UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

APEX FINTECH SERVICES LLC d/b/a APEX FINTECH SOLUTIONS, Respondent, and **JOHN D. RICHARDSON,** Charging Party.	Case No. 12-CA-325317

POST-HEARING BRIEF OF APEX FINTECH SERVICES LLC D/B/A APEX FINTECH SOLUTIONS

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I. INTRODUCTION

Online speech can have real-world consequences. Charging Party John Richardson ("Richardson") understood that reality and sought to harness it by making spurious and unprovoked attacks on Apex Fintech Solutions, Inc.'s ("Apex" or the "Company") leaders.

In August 2023, Richardson published two public posts attacking Apex and its leadership. He asserted that Apex leaders, including Human Resources Representative Brianna Rodgers, Chief Technology Officer Palak Jain, Chief of Staff Stephen Lach, and Chief Executive Officer William Capuzzi fostered a "culture of bias." He alleged that they permitted "outright hate to proliferate," tolerated "pervasive issues of bigotry," encouraged employees to "openly espouse bigotry," and allowed "venom" to spread throughout the workplace. These were not minor criticisms or expressions of disagreement with any actual Company policy. They were vicious, untrue public attacks directed at harming the reputation of his employer and its Human Resources leadership.

Apex disputed those accusations and acted to protect its reputation and the reputations of those leaders. When Richardson refused to remove unprotected portions of his postings, Apex terminated his employment.

The question presented in this case is not whether employees may criticize their employers or seek support from coworkers. They unquestionably may. The question is whether the Act provides limitless protection for false public attacks simply because an employee invites coworkers to agree with him.

The Act does not require an employer to accept any level of public abuse from an employee. Rather, it demands a balance between employees' rights to engage in genuinely protected concerted activity and employers' legitimate interests in protecting their businesses from defamation and misconduct.

Here, the balance weighs decisively in Apex's favor. Richardson's posts were not spontaneous workplace outbursts. They were deliberate, public statements published on a professional networking platform and directed at a broad audience. They were made without any coworker support. Richardson sought to punish Apex and its Human Resources leadership for their so much as acknowledging workplace sexism and diversity issues, not to advance any genuine, shared employee concern.[1] Moreover, the factual premises underlying his attacks were unsupported by the evidence presented at hearing.

Under the National Labor Relations Board's (the "Board") setting-specific approach to employee social media misconduct, as articulated in *Pier Sixty*, Richardson's calculated and inflammatory allegations lose the protection of the Act. If the Board instead applies a *Wright Line* analysis, the result is the same: Apex would have terminated Richardson because of the nature of his public attacks regardless of any request for coworker support contained in the posts. *Wright Line*, 251 NLRB 1083 (1980).

Whatever analytical framework is applied, the conclusion remains unchanged. The Act does not grant an employee a license to make serious public accusations against an employer without consequence merely because the employee asks other employees to agree. Because Richardson's conduct was not protected by the Act, the Complaint should be dismissed in its entirety.[2]

[1] There is considerable irony to the fact that one of Richardson's main contentions was that the company supported sexism because it refused to censor posts his female coworkers made about working conditions. Specifically, female coworkers had participated in group discussions about earning less than male counterparts for the same work and being interrupted by male coworkers. Discussions about these working conditions, made through humor, had generated genuine coworker support on internal discussion channels. Richardson believed that these protected concerted conversations should be removed by the company and the employees who engaged in those activities should face termination. (GC Ex. 57).

[2] The Hearing in this matter was held between May 5 and 7, 2026, based on a Complaint and Notice of Hearing that issued on December 29, 2025, and an Amended Complaint and Notice of Hearing ("Complaint") that issued on April 15, 2026.

II. FACTUAL BACKGROUND

A. Apex Fintech Services LLC Business Operations As A Distinct Employer

Apex is a female-founded fintech company providing custody and clearing services to broker-dealers and institutional clients. (Tr. 33, 217:18-218:13). Apex executes millions of trades and account openings every year and successfully competes against significantly larger companies. The Company's competitive advantage stems from its intellectual property, manuals, and training programs. (Tr. 231:5-21). If Apex's proprietary materials fell into a rival's hands, the other firm "would [] duplicate all of [the Company's] systems and put [it] out of business." (Tr. 231:17-21). Further, the Company's reputation is part of its "secret sauce" and it strives to cultivate a positive and unique reputation in the highly competitive fintech industry. The Company maintains employee agreements with restrictions against disseminating proprietary and negative information to ensure the Company remains competitive in the market. (Tr. 230:21-231:21). Specifically, the agreements include specifically tailored definitions of proprietary information and non-disparagement provisions:

> 1. Definitions of Proprietary Information
>
> As used herein, the term "Proprietary Information" means any and all information regarding, related to or belonging to the Company, its businesses, business relationships and financial affairs, whether oral or written, and whether or not labeled or identified as confidential or proprietary that is confidential or proprietary in nature, including without limitation:
>
> …
>
> (iii) The subject matter of the Company's . . . . manuals . . . . training materials…;
>
> …
>
> (vi) Company's educational process and all materials related thereto;
>
> (vii) The Company's list of past, existing . . . members, partners, stockholders, and investors; and;

> (viii) Any other information or documents which the Company reasonably regards as being confidential.
>
> 11. Non-Disparagement; Public Profiles.
>
> Employee acknowledges and agrees that the professional reputation of the Company is an important asset that should not be impaired by Employee, either during or after employment ceases or terminates for any reason. Employee therefore agrees to not, either directly or indirectly, make any oral or written statement to any third party or person that disparages, or reflects negatively on the Company, the Company's business or operations, or the Company's partners, officers, employees, or management. Employee further agrees not to act in a manner that denigrates, demeans, or reflects negatively on the Company, its owners, employees or management, the Company's business, operations, or the Company's financial condition.

(GC Ex. 2).

While Apex is owned by Peak6, which also owns other independent entities, aside from common ownership, Apex operates as a distinct employer. (Tr. 32-34, 55:7-13, 39:8, 225-228, 227:4-19). Apex maintains its own executive leadership and CEO, separate legal and human resources functions, and independent authority over hiring, discipline, and termination decisions. (Tr. 39:8, 225-228, 227:4-19). Further, while Apex occasionally leases space in the same buildings as another Peak6 company and the Peak6 website contains some information about Apex, the businesses are physically separated by barriers, do not pool financial resources, and do not integrate their day-to-day operations. (Tr. 225:16-20, 226:22-25).

B. Apex's Commitment To Employee Engagement And Tools Utilized For Communication

Apex values employee engagement and has a number of workplace programs to achieve engagement, mentorship, and professional development, including Employee Resource Groups ("ERGs") which are employee created groups designed to support members at the Company. (Tr. 224, 269-271). These ERGs are not monitored by the Company and are entirely run by their

respective employee-members. (Tr. 224). ERGs at the Company include (along with others): Women in Tech Alliance and Glow PowHer leadership programming. (Tr. 81-82, 95-96, 224). Joining and engaging with ERGs is entirely voluntary and intended to promote inclusion and professional development in a historically male-dominated industry. (Tr. 224). ERGs are open to all employees and an employee does not necessarily have to identify with a specific group to join that group. (Tr. 224:3-13).

Along with encouraging ERGs to support employees, the Company has implemented many other tools to foster employee collaboration. For example, employees have access to Slack, a communication platform used for sending direct messages back and forth, conveying company news, and creating chat groups for personal and professional interests amongst employees. (Tr. 221:17-21). Employees can unilaterally create new Slack "channels" to discuss either business or personal topics, such as Formula 1 racing. (Tr. 221:23-222:5). Many ERGs also utilize Slack channels. (Tr. 249). Slack contains a large volume of accessible historical content, including messages that predate a particular employees' tenure at the Company. (Tr. 249:13-22).

C. Richardson's Employment With Apex

Apex hired Charging Party John D. Richardson in October 2021 as a Data Engineer. (Tr. 62:22-25, 63:1-10). As a Data Engineer, Richardson was responsible for moving and checking data as well as writing code for archiving data. (Tr. 63:6-12). Richardson worked remotely from Florida and reported to Tom Warner, who in turn reports to engineering department head Sudha Guttula. (Tr. 63-64).

Prior to the start of his employment, Richardson executed a confidentiality, noncompetition, and nonsolicitation agreement on October 7, 2021. (Tr. 62:4–11). Apex relies on such agreements to protect its proprietary programs, materials, and training and, because of this, Richardson was subject to the agreement during his employment. (Tr. 62:14-16, 231:5-21).

During onboarding in early November 2021, Richardson was assigned standard onboarding materials, which included a task related to the "Poker Power" program, which is a Peak6 entity. (Tr. 64-65; GC Ex. 4).

