UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In the Matter of:

MIDWEST TERMINALS OF TOLEDO
INTERNATIONAL, INC.
Employer

And

INTERNATIONAL LONGSHOREMEN’S
ASSOCIATION
Petitioner

Case No.: 08-RC-288488

PETITIONER’S OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW

MAZZOLA MARDON, PC
26 Broadway, 17th Floor
New York, NY  10004
(212) 425-3240

Counsel for Petitioner International Longshoremen’s Association
I. FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2022, the Petitioner International Longshoremen’s Association (the “ILA”) filed a petition seeking to represent the following unit of longshoremen (in all of its various specific classifications), warehousemen, checkers, and maintenance employees employed by the Employer Midwest Terminals of Toledo International, Inc. (“MTTI” or the “Employer”).

All regular full-time and part-time longshoremen, checkers, port laborers, loader operators, front end loaders, warehousemen, crane operators, power operators, tow motor operators, material handler operators, mechanics, maintenance employees, welders, signalmen, winchmen, linesmen, dispatchers, dock stewards, expeditors, hatch leaders, warehouse leaders, and deck leaders.

The ILA petitioned for a unit of twenty-five employees employed at MTTI’s 3518 St. Lawrence Drive facility in the Port of Toledo (“Facility 1”). The petitioned-for unit employees perform job functions related to the loading and unloading of cargo from water-bound vessels calling on Facility 1.

MTTI argued that the ILA’s unit description was not appropriate because MTTI does not classify longshore employees by their specific job classifications (e.g., crane operators, front end loaders, signalmen), instead using the generic catch-all term “dockworker.” MTTI also argued that the smallest appropriate unit must include three rail locomotive employees, six supervisors, a safety and security officer, a college engineering intern, and two individuals—David Katafiasz and James Nietfeld—who do not work for MTTI but for a different company called Midwest

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1 About a mile north of Facility 1 is the Ironville Facility, which is owned and operated by related entities to MTTI. T. 61. There are three different companies operating out of the Ironville Facility: (1) Midwest Terminals II, Inc. (“Midwest II”), which employs the dockworkers at the Ironville Facility; (2) Ironville Rail & Transfer LLC (“IRT”), which employs rail and transfer employees at the Ironville Facility; and (3) Toledo Industrial Railroad LLC (“TIR”) which employs railroad employees at the Ironville Facility. T. 770. There are also the related companies Midwest Terminals Utica (“MWTU”) and Kuhlman Bulk Materials Facility (“KBMF”); together, all of the Midwest companies—MTTI, Midwest Ironville, IRT, TIR, MWTU, and KBMF—will be referred to as “Midwest Terminals Companies.” See MTTI Exs. 3, 4, 5. All Midwest Terminals Companies employees are subject to the same safety policy, employee handbook, and basic terms and conditions of employment. See id.

2 The parties stipulated that the supervisors will vote subject to challenge, if they were not excluded for other reasons. Thus, evidence on supervisor status was limited to questions sufficient to establish a community of interest.
Terminals of Toledo II, Inc. (“Midwest II”), which is located out of the Ironville Facility. Katafiasz and Nietfeld are paid by Midwest II and they are listed as Ironville employees for purposes of tracking attendance. DDE at 15. The equipment they operate “is generally fueled by Ironville Facility employees . . . [and they] are not involved in the operation of the locomotive and are not certified to operate the locomotive.” Id. at 9. They “work primarily in and around the bio storage area southeast of Saint Lawrence Drive, which is the on the dry side of Facility 1.” Id. They handle different products than the unit employees, they fill out different timesheets than the unit employees, and they have a lack of interchange, contact, and functional integration with the unit employees. Id. at 13-15.

