and Union witnesses uniformly testified that all New York Reps are subject to quotas. (Tr. 134, 251) Tellingly, in each of the six quota periods of 2020, the similarity of quotas between the UNY and MNY Reps ranged between 74% and 96%. (Co. Ex. 32). As Gregory testified:

> I did prepare this document [Co. Ex. 32] as a recap summary of the last year's quotas for the six time frames, quotas worked. The comparison would be the total. I apologize if that's the middle column. But the total is the number of quotas. As indicated earlier, we talked about doing 24 in Jan/Feb and July/August. You see there were 23. Again, if an item was out of stock for an extended period of time during the month, we would drop that quote from being a what we call a regular quota that would count against you if you do not perform on it. And the comparison between the Metro and Upstate quotas for the month of January was 17. And as you can see down the chart, the numbers were the same in both -- under both licenses for the state were, you know, at a 70 plus percent and greater. The July/August, 19 out of 24. Again, there's your 24. Explanation on September and October, again, due to some inventory problems, we have a whole bunch of stuff going on on planet Earth with shipping goods that there are inventory delays much greater than what we anticipated. And so we dropped four of them and counted four as double. I believe someone else, Jay earlier this afternoon commented on that. So now it was 23 out of 24, the same. And you see all of them in December. Also, a comment, call out here is in March/April when COVID hit. We did drastically reduce the number of orders that we were expecting the sales organizations to make, recognizing COVID, and nothing to do with meeting with the salesmen's club on October 1st, since March/April was long before that, so. And that's it. (Tr. 393-394).

Indeed, Novak admitted that the Employer made an effort to maintain quota uniformity across New York state and that she became aware of that effort in the fall of 2020. (Tr. 250, 251, 255). In fact, when Novak went through the UNY quotas (Co. Ex. 9) she admitted that many of those quotas applied to her and the MNY Reps. (Tr. 277-289). Venezia attempted to bury his head in the sand when asked whether he was aware of the similarities in quotas between MNY and UNY although he ultimately admitted to the similarities:

> Q. Are you aware that approximately 95 percent of the quotas in New York are across -- they're the same suppliers, basically?

> A. I was not aware of -- if -- if that's true. I was not aware of that characterization until this hearing. And I did see a side by side for the first time I think last week of the quotas up and down. I don't receive Upstate quotas. And I don't receive Upstate bonus -- bonus programs.
>
> Q. So when you saw them a week ago, were they very similar across Upstate and Metro?
>
> A. They were. (Tr. 372).

While the quotas are substantially identical, the goals for all New York Reps may be slightly different as it depends on the percentage of market share that he or she would have. (Tr. 118). Importantly, these differences are based on each Reps performance - not by a Region north or south. Reps with a higher market share on an item would have a lower goal threshold, whereas Reps with a lower market share would have a higher threshold. (Tr. 118-19).

Whenever a Rep does not make any progress towards a quota, that is known as a "zero." (Tr. 144-45). Historically, zeroes were counted as negative scores. (Tr. 145-46; Co. Exs. 5-6). Starting in September 2020, the Employer explained to the entire New York State selling organization that zeroes were not permitted.[13] (Tr. 146-47). These changes were made because if Reps are not participating in the performance of a supplier's expectations in the market, the Employer suffers. (Tr. 146).

6. <u>Sales Incentive Programs</u>

Opici also offers incentive programs to its Reps to earn additional compensation. (Tr. 112). In order to qualify for these incentives, all New York Reps need to attain a threshold quota performance percentage. (Tr. 117; Co. Ex. 5). That minimum threshold is the same for Reps across New York state (Tr. 117). Although there are separate incentive program lists for UNY and MNY, the programs between the two are substantially similar. (Tr. 151; Co. Exs. 9-13). Indeed, both

[13] The Employer did provide a grace period from September to December 2020. (Co. Ex. 5).

Novak and Venezia admitted the similarities. (Tr. 235-36; 372). In addition, Novak acknowledged that many of the sales incentive programs run state wide. (Tr. 275-276). Opici regularly runs competitions among all its New York Reps and samples of these were introduced at Hearing and establish that sales incentive programs are indeed run state wide. In these competitions, Reps from anywhere in the state may win trips, dinners or compensation based on their performance as compared to the other Reps throughout the state. (Co. Exs. 9-11).