D. Richardson Raises Concerns About An Onboarding Task Which The Company Reviews and Addresses.

On November 2, 2021, the day after Richardson began his employment, Richardson raised concerns about the Poker Power program and its alleged differing directions based on gender. (Tr. 65-67; GC Ex. 5). In response, Apex Human Resources addressed Richardson's concerns and informed him that participation in the Poker Power task is not required for his onboarding. (Tr. 68:25-69:6, 73; GC Ex. 10). In addition, Rodgers advised Richardson that the Company has revised the language used for the tasks to make Poker Power and other similar programs as inclusive as possible, and conveyed appreciation for Richardson raising his concerns and encouraged him to continue doing so. (GC Ex. 10). Further, Rodgers recommended changes to the onboarding process and the assigned tasks. (GC Ex. 11). All of Richardson's concerns were reviewed and addressed by the Company.

Despite the Company's response to Richardson's concerns, Richardson continued to pursue his agenda. In March 2022, Richardson filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging sex discrimination. (*See* Tr. 281:10-14). The EEOC dismissed Richardson's Charge and issued a notice of right to sue. (*Id.*). Although Richardson obtained the right to sue from the EEOC, he chose not to sue, stating "I didn't think it was going to be economically worth it. And I felt that it was going to end up being better to try and effectuate change internally at the company." (Tr. 281:15, 282:6-9). Notably, Richardson was still employed by the Company when he received the notice of right to sue from the EEOC. (Tr. 282:25-283:5).

E. Richardson Begins Digging In The Bowels Of The Company's Historical Slack Channels For Content That Offends Him And, When Reported, The Company Investigates

Richardson mined through historical Slack messages in various Slack channels, including channels he had not joined, and that predated his employment, to find examples of communications he claimed were offensive. Richardson also attended various Diversity, Equity, and Inclusion ("DEI") panels and meetings where individuals proposed and pitched various ideas to improve DEI. (Tr. 77, 90-91; Jt. Ex. 1; GC Exs. 15, 27, 33, 34, 40). Richardson claims to be offended by employees discussing their workplace concerns.

Richardson collected examples of communication that he could say offended him from his targeted review of Slack channels and meeting attendance. Based on what he collected, Richardson emailed Human Resources on July 12, 2023, to complain about perceived sexism in his coworkers' old Slack discussions. (GC Ex. 37). Specifically, Richardson asserted:

> I would like to report sexism in company slack channels. These channels were used by a number of close participants, and none of them objected … I am becoming increasingly uncomfortable interacting with people in the company who are openly supporting sexism.

(*Id*.). Richardson outlined his individual concerns by making "I" statements and noting how the statements he found affected him personally. (*Id.*).

Apex took Richardson's concerns seriously and retained an independent outside counsel to investigate the allegations. (Tr. 216:4-15). As the investigation proceeded, Richardson supplemented his report with additional examples alleged discriminatory conduct. This included highlighting a non-Apex after-work event designed for women, two slack messages containing photos from three years prior, another slack message containing a photo along with information about the individuals in the group and their interaction with the post, a screenshot of an individual

reposting a Tweet, and reference to alleged comments made during a Diversity, Equity, and Inclusion panel. (GC Exs. 40, 45).

While the investigation was pending, in or around late August, Richardson posted an internal Slack message accusing the Company of tolerating "objectively offensive and sexist remarks." (GC Ex. 48; Tr. 162-163). The message contained no mention of other employees sharing in Richardson's concerns. (GC Ex. 48). Following this message, Kaya Nassiri, asked Richardson to maintain confidentiality regarding the *ongoing* investigation, to preserve the integrity of the process. (Tr. 152-153; GC Ex. 54). No other employees electronically commented on Richardson's post.

Around the time of this post, Richardson alleged he spoke with a coworker, Robert Burrage, and shared his plan to attack the Company publicly. (Tr. 167:25-168:9, 170:13-171:14). According to Richardson, Burrage supported the idea that Richardson do so. However, Richardson did not testify that Burrage agreed with or specifically supported any particular message in the post.[3] (Tr. 170:13-171:14). Richardson also reached out to individuals on LinkedIn to solicit support for his attacks; however, no response was received. (*See* GC Ex. 53).

F. Richardson Posts False, Derogatory, Disparaging, And Defamatory Attacks About The Company On LinkedIn

On August 25, 2023. Richardson posted on LinkedIn accusing Apex and certain leaders identified by title of discrimination and hatred. (GC Ex. 57). He asserted that the Company permitted "outright hate to proliferate," that a Human Resources leader's participation on a DEI panel was a "tirade" against white men, that Apex suffered from "pervasive bigotry at high levels of management," and that coworkers "openly engage in hate and bigotry." (*Id.*). He claimed the Company's Chief of Staff encouraged discrimination in hiring. He implied an "internal

[3] Burrage did not testify at the hearing. (*See* generally Hearing Transcript).

communications manager" mislead federal investigators. Richardson asserted that the entire Human Resources team was "part of" the group of sexists. He claimed, "HR and senior leadership have not just allowed, but encouraged my coworkers to openly espouse bigotry."

Ultimately, Richardson accused Apex of having a discriminatory culture that promoted and normalized hatred, and wrote: "I shouldn't have to subject myself to sexist jokes and bigots." (*Id.*). Richardson referenced historical Slack content he had found, much of which predated Richardson's employment and was archived in dormant Slack channels, as well as context-free descriptions of comments made at various meetings and trainings. (*Id.*).

On August 30, 2023, five days after his initial post, Richardson posted again on LinkedIn. (GC Ex. 64). Richardson titled this post: "A Culture of Bigotry at Apex." (*Id.*). Richardson named individual employees including Rodgers, Palak Jain, and "Stephen L[ach]" and accused them of racism, sexism, and discriminatory hiring practices, and alleged illegal conduct and civil rights violations by the Company. (*Id.*). Rodgers was accused of going on a "racist/sexist rant" and condoning civil rights and employment law violations. He said that Jain had participated in sharing "sexist jokes." Richardson implied Lach encouraged hiring discrimination.

G. Although The Company Requested That Richardson Remove Only The False, Derogatory, Disparaging And/Or Defamatory Statements About The Company And Its Employees From LinkedIn, Richardson Refused And The Company Terminated His Employment

After Richardson's second post, on August 30, 2023, Michael Walters, Senior Director of Human Resources, requested that Richardson revise his LinkedIn Post to remove the misstatements and remarks that were derogatory and disparaging to fellow employees. Walters, however, made it clear that Richardson is:

> certainly free to express [his] own opinions concerning [his] workplace, working conditions, and environment … [and] our request is not intended to interfere with any rights [he] may have to express issues regarding the terms and conditions of [his]

> employment. [The Company is] not requesting that [he] take down or delete the posts, but merely that any false, derogatory, disparaging and/or defamatory statements be removed.

(GC Ex. 67). After back-and-forth communication between Walters and Richardson, Richardson refused to revise his posts to remove the remarks containing false, derogatory, disparaging and/or defamatory statements. On or about September 1, 2023, Apex terminated Richardson's employment. (Tr. 204-205; GC Ex. 73).

H. The Company Files A Lawsuit Against Richardson For Defamation Based On The False, Derogatory, Disparaging And/Or Defamatory Statements He Made About The Company And Its Employees

In October 2023, Apex initiated a civil action against Richardson alleging defamation, based on Richardson's false, materially misleading, and defamatory statements in his public posts. (Tr. 237-239; GC Ex. 81). Specifically, the Company pointed to Richardson's accusation that Apex has discriminatory hiring, civil-rights violations, bigotry, and fosters a culture of hatred. (GC Ex. 81). The litigation proceeded through initial discovery stages, including service of interrogatories and document requests. (Tr. 239-241). The Company later withdrew the lawsuit ahead of the Complaint's issuance.

I. Richardson Utilized LinkedIn, On Two Occasions, To Describe His Department Leader As A "Ratfuck"

Following the filing of the lawsuit and the termination of his employment, Richardson posted at least two additional times on LinkedIn, mentioning Guttula by name and calling her "ratfuck." (ER Exs. 2, 3). Guttula is still employed by the Company. In one of the posts, Guttula was sharing exciting news about a promotion and Richardson reposted Guttula's post stating:

> Apex Fintech Solutions, by their actions, once again confirms that it supports mgmt targeting employees for speaking out against discrimination and labor violations.
>
> For example, Sudha "ratfuck" Guttula at one point instructed subordinate employees to rat on concerted activity.

> Apex was recently found to have violated a litany of labor and anti-retaliation laws by regional office of the NLRB. Yet they continue to reward bad actors.
>
> Not a good look Apex. You need to treat your employees better. They deserve better. and they demand better.
>
> This is posted in context of an ongoing labor dispute. This post Is protected speech and retaliation will be met with federal charges if appropriate.

