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

MILLER PLASTIC PRODUCTS, INC.

and **Case No. 06-CA-266234**

RONALD VINCER, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF POSITION ON REMAND FROM THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counsel for the General Counsel (the General Counsel) submits this statement of position to the National Labor Relations Board (the Board) following the U.S. Court of Appeals for the Third Circuit's (the Court) decision in *Miller Plastic Products Inc. v. NLRB*, 141 F.4th 492 (3d Cir. 2025), to remand this case back to the Board for further proceedings in compliance with the directives therein. In relevant part, the Court affirmed as supported by substantial evidence the Board's findings that: (i) Ronald Vincer engaged in protected concerted activity when he brought concerns about pandemic protocols and the plant's operating status to management during the March 16, 2020[1] all-hands meeting and raised similar issues again in a one-on-one conversation with Chief Operating Officer (COO) Timothy Zeliesko on March 23, *id.* at 510–13; (ii) Vincer's three unsigned warnings from 2019 and early 2020 did not carry any evidentiary value, *id.* at 515 n.154; and (iii) Vincer's protected concerted activity was at least a motivating factor in his discharge, *id.* at 514–16. The Court remanded the case for the Board to reevaluate the Respondent's affirmative defense that it would have discharged Vincer even absent his protected

[1] All subsequent dates are in 2020 unless otherwise noted.

concerted activity. *Id.* at 519–20. In this regard, the Court was concerned that the Board's decision did not address testimony bearing on Vincer's performance from a coworker, who was credible, as well as the COO and another manager, who were generally discredited but whose testimony the Board nonetheless relied on to support certain factual findings. *Id.* at 517–20. In addition, the Court was concerned that the Administrative Law Judge (the ALJ) gave short shrift to planned workforce reductions tied to financial pressures early in the COVID-19 pandemic. *Id.* at 519.

To address the Court's limited remand, the General Counsel respectfully requests that the Board remand the case to the ALJ for further analysis and findings as to whether the Respondent has proven its affirmative defense, with specific instructions to: (1) resolve the credibility issues identified by the Court that are necessary to make findings as to Vincer's performance; and (2) reconcile those performance findings with evidence that the Respondent needed to make staff cuts in late-March.

STATEMENT OF THE CASE

I. FINDINGS OF FACT

Charging Party Vincer was a highly skilled fabricator at Miller Plastic Products, Inc. (the Respondent), a Pennsylvania plastic container manufacturer, from 2015 until his termination on March 24, 2020. *Miller Plastic Products, Inc.*, 372 NLRB No. 134, slip op. at 1, 16 (2023). Casual conversation among employees while they worked was commonplace and accepted by management. *Id.*, slip op. at 1, 16–17. Managers periodically counseled Vincer about his performance deficiencies, including excessive talking, distracting coworkers, and using his cellphone. *Id.*, slip op. at 1, 17.

In March 2020, employees frequently discussed the emerging COVID pandemic and Vincer expressed concern to coworkers that the Respondent was not an essential, life-sustaining business that was permitted to remain open under the Pennsylvania governor's emergency orders. *Id.*, slip op. at 2, 7 n.22, 18–19. During a March 16 all-hands meeting at which COO Zeliesko stated his belief that the Employer would be classified as an essential business and outlined the company's health and safety measures, several employees raised questions regarding whether the Respondent qualified as an essential business. *Id.*, slip op. at 2 & n.6, 19 & n.13. Vincer protested that the Respondent had not implemented the proper safety precautions and that employees should not be working. *Id.*, slip op. at 2 & n.5, 7, 22. Zeliesko responded that employees needed to keep working until there was further clarification from the state government. *Id.*, slip op. at 2, 19. On March 23, Vincer asked Zeliesko about the Respondent's return-to-work requirements for employees after having or being exposed to COVID and if Zeliesko thought the Respondent should be open. *Id.*, slip op. at 2, 20.