A hearing was held before Region 8 on February 2-9, 2022 via Zoom. Following the parties’ submission of post-hearing briefs, Regional Director Iva Y. Choe issued a Decision and Direction of Election (the “DDE”) on May 27, 2022. The DDE directed a mail ballot election comprising of “All full-time, regular part-time, and on call maintenance employees and dockworkers performing longshoring, stevedoring and warehousing duties employed by the Employer its Facility 1 location in Toledo, Ohio; excluding all other employees, scale house employees, warehousemen on the east or dry side of Facility 1, office clerical employees, confidential employees, managers, guards, and supervisors as defined in the Act.”4 Id. at 24. Further, the DDE found that the rail locomotive employees must be included in the unit, but that

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3 Notably, MTTI does not seek the inclusion of certain other employees who work at Facility 1: four employees who work at the “scale house” where commercial vehicles check in to pick up cargo and four to five employees performing warehousing duties on the dry side of Facility 1 who are represented by the International Brotherhood of Teamsters, Local 20. See DDE at 4.

4 The ILA intends to file its own Request for Review on the basis that the Regional Director’s unit description is inappropriate insofar as it does not include “checkers.” The ILA believes that the Regional Director made a factual error based on the undisputed record by failing to include “checkers” in the unit description as “checker” is a job classification currently being performed by unit employees that is separate and distinct from dockworker or longshoreman.
the safety officer, college intern, and the two Midwest II employees, Katafiasz and Nietfeld, must be excluded. *Id.* at 21-23.

On May 15, 2022, MTTI submitted a Request for Review of the DDE (the “Request”) seeking review of the Regional Director’s decision to exclude Katafiasz and Nietfeld from the unit. As the Request was not filed within ten (10) days of the DDE, the election ballots will not be impounded pursuant to the existing Board rule. The mail ballots were mailed to unit employees on June 13, 2022 and are scheduled to be commingled and counted on July 13, 2022. MTTI intends to have Katafiasz and Nietfeld vote subject to challenge.

**II. SUMMARY OF ARGUMENT**

The Board should summarily deny MTTI’s Request. MTTI has not demonstrated that: (1) the Regional Director departed from Board precedent; (2) the Regional Director committed a substantial factual error in the DDE (which also prejudiced the Employer); (3) a substantial question of law is raised; or (4) an existing Board policy should be reconsidered.

The various arguments in MTTI’s nearly thirty-page brief are unsupported by the record. The DDE complies with long-established Board precedent. The DDE is also based on what should be considered indisputable facts; facts that show distinct communities of interest between Katafiasz and Nietfeld and the unit employees.

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5 MTTI also includes several arguments that can, at best, be described as purposefully misleading. For example, in its Request, MTTI claims that the ILA itself “petition[ed] for and claim[ed] a wall-to-wall unit as appropriate.” Request at 2. This is not the case. The phrase “wall-to-wall unit” is not found anywhere in the ILA’s petition. Region Ex. 1a. Nor did the ILA ever propose that the petitioned-for unit include a “wall-to-wall unit” of employees working at Facility 1. Region Ex. 4. This would be nonsensical since four warehouse employees are already represented by the Teamsters and the ILA did not argue that the scale house employees, rail employees, interns, or safety officers should be included in the unit. In its position statement, the ILA did inartfully use the term “wall-to-wall” to explain why it was petitioning for a unit that included all the specific job classifications (crane operator, front end loader, signalman, etc.) performed by longshoremen rather than just using the catchall term “longshoremen.” This was clearly explained to MTTI’s attorneys at the parties’ pre-hearing conference. Indeed, MTTI’s attorneys acknowledged that it understood the ILA’s explanation at the conference. Now, however, MTTI tries to exploit any remaining confusion to mislead the Board.
There is nothing new in MTTI’s brief. MTTI is merely asking the Board to overturn the DDE on grounds already considered by Regional Director Choe. As MTTI’s arguments are all without merit, reversal of the DDE cannot be granted here.

III. STANDARD OF REVIEW

The Board “will grant a request for review only where compelling reasons exist.” Section 102.67(c), NLRB Rules and Regulations. Accordingly, a request for review may be granted only upon one or more of the following grounds:

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

Id. None of these grounds exist in this case as it relates to Katafiasz and Nietfeld.