(ER Ex. 2). In his next post, Richardson reposted a Company LinkedIn post which tagged leaders and its women's network, stating:

> Kathy McClure, who was in small group chat channels where people were sharing sexist material? The very same who helped develop a sexist program at Apex?
>
> Sudha "ratfuck" Guttula: the one who instructed employees to snitch on concerted activity?
>
> Employees deserve better than these two stains on Apex. Employees should demand better. Management should be better, Why are these the types Apex elevates? Is this what Apex thinks leadership should be? is Apex officially condoning r rewarding that kind of behavior with this 'inspiring' post? What does this say about what Apex values?
>
> Do *you" find these actions inspiring?
>
> This is posted in context of an ongoing labor dispute. This post is protected speech under the NLRA and retaliation may be met with federal charges as appropriate.

(ER Ex. 3). Richardson testified that he "reposted [Apex's post] with [his] thoughts." (Tr. 287:10-11).

III. LAW AND ARGUMENT

A. General Counsel Failed To Establish A Single Employer Relationship

It was apparent at the hearing that General Counsel seeks to have employment agreements used by other Peak6-owned entities declared unlawful. General Counsel, however, never notified

any of these other entities that their conduct would be at issue in the hearing or that they would be covered in a remedial order.

Basic justice requires that the NLRB give a party notice before ordering it to remedy an unfair labor practice. Yet, Apex is the only entity that has ever received a charge here.

The original September 5, 2023, charge named "Apex Fintech Solutions" as the charged party. (GC Ex. 1(a)). The Amended Charge and Second Amended Charge likewise only named Apex. (GC Exs. 1(c), 1(e)). Neither the Complaint nor the Amended Complaint alleges that Peak6, Peak6 Capital Management, We Insure, Team Focus, Zogo, Evil Geniuses, Poker Power, or any other entity operated as a single employer with Apex. Instead, the only party put on notice of the hearing was "Apex Fintech Services LLC d/b/a Apex Fintech Solutions."

By the time this matter reached hearing, the case had been pending for more than two and a half years. During this entire time, Apex was never notified that the Board would evaluate the conduct or legal obligations of any other entity.

The General Counsel nevertheless appears to seek relief that would bind other Peak6-affiliated entities. The Board should reject that effort. On top of the basic unfairness of expanding the scope of a hearing *during the hearing*, the evidence does not establish a single-employer relationship.

1. *No Other Entities Were Put On Notice*

Due process requires notice before a party's rights may be affected by a Board order. Section 10(b) of Act requires service of the charge upon "the person against whom such charge is made." NLRA § 10(b). Only Apex has been named or served with a charge here.

There is no justification for failing to put any other parties on notice. This case does not involve a simple misnomer. *See, e.g., American Steamship Co.*, 222 NLRB 1226, 1231 (1976) (service requirements are met were the failure to name correct party is an "obvious misnomer").

Rather, the General Counsel asks the Board to adjudicate the rights of entities that never received notice that they faced potential liability. Doing so would deny those entities the opportunity to present evidence, examine witnesses, and defend their business practices.

General Counsel will attempt to cover over the procedural defect here by arguing that they were put on notice in Complaint paragraph 4, which provides that the employment agreement applied to Apex Clearing Solutions "and all affiliates and subsidiaries of Apex Clearing Corporation, including Respondent." This is plainly insufficient because Complaint paragraph 8 only alleges that Respondent violated the Act and does not name any "affiliates and subsidiaries" as also being involved in any violations. Likewise, the Remedy section only seeks to have Respondent correct violations, not any unnamed "affiliates and subsidiaries."

Other Peak6 entities were never notified that their conduct would be at issue in this hearing. Any attempt by the General Counsel to add another party here would stretch the "charged conduct beyond its breaking point." *See Vermont Information Processing v. NLRB*, 176 F.4th 690 (DC Cir. 2026) (refusing to enforce portions of a Board order that addressed conduct not covered in the complaint). The Board should therefore reject any attempt to impose liability on entities not named in the Charge or Complaint.[4]

2. *General Counsel Cannot Prove Single Employer Status*

Setting aside the important notice issues implicated, the General Counsel has not proved that Apex operates as a single employer with Peak6 or other affiliated entities.

As the party making a single employer claim, the General Counsel bears the burden of proof. *Dow Chemical Co.*, 326 NLRB 288, 288 n. 4 (1998). The Board evaluates four factors when

[4] An attempt to add other parties by an Amendment to the Complaint after the close of the hearing is a denial of due process and should not be allowed at this stage, since those other entities are unable to present a defense. *See, e.g., New Era Cap Co.*, 336 NLRB 526 (2001) (General Counsel cannot wait until the post-hearing brief to include allegations, which fails to put a respondent on notice when it needs to defend itself).

determining whether separate entities constitute a single employer: common ownership, interrelation of operations, common management, and centralized control of labor relations. *Bolivar-Trees, Inc.*, 349 NLRB 720 (2007). Common ownership, when present, does not by itself establish a single employer relationship; the Board has stressed that the latter three factors "are more critical than common ownership" and has placed "particular emphasis on whether control of labor relations is centralized." *Gartner-Harf Co*., 308 NLRB 531 (1992); *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991). A single-employer relationship generally will be found only if one of the entities exercises actual, active control over the day-to-day operations or labor relations of the other. *Id. citing Radio Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965); *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980).

Apex does not dispute that Peak6 owns it. Common ownership, however, proves little by itself and is akin to a threshold issue. The remaining factors strongly favor separate-employer status. First, Apex and Peak6 do not share common management. Apex maintains its own CEO and executive leadership team and operates independently from other Peak6 companies. (Tr. 39:8). Apex also maintains separate legal and human-resources functions. (Tr. 225-226).

Second, the entities only have *de minimis* operational integration. Apex occasionally leases space in buildings that also house other Peak6 companies, but physical barriers separate the businesses. (Tr. 225:16-20). Although the Peak6 website contains information about Apex, the entities do not pool financial resources, and they do not integrate their day-to-day operations. (Tr. 226:22-25). They also operate in different lines of business.

Third, no evidence shows centralized control of labor relations. Apex makes its own hiring, discipline, and termination decisions. (Tr. 227:4-19). It creates its own job descriptions and issues its own W-2 forms.

In short, the General Counsel can only establish common ownership between Apex and other Peak6 entities. The record does not show common management, meaningful operational integration, or centralized control of labor relations. Because the General Counsel failed to prove the factors that matter most, Apex is not a single employer with any other entities.

B. General Counsel Failed To Prove Richardson Was Engaged In Protected Concerted Activity

The core of the General Counsel's case is that Richardson engaged in protected concerted activity when he posted to LinkedIn on August 25 and August 30, 2023. Proving protected concerted activity is a threshold issue and the burden rests on the General Counsel to establish it. While there is superficial appeal to this contention—Richardson's posts included calls to coworkers to join him—a close examination of the facts reveals that he was advancing an entirely personal grievance, not a group concern.

The standard for distinguishing group concerns from personal grievances is long established. In *Meyers I*, the Board defined concerted activity as conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). In *Meyers II*, the Board clarified that an employee must raise a "truly group concern," not an individual complaint disguised in collective language. *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Although the Act protects efforts to "initiat[e], induc[e], or prepar[e] for group action." *Meyers II*, 281 NLRB at 887, quoting *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3d Cir. 1964), concertedness turns on substance rather than the use of particular words. An employee does not transform an individual complaint into concerted activity simply by invoking "we" instead of "I." *See Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019) ("The applicable standard should not sanction an all-but-meaningless inquiry in which concertedness hinges on whether a speaker uses the first-person plural pronoun in the presence of fellow employees and a supervisor."), *overruled by Miller Plastic Products*, 372 NLRB No. 134 (2023), order vacated in part *Miller Plastic Products Inc. v. NLRB,*, 141 F.4th 492 (3rd Cir. 2025).

The Third Circuit recently emphasized that there must be "evidence of some activity or discussion that imbues the concern with a 'truly group' character." *Miller Plastic Products v. NLRB*, Nos. 23-2689, 23-2857 (3d Cir. June 23, 2025). Where employees have not coordinated their actions ahead of time, evidence that coworkers share the same concern helps distinguish a truly group issue from a solo complaint. *Id.* The Act protects collective concerns, not "purely personal disputes." *Scooba Manufacturing Co. v. NLRB*, 694 F.2d 82, 84 (5th Cir. 1982).

In this case, the General Counsel failed to establish that Richardson's posting was anything more than an extension of his personal animosity toward Apex. By August 2023, he had already spent years complaining to Apex that the Company treated white men unfairly. He raised those concerns through complaints to Human Resources within his first work week, an EEOC charge after a year of employment, and a renewed complaint in July 2023 – none of which were met with any resistance toward Richardson.