On March 24, Plant Manager Blake Trenary observed Vincer texting on his cellphone on the plant floor and reported it to Zeliesko. *Id.*, slip op. at 2, 20, 23. Almost immediately, and without any further investigation, Trenary and Zeliesko went to Owner Donnie Miller and recommended terminating Vincer. *Id.* Shortly thereafter, the Respondent discharged Vincer purportedly for "poor attitude, talking, and lack of profit." *Id.*, slip op. at 2, 20. A couple weeks before Vincer's discharge, on March 5, he and his coworker friend, James Boustead, were counseled about excessive talking and production times, but Vincer was not issued a written warning. *Id.*, slip op. at 1–2, 17, 23.

Meanwhile, the Respondent was experiencing financial repercussions from the COVID pandemic and was considering taking out a loan through the Paycheck Protection Program

(PPP).[2] *Id.*, slip op. at 20, 23. PPP loans were made available through the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), Pub. L. No. 116-136, 134 Stat. 281, which was signed into law on March 27, three days after Vincer was discharged. 372 NLRB No. 134, slip op. at 20, 23. The Respondent believed that businesses that received PPP loans would be required to retain workers and maintain payroll for the potential loan to be forgiven. *Id.*, slip op. at 20, 23. These concerns factored into the Respondent's termination of three other employees during the last week of March. *Id.*, slip op. at 20–21, 23.

II. PROCEDURAL HISTORY

A. Proceedings before the Administrative Law Judge and Board

ALJ Michael A. Rosas issued a decision on May 27, 2022, finding that the Respondent violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by discharging Vincer for engaging in protected concerted activity. 372 NLRB No. 134, slip op. at 16, 22–24. In so finding, the ALJ made credibility determinations based on the entire record including his observation of the witnesses' demeanor. *Id.*, slip op. at 16. The ALJ found Vincer was a credible witness, often crediting him over the Respondent's witnesses, and characterized coworker Boustead as "the most credible witness in this case." *Id.*, slip op. at 17 n.6, 19 nn.12–13, 20 nn.14–15, 20. The ALJ generally discredited COO Zeliesko and Manager Trenary. *Id.*, slip op. at 18 nn.9–10. The ALJ expressly discredited Zeliesko and Trenary's denial that Vincer's expressed COVID concerns were mentioned when the Respondent decided to discharge him. *Id.*, slip op. at 20 n.19.

As an initial matter, the ALJ found that Vincer engaged in protected concerted activity by raising health-related concerns about the Respondent remaining open and its COVID precautions

[2] The ALJ inadvertently referred to this program as the "Payment Protection Program." 372 NLRB No. 134, slip op. at 20.

during the March 16 all-hands meeting and a one-on-one conversation with Zeliesko on March 23. *Id.*, slip op. at 22–23.[3] In considering whether Vincer's protected concerted activity motivated his discharge, the ALJ reviewed Vincer's scant disciplinary record, the Respondent's suspicious actions surrounding his termination, and its shifting defenses. *Id.*, slip op. at 23–24. The ALJ gave no weight to the "three dubious" unsigned warning forms "allegedly issued" to Vincer in 2019 and early 2020. *Id.*, slip op. at 17 n.6. Thus, Vincer had only ever received counseling before his discharge, including on March 5 for excessive talking and production times, together with coworker Boustead.[4] *Id.*, slip op. at 17 & n.6, 23. Vincer was never issued a written warning. *Id.*, slip op. at 2, 17, 23. The ALJ found Vincer's disciplinary history "relatively bare" compared to other employees the Respondent disciplined or discharged, reflecting disparate treatment toward Vincer. *Id.*, slip op. at 23–24. Indeed, others were all given second or more chances for misconduct, some of which was malicious, intentional and/or cost the company money. *Id.* The Respondent's lack of an investigation, including no documentation or analysis of Vincer's production deficiencies, also supported finding animus. *Id.*, slip op. at 23. The ALJ also found that the Respondent presented inconsistent reasons for discharging Vincer, varying from inability to meet production times to excessive talking and cellphone use to safety risks and its financial condition. *Id.* Lastly, the ALJ found the timing of Vincer's discharge—one day after speaking to Zeliesko about the Respondent's return-to-work procedure and decision to stay

[3] The ALJ also used the phrase "inherently concerted" in referring to Vincer's statements at the all-hands meeting, but the Board found it unnecessary to analyze his conduct under that doctrine. 372 NLRB No. 134, slip op. at 1 n.1.