7. Overlap of Sales Territories

There are eleven Reps who sell products in *both* the UNY and MNY areas. (Co. Ex. 2). Both Novak and Venezia admitted that they have or currently do, sell products to customers who are located in UNY and MNY areas. (Tr. 274, 315). Young, proving the point that he does not grasp the Employer's operation, testified that he did not believe Reps sell products in both the UNY and MNY areas. (Tr. 428-29). It became perfectly clear at Hearing that the Employer does not limit its Reps to a specific area. (Tr. 96). If a Rep based in MNY wants to sell to a customer in UNY, they would be selling under the UNY price book (and vice-versa). Id. Indeed, Novak admitted there are transfers of product from the Syracuse facility and the Glen Rock facility to accommodate this. (Tr. 272). More importantly, if a Rep sells product outside of their area under a different license, it still counts towards their quota goal. (Tr. 255). Whenever a Rep wants to open a new account, whether in their area or not, they have to fill out an account application. (Tr. 247-48). Finally, if a customer located in MNY (or UNY) wants a product that is only stocked in the Syracuse (or Glen Rock) facility, the product would ship from one facility to another before it is distributed to the customer. (Tr. 272). While Venezia acted like cross territory sales were difficult to have approved, he quickly rattled off the instances when he requested and was permitted to do so. (Tr. 367). Novak did the same. (Tr. 247-48).

C. The Employer's Operations Outside of New York

In addition to selling wine and spirits in New York State, the Employer does business in New Jersey, Connecticut, Maryland, Delaware, Washington, D.C., and Florida. (Tr. 20). In each market, the Employer has separate legal entities. Id. A labor organization represents Reps in only one of the states listed above: New Jersey. Id. It is the same Union as the one in the current petition. Id. In New Jersey, the Union represents *all* of the Reps in the state. (Tr. 21; Co. Ex. 34). Much like New York, in New Jersey the employer has two distinct divisions and two different licenses. Reps in New Jersey service retail stores and restaurants, and there are two distribution facilities with one servicing Northern New Jersey (Glen Rock) and the other servicing Southern New Jersey (Shamong). (Tr. 21, 41).

II. BRIEF REVIEW OF EACH WITNESS AND GENERAL SUMMARY OF TESTIMONY

A. The Employer's Witnesses

In sum, the Employer's witnesses provided clear and poised testimony. None of the testimony was clouded or contrived and all of the witnesses appeared credible. Taking them in order, the testimony can be broken down as follows:

Dina Opici, President of Opici Family Distributing, testified on day 1 and 2 of the Hearing. Co. Exs. 1 and 29 were introduced through her. Ms. Opici provided background on the corporate structure of the Employer, the Employer's New York operations, and how New York is configured with regard to its suppliers and Reps. Ms. Opici further provided an overview of the changes the New York operation started to undergo in 2018 and 2019 in direct response to supplier concerns.

Steve Hutchinson, Executive Vice President of Sales for New York State, testified on day 1 of the Hearing. Co. Exs. 2 through 4 were introduced through him. Hutchinson provided what Reps do on a day-to-day basis and the types of operations conducted in the Employer's New York

facilities. Hutchinson provided details on the Employer's New York organizational chart, how Reps in New York state are grouped, how sales strategy is driven my himself and senior management and the Employer's relationship with its New York suppliers. Hutchinson also provided how Reps in MNY perform work in UNY. Finally, Hutchinson detailed how in both MNY and UNY, off-premise business accounts for a greater percentage of volume sold and revenue, but on-premise business accounts for a greater percentage of clients.

John Gregory, Director of Portfolio Management for New York State, testified on day 1 and 2 of the Hearing. Co Exs. 2 through 13, Co. Exs. 21 through 28, and Co. Ex. 30 through 33 were introduced through him. Gregory provided details on quotas, price books, sales incentive plans and there similarities across New York. Gregory also provided background on distribution and the Employer's relationship with suppliers across New York.

Paula Russo, Director of Human Resources and Payroll, testified on day 2 of the Hearing. Co Exs. 14 through 20 and Co. Ex. 29 were introduced through her. Russo provided that all Reps across New York have the same work skills and are subject to the same employee handbook (and employee handbook acknowledgement form), employment payroll and insurance policies and complete identical trainings. Russo also provided that all Reps across New York are subject to the same job description and have is no difference in education, training, and experience between the Reps. Russo further provided Reps receive across New York receive. the same fringe benefits package and seniority is used to determine vacation.

B. <u>The Union's Witnesses</u>

In sum, the Union's witnesses can be characterized as uninformed, evasive, and not forthcoming. At times, it appeared the Union's witnesses had a "coached" approach to their testimony. In the end, all three Union witnesses admitted that the Reps the Union seeks to exclude

from the Petition share many similarities with the Reps in the petitioned for unit. Taking them in order, the testimony can be broken down as follows:

Bonnie Novak, a Rep who works primarily in MNY, testified on day 2 of the Hearing. Novak provided that she services accounts primarily in Westchester county, but that she also services accounts in Putnam county, Rockland county and Dutchess county (counties not covered by the Petition). Novak provided the commission rate for Reps in New York. Throughout her testimony, Novak stated "may be" or "I don't know" or "I'm not sure" or "I believe" and other qualifiers as an answer to a question over 30 times.[14] This demonstrated her general evasiveness. That notwithstanding, Novak admitted:

- the commission rate for Reps in New York is the same for all Reps;
- that she was aware of the commonality and uniformity regarding the Employer's New York state Reps beginning in 2020;
- that she attended sales meetings with MNY Reps and UNY Reps in 2020;
- that quotas and sales incentive programs were similar or the same for MNY Reps and UNY Reps;
- that the MNY price book and UNY price book share many similarities and that she has and can sell out of both price books;
- that some of the counties that she sells in that are covered by the Petition are similar to the selling area of counties not covered by the Petition;
- that the density population of some counties covered by the Petition are similar to the density population of counties not covered by the Petition;
- that as of 2019 the Employer was moving to a more centralized management of its New York Reps;
- that there is a transfer of product from the Syracuse facility to the Glen Rock facility (and vice-versa);
- that all New York Reps have the same job duties and skills, and;
- that MNY Reps sell product in counties not covered by the Petition.

James Venezia, a Rep who works primarily in MNY, testified on day 2 of the Hearing. U. Ex. A through H and U. Ex. K were introduced through him. Venezia provided that he services

[14] Hearing Officer Alston commented on the record about Novak's evasiveness, noting her "testimony in regards to cross has been I don't know, I believe, probably." (Tr. 278).

accounts in Manhattan, Brooklyn and that he has a couple of accounts in Queens. Venezia provided that he previously serviced accounts in counties not covered by the Petition, but that those accounts dried up for various reasons. Venezia discussed the location of his accounts and how they are relative to one and other and the differences between the MNY price book and the UNY price book. Venezia also provided background on the metro sales club. Throughout his testimony, Venezia admitted:

- that the metro sales club is not a labor organization and has never negotiated with the Employer as one;
- that he does, or previously has, sold product in counties not covered by the Petition;
- that the commission rate is the same for all Reps in New York;
- that he attended sales meetings with MNY Reps and UNY Reps in 2020;
- that his understanding of the similarities in quotas and sales incentive programs for all Reps across New York was not clear until this proceeding;
- that his understanding that the Employer was moving to a centralized management of all New York Reps was not clear until this proceeding;
- that Reps can sell in counties in New York that are covered by the Petition and in counties in New York that are not covered by the Petition;
- that he recalls the Employer's New York organization chart (Co. Ex. 1) being presented to the sales representative in 2019, and;
- that a strength of the Employer in New York is to have an ability to sell across the entire state of New York.

David Young, UFCW international vice president and director of Region 1, testified on day 3 of the Hearing. Young provided that he was the Union representative who contacted the Employer to discuss voluntarily recognition and who ultimately filed the Petition. Throughout his testimony, Young admitted:

- the collective bargaining agreement that the Union has with the Employer in New Jersey covers all New Jersey Reps;
- he is unaware of how the Employer operates in New Jersey;
- he is unaware of how the Employer operates in New York;
- that in his demand for recognition the Union made no reference to representing work performed only in certain counties in New York;
- that the Petition seeks to represent Reps only from select counties in New York;
- that all New York Reps have the same job duties and perform the same functions;
- that the only difference among Reps in New York is the geography they cover, and;

- that the Petition filed by the Union seeks to cover work only performed in the counties provided for in the Petition.

III. LEGAL STANDARD

A. The National Labor Relations Act and Appropriate Units

Section 9(a) of the National Labor Relations Act ("NLRA" or "Act") provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159(a). The Supreme Court has explained that Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit." American Hospital Assn. v. NLRB, 499 U.S. 606, 610 (1991) (emphasis omitted from original; citations omitted). Whenever unit appropriateness is questioned, the Board has traditionally determined "whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 6 (2017). The Board applies a multi-factor test that considers:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, Inc., 338 NLRB 123, 123 (2002). The Board has also "long given substantial weight to prior bargaining history." The Boeing Co., 368 NLRB No. 67, slip op. at 4 (2019). However, a "history of collective bargaining, not predicated upon a prior Board certification, is not controlling." In re J. C. Penney Co., 86 N.L.R.B. 920, 922 n.11 (1949); see also NLRB v. Porter Cnty. Farm Bureau Coop. Ass'n, 314 F.2d 133, 136 (7th Cir. 1963) ("Past history of

bargaining, not predicated on a Board certification, is not controlling on the issue of what constitutes an appropriate bargaining unit.”).

In Boeing, the Board clarified that “PCC Structurals contemplates a three-step process for determining an appropriate bargaining unit under our traditional community-of-interest test.” Boeing, slip op. at 5. At Step 1, “the proposed unit must share an internal community of interest.” Id. Next, at Step 2, “the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed.” Id. The Board explained that at this step, the inquiry must also consider whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” Id. (internal citations and quotations omitted, emphasis in original). Finally, at Step 3, “consideration must be given to the Board's decisions on appropriate units in the particular industry involved.” Id.