III. NO COMPELLING REASONS EXIST TO REVERSE THE REGIONAL DIRECTOR’S DECISION TO EXCLUDE KATAFIASZ AND NIETFELD

A. Regional Director Choe Did Not Depart From Board Precedent.

Regional Director Choe’s findings and reasoning comply with Board precedent. Regional Director Choe relies on controlling Board law, stating: “In PCC Structurals, the Board specifically found that the traditional community-of-interest test is the ‘correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees.’” DDE at 16 (citing PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 2 (2017)).
Regional Director Choe explicitly references and complies with the three-step analysis enunciated in *Boeing*. DDE at 16 (citing *The Boeing Company*, 368 NLRB No. 67, slip op. at 3 (2019)). The Regional Director states: “The Board has clarified that the traditional community-of-interest test, as articulated in *PCC Structural*, involves a three-step analysis. First, the proposed unit must share an internal community of interest. Second, 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. Third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.” *Id.* Regional Director Choe then performs an in-depth analysis of this traditional community-of-interest test. DDE at 4-23.

Contrary to the Employer’s assertion that the DDE “wholly failed to comply with the requirement under NLRB precedent that it explain why the purported distinctions between Katafiasz, Nietfeld, and the employees determined in the Decision to be included in the Unit . . . actually outweigh their commonalities, and why those purported differences render them “meaningfully distinct,”” the DDE thoroughly identifies why the excluded employees have distinct interests. Indeed, after performing a detailed review of each of the traditional community-of-interest factors while comparing Katafiasz and Nietfeld to the unit employees, *see id.* at 4-15, the Regional Director specifically explains how the differences between Katafiasz and Nietfeld and the unit employees outweigh the similarities, *see id.* at 21-22.

For example, as a basis for her decision, Regional Director Choe explained that “it does not appear that Katafiasz and Nietfeld are employees of the Employer and their inclusion would not conform to an administrative function or grouping of the Employer’s operation.” *Id.* at 22. This finding was based, in part, on the fact that they “are not paid by the Employer and are paid by a different entity, Midwest II;” a difference the Regional Director found to be “significant in
the context of collective bargaining.” *Id.* at 21. Yet contrary to the Employer’s assertion, the
Regional Director also cited to other evidence that showed MTTI was not their employer, such as
the fact that Katafiasz and Nietfeld “complete difference timesheets than the undisputed
employees and locomotive rail employees and are listed with the ‘Ironville’ employees for
purposes of tracking attendance.” *Id.* at 21-22.

In addition, Regional Director Choe found that “other factors support the conclusion that
the bio storage rail employees share meaningfully distinct interests that warrant their exclusion
from the appropriate bargaining unit.” *Id.* at 22. The Regional Director found:

There is no evidence of any interchange or contact between the bio storage rail
employees and the other employees. Katafiasz and Nietfeld work on the dry side
of Facility 1 whereas the undisputed dockworkers work primarily on the wet side.
The two undisputed dockworkers, one of whom has been working at the Port
since 1966, testified that they did not know who Katafiasz and Nietfeld were.
There is no record evidence of work-related contacts between the bio storage rail
employees and the undisputed employees or the locomotive rail employees. The
timesheets of Katafiasz and Nietfeld reflect that they work with different
materials than the undisputed dockworkers. Thus, the record does not suggest
strong functional integration between the bio storage rail employees and the
undisputed or locomotive rail employees.

*Id.*

The Regional Director then weighed these differences against the similarities Katafiasz
and Nietfeld share with the unit employees, finding that these differences outweighed the
similarities:

There are factors that weigh in favor of inclusion. While the testimony was
limited regarding the skills and job functions of Katafiasz and Nietfeld, the record
reflects that they transfer material from railcars directly to trucks. Thus, their job
functions are arguably similar to the undisputed dockworkers. In addition,
although paid by a different entity, they receive the same employee benefits as the
undisputed employees and locomotive rail employees. In terms of supervision, the
record reflects that they are supervised by Sellers and Hall. However, these
factors are not sufficient to negate the bio storage rail employees’ distinct
community of interest, including the lack of administrative grouping, the lack of
job overlap or temporary or permanent interchange with any other employees,
lack of contact with the undisputed and locomotive rail employees, and the lack of functional integration. *See United Operations*, 338 NLRB 123, 125 (2002) (The fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact, or functional integration).