[4] The ALJ later characterized the March 5 counseling as Vincer's sole "warning" over the course of five years, 372 NLRB No. 134, slip op. at 23, however he earlier observed that "undocumented verbal warnings, including the one by [owner] Miller on March 5, were actually a form of counseling." *Id.*, slip op. at 17 n.6.

open—suspect. *Id.* Although Vincer's discharge occurred during an economic downturn, as the Respondent pondered who to keep on its payroll if it received a PPP loan, and the Respondent discharged three other employees around the same time, the ALJ found Vincer's inclusion in that "mix" of late March terminations to be partially motivated by his protected concerted activity. *Id.*, slip op. at 23. The three other discharged employees had, respectively, a lengthy disciplinary history (Christopher Cowger), a consistent pattern of missing sales goals (Eric Saloom), and chronically poor attendance resulting in costly project delays in addition to numerous documented disciplines (David Onuska). *Id.*, slip op. at 21 & n.24.

Finally, the ALJ determined that the Respondent "failed to prove by a preponderance of the evidence that it would have discharged Vincer" absent his protected concerted activity. *Id.*, slip op. at 24. The ALJ noted that in the absence of documentary or other reliable evidence, there was no way to evaluate how Vincer's production compared to other employees. *Id.* Accordingly, the ALJ found that the Respondent violated Section 8(a)(1) by terminating Vincer. *Id.*

The Respondent filed exceptions and a supporting brief while the General Counsel filed cross-exceptions and a supporting brief. *Id.*, slip op. at 1 n.1. Both parties filed answering and reply briefs. *Id*.

The Board (Chairman McFerran and Members Wilcox and Prouty; Member Kaplan concurring in the result) issued a decision on August 25, 2023 affirming the ALJ's determination that the Respondent violated Section 8(a)(1) by discharging Vincer. *Id.*, slip op. at 1. As an initial matter, the Board carefully examined the record and found no basis for reversing the ALJ's credibility findings, affirming that Trenary lacked credibility based only on the ALJ's "overall assessment of the demeanor of the witnesses," rather than any reliance on the fact that his roommate still worked for the Respondent (Trenary no longer did). *Id.*, slip op. at 1 n.1. The

Board then found that Vincer engaged in protected concerted activity when he voiced collective employee concerns during the March 16 all-hands meeting about Respondent's COVID safety precautions and decision to remain open, and subsequently questioned COO Zeliesko about those issues on March 23, because Vincer raised a truly group complaint to management at the meeting and the follow-up conversation was a logical outgrowth of that earlier complaint. *Id.*, slip op. at 7–8. Although the Board agreed with the ALJ that finding a violation was "warranted under extant law," including *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), the Board majority overruled *Alstate Maintenance* and restored the prior totality-of-the-circumstances standard.[5] 372 NLRB No. 134, slip op. at 1, 7. The Board adopted, without substantive discussion, the ALJ's findings that Vincer's activities were for mutual aid or protection, that they were a motivating factor in his discharge, and that the Respondent failed to carry its burden of proving it would have made the same decision absent that activity. *Id.*, slip op. at 2 n.9, 8. Accordingly, the Board affirmed that Vincer's discharge violated Section 8(a)(1) under *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

B. Third Circuit Decision and Remand

Following the Respondent's petition for review and the General Counsel's cross-application for enforcement, on June 23, 2025, the Court issued its decision affirming the Board's finding of a prima facie case as to Vincer's discharge and granting, in part, the Board's cross-application for enforcement. *Miller Plastic Prods.*, 141 F.4th 492. The Court held that substantial evidence supported the Board's findings that Vincer engaged in protected concerted