IV. ARGUMENT

A. The Proposed Unit Standing Alone Contains the Same Differences Among Reps as the Reps the Union Seeks to Exclude

Using the Union’s rationale for why the UNY Reps should not be included with the MNY Reps reveals the very same differences within the MNY group that the Union claims are significant enough to separate the UNY Reps from the MNY Reps. Stated differently, the Union argues that the UNY Reps should be excluded because they may have different product mix, service different areas, and have a different Regional Manager. These same differences are true within the 6 Regions that make up MNY. Their selling areas differ by individual, they have a different customer mix by individual, and they have different Regional Managers.

Indeed, the petitioned for unit does not exactly satisfy Step 1 of *PCC Structurals*. The MNY Reps are geographically separated from each other (as the they operate in six different

regions) and have different regional managers. (Co. Ex. 1). Both Venezia and Novak admitted that they do not travel to some of the regions/counties covered by the Petition because there work is generally focused to a particular area. (Tr. 234, 242, 315 361). Novak also admitted that the differences in working conditions between NYC and Westchester country are similar to the differences in the working conditions between NYC and Putnam, Duchess or Orange counties. (Tr. 258, 267). Veneiza and Novak further admitted to the varying degrees of geographic areas served by each MNY sales representative (Tr. 258, 269-70, 364). Further, the record reveals that all Reps that work within a county, whether it be a county included or excluded by the Petition, do not work the same accounts as other Reps within or outside that county. (Tr. 273-74, Co. Ex. 2).

B. The Interests of the UNY Sales Representatives are not Meaningfully Distinct from and do not Outweigh Similarities with the Interests of the MNY Sales Representatives

Even if the MNY Reps share an internal community of interest, on balance the interests of the UNY Reps are not meaningfully distinct from and do not outweigh similarities with the interests of the MNY Reps. Before examining the traditional community of interest factors, it is important to recognize that Reps, like the Union's own witnesses, have sold and still sell in both the UNY and MNY areas. (Tr. 233, 330, 355; Co. Ex. 2). It is no accident that there are currently eleven Reps who sell in both areas under both price books. (Co. Ex. 2). The Employer does not limit its sales representative to a specific area. (Tr. 96).

1. The MNY Sales Representatives Have a High Degree of Functional Integration with the UNY Sales Representatives

Both the MNY and UNY Reps sell alcoholic beverages to businesses, which constitute integral parts of a single work process. See Budget Rent A Car Systems, 337 NLRB 884, 885 (2002). Not only do the Reps sell substantially similar alcoholic beverages (which are at least 85% *identical b*etween both groups), the Reps sell products for which Opici has been appointed by at

least 90% of suppliers on a statewide basis. (Tr. 36, 89, 388-80; Co. Ex. 31). Suppliers are the lifeblood of Opici's business, and the performance across the state is pivotal to whether they will continue or terminate their representation with Opici. (Tr. 53-54, 70). This is not a theoretical concern: suppliers have terminated their relationship with Opici in cases where one group was performing well, but the other was not. (Tr. 28-29). In fact, the disconnect between the two groups, which resulted in terminations worth millions of dollars in business, prompted Opici to change its approach to a statewide focus, and this has been the goal and the undertaking since 2019. (Tr. 28-30). This overarching statewide plan is specifically what lead to the development of the statewide quota policy prohibiting "zeroes." (Tr. 145-46, 183; Co. Exs. 5-6). Strategically, the Union's attack on the quota system is two-fold: filing a Petition designed to break up statewide operations so as to render the quotas meaningless and filing a meritless charge aimed at delaying the very same plan from moving forward as communicated over the preceding year. Either way, this entire matter is about the Union trying to change Opici's structure and operations in New York.

2. The Unit Sought Does not Correspond with Any Segment of Opici's Organizational Structure

The petitioned-for unit includes only the Reps in New York City, Westchester, and Long Island. (Bd. Ex. 1). Both the Employer's and Union's witnesses testified that the Employer does not presently employ a UNY or MNY sales manager. (Tr. 83, 265, 298). All New York Reps have known (or must have known) since September 4, 2019, Opici "will be taking the current two division structure that exists in New York and transitioning to a more centralized management of both our route to market and vendor relations." (Co. Ex. 33). Indeed, Novak admitted that the Employer was operating with centralized management before the Petition was filed. (Tr. 250, 266).

Novak further admitted that Hutchinson has previously talked about the importance of commonality and purpose across New York State as one sales division. (Tr. 266).

Currently, the NY Reps are grouped into nine regions, they report to their regional managers, and the regional managers report in to the New York State Director of Sales. (Tr. 83; Co. Ex. 1). The MNY Reps encompass six regions, while the UNY Reps encompass three regions. Id. The Petition's departure from any aspect of the Employer's organizational structure must weigh against finding the petitioned-unit appropriate. There is not a single Metro New York or Upstate New York dedicated employee on the Organization Chart.