*Id.*

In weighing community-of-interest factors, no factor is dispositive. Rather, the Regional Director must weigh all relevant factors in determining community of interest. *See PCC Structurals*, 365 NLRB No. 160, slip op. at 11. Here, far from a departure of Board precedent, the DDE provides a thorough, fact-based analysis that clearly explains the Regional Director’s reasoning for finding that the two Midwest II employees share meaningfully distinct interests from the unit employees of MTTI. Thus, the DDE fully complies with Board precedent and reversal is not merited here.

As an additional matter, MTTI’s argument that the DDE departed from Board precedent by ignoring the presumption in favor of a facility-wide unit borders on the absurd since MTTI never argued for a wall-to-wall unit of all employees working Facility 1. MTTI does not seek the inclusion of the Teamster warehouse employees or the scale house employees also working at Facility 1. *See DDE* at 4. Moreover, the DDE does explicitly consider the fact that Katafiasz and Nietfeld work in an assigned-area on the dry side of Facility 1; however, the Regional Director rightly concludes that, based on all relevant factors, the Katafiasz and Nietfeld share meaningfully distinct interests from the unit employees. *See id.* at 22; *see also Ikea Distr. Servs.*, 370 NLRB No. 109, slip op. at 10 (2021). This argument therefore has no merit and can safely be discarded.
B. Regional Director Choe Based Her Decision on the Record and Therefore the DDE Is Not Clearly Erroneous

While the Employer complains that Regional Director Choe made several “improper factual determinations,” the Regional Director’s conclusions are all based on the factual record and are not clearly erroneous. MTTI also provides no basis as to how any of these allegedly improper factual determinations prejudiced MTTI.

First, MTTI assertion that the DDE improperly determined that Katafiasz and Nietfeld have a distinct work location in and around the bio storage on the “dry-side” of Facility 1 is baseless. The parties stipulated to this fact at the hearing and MTTI’s only witness, Operations Manager Steve Sellers, testified to this as well. See T. 94, 770. Further, contrary to MTTI’s assertion, Regional Director Choe did not ignore evidence that unit employees could sometimes work in the bio storage area or elsewhere on the dry-side of Facility 1, e.g., noting that employees “assigned to move railcars could work south of bio storage,” that the maintenance employees work on the “dry-side,” and that the “undisputed dockworkers go to the maintenance shop on the dry side of the facility when they experience issues with equipment.” DDE at 7, 13. Nor did the Regional Director find that undisputed unit employees “always” work on the wet-side, just that they “primarily” do, which is consistent with the record evidence. T. 476:3-10; see also Teamsters Loc. 20 & Midwest Terminals of Toledo Int’l, Inc., 359 NLRB 983, 986 (2013).

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6 Throughout its brief, MTTI makes a number of misleading statements that are unsupported by the record. Many of these statements are based solely on the allegedly “undisputed” testimony of Sellers. But the ILA was not required to refute all of the obvious inconsistencies and blatant falsehoods in Sellers’ testimony. Rather, the ILA, in its post hearing brief, simply relied upon the record exhibits and testimony to support its contentions. Pre-election representation hearings are supposed to be fact-finding missions that are non-adversarial in nature. See “Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings,” Office of the General Counsel NLRB, September 2003. A prelection representation hearing is conducted by a hearing officer, whose duty is “to inquire fully into matters in issue and to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.” NLRB Rules and Regulations, Section 102.64(b).
And MTTI provides no basis whatsoever to explain how this allegedly improper determination prejudiced MTTI.