[5] The General Counsel is interested in addressing the issue of concert in the context of group meetings, an issue addressed in *Alstate Maintenance*, in a future appropriate case.

activity during the March 16 meeting because Vincer raised a "truly group complaint" and during the March 23 conversation with Zeliesko, which was an extension of that earlier complaint. 141 F.4th at 510–13. The Court held that "substantial circumstantial evidence" supported the Board's finding that Vincer's protected activity was at least a motivating factor in his March 24 termination based on timing, a significant reversal in Respondent's response to Vincer's rule violations, his "relatively bare" disciplinary file compared to others, and the lack of investigation, analysis, or documentation surrounding the reasons for his termination.[6] *Id.* at 514–16. In so finding, the Court affirmed that Vincer's three unsigned warnings from 2019 and early 2020 did not carry any evidentiary value. *Id.* at 515 n.154. The only part of the prima facie case about which the Court disagreed was the Board's shifting-reasons rationale. *Id*. at 516 n.158. The Court found the Respondent's somewhat varied explanations for Vincer's discharge to be consistent with its position that Vincer's "talking and cellphone use were unacceptable" inasmuch as "talking instead of working . . . was bad for efficiency, safety, and profitability." *Id*.

The Court also disapproved of the Board's categorical rejection of the Respondent's affirmative defense—that "Vincer's poor performance would have led to his termination whether or not he raised concerns about pandemic policies, particularly in light of the financial pressures that [the Respondent] faced by late-March of 2020." *Id.* at 516, 519. The Court found that the ALJ erred by focusing too narrowly on production times—which the Employer had not universally considered in making retention decisions in preparation for a possible PPP loan—rather than Vincer's other behaviors, namely, excessive talking and cellphone use, which could harm performance. *Id.* at 517.

[6] The Court also approved the ALJ's decision to defer considering the Respondent's after-acquired evidence to the compliance proceeding since it did not bear on liability. 141 F.4th at 520–22.

Moreover, the Court took issue with the ALJ's failure to address testimony from multiple witnesses that bore on Vincer's performance. *Id.* at 517–19. First, the Court pointed out that the ALJ overlooked testimony from credible witness and coworker Boustead that supported the Employer's affirmative defense—such as that he and Vincer received multiple "'verbal warnings' for talking," that Vincer's distracting behavior became more severe beginning in late 2019, and that Vincer was on his cellphone ten or more times per day. *Id.* at 517–18. In this regard, the Court noted that a "factfinder plausibly could disregard Boustead's descriptions of Vincer's performance because Boustead was not a supervisor," but that the ALJ did not explicitly do so. *Id.* at 518. Second, the Court criticized the ALJ for selectively relying on certain testimony from Zeliesko and Trenary[7] (notwithstanding that they were not credible overall) while failing to address in any way their testimony reflecting on Vincer's performance—such as needing to ensure Vincer was working almost every time they walked the plant and observing that Vincer would stop working while talking. *Id.* at 518–19. In essence, the Court was unable to determine if the ALJ "adequately accounted for pertinent testimony regarding Vincer's performance" without a "more precise explanation of which testimony was deemed credible and why." *Id.* at 519. The Court opined that it would be "reasonable to conclude that Vincer would have been included in the group fired in late-March" absent his protected conduct if his "performance declined in the months before he was terminated, if management repeatedly spoke to him about this, and if management planned to make certain staff cuts in response to pandemic-era economic conditions." *Id.* Finally, the Court summarized the shortcomings in the ALJ and

[7] The Court noted that their testimony was relied upon with regard to disciplinary practices, management's communications with employees about the pandemic, the Respondent's reasons for terminating two other employees, and a key statement Vincer made related to the pandemic at the all-hands meeting. 141 F.4th at 518–19 & n.176.