3. The MNY Sales Representatives do not Perform Distinct Duties or Possess Unique Skills

Overwhelmingly, the evidence shows that MNY Reps do the same job as the UNY Reps. All Reps are field positions with the same job description and identical work skills. (Tr. 72, 94, 96; Co. Ex. 4). In fact, both Novak and Young admitted that the job duties of all New York State Reps are consistent across the state. (Tr. 272, 420-421). The following interaction between Employer counsel and Union representative Young sheds further light on the exacting similarities of all sales representative:

> Q: So in terms of the work that the employees do, I notice that you included -- and -- and I want to understand your knowledge, you included that this applies to -- to people who work for Opici New York, one entity. And you said it's all employees that call on sales accounts. Do you dispute that the employees outside of the eight counties in New York also call in sales accounts, the sales representatives? (Tr. 417-418.)
>
> A: It was specific to the geographic region. (Tr. 418).
> …
>
> Q: do you dispute that sales representatives within the -- in the area -- well, across the entire state, all call on sales accounts? (Tr. 418).
>
> A. Sure (Tr. 418).
>
> Q. Do you dispute that? (Tr. 418).

A. No (Tr. 418).

Q. And they also cover customer routes? (Tr. 418).

A. In the geographic area they're assigned, sure. (Tr. 418).
…
Q. Do you know whether or not the sales representatives across the state commonly take weekly inventory of company items? (Tr. 419).

A. If it's part of their job assignment, I would assume that they do. (Tr. 420).

Q. Do you think it's part of the regular job -- are you aware of whether it's part of the regular job assignment for sales representatives in the State of New York? (Tr. 420).

A. To take inventory? (Tr. 420).

Q. Yeah. (Tr. 420).

A. Yes. (Tr. 420).

Q. Okay. All right. And the answer is yes, it is part of their regular job? (Tr. 420)

A. That's my understanding. (Tr. 420).

Q. Okay. Is it there -- is it sales representatives' jobs to conduct sales presentations? (Tr. 420).

A. When asked to do so. (Tr. 420).

Q. Is it their job to take orders? (Tr. 420).

A. Yes. (Tr. 420).

Q. Is that their job to cultivate owners, managers, clerks, and other persons associated with product sales? (Tr. 420).

A. Yes. (Tr. 420).

Q. Is it their job to submit orders into the entry system? (Tr. 420).

A. Yes. (Tr. 420).

Q. Is there any difference that you're aware of and you can speak to, other than simply geography, that you're asserting that has any difference between these

> primary duties that you guys have listed and across the State of New York for all sales representatives? (Tr. 420).
>
> A. Can you repeat that? (Tr. 420).
>
> Q. Is there anything that you can point to with specificity that says that -- and I'll rephrase it a little bit -- that there's any difference amongst these primary responsibilities, other than pure geography, across the State of New York for all sales representatives? (Tr. 420-421).
>
> A. No, not that I can speak to specifically. (Tr. 421).
>
> Q Thank you. And in fact, all sales representatives have some different area or territory that they primarily sell in; is that correct? (Tr. 421).
>
> A Yes. (Tr. 421).

In addition, all Reps across New York state are subject to the same exact job description. (Tr. 93-94; s*ee also* Co. Ex. 4). Finally, there is no difference in education, training, and experience between the Reps. (Tr. 97). Thus, there is no basis on which to distinguish the MNY Reps based on their skills and duties.

4. <u>The MNY Sales Representatives are not Separately Supervised</u>

There is no separate supervision of just the MNY or UNY Reps. (Co. Ex. 1). The Employer does not employ a UNY or MNY sales manager. (Tr. 83, 265, 298). In fact, as admitted by Novak ,the last time there was any type of manager who was responsible solely for UNY and/or MNY was at some point in 2019. (Tr. 265).

The Reps are managed at a regional level, and the regional managers report in to the New York State Director of Sales. (Co. Ex. 1). The MNY and UNY Reps share in the same centralized decision-making supervision at one level above their regional managers. (Tr. 83-84; Co. Ex. 1). Both Ms. Opici and Hutchinson testified to the importance of centralized management and its interplay with its supplier relationship when discussing treating all New York Reps under one umbrella. (Tr. 30-31, 69). Thus, this factor does not support finding the MNY unit appropriate.

In Bashas', Inc., 337 NLRB 710, 711 (2002), the Regional Director certified a bargaining unit of meat department and wall-deli department employees at 17 grocery stores that operate in one county of Arizona while excluding those same employees at 9 other grocery stores in other counties of Arizona. The employer, like here, maintained common labor relations policies, had centralized management and the employees the union sought to exclude had the same skills and duties, terms and conditions of employment and received the same benefits and wage rate as the employees included in the petitioned for unit. The Board overturned the Regional Director's finding that a 17-store unit in one county of Arizona was inappropriate and instead a 26 store unit in multiple counties of Arizona was appropriate because, in part, the proposed unit did "not conform to any administrative function or organizational grouping," the "unit employees at the 17 stores do not share common supervision separate from employees at other stores[,]" and "[t]he employees in each store are supervised separately from all other stores by a local store manager who has significant local autonomy." Bashas', Inc., 337 NLRB at 711. Similarly, in Acme Markets, 328 NLRB 1208, 1209 (1999), the Regional Director found three separate statewide units to be appropriate before the Board overturned the Regional Director and held that a four-state employer wide unit was appropriate. Like here, there operations were standardized and personnel and labor relations policies were administered centrally. Acme Markets, 328 NLRB at 1209. The Board noted that none of the four States had separate supervision at the state level, and there was "no administrative structure corresponding to the three separate statewide units found appropriate by the Regional Director." The rationale in Bashas' and Acme especially applies here.