Next, contrary to MTTI’s assertion, Regional Director Choe did not improperly determine that interaction and interchange weighed against inclusion. The Regional Director reasonably found that “there was no evidence regarding the frequency of the contact or the nature of the interactions between the bio storage rail employees and the other employees;” “[t]wo dockworkers, one of whom has been working at the Port since 1966, testified that they did not know who Katafiasz and Nietfeld were;” and “there is no evidence that undisputed employees perform the work of Katafiasz and Nietfeld in the area of bio storage, or vice versa.” DDE at 13-14. These findings are all supported by record. T. 338-39, 468-49, 770-71. Indeed, at the hearing, MTTI put in almost no evidence at all on either Katafiasz or Nietfeld. See T. 73:21-74:11, 93:15-98:2. And, in its brief, MTTI misrepresents the purported evidence that it does cite of interaction and interchange between Katafiasz and Nietfeld and the unit employees.7 For example, MTTI states that Sellers testified that the “Alleged Rail Employees (including Katafiasz and Nietfeld) . . . communicated with the Unit Employees ‘all day every day,’ both by ratio and face-to-face, on a daily basis.” Request at 14. But MTTI tellingly does not include the full quote, excerpting the part where Sellers makes it clear that he is only talking about the employees involved in the operation of the rail cars and not the bio storage employees. See T. 75-6 (“Q. How often do the alleged rail employees communicate with other employees in the proposed bargaining unit? A. All day every day. They're going to have direct communication with everybody, whether they're -- where they're moving cars to, where they're going to need to

7 MTTI’s arguments here regarding the undisputed maintenance employees are also meritless. For example, unlike the bio storage employees, the maintenance employees are employed by MTTI and are functionally integrated with the undisputed unit employees as they perform preventative maintenance on the equipment and complete repairs on equipment operated by the undisputed dockworkers. See DDE at 7.
move them when they're done with cars. I mean, they have -- they're in direct communication with them all day long.”

Finally, contrary to MTTI’s assertion, Regional Director Choe did not improperly rely on Katafiasz’s and Nietfeld’s placement on Midwest II’s payroll. In finding that they were not “employees of the Employer,” Regional Director Choe reasonably relied on the fact that Katafiasz and Nietfeld, unlike all of the other employees at issue, were paid by Midwest II.8 DDE at 21-22; see also ILA Ex. 8. However, Regional Director Choe did not only rely on this fact, noting that Katafiasz and Nietfeld filled out different time sheets than the MTTI employees, that Ironville facility employees provided the fuel for their equipment, and that they were listed as Midwest II employees on the attendance tracker. DDE at 21-22; see also ILA Ex. 7. Thus, based on all of these factors, the Regional Director reasonably concluded that Katafiasz and Nietfeld were not employees of MTTI.

The DDE also does not ignore any of the evidence MTTI cites that purportedly shows Katafiasz and Nietfeld were employed by MTTI. For example, Regional Director Choe notes that “[T]he testimony was limited regarding the skills and job functions of Katafiasz and Nietfeld. . . . In addition, although paid by a different entity, they receive the same employee benefits as the undisputed employees and locomotive rail employees. In terms of supervision, the record reflects that they are supervised by Sellers and Hall.” DDE at 22. Ultimately, however, based on the reasonable review of the complete record, the Regional Director determined that this evidence was insufficient to show that MTTI employs Katafiasz and Nietfeld.