Richardson's own July 12 email complaint to Human Resources confirms the exclusively personal nature of the dispute. Richardson complained that "I am becoming increasingly

uncomfortable," that "I have continued to be denied elements of my offer package," and that "I consistently take an active, rather than passive stance in opposing sexism when I see it." (GC Ex. 41). Richardson had previously indicated that he was particularly sensitive to "gender being used to describe" workplace matters. (GC Ex. 5). Regarding workplace activities that women were encouraged to participate in, Richardson wrote that "I feel extremely uncomfortable with all this." *Id.* These statements establish the particularly and specifically individual nature of Richardson's concerns. Richardson's individual complaints did not suddenly transform into a group concern a month later when he reiterated the exact same points but tacked on a plea for other employees to agree with him. This was an individual, not group, concern from the start.

The General Counsel failed to prove that other employees shared Richardson's concerns. In late August, Richardson posted an internal Slack message accusing the Company of tolerating "objectively offensive and sexist remarks." (GC Ex. 48; Tr. 162). The record contains no evidence that any coworkers agreed with the post or made plans for group action.

General Counsel's best evidence that coworkers supported Richardson are phone records showing a 22-minute telephone call between Richardson and Robert Burrage shortly before Richardson's first LinkedIn post. (GC Exs. 52, 59; Tr. 166). Yet, in testifying about the call, Richardson did not claim that Burrage shared his concerns, agreed with his attacks, or wanted to pursue collective action. (Tr. 170:25-171:14). Richardson testified only that Burrage "supported" the idea of making his public post. (Tr. 171:13-14). The record does not reveal whether Burrage actually agreed with Richardson's attacks, intended to participate in any action, or even knew what Richardson planned to publish. In fact, Burrage responded to Richardson's August 25 post by emailing Richardson that he believed Apex engaged in "anti-arabism," an entirely distinct concern never apparently shared by Richardson. (GC Ex. 60). This suggests that there was never any

agreement about Richardson's attacks. Because the General Counsel did not call Burrage as a witness, the record sheds no additional light on the conversation or whether Burrage actually supported the content of the post.

The fact that an employee listened to Richardson for twenty-two minutes is the General Counsel's strongest evidence that the postings were a genuine group concern. The remaining evidence points in the opposite direction. For example, much of the General Counsel's evidence shows that Richardson sent LinkedIn messages to male coworkers seeking support for his post and received little or no response. General Counsel Exhibit 53 consists of messages to a coworker that went unanswered. General Counsel Exhibits 61 and 70 contain messages sharing Richardson's August 25 post, but nothing shows that the recipients even read the underlying post. One employee briefly "liked" the post before removing that reaction. (GC Exs. 63, 75). Without testimony from that employee, the Board cannot infer support for Richardson's position, as opposed to an accidental click. Another coworker commended Richardson's "bravery" after he was terminated while simultaneously acknowledging that he did not "understand all the context" of Richardson's attacks on Apex or its Human Resources leadership. (GC Ex. 75).

In short, the record contains almost no evidence, if any at all, that Richardson's coworkers told him that they joined in his attacks. While Richardson hoped they would, the evidence shows they did not. This was **not** a group concern or action.

To get around the lack of actual group concern, the General Counsel may argue that Richardson sought to induce group action and that concertedness does not depend on whether coworkers accepted his invitation. That principle is correct as far as it goes. But it begs a more fundamental question: what group action was Richardson actually proposing?

Richardson's posts simply asked coworkers to agree with his views. One passage states:

> I am stepping forward with the intent and the hope that others will join me in a visible way." "I would love for people of all demographics to step up beside me in opposing bigotry.

Yet, the posts themselves largely restated grievances that Richardson already knew were uniquely his own. One of his principal demands was a one-on-one meeting with the Chief Executive Officer to discuss Richardson's personal vision for the Company. The posts repeatedly centered on Richardson's individual dispute, not a shared workplace objective.

This case, therefore, differs from the typical case in which an employee unsuccessfully seeks support for a genuinely collective concern. Before publishing his LinkedIn posts, Richardson already knew that coworkers had shown no interest in his allegations. He had sought support and failed to obtain it. His subsequent use of collective language did not change the fundamentally individual nature of his dispute.

Richardson's LinkedIn posts were not a bona fide effort to secure "mutual aid or protection." They repackaged a personal agenda in collective language. The record contains no evidence of coordination, no evidence of meaningful coworker support, and no evidence that employees shared Richardson's core concerns. As the Third Circuit observed in *Miller Plastic Products*, evidence that employees share a concern helps distinguish "a solo complaint" from a "truly group concern." 141 F.4th at 509.

Here, the evidence shows only a solitary concern – Richardson's conduct amounted to individual attacks, not protected concerted activity. Accordingly, the General Counsel failed to establish the first element of its case.

C. Richardson Was Lawfully Instructed To Keep The Ongoing Investigation Confidential

In paragraphs 6(a) and 6(b) of the Amended Complaint, the General Counsel alleges that Kayla Nassiri violated the Act by failing to give Richardson an end date when telling him not to discuss an investigation. The evidence at the hearing shows that this claim is just not true.

General Counsel Exhibit 54 is an email Nassiri sent to Richardson. The Human Resources manager wrote to Richardson that "it is essential that everyone involved in this investigation maintain confidentiality and avoid naming specific employees related to the **ongoing** investigation." (GC Ex. 54) (emphasis added). The confidentiality requirement only applied while the investigation remained open, *i.e.* was "ongoing." Apex therefore did not impose an indefinite or open-ended confidentiality requirement.[5]

The Board has repeatedly shifted its approach to whether it is lawful to tell employees not to discuss investigations. In *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), the Board held that employers needed to make a particularized showing that confidentiality was necessary before it could impose any restrictions on discussing investigations. The Board later reversed course in *Apogee Retail LLC*, 368 NLRB No. 144 (2019), holding that confidentiality rules limited to the duration of an investigation were categorically lawful. The Board subsequently overruled *Apogee Retail* in *Stericycle, Inc.*, 372 NLRB No. 113 (2023).

Since announcing the *Stericycle* standard, the Board has not issued any decisions addressing how to evaluate restrictions on discussing investigations. Thus, the general *Stericycle* standard currently applies, although, as argued below, Apex maintains that was wrongly decided

[5] Richardson testified that Naureen Amjad, the outside attorney who interviewed him as part of an investigation into his complaints, instructed him to keep "things confidential." (Tr. 152:7-8). Amjad was not alleged as an agent in the Amended Complaint nor was her conduct alleged as unlawful. Because Apex was not on notice that this statement would be at issue and because the Counsel for the General Counsel did not seek to orally amend the Complaint, it is inappropriate to make any findings regarding this alleged statement.

and should be overturned. Under this standard, the General Counsel bears the initial burden of proving that a rule would reasonably tend to chill employees from exercising Section 7 rights. *Id.*, slip op. at 2. If the General Counsel satisfies that burden, the employer may demonstrate that the rule advances a legitimate and substantial business interest that cannot be served through a narrower alternative. *Id.* The Board emphasized that this inquiry requires a case-specific analysis.

The General Counsel cannot satisfy that burden here. Nassiri issued the instruction to Richardson immediately after he posted a Slack message accusing a nonsupervisory coworker of making "objectively offensive and sexist remarks." (GC Ex. 48; Tr. 162). The coworker objected to the accusation. Nassiri told Richardson not to discuss the ongoing investigation to maintain its integrity, as a workplace dispute could compromise the inquiry. This was especially important for an investigation such as this that involved sensitive and potentially divisive allegations.

Viewed in context, the instruction to not discuss an ongoing investigation would not reasonably deter employees from exercising Section 7 rights. It did not prohibit employees from discussing workplace concerns generally. Nor did it impose a permanent restriction on communications among employees. Instead, it required a key participant to maintain confidentiality only while the investigation remained pending.

The instruction also served a substantial and legitimate business interest. Apex needed to investigate Richardon's allegations while minimizing workplace disruption and preventing the conflict from escalating. A temporary confidentiality directive provided a measured way to accomplish that objective. Under these circumstances, no narrower alternative would have protected the investigation as effectively.

Accordingly, the limited-duration instruction was lawful under *Stericycle*. The instruction would also be lawful if the Board corrects its mistake under *Stericycle* and returns to the *Apogee Retail* framework. The allegations in paragraphs 6(a) and 6(b) should therefore be dismissed.

D. Apex Lawfully Terminated Richardson For His LinkedIn Postings

The central issue in this case is whether Apex lawfully terminated Richardson for his public LinkedIn posts.[6] The General Counsel will argue that because Richardson included an unanswered call for coworker support in his posts, the Act immunized everything else he wrote.

The law, however, is not so broad.

The Board evaluates whether otherwise protected online statements lose the Act's protection under the *Pier Sixty* "totality of the circumstances" framework.[7] *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015). That framework considers: (1) evidence of animus; (2) employer provocation; (3) whether the conduct was impulsive or deliberate; (4) the location of the posting; (5) the subject matter; (6) the nature of the posting; (7) whether the employer previously tolerated similar language; (8) whether a rule addressed the conduct; and (9) whether the discipline was disproportionate.