5. **The Working Conditions Between the UNY and MNY Sales Representatives Are Essentially Identical**

The MNY and UNY Reps receive the same benefits, have similar work and hours expectations, have the same administrative support, complete identical trainings, and are subject to the same handbook, employment, and payroll policies. (Tr. 33-35, 85, 97, 194-204; 205-07, 382; Co. Exs. 1, 14-20). Except for new Reps, all Reps are paid on a commission basis. (Tr. 22, 53). The commission rates are the same throughout the state, which was admitted by Novak and Venezia (Tr. 248-49, 350, 358), and the overall compensation between both UNY and MNY Reps is nearly the same as provided by Hutchinson. (Tr. 95-96). In addition, all new hire Reps across New York are subject to the same orientation which is held at the Employer's Glen Rock facility. (Tr. 200). Similarly, employment records for all of the New York state Reps are kept at the Employer's Glen Rock facility.

They sell nearly identical products, are subject to overwhelmingly similar quotas, and participate in overwhelmingly common sales incentive programs. (Tr. 151; Co. Exs. 9-13, 31-32). Indeed, in the most recent price books, which both have over 3300 items, the amount of commonality between the books is manifest. Both books had a commonality of 3053 items, resulting in the MNY book being 85% identical to the UNY book and the UNY book being 91% identical to the MNY book. *Id.* Novak admitted that the price books are very similar. (Tr. 257). Regarding quotas, in each of the six quota periods of 2020, the similarity of quotas between the UNY and MNY Reps ranged between 74% and 96%. (Co. Ex. 32). Both Employer and Union witnesses uniformly testified that all New York State Reps are subject to similar quotas. (Tr. 134, 372). In fact, Novak admitted that the Employer has made an effort to maintain quota uniformity across New York State. (Tr. 250, 251, 255). Venezia also ultimately admitted that quotas between MNY and UNY are similar. (Tr. 372). Regarding sales incentive programs, although there are

separate incentive program lists for UNY and MNY, the programs between the two are substantially similar. (Tr. 151; Co. Exs. 9-13). Both Novak and Venezia acknowledged the similarities. (Tr. 282, 359-59). Even more, Novak admitted that many of the sales incentive programs run state wide. (Tr. 275-76, 282). This includes competitions across the state and payouts across the state.

Although the Union may try to nitpick that the MNY Reps may have minor differences in shutdown periods (or the time some people take vacation) and travel compensation then UNY Reps (Tr. 107-08, 215-16), such a claim must be taken with a grain of salt. Regarding shutdown periods, the record made clear that even though the Glen Rock and Syracuse facilities have different shutdown periods, they both shutdown during the year. (Tr. 107). Regarding, travel reimbursement compensation, the record makes clear that difference is because Reps covered by the Petition have a flat rate, and those who are not do not have a flat rate. (Tr. 102). All told, these are extremely minor differences and the Union put on no evidence about how such minor differences would compel the finding of a separate MNY bargaining unit. It is also worth noting that in his effort to exaggerate his importance, Venezia testified twice that he is the only Rep to have negotiated his own separate expense account. Assuming this is true, and further assuming that the Union's point that small differences necessitate separate units, it would thus be the case that Venezia cannot now be a member of any unit.

The Union may also try to gin up the importance of the so-called "metro sales club" in an effort to differentiate the MNY Reps from the UNY Reps. The reality is that the metro sales club is insignificant to this analysis given the abundance of similarities between terms and conditions of employment of all New York State Reps. Participation in the sales club is voluntary and the sales club is not a labor organization and is not certified to represent any sales representative.

The reality is that in the past two years and during the COVID-19 pandemic, the Employer has been undertaking massive efforts to unite what was once two different divisions of Opici into a cohesive, statewide operation (Tr. 35-36, 69-70; Co. Ex. 33). On balance, any irrelevant differences do not weigh strongly in favor of finding a MNY unit appropriate and instead all factors favor a statewide unit.