Board's analysis of the Respondent's affirmative defense as follows: (1) focusing solely on how Vincer's production compared to others; (2) failing to explain whether testimony from Boustead, Zeliesko, and Trenary about Vincer's performance was discredited; and (3) failing to reconcile that testimony with the Respondent's evidence that it needed to make staff cuts in late March. *Id.*

Rather than conduct a *de novo* review of these issues, the Court determined that the proper course was to remand the case to the Board for additional explanation and further consideration of whether the Employer established its affirmative defense. *Id.* at 519–20. It underscored that the "evidence [was] not so powerful as to compel the conclusion that [the Respondent] should prevail on its affirmative defense." *Id.* at 520. The Court took no position as to how the evidence of Vincer's performance should be weighed or credited. *Id.*

ARGUMENT

The General Counsel respectfully requests that the Board remand the case for the ALJ to further evaluate the Respondent's affirmative defense in light of the Court's limited remand. Specifically, the Board should remand the case to the ALJ for additional analysis and findings as to whether the Respondent satisfied its rebuttal burden of showing it would have discharged Vincer absent his protected concerted activities, with specific instructions to: (1) resolve the credibility issues regarding Boustead, Zeliesko, and Trenary to make findings as to Vincer's performance; and (2) reconcile those performance findings with evidence that the Respondent needed to make staff cuts in late-March. The ALJ is in the best position to resolve these credibility issues, clarify his findings on the need for workforce reductions, and make a recommendation on the affirmative defense so the Board can reconsider the matter to the satisfaction of the Court.

The ALJ is in the Best Position to Resolve the Credibility Questions and Reevaluate the Respondent's Financial Pressures As Part of Reassessing the Respondent's Affirmative Defense

The Board's Rules and Regulations provide that the administrative law judge's decision is to contain "findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case." 29 C.F.R. § 102.45(a). Under 29 C.F.R. § 102.154, the Board may remand a case to the administrative law judge for further proceedings. The Board attaches great weight to the administrative law judge's credibility findings, insofar as they are based on demeanor, given that the judge observes the witnesses testify while the Board and courts only review "cold records." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enforced per curiam*, 188 F.2d 362 (3d Cir. 1951). The Board's credibility evaluation is "more searching" where findings are based on other factors like weight of the evidence, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Troy Grove*, 371 NLRB No. 123, slip op. at 2 (2022). The Board remands cases to administrative law judges when it is unable to fulfill its review function due to credibility issues or questions about the factual basis for the judge's findings, including after circuit court remands. *See St. Louis Cardinals, LLC*, 369 NLRB No. 3, slip op. at 1–2 (2020); *Lee Builders, Inc.*, 341 NLRB 726, 726 (2004); *Alcon Fabricators*, 334 NLRB 604, 604 (2001).

The Board properly remands a case to the administrative law judge to reexamine an employer's affirmative defense where credibility issues relevant to that issue have not been fully resolved. In *St. Louis Cardinals*, the Board remanded the issue of whether the employer carried its *Wright Line* defense burden, which turned in large part on the credibility of a supervisor who the judge was skeptical of but had not clearly discredited. 369 NLRB No. 3, slip op. at 2 & n.6.

The Board found it unclear whether the judge discredited the supervisor's testimony that the employees were poor performers or simply declined to consider it. *Id.*, slip op. at 2. On remand, the judge invited supplemental briefs on the prior record, made additional credibility determinations, and ultimately rejected the defense after specifically identifying which parts of the supervisor's testimony were discredited and why. 370 NLRB No. 31, slip op. at 1 n.4, 4, 7–8 (2020).

Remanding credibility and factual issues to the administrative law judge is appropriate even after a circuit court remand to the Board. In *NLRB v. Alcon Fabricators*, the Sixth Circuit remanded the case to the Board to consider whether the employer had a good faith doubt as to the union's continuing majority status, a factual issue that required credibility determinations the judge failed to make. 113 F.3d 1235 (6th Cir. 1997) (table decision). After accepting the remand, the Board in turn remanded the case to the administrative law judge to prepare a supplemental decision. 334 NLRB at 604. After additional briefing, the judge issued a decision resolving the credibility of the employer's witnesses and, consequently, whether the good faith doubt standard had been satisfied. *Id.* at 605–06. Similarly, in *New York Party Shuttle, LLC d/b/a Onboard Tours, Washington DC Party Shuttle LLC*, the circuit court remanded part of the case to the Board to revise the backpay calculation, which the court found was based on impermissible speculation. 372 NLRB No. 5, slip op. at 1 (2022). The Board then remanded the case to the administrative law judge to further develop the evidentiary record as to the disputed period but limited the scope of the remand to comparator calculations. *Id.*, slip op. at 2.