Although *Pier Sixty* establishes the standard for evaluating online misconduct, the test itself is flawed because it rests on assumptions that do not apply in all situations, including this charge. For example, factors 6 and 7 focus on whether profane or vulgar language was used and whether there are workplace comparators. However, posts can be unprotected even if they do not use vulgar or profane language. Using non-vulgar language can still result in a vulgar, defamatory, damaging

[6] As the posts were not genuinely concerted, the termination was lawful.

[7] During opening statements, Counsel for Apex mistakenly stated that this was an *Atlantic Steel* case. This was incorrect, as *Atlantic Steel* applies to face-to-face misconduct taking place in the workplace. *Pier Sixty* applies to online misconduct.

message. For example, had Richardson decided to describe his boss's boss as "a person who has intercourse with rats" rather than "ratfuck," such a statement would still remain unprotected.

Likewise, the fact that other employees have not engaged in the same unprotected activities should not be a mitigating factor. Richardson's misconduct is a good example of how these factors are a poor fit in evaluating online misconduct. Richardson launched a lengthy and unsupported public attack accusing his employer and its leadership of vile and repulsive bigotry. These are plainly disruptive accusations for an employee to baselessly lodge even if no vulgar language was used. Likewise, these postings clearly went too far even in the absence of comparable employees engaging in similar unprotected activities. The *Pier Sixty* factors are simply not a good fit for the many potential permutations of online misconduct. The Board should return to its decision in *General Motors* and apply the *Wright Line* analysis instead of setting specific analyses such as *Pier Sixty*.

Despite the good reasons for the Board to abandon the *Pier Sixty* analysis, under that framework the relevant factors weigh overwhelmingly in favor of Apex's decision.

1. *Absence Of Animus (Factor 1)*

Factor 1, whether there is evidence of animus, weighs heavily in Apex's favor.

Nothing in this record suggests hostility toward protected, concerted activity. To the contrary, Apex repeatedly took Richardson's concerns about purported discrimination seriously. After his July 2023 complaint, the Company retained an outside investigator to evaluate his allegations. When Richardson posted his concerns internally on Slack, Apex neither removed the post nor disciplined him for it.

Most importantly, Apex gave Richardson an opportunity to revise his public posts before it terminated him. On August 30, an Human Resources representative informed Richardson that he remained "free to express" his opinions regarding his workplace, working conditions, and work

environment. (GC Ex. 67). The Company merely requested that he remove factual inaccuracies and "derogatory and disparaging remarks." The email expressly disclaimed any intent to interfere with rights under the Act. That conduct reflects caution, not animus.

The General Counsel may argue that Apex acted with animus because it declined Richardson's request to identify which statements were objectionable. Richardson's personal belief that every statement he made was true does not establish Apex bore anti-union or anti-Section 7 animus. Apex was not obligated to participate in line-by-line negotiations with Richardson over the contents of his posts. Its decision not to engage in that exercise cannot reasonably support an inference of unlawful motive.

Because there is no evidence of general animus against any genuine protected concerted activities, Factor 1 favors Apex.

2. *Provocation And Premeditation (Factors 2 And 3)*

Factors 2 and 3 also favor Apex. Factor 2 considers whether the employer somehow provoked the online conduct and Factor 3 examines whether the post was premediated or spontaneous.

Richardson's posts were deliberate, not impulsive. By August 22 at the latest, he was contemplating a public campaign against Apex. (Tr. 171:6-14). This meant he had at least three days to think about what he intended to post. He reviewed and revised his drafts before publication. (Tr. 264:21-265:4). Although he could not recall precisely how long he spent preparing the posts, the lack of spelling or typographical errors reflects a calculated and deliberate effort rather than a spontaneous reaction.

Nor did Apex provoke the conduct in any meaningful sense. Richardson did not testify that the August 25 post was an immediate response to a particular event. As for the August 30 post, Richardson testified that he wrote it in reaction to learning that Brianna Rodgers had received

a new title. (Tr. 264:3-12). Thus, the closest Apex came to "provoking" Richardson was giving a new title to a woman of color. His reaction to that event cannot reasonably be characterized as a response to provocation.

Factors 2 and 3 therefore weigh strongly against extending the Act's protection.

3. *Location Of The Posting (Factor 4)*

Factor 4, the location of the postings, also cuts against protection.

Richardson chose to make his allegations on LinkedIn, a professional networking platform designed for business and professional audiences. Richardson's posts were fully public. (Tr. 189:20-25). He intended them to be seen by *anyone* using the popular business website and not just the coworkers whose support he claimed to seek. Richardson used the most public forum available to him to broadcast his allegations as widely as possible.

That decision matters. In *Triple Play Sports Bar & Grille*, the Board emphasized that an online discussion criticizing an employer was protected because it was not directed to the general public. 361 NLRB 308, 312 (2014). Richardson did the opposite. He selected a platform designed to maximize professional visibility and expose Apex to public criticism.

Richardson sought to harm the reputations of Apex and anyone associated with Apex on LinkedIn, not merely communicate with coworkers. Factor 4, therefore, weighs heavily against protection.

4. *Subject Matter Of The Posting (Factor 5)*

Even Factor 5, the subject matter of the posting, does not favor protection.

As already established, Richardson's post addressed an entirely personal concern—his disdain for coworkers as Apex whom he wanted fired for their thoughts on gender in the workplace. Instead of building a critique of policies, Richardson attacked his company and coworkers using

emotionally charged language. He accused them of hatred and venom, of tirades, of violations of the law. The subject matter was not protected.

General Counsel will likely argue that this factor favors protection between Richardson added language to the end of his August 25 post soliciting support from coworkers. To be sure, Richardson buried a call for other employees to agree with him in the 21st and 22nd paragraphs of his post when he asked others to "voice support" for his claims and "step up beside me." (GC Ex. 57). This, however, is less a call to advance a shared workplace concern or even have a real discussion and more of an empty statement indicating a hope that others will simply agree with him.

Thus, even Factor 5, the subject of the post does not favor protection.

5. *Nature Of The Postings (Factor 6)*

Factor 6, addressing the nature of the postings, weighs most heavily in Apex's favor.[8]

Richardson criticisms did not merely critique management and its policies. He repeatedly accused Apex's employees of unlawful and morally reprehensible conduct. According to Richardson, Apex's [insert titles] fostered "a culture of bias," allowed "outright hate to proliferate," tolerated "pervasive issues of bigotry," encouraged employees "to openly espouse bigotry," and allowed "venom" to spread throughout the workplace. (GC Exs. 57, 64). He also accused an Human Resources official of going on a tirade against "white males," despite being unable to recall details supporting that accusation.[9] (Tr. 276:16-17).

[8] In a pre-*Pier Sixty* decision, *Triple Play Sports Bar*, the Board considered whether the comments crossed a line into disloyalty by criticizing products and services as well as whether the comments constituted defamation. 361 NLRB at 312-313. As *Pier Sixty* did not require defamation to lose protection, the earlier decision should not be read as requiring such a high standard for the nature of a post to lose protection.

[9] Although Richardson claims that GC Exhibit 28, a transcript of an August 1, 2023, DEI panel is not reliable, the purported "tirade" is likely found on page 42 of the transcript. In this section, Brianna Rodgers described feeling more comfortable when an interview panel is not all white men:

Many of Richardson's examples of discrimination rest on strained or distorted interpretations of benign statements. He portrayed comments encouraging a diverse panel of *interviewers* as evidence of discriminatory hiring practices.[10] Another story about passing over a current employee with known deficiencies in favor of an outsider with more potential upside was likewise characterized as "rot" seeping into company culture. Employees who engaged in their own protected concerted activities by noting that women are often paid less than men for the same work and by making observations about men interrupting them were described as examples of "toxic attitudes" or are "objectively offensive." (GC Ex. 64).

This was not a brief emotional outburst. Richardson published thousands of words accusing specific coworkers of discrimination, unlawful conduct, and systemic bigotry. These are serious and damaging accusations.

Apex possessed a legitimate interest in protecting its reputation, and the reputations of its employees, from Richardson's vitriolic and hyperbolic public attacks. That interest carries particular weight where the accusations rested on speculation, exaggeration, or significant distortion. Many of Richardson's examples of a culture where white men were discriminated against occurred before Apex hired Richardson, an individual who presents as a white man.

> Because when you are a minority and you're interviewing with an all-white panel or all-white males, I will tell you that you're already like, okay, game time. Let's go. One, two, three. Here we go. And so you immediately code switch.
>
> And so I will tell you that when I've been able to interview with another woman or interview with someone who's a minority, there's an instant sense of disarmament that happens while you're in that conversation. And you feel more of yourself, and so you can really focus more on the answers versus I need to say this how a White man would want to hear it. And that's very key. Right?