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8 The record indicates that when a Midwest II employee transfers to become an MTTI employee, it is reflected in the company’s payroll. For example, the payroll records and daily time sheets reflect that Ronald Durbin worked for Midwest II until August 2021, but began working as a longshoremen or “dockworker” for MTTI as of September 2021. (ILA Ex. 8.)
Moreover, the Request explicitly tries to mislead the Board about the supposed evidence that the DDE allegedly ignored regarding “which entity supervised them, assigned them work, trained them, issued their policies and procedures, determined their compensation, provided their benefits, or issued them their equipment.” Request at 26. For example, MTTI fails to mention that all employees of Midwest Terminal Companies share the same basic terms and conditions of employments. Indeed, the benefits plan, employee handbooks, and safety handbooks are equally applicable to all employees of Midwest Terminals Company, including employees of Midwest II, IRT, TIR, as well as management employees, office employees, the Teamsters, and scale house employees. T. 678-683; MTTI Exs. 3, 4, 5; see also Ikea Distr. Servs., 370 NLRB No. 109, slip op. at 13 (the “fact employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists”). Further, as to skills/training, MTTI fails to tell the Board that the shared “Safety Made Simple” or “SMS” training program they reference was a basic training program done at all Midwest Terminals Company facilities and was taken by all of Midwest’s “operational” employees, including Midwest II employees. T. 561-64, 580, 588; see also Ikea Distr. Servs., 370 NLRB No. 109, slip op. at 13 (“[S]haring a common personnel system for hiring, background checks and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common.”)

As to supervision and assignment of work, the Regional Director does credit Sellers’ testimony that Sellers and Hall supervise Katafiasz and Nietfeld even though no actual credible evidence exists in record to support this testimony. The Employer put in zero documentary evidence on this point, instead relying solely on Sellers’ elusive, and exceedingly unhelpful, testimony that “they both work at Facility-1, and they're no different than anybody else. They
report and go through the same gate, just like everybody else.” T. 73-74. This vague testimony should not be credited as sufficient evidence of Sellers supervision or assignment of these employees, particularly in light of the fact that MTTI withheld material evidence regarding who pays these two employees until the last day of the hearing when the Hearing Officer ordered them to turn over pay roll documents. 755, 770-74. Nonetheless, there is no actual evidence in the record regarding the extent to which Sellers and Hall supervise Katafiasz and Nietfeld or that they are not supervised by Midwest II managers. Nor is any actual evidence that Sellers and Hall assign them the jobs in the bio storage area, jobs which Katafiasz and Nietfeld work day-in-and-day-out. See T. 770; ILA Ex. 3 (“Daily Timesheets”).

Further, MTTI states that Katafiasz and Nietfeld operate “power equipment” like the unit employees; but, as Regional Director Choe states, “it is not clear from the record what equipment Katafiasz and Nietfeld operate.” See DDE at 9, fn. 23. MTTI also argues that Katafiasz and Nietfeld are paid according to MTTI’s pay scale because they are allegedly compensated under MTTI’s level system. But there is no actual evidence in the record that Katafiasz and Nietfeld are paid according to MTTI’s pay scale or that Midwest II employees did not also receive levels. Nor does MTTI explain why Katafiasz and Nietfeld, unlike all the other unit employees, are the only two employees paid $23.53 an hour. See ILA Ex. 8 (“Payroll Records”).

In sum, the Regional Director’s determination was not clearly erroneous but reasonably based on the record before her. The Employer also has not shown that the DDE’s allegedly improper determinations somehow prejudiced MTTI. As such, there is no compelling basis to reverse the Regional Director’s decision and the Request must be denied.
V. CONCLUSION

Regional Director Choe’s DDE fully aligns with Board precedent, relies on record evidence, and does not include findings that are clearly erroneous. Thus, no compelling reasons exists to overturn the DDE and the ILA respectfully requests that the Board deny the Request and affirm the Regional Director’s DDE.

Dated: June 30, 2022
New York, New York

MAZZOLA MARDON, PC

By: /s/Elizabeth Alexander
   Elizabeth Alexander
   Daniel Wolff
   26 Broadway, 17th Floor
   New York, NY 10004
   (212) 425-3240

Counsel for Petitioner International Longshoremen’s Association
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have this date been served by electronic mail

upon the following parties:

Daniel B. Pasternak
Squire Patton Boggs (US) LLP
1 E Washington St #2700
Phoenix, AZ 85004
daniel.pasternak@squirepb.com

William J. Kishman
Squire Patton Boggs (US) LLP
4900 Key Tower, 127 Public Square
Cleveland, Ohio 44114
william.kishman@squirepb.com

Dated: June 30, 2022

/s/ Daniel Wolff
DANIEL WOLFF