Where appropriate, the Board may remand a case to an administrative law judge with specific instructions as to the issues that need to be addressed, including fully setting forth the bases for credibility resolutions. In *Lee Builders*, the Board remanded the case to the judge to

provide credibility determinations on all disputed testimony, specifically identify the witnesses who were credited and discredited, and detail the bases for those determinations. 341 NLRB at 726. There, the judge had credited the testimony of the employee witnesses above all the employer's witnesses but had not identified which specific employee statements he credited and why, which of the employer's witnesses' statements he discredited and why, and which statements he relied on to find each violation. *Id.* at 726. The Board's remand also specified that the judge needed to explain the factual basis and analysis for each violation. *Id.*

Here, as in *St. Louis Cardinals*, remand to the ALJ is appropriate because the strength of Respondent's affirmative defense under *Wright Line* depends on unresolved credibility determinations that the ALJ is in the best position to decide. The Court criticized the ALJ for not stating whether he was discrediting Boustead's statements about Vincer's performance. 141 F.4th at 517–18. The ALJ found Boustead "the most credible witness" in the case, noting that Boustead's testimony was "spontaneous, his demeanor was calm and consistent, and he was genuinely receptive to inquiry from both sides throughout." 372 NLRB No. 134, slip op. at 19 n.12. However, the ALJ did not address Boustead's testimony about Vincer's performance when analyzing the Respondent's *Wright Line* rebuttal burden, specifically Boustead's testimony about warnings he and Vincer received, Vincer's disruption of others' work and cellphone use, and his distracting behavior becoming more severe in late 2019. 141 F.4th at 517–18. The Court observed that a factfinder could plausibly disregard Boustead's testimony since he was not a supervisor, but pointed out that Boustead had not been discredited about Vincer's performance on this or any other basis.[8] *Id.* at 518. Like the judge in *Lee Builders*, here the ALJ credited

[8] The Court noted, however, that discrediting Boustead would "have the troublesome consequence of leaving Vincer as the sole witness able to testify about his own performance, to the extent the ALJ discredited Trenary and Zelisko's testimony." 141 F.4th at 518.

Boustead over the Respondent's witnesses but did not specify whether he was also crediting Boustead's statements on Vincer's performance. *See* 341 NLRB at 726. As in that case, the Board should remand the instant matter to the ALJ to address Boustead's testimony about Vincer's performance and identify whether it should be credited or discredited, and the basis for such a decision.

Likewise, remand is appropriate for the ALJ to address Trenary's and Zeliesko's testimony about Vincer's performance. The Court faulted the ALJ for "selectively rely[ing] on certain testimony from Trenary and Zeliesko," while failing to account for their "[p]otentially relevant" testimony impugning Vincer's work habits. 141 F.4th at 518–19 & nn.176–183. The ALJ found Zeliesko "was not a credible witness[,]" explaining that he "seldom answered a question directly and was evasive when asked about the Respondent's disciplinary practices." 372 NLRB No. 134, slip op. at 18 n.9. Likewise, the ALJ found Trenary "lacked credibility." *Id.*, slip op. at 18 n.10. Thus, while the ALJ generally discredited Trenary and Zeliesko, he did not make explicit credibility findings on their statements about Vincer's performance—as he did in rejecting their explanations for Vincer's discharge.[9] *Id.*, slip op. at 20 n.19. While "'nothing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony," remand provides the ALJ an opportunity to explain precisely what testimony is credible, what is unreliable, and why. *Daikichi Sushi*, 335 NLRB 622, 622 (2001) (quoting *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds*, 340 U.S. 474 (1951)), *enforced per curiam*, 56 F. App'x 516 (D.C. Cir. 2003) (table). The ALJ is

[9] The ALJ did not make particularized demeanor evaluations for Trenary or Zeliesko, but stated at the outset of the decision that his findings were based on "the entire record, including [his] observation of the demeanor of the witnesses." 372 NLRB No. 134, slip op. at 16, 18 nn.9–10.

in the best position to review the transcript, evidence, and his recollection of the witnesses' demeanor and classify which statements about Vincer's performance are to be credited, if any.