As Richardson could not testify with any detail about the nature of the tirade, there is no reason to give his baseless claim of modified transcript credence. Instead of a tirade, Rodgers was describing the established practice of "codeswitching" to connect with a specific audience.

[10] "I have another recommendation that I've heard that I want to pass on, I think it's really good. If you're hiring for a position, find someone that doesn't look like everyone else, right? *Find someone that has a different background to do the interview, right*? Four of you can meet, a fifth one that brings a different perspective is really important *because they may ask different questions*." (emphasis added). (GC Ex. 28, p. 41).

Notably, none of Richardson's examples of "outright hate" or "open bigotry" involved conversations he was directly involved in but instead involve conduct that he deliberately searched out and amplified.

The record also undermines the sincerity of Richardson's allegations. After receiving an EEOC right-to-sue notice, Richardson chose not to pursue litigation because doing so was not economically worthwhile. (Tr. 282:7). Yet he continued to publicly accuse Apex of pervasive civil-rights violations.

At a minimum, the accusations were reckless. They were also highly damaging.[11] The nature of the postings therefore weighs strongly against protection.

6. *Comparable Conduct, Work Rules, And Proportionality (Factors 7 Through 9)*

The remaining factors, which can be considered together because they collectively cover whether an employee should have expected the discipline, all favor Apex. Factor 7 addresses whether the employer considered similar language offensive in the past. Factor 8 covers whether there was a specific rule regarding the language at issue. Factor 9 examines whether the discipline for the posting was typical or disproportionate.

Apex maintained a policy prohibiting defamatory conduct.[12] Richardson therefore had notice that the Company could discipline employees who publicly made damaging accusations about fellow coworkers. Factor 8 therefore does not support protection.

[11] Although Richardson did not testify that his purpose was to damage Apex's reputation, intent to do exactly that can be inferred based on the fact that no reasonable company would want to be viewed as discriminating against classes of employees.

[12] Although the Counsel for the General Counsel asserts that policy is unlawful because it prohibits employees from making statements that "disparage" or that "reflects negatively" on Apex, policies such as this one that prohibit defamation are lawful. At a minimum, Richardson was on lawful notice that he could not defame Apex.

Factors 7 and 9 also favor Apex. The General Counsel identified no comparable instance where Apex tolerated similar public accusations of discrimination, hatred, and civil-rights violations. The absence of comparators does not help Richardson. Rather, it reflects the exceptional nature of his conduct.

Richardson's actions were extreme by any standard. The General Counsel failed to show that Apex routinely tolerated similar misconduct or treated similar conduct more leniently. In total, the seventh, eighth, and ninth factors all weigh against protection.

7. *The Totality Of The Circumstances*

Viewed as a whole, the *Pier Sixty* factors support Apex's actions.

Richardson acted deliberately and made a post attacking others. Apex did not provoke the conduct. The Company displayed no animus toward protected activity. Richardson chose a public platform and used it to accuse Apex's leaders of discrimination, bigotry, hatred, and unlawful conduct. Even after Apex gave him an opportunity to revise the posts, he refused.

Under the totality of the circumstances, Richardson's conduct lost any protection the Act might otherwise have afforded. Apex therefore lawfully terminated his employment.

8. *The Board Should Return To The* General Motors *Standard*

Alternatively, the Board should abandon *Lion Elastomers'* embrace of separate standards for evaluating employee misconduct and return to the approach adopted in *General Motors*. The Board's current collection of setting-specific standards creates unnecessary complexity and leaves parties with less certainty about the scope of the Act.

General Motors correctly held that *Wright Line* provides a uniform and reasonable framework for evaluating allegedly unlawful conduct. Richardson's actions illustrate why that approach makes sense. The Board's setting specific standard for evaluating online misconduct, issued on May 1, 2023, encouraged Richardson to believe that the Act did not place guardrails on

his ability to abuse and defame his employer as long as his actions contained a gesture toward group activity.

Applying *Wright Line* here would provide more clarity while still leading to the same outcome. Apex can easily show it would have terminated any other employee who publicly accused the Company or fellow employees of promoting hate and bigotry, on LinkedIn if there was no group concern involved. Richardson's fleeting efforts to recruit support played no role in the termination decision. Thus, there is insufficient evidence of animus against any protected activity and Apex could meet the rebuttal standard by showing it would have taken the same actions absent any protected activities. The record also contains no evidence of pretext. Apex expressly told Richardson he could continue discussing workplace concerns if he removed the unprotected content. He declined that opportunity.

If the Board were to return to its standards articulated in *General Motors* and *Wright Line*, it would find that Apex would have taken the same action absent any purported protected activity and that no evidence of unlawful motivation exists.

E. Walters' Email Was Not A Threat

Complaint paragraphs 6(c) and 6(d) allege that Apex, through Human Resources Director Michael Walters, threatened unspecified reprisals if Richardson failed to remove protected social-media posts. The evidence does not support that allegation.

The allegation rests entirely on two emails Walters sent to Richardson on August 30 and 31, 2023. In his August 30 email, Walters asked Richardson to remove the portions of his posts that contained "derogatory and disparaging remarks." (GC Ex. 67). Walters simultaneously emphasized Richardson's right to engage in protected activity, stating that Richardson remained "free to express" his opinions regarding his workplace, working conditions, and work

environment. Walters further explained that Apex's request should not be interpreted as interfering with Richardson's right to discuss terms and conditions of employment.

Rather than interfering with protected activity, the email attempted to distinguish between protected workplace discussions and statements that were unprotected. Far from evidencing coercion, the email reflects an effort to avoid infringing on Richardson's statutory rights.

Richardson responded by asking Walters to identify the specific statements that Apex found objectionable. Walters declined to engage in a line-by-line debate over the contents of the posts and, on August 31, reiterated the Company's request that Richardson remove the offending material. (GC Ex. 69).

This exchange did not constitute an unlawful threat. An employer does not violate the Act by warning an employee that unprotected conduct may result in discipline. *See DaimlerChrysler Corp.*, 344 NLRB 1324, 1326 (2005), overruled in part on other grounds by *General Motors LLC*, 369 NLRB No. 127 (2020) (employer did not violate the Act where it told an employee it would investigate threat to engage in an unprotected work slowdown). Walters clearly drew a line between protected and unprotected activity and gave Richardson an opportunity to remove the latter.

Because Walters' communications amounted to a warning regarding unprotected conduct, it was not a threat of reprisal for protected activity. The allegations in paragraphs 6(c) and 6(d) should be dismissed.

F. Apex Maintained Lawful Policies

Complaint paragraph 4 challenges two provisions of Apex's Employment Agreement: (1) the definition of "Proprietary Information," which includes materials such as manuals, training materials, educational materials, and lists of equity holders; and (2) the Agreement's non-disparagement provision.

The Board currently evaluates workplace rules under *Stericycle, Inc.*, 372 NLRB No. 113 (2023). Under that framework, the General Counsel bears the initial burden of proving that a rule has a reasonable tendency to chill employees from exercising Section 7 rights. If the General Counsel satisfies that burden, the employer may rebut the presumption of unlawfulness by establishing that the rule advances legitimate and substantial business interests that cannot be served through a more narrowly tailored provision. *Id.*, slip op. at 2.

Stericycle was wrongly decided. The decision gives insufficient weight to legitimate employer interests and has generated significant uncertainty regarding ordinary and reasonable workplace rules. Notably, even the General Counsel's office recently urged the Board to reconsider the *Stericycle* framework. *See Counsel for the General Counsel's Exceptions and Supporting Brief, Starbucks Corporation*, Case 13-CA-322871 (filed June 17, 2026).

Apex agrees that the Board should replace *Stericycle* with a standard that more appropriately balances employee rights and legitimate business interests. Nevertheless, because *Stericycle* remains controlling precedent, Apex addresses the challenged provisions under that framework without waiving its position that the Board should abandon it.

1. *Apex's Definition Of Proprietary Information Is Lawful*

The General Counsel challenges only Apex's definition of "Proprietary Information." This challenge fails at the outset because the definition itself does not restrict employee conduct. It merely identifies categories of information that Apex considers proprietary. Absent a restriction on employee activity, no reasonable employee would conclude that a definitional provision, standing alone, limits Section 7 rights.

The General Counsel may argue that employees would read the definition together with other provisions of the Employment Agreement.[13] Even under that approach, the challenged language remains lawful. For example, the definition of proprietary information includes lists of past members, partners, stockholders, and investors. Apex does not refer to employees as members, so the rule does not prohibit disclosure of information about coworkers.