6. The MNY Sales Representatives Have Regular Contact with the UNY Sales Representatives

Due to their nature as field agents, the Reps do not report to an office and usually work in their "little cocoon[s]." (Tr. 361-62). Even within their own regions, Reps do not know their fellow Reps' accounts. (Tr. 273). Despite the inherent challenges of a field position, coupled with the COVID-19 pandemic, all sales meetings since early 2020, which are typically twice a month, have been statewide. (Tr. 76, 94-95). While the Employer acknowledges that employee interchange between UNY and MNY is not constant, nothing prohibits a UNY sales representative from selling or working in a MNY area (and vice versa). It became perfectly clear at hearing that the Employer does not limit its Reps to a specific area. (Tr. 96). If a sales representative based in MNY wants to sell to a customer in UNY, they can but would be selling under the UNY price book (and vice-versa). Id. In addition, the Board has long considered the ratio of the time spent in the field and in the office between groups. See NLRB, Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings, at 72-74 ("The following are general community of interest questions a hearing officer should ask when unit issues arise…(r) Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities."); see also A. B. Dick Co., 230 NLRB 257, 257-58 (1977) (finding an appropriate unit consisting of all service representatives when "The nature of their duties necessitates that they spend an overwhelming proportion of their work hours away from the Southfield facility servicing equipment at the

customer's location."); Farmers' Educ. & Coop. Union, 92 NLRB 248, 251 (1950) (finding "that the insurance solicitors do not possess sufficient community of interest with the other employees to be included in the unit" when, in part, they did not report to the office in person.). The regular contact requirements under the community of interest test need to be balanced with the fact that Reps routinely travel and are not consistently in an office.

7. Geographic Proximity Supports Finding A Statewide Unit Appropriate

As highlighted above, the Reps work in the field and are not required to report to any facility. Although the Glen Rock and Syracuse facilities are a sizable distance from each other, they interchange product regularly and routinely. Thus, they are integrated. As for the selling areas of the Reps, they are usually remote from one and other as the Reps do not sell to each other's accounts. This point, however, proves nothing. All of the selling areas are contiguous with or slightly overlap with another selling area. They are connected. It is not as if the Employer is proposing a unit that covers a group in California and a group in New York. It is a group that has contiguous areas across New York.

A UNY representative can serve an account one mile from Westchester or even in Westchester. Similarly, a MNY representative could serve accounts 90 miles from Westchester in Eastern Long Island. (Tr. 135-36). The MNY unit sought goes as far east as Suffolk County and as far west as Staten Island. Limiting the Petition to the eight counties requested by the Union would exclude UNY Reps in Putnam, Dutchess, Rockland, Orange and Albany county, all of whom are closer to Westchester county than Suffolk county.[15] See Bud Antle, Inc., 359 NLRB

[15] The distance between Albany and Peekskill, the northernmost city in Westchester County, ranges between 113 and 117 miles. https://www.google.com/maps/dir/Albany,+NY/Peekskill,+NY/@41.9741132,-74.9402265,8z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x89de0a34cc4ffb4b:0xe1a16312a0e728c4!2m2!1d-73.7562317!2d42.6525793!1m5!1m1!1s0x89c2b6ea3df98c41:0xe8e288f9b0fab8a1!2m2!1d-73.9204158!2d41.2900939!3e0. The distance between Montauk and New Rochelle, the southernmost city in Westchester County, ranges between 116 and 121 miles. https://www.google.com/maps/dir/Montauk,+NY+11954/New+Rochelle,+NY/@40.8572487,-

1257 n. 3 (2013), *reaffd*. 361 NLRB 873 (2014) (taking administrative notice when distances between cities based on Google Maps). The fact that there are eleven Reps selling in both areas shows that geographic proximity based on sales territory that the Union seeks to impose here is wholly inappropriate.

Finally, it is undeniable that Venezia and others may open (and have opened) accounts in geographically dispersed areas. Venezia described multiple accounts in other areas, as did Novak. While they both pretended approval might be withheld, they ultimately conceded that approval would be given except if it was for an existing or related account. Moreover, Venezia and Novak ultimately revealed the real constraint on selling in widely dispersed areas - it is obviously too hard for a representative to cover too large an area and they are better served by focusing on areas closer to other accounts.

The Union's reliance on their imaginary line in the sand between counties included in the Petition and counties excluded from the Petition, and their geographic separation in miles from each other, must be evaluated properly. Indeed, the Board recently reiterated that geographic proximity alone does not determine whether the petitioned-for unit is appropriate. See Enel N. Am., Inc., No. 32-RC-259399, 2020 WL 7122367, at *1 (Dec. 3, 2020) (unpublished) ("While the factor of geographic proximity weighs against a community-of-interest finding here, the other relevant factors on balance establish that the petitioned-for unit is an appropriate unit."); see also Capital Coors Co., 309 NLRB 322, 325 (1992).[16]

73.4536093,9z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x89e8ab5250fa0ef7:0x12eb762c1bf614f!2m2!1d-71.9545146!2d41.0359353!1m5!1m1!1s0x89c28d89d5ba56b5:0xcf7ac33b6a7edaa2!2m2!1d-73.7823549!2d40.9114882!3e0

[16] Here, yet again the Region must not be misled. First, the areas served are contiguous. Second, we are not arguing to include two geographically separated **FACILITIES**. These are all selling areas in one state. They are all separate from each other on the one hand and contiguous with each other on the other hand. As the case law on geographic proximity makes clear, this argument relates at its core to separate physical locations, not to a rationale that would let the Union split off one group of 70 plus Reps working across the same state.