In addition to making these credibility determinations, it is equally important that the ALJ "reconcile that [performance-related] testimony with the evidence that [the Respondent] needed to make staff cuts in late-March." 141 F.4th at 519. The Court noted Vincer reasonably could have been included in the group discharged in late-March regardless of his protected concerted activity if his performance truly declined and management repeatedly discussed this with him while also planning "to make certain staff cuts in response to pandemic-era economic conditions." *Id.* The Court characterized the ALJ's decision as "agree[ing] that pandemic-era economic pressures would have led [the Respondent] to fire some employees in late March" and that "these same considerations were 'a factor' in Vincer's termination." *Id.* at 517. Although the "Respondent's financial concerns in general" were undisputed, 372 NLRB No. 134, slip op. at 20 n.18, it would be prudent to clarify on remand whether the Respondent proved that it needed to reduce its workforce by four employees in March 2020 due to financial conditions or whether the prospect of a PPP loan merely caused the Respondent to terminate its poorest performers to avoid retaining them for some period as a condition of the loan (and if Vincer would have been included in either group). Although the Court rejected the assumption that the Respondent "selected the employees . . . by comparing production times," 141 F.4th at 517, the Court seems to view this case as a layoff "selection" case.[10] *Merrill Iron & Steel*, 335 NLRB 171, 174 & n.21 (2001) (defense of business necessity for layoff does not shield employer from a finding its selection of employees for layoff was discriminatorily motivated). On remand, the ALJ can

[10] Indeed, the ALJ occasionally characterized the late-March rash of firings as a layoff. 372 NLRB No. 134, slip op. at 21, 23 ("laid off").

clarify whether such a characterization is accurate based on further scrutiny of the record evidence, including the Respondent's financials.[11]

Inasmuch as the Court took no position on how the evidence should be weighed or credited, 141 F.4th at 520, remand is appropriate for the ALJ to review the entire record in light of these additional credibility determinations and further consider financial pressures facing the business in order to reevaluate whether the Respondent would have discharged Vincer absent his protected concerted activity.

CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board remand the case to the ALJ to reevaluate whether the Respondent would have discharged Vincer absent his protected concerted activity, with specific instructions to: (1) make the requisite credibility determinations as to the performance-related testimony highlighted by the Court; and (2) reconcile those performance findings with evidence that the Respondent needed to make staff cuts in late March.

[11] For example, the ALJ noted a significant net loss in January 2020 as compared to that month in 2019. 372 NLRB No. 134, slip op. at 20. However, he did not scrutinize the year-to-date figures, which show a much smaller reduction in revenue ($2,580,316 in 2019 versus $2,534,020 in 2020, a decrease of less than 2 percent) and that the business was still profitable as of January 2020 (year-to-date net income of $144,597). *See* Respondent's Exh. 14. Moreover, the ALJ's focus on the comparison of profits in January year over year presented a skewed financial picture since it is evident that the very high profits in January 2019 were an anomaly. *See id.* (showing January 2019 net income ($125,450) was about half the net income for the year-to-date period ($257,369) despite January apparently being seven months into the fiscal year—judging by a monthly building rent of $7,000 and year-to-date paid rent totaling $49,000).

Respectfully submitted,

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Dated: April 10, 2026

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 10, 2026, the aforesaid General Counsel's Statement of Position in Case 06-CA-266234 was e-filed with the NLRB's Executive Secretary's office and served on the following individuals/parties by electronic mail at the following addresses:

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