Apex also has legitimate and substantial business interests in protecting the remaining categories of information covered by the definition, including training manuals and educational materials. Apex competes in the financial services industry against significantly larger organizations. It developed a specialized training programs and materials that allow it to operate efficiently with far fewer personnel than its competitors. (Tr. 231:5-21). These training materials constitute valuable intellectual property. Apex reasonably seeks to prevent competitors from obtaining them, and no narrower alternative would adequately protect that interest.

Accordingly, even under *Stericycle*, the definition of Proprietary Information is lawful. The provision identifies categories of confidential business information, serves substantial business interests, and does not reasonably tend to chill employees from exercising Section 7 rights.

2. *The Non-Disparagement Policy Is Not Unlawful As Applied*

The Board's treatment of workplace civility rules has shifted significantly over time. Under *Boeing*, the Board recognized that employers have a legitimate interest in maintaining standards of workplace conduct and held that many civility rules were lawful. *The Boeing Co.*, 365 NLRB 154 (2017), overruled by *Stericycle*, 372 NLRB No. 113. As the Board observed in *Boeing*, employers have a legitimate interest in civility rules because nearly all employees prefer workplaces characterized by professional and respectful interactions.

[13] General Counsel has waived arguing that such other sections violate the Act by not pleading them.

Apex maintains that *Boeing* strikes a better balance than the *Lutheran Heritage* approach in place after *Stericycle*. Employers must be able to adopt reasonable rules governing how employees interact with one another. To the extent *Stericycle* calls such rules into question, it fails to adequately account for legitimate business interests. Here, the portions of Apex's policy prohibiting conduct that denigrates, demeans, or disparages coworkers reflect ordinary workplace-civility expectations and should be found lawful. Likewise, the broader prohibition on disparaging statements about the Company and its operations resembles rules previously found lawful under the *Boeing* framework. *See, e.g.*, *Baylor Univ. Med. Ctr.*, 2018 NLRB LEXIS 77 (ALJ Ringler), dismissed on other grounds, 369 NLRB No. 43 (2020).

Moreover, any issue with the wording of the disparagement policy does not establish that Apex unlawfully terminated Richardson. At most, a finding that portions of the rule are overbroad would warrant a revised policy and notice posting. It would not transform Richardson's discharge into an unfair labor practice.

The Board has long recognized that an employer may lawfully discipline an employee whose conduct disrupts operations, even where an overbroad rule is cited in connection with the discipline. *Continental Group*, 357 NLRB 409, 412 (2011). The relevant question is whether the employee's conduct itself, rather than the existence of the rule, motivated the discipline. *Id*.

The answer to that question is clear here. Apex terminated Richardson because he launched an extensive public attack accusing the Company of discrimination, bigotry, and unlawful conduct. As discussed above, those statements fell outside the Act's protection. Apex acted because of the conduct itself, not because Richardson violated a workplace rule in the abstract. The underlying termination was not unlawful simply because the policy was invoked on the termination notice.

Moreover, the record undermines any claim that the policy coerced employees from engaging in protected activity. Richardson did not remain silent out of fear of discipline. He publicly criticized Apex in lengthy and highly visible LinkedIn posts. The policy plainly did not deter him from speaking. Under these circumstances, it would make little sense to conclude that citing the non-disparagement provision in the termination notice somehow coerced Richardson in the exercise of Section 7 rights.

The Board must reject the General Counsel's challenge to the non-disparagement policy and, at a minimum, decline to order reinstatement based on the Company's reliance on that provision.

G. The General Counsel Failed To Prove That The Defamation Lawsuit Was Objectively Baseless

After terminating Richardson, Apex filed a defamation action against him in Florida and pursued ordinary litigation steps, including discovery. Complaint paragraphs 7(b) through 7(e) allege that the lawsuit was objectively baseless, preempted by the Act, and that the discovery requests were coercive. The evidence does not support these allegations.

1. *The Defamation Lawsuit Was Not Objectively Baseless*

The threshold question is whether Apex's lawsuit had a reasonable basis in fact and law. If it did, the lawsuit cannot be found to be objectively baseless regardless of Apex's motives. *B E & K Construction Co.*, 351 NLRB 451, 456 (2007).

A lawsuit is objectively baseless only where the plaintiff's legal position is plainly foreclosed, frivolous, or rests on factual inferences no reasonable litigant could draw. *Allied Mechanical Services*, 357 NLRB 1227, 1229 (2011), *quoting Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). The General Counsel must also show that, at the time the suit was filed, the plaintiff neither possessed nor reasonably believed it could obtain evidence necessary to prove the

claim. *Milum Textile Services*, 357 NLRB 2048, 2053 (2011). Apex's lawsuit comfortably clears this threshold.

The suit arose under Florida law and alleged that Richardson made false statements that damaged Apex's business reputation. Florida recognizes a claim for defamation when a person publishes false statements that expose another to distrust, hatred, contempt, ridicule, or tend to injure that person's business or profession. *LRX, Inc. v. Horizon Assoc. Joint Venture*, 842 So.2d 881, 885 (Fla. Dist. Ct. App 2003). Florida further recognizes defamation *per se* when a statement tends to injure a person or business in its trade or profession. *Blake v. Giustibelli*, 182 So.3d 881 (Fla. Dist. Ct. App. 2016).

Defamation law protects businesses as well as individuals, as Florida courts have long treated accusations that impugn the integrity or lawful operation of a business as actionable *per se*. *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla. 1953); *Madsen v. Buie*, 454 So.2d 727 (Fla. Dist. Ct. App. 1984). In defamation *per se* cases, the plaintiff does not need to prove specific damages because the injury to reputation itself is compensable. *Campbell*, 66 So.2d at 497. Corporations may maintain defamation actions under Florida law. *Army Aviation Heritage Foundation & Museum v. Buis*, 504 F. Supp. 2d 1254 (N.D. Fla. 2007).

Applying that here, Richardson publicly accused Apex of discriminatory hiring, civil-rights violations, bigotry, and fostering a culture of hatred. Those allegations went far beyond rhetorical insults or opinions. They accused Apex of specific and odious misconduct in the operation of its business. These harmed its reputation and impugned the Company's integrity, subjecting it to distrust. At a minimum, Apex possessed a reasonable basis to argue that such statements constituted defamation *per se* under Florida law.

It is not necessary to decide whether Apex ultimately would have prevailed. The only question is whether the claims were reasonably based, which they plainly were. Paragraph 7(b), therefore, should be dismissed.

2. *The Lawsuit Was Not Preempted By The Act*

The General Counsel likewise failed to establish NLRA preemption.

As a general matter, state-law claims are preempted only when the underlying conduct is actually or arguably protected by Section 7. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-46 (1959); *Ashford TRS Nickel, LLC*, 366 NLRB No. 6 (2018). As Richardson's postings were not protected, preemption does not apply.

Even if they were protected, they were not preempted. In *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the Supreme Court held that defamatory statements made during labor disputes may be preempted unless the plaintiff can show that that defamatory statements were made with actual malice, meaning knowledge of falsity or reckless disregard for the truth, and resulted in actual damages. *Id.* at 65.

Apex satisfied the requirements established in *Linn* because the Florida defamation suit here properly pled malice and actual damages. *See Beverly Health & Rehabilitation*, 331 NLRB 960, 963 (2000).

The Florida complaint expressly alleged that Richardson made statements that were either knowingly false or made with reckless disregard for their truth. (GC Ex. 81 ¶ 36). The complaint further alleged that Richardson acted with malice and sought to damage Apex's reputation. *Id.* ¶ 37. Apex alleged actual damages, including lost profits and diminished earning capacity. *Id.* Thus, the pleadings meet the *Linn* standard and were not preempted.

More importantly, the record demonstrates that Apex possessed evidence supporting those allegations. For example, Richardson publicly claimed that an HR representative went on

a “tirade” against white men. Yet Richardson could not identify details supporting that accusation, and the transcript of the underlying meeting contains no statements that remotely resemble a tirade. His allegation was therefore made with reckless disregard for the truth. Likewise, Richardson claimed that Apex’s senior leadership encouraged employees to “openly espouse bigotry,” despite having no evidence that any leader directed employees to engage in discriminatory conduct.

Similarly, Richardson mischaracterized comments encouraging the use of a diverse panel of *interviewers* as evidence of unlawful hiring discrimination. The underlying statement concerned who should participate in interviews, not who should be hired. Richardson took a portion of a statement and stripped critical context in order to present it as proof of civil-rights violations. At a minimum, this proves Richardson acted recklessly with respect to the truth of his claim, if not with knowledge of falsity.

Richardson also publicly asserted that Apex refused to engage in dialogue regarding his concerns. That allegation was demonstrably false. Apex repeatedly discussed those concerns with Richardson and even hired outside investigators to evaluate them. Disagreeing with Richardson’s conclusions is not the same thing as refusing to engage with him.