8. The Bargaining History Between The Employer and the Union Support Finding a Statewide Unit Appropriate

Throughout the Hearing, the Union put on irrelevant evidence and testimony about the Metro Sales Club in an effort to demonstrate that the Employer has a bargaining history in MNY. (Tr. 59). In addition to the gross mischaracterizations of what the Sales Club actually does, the Union's own witnesses conceded that they were unaware of any other unions having negotiations with Opici or that the Sales Club was recognized in an NLRB proceeding to represent any New York employees (Tr. 347-48, 437). Even if there was a history of some MNY-centric conversations, the fact that the Sales Club was not predicated on a Board certification means that this history is not controlling or probative on what constitutes an appropriate bargaining unit. See In re J. C. Penney Co., 86 N.L.R.B. at 922 n.11. In contrast, the very same union represents *all* of the Employer's New Jersey Reps on a statewide basis. (Tr. 21; Co. Ex. 34). Since the Union already represents the New Jersey Reps via a statewide unit, this history of collective bargaining across an entire state for the very same Union and the very same Employer supports finding that only a New York State unit is appropriate. Finally, Young also admitted that UFCW District One covers all of New York State. (Tr. 412). Thus, any notion that the Employer's New York business should be cut in two based on a bargaining history is belied by the UFCW's very own structure.

In all, the Regional Director should find that the petitioned-for Reps primarily working in eight southern counties in New York do not share a community of interest that is sufficiently distinct from the interests of the excluded Reps working throughout the balance of New York, making the unit inappropriate under the second step of PCC Structurals.

C. No Industry-Specific Guidelines are Applicable

The Boeing Board explained that at the final step of the analysis, it should consider guidelines "that the Board has established for specific industries with regard to appropriate unit

configurations." Boeing, slip op. at 5. Such industries include public utilities, defense contractors, and retail establishments. Id. Neither of which are applicable here, and there appears to be no Board guidelines for the beverage industry and Reps generally.

D. The Petitioned For Unit Would Inappropriately Fracture the New York Sales Force

The arbitrary unit proposed by the Petitioner cannot be squared with the text of the Act, which limits the ability of unions to artificially construct units that do not have a basis in the organizational structure of the Employer's business. Such a unit also cannot be squared with Congress's direction, in section 9(c)(5), that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). That provision is intended to prevent artificial units of the sort at issue in this case. It prevents a union from proposing a unit that lacks significance within the employer's organization, and that makes sense only as a division of employees likely to vote in favor of union organization. Lundy Packing Co., 68 F.3d, 1577, 1581–82 (4th Cir. 1995). The Board must, instead, authorize a unit that is "appropriate" in the context of the Employer's organization. In the context of this case, that appropriate unit must include all of the Employer's New York Reps. The Employer notes once again that the above realities are especially true when, as here, the sole purpose of the Union is to split the petitioned-for unit from a large unit.

The Board's decision in Bergdorf Goodman, 361 NLRB No. 11 (2014), illustrates how a petitioned-for fractured unit is inappropriate In that case, the union sought to organize employees working in the second floor salon shoe department of the company's multi-floor, Manhattan store and the contemporary footwear employees working on the fifth floor of the store who themselves were a subset of the larger contemporary sportswear department. In its decision, the Board noted that the petition carved out a collection of employees whose boundaries did not resemble any

"operational lines drawn by the employer." The petitioned-for unit was fractured in Bergdorf Goodman because it did not constitute a true "departmental unit" that included *the entire* group of employees who shared a community of interest. As in Bergdorf, there are slight selling differences, but in the end the community of interest lies with how the employer draws its operational lines and not with the manner in which a union might desire to re-draft them.

The same analysis applies here and warrants the Region to determine that the petitioned-for unit is an impermissible fractured unit.

V. CONCLUSION

In summary, Opici has shown that only a statewide unit is appropriate. On balance, the majority of factors indicate that the MNY Reps do not share a community of interest separate from the UNY representatives. A unit of the MNY Reps would constitute an arbitrary segment of the Employer's operations and is not appropriate for purposes of collective bargaining. The manifest and overwhelming community of interest is with a single unit of Reps across the entire State of New York.

Respectfully submitted,

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Dated: January 28, 2021

CERTIFICATE OF SERVICE

I, Glenn J. Smith, Esq., certify that on this date I caused a copy of the foregoing Post-Hearing Brief to be served via Electronic Filing through the Board's website upon:

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