These statements are just a few examples showing that Apex not just plead but could have established actual malice in its defamation suit. As noted above, Florida law *presumes* damages in defamation per se cases such as this, so Apex would be able to establish that it was entitled to damages. The lawsuit falls squarely within the safe harbor recognized in *Linn* for avoiding preemption. The General Counsel failed to prove that the Act preempted the litigation.

3. *The Discovery Requests Were Lawful*

General Counsel's discovery allegations fare no better.[14]

The Board applies the three-part test set forth in *Guess? Inc.*, 339 NLRB 432 (2003), when evaluating discovery requests issued in related litigation.[15] Under that standard, the Board asks: (1) whether the requests sought relevant information; (2) whether they served an unlawful objective; and (3) whether the employer's need for the information outweighed any Section 7 confidentiality interests. *Pain Relief Centers, P.A.*, 371 NLRB No. 143 (2022). Apex satisfies all three requirements.

First, the discovery requests and interrogatories were plainly relevant. They sought information concerning witnesses and communications relating to Richardson's defamatory statements. For example, one interrogatory asked Richardson to identify individuals who contacted him regarding his LinkedIn posts. (GC Ex. 82). There were discovery requests for similar materials. Information about who contacted Richardson and what they said could reveal whether anyone informed Richardson that his statements were inaccurate, which bears directly on knowledge of falsity and actual malice. They were therefore relevant.

Second, the record contains no evidence that Apex pursued discovery for an unlawful purpose. The timing of the requests tracked the ordinary progression of the Florida litigation. Nothing about the requests suggests an effort to interfere with protected activity. This is especially

[14] General Counsel provided incomplete evidence regarding the discovery requests in GC Exhibit 83. The version admitted into evidence is only half complete, consisting of odd numbered pages. Legal conclusions should not be made where General Counsel did not introduce a complete document containing the full context.

[15] *Guess? Inc*. is wrongly decided and should be revisited. Specifically, the third prong of the analysis, which purports to balance the employer's interest in obtaining the information against the employees' confidentiality interests under Section 7 of the NLRA, is vague and subjective. For example, in *Chinese Daily News*, 353 NLRB 613 (2008), three different parts of the NLRB (an administrative law judge, the Board, and the Division of Advice) each applied the test differently and reached different conclusions.

the case where, as noted above, the activity in question was not protected and occurred long before the discovery requests.

Third, Apex's need for the information outweighed any conceivable Section 7 interest. Unlike the discovery requests at issue in *Pain Relief Centers*, the interrogatories did not target communications with the Board or information employees provided to the General Counsel in support of NLRB charges. The requests instead sought information relevant to the underlying defamation claims. Any responsive information existed independent of the Board proceeding and was not created in connection with an unfair labor practice investigation. The Section 7 interests here were de minimis, while the need for the information was significant.

Because the discovery requests sought relevant information, served a legitimate litigation purpose, and did not meaningfully burden protected activity, they satisfied the *Guess?* standard. The General Counsel failed to prove that Apex's lawsuit was objectively baseless, failed to establish NLRA preemption, and failed to show that Apex's discovery requests violated the Act. Complaint paragraphs 7(b) through 7(e) should therefore be dismissed.

H. Richardson's Post-Discharge Misconduct Renders Him Unsuitable For Reinstatement

The Board may deny reinstatement where a discriminatee engages in "misconduct so flagrant as to render [the employee] unfit for further service, or a threat to efficiency in the plant." *Fund for the Public Interest*, 360 NLRB 877, 877 (2014), quoting *Hawaii Tribune-Herald*, 356 NLRB 661, 663 (2011). The Board has emphasized that this remedy is reserved for extraordinary cases. *United Parcel Service, Inc.*, 372 NLRB No. 158 (2023).

This is such a case.

Following his discharge, Richardson twice called a female manager—his boss's boss—a "ratfuck" in public social-media posts. Although the epithet did not contain an express threat of

violence, it went far beyond ordinary workplace criticism, intemperate language, or poor judgment. The term is crude, deeply offensive, and personally degrading. It crosses the line that separates intemperate statements from the type of conduct that no employer should be required to tolerate.

The seriousness of the misconduct is magnified by both its target and its audience. Richardson directed the insult at a specific female manager who remains employed by Apex. He did so publicly on LinkedIn, a professional networking platform. In at least one instance, he posted the remark in response to that manager sharing positive career news.

A reinstatement order would therefore require Apex to place the targeted manager back into a working relationship with an employee who publicly subjected her to repeated, vulgar personal attacks. The Board's remedial authority does not require such an outcome.[16]

Richardson's conduct was not an isolated lapse in judgment. It was a deliberate and public attack on a current manager that reflected a level of hostility incompatible with continued employment. Under these circumstances, his post-discharge misconduct renders him unfit for reinstatement even if the Board were to find liability on any underlying claim.

I. General Counsel Seeks Unjustifiable Remedies

Even if the Court finds that Apex violated the Act, several of the remedies sought by General Counsel exceed the Board's remedial authority under Section 10(c) and are impermissibly punitive rather than remedial.

First, General Counsel seeks an order requiring Apex to make Richardson whole for any "direct or foreseeable pecuniary harms" resulting from his discharge. This request is based on the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022). However, the Fifth Circuit subsequently

[16] This is distinguishable from *Nexstar Broadcasting, Inc.*, 2020 WL 2949384 (2020), in which and ALJ found that the employee did not use the phrase "rat fuck" and that it was no evidence that anyone heard the remark if it was made.

denied enforcement of that aspect of the Board's order and vacated the award of consequential damages, concluding that the Board had exceeded its statutory authority. *Thryv, Inc. v. NLRB*, 102 F.4th 727, 764-67 (5th Cir. 2024).

Section 10(c) authorizes the Board to order a respondent to "cease and desist" from unfair labor practices and to take such affirmative action, "including reinstatement of employees with or without back pay," as will effectuate the policies of the Act. 29 U.S.C. § 160(c). The statutory language authorizes traditional equitable remedies designed to restore the status quo ante. It does not authorize awards of compensatory or consequential damages for collateral economic losses. As the Supreme Court has repeatedly recognized, compensatory damages are the classic form of legal relief rather than equitable relief. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). Because the Board's authority is limited to the remedies Congress authorized, any award of consequential damages for alleged pecuniary harm would exceed the Board's statutory authority and should be rejected.

Moreover, the Board's attempt to adjudicate and award compensatory damages raises substantial constitutional concerns. As Members Kaplan and Ring observed in their dissent in *Thryv*, the Board's expansion into compensatory damages "obviously runs headlong into the Seventh Amendment's guarantee" that such claims be tried before a jury. *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 38 (Kaplan & Ring, dissenting in part). The Board's assertion of authority to award such damages also implicates broader concerns regarding the limits of administrative adjudication under Article III. These constitutional concerns provide an additional reason to decline General Counsel's request for a *Thryv*-based award of consequential damages.

General Counsel's request that Apex both physically post and electronically distribute a remedial notice should likewise be denied. The Board's traditional notice-posting remedy is

generally sufficient to inform employees of their rights and of the Board's disposition of the case. General Counsel failed to present any evidence at the hearing suggesting that a physical posting would be ineffective or that an additional electronic-distribution requirement is necessary to effectuate the purposes of the Act. Absent such a showing, requiring both forms of notice would be unnecessarily burdensome and would exceed what is reasonably necessary to remedy the alleged violation. Accordingly, if a notice remedy is ordered, it should be limited to the Board's traditional posting requirement.

J. Preservation Of Affirmative Defenses

Apex maintains that this proceeding violates its rights under the United States Constitution because the Board's method of appointing administrative law judges violates the Appointments Clause and such judges are unconstitutionally isolated from removal.

Additionally, this proceeding constitutes an improper combination of investigatory, prosecutorial, and adjudicatory functions in violation of Apex's due process rights.

IV. CONCLUSION

It is clear that Richardson did not engage in protected concerted activity—rather, Richardson publicly pursued personal concerns based on unsupported allegations of serious misconduct. Even if Richardson's conduct could be considered protected concerted activity, which it cannot, his statements lost protection of the Act as they were disparaging and false. The Company acted within its rights and lawfully when asking Richardson to remove ***just*** the portions of his posts which were defamatory, as it protected his right to share true workplace concerns, and acted properly when terminating Richardson's employment only after he refused to remove the false and disparaging statements from his public posts. Further, the employment agreement, the confidentiality reminder, and the defamation lawsuit were lawful, narrowly tailored, and supported by facts and law. The General Counsel has failed to establish any evidence demonstrating that any

threat, coercion, or other improper motive was present. Accordingly, Apex requests that the Complaint be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of July, 2026, the foregoing *Post-Hearing Brief of Apex Fintech Services LLC d/b/a Apex Fintech Solutions* in Case No. 12-CA-325317 was electronically filed through the Board's website and served via electronic mail as required under the Board's Rules and Regulations upon the following:

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