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

AMERICAN AUTOMOBILE ASSOCIATION OF NORTHERN CALIFORNIA, NEVADA & UTAH	**Cases 32-CA-280838** **32-CA-282213** **32-CA-284409** **20-CA-284659** **20-CA-284664** **32-CA-285247**
and	**32-CA-291041** **32-CA-291138** **32-CA-292625** **32-CA-294216** **32-CA-294816**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 665	**32-CA-295908** **32-CA-296162** **32-CA-301979**

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

D. Criss Parker
Amanda Brunt
Counsel for the General Counsel
National Labor Relations Board, Region 32
1301 Clay Street, Suite 1510N
Oakland, CA
phone: 510-637-3300
email: criss.parker @nlrb.gov
email: amanda.brunt@nlrb.gov

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I. PRELIMINARY STATEMENT[1]

This case arises out of Respondent American Automobile Association of Northern California, Nevada and Utah ("AAA" or "Respondent")'s campaign to resist at every turn the successful effort of Teamsters Local 665 (the Union) to represent the commissioned sales agents employed by Respondents at 78 Northern and Central California branch offices. In response to the Union's decisive election victory, Respondent closed branches, fired well-known pro-Union employees, made a slew of unilateral changes, and failed to reach a first collective-bargaining agreement with the Union, instead declaring impasse and imposing a last, best and final offer (the subject of separate ongoing litigation in 32-CA-321155, et al.). Two more major cases against Respondent (32-CA-321155 et al. and 32-CA-312204 et al.) involving the same bargaining unit have been heard by ALJ Anzalone and are awaiting decision, while a fourth (32-CA-333471) is scheduled for trial on August 31, 2026. Pursuant Section 102.46(d)(1), Counsel for the General Counsel (GC) hereby files the following Brief in Answer to Respondents Exceptions[2] and urges herein that the Board affirm the ALJ's decision. GC also takes the position that notwithstanding the voluminous evidence in this protracted case, the matters in dispute are or will be comprehensively covered in the parties' briefs to the Board, such that there is no demonstrable need for oral argument in this case.

II. PRELIMINARY NOTE ON CREDIBILITY

Respondent argues in its exceptions that the Board need not grant any special deference to the ALJ's inferences since he was not personally present to observe demeanor at the trial. Respondent's argument is misguided in several respects.

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[1] References to the record are as follows: Tr. for transcript; GC Exh. for General Counsel exhibits; R. Exh. for Respondent exhibits, ALJ Exh. for ALJ exhibits; U Exh. for union exhibits; REB for Respondent's Exceptions Brief.

[2] On July 1, 2026, Respondent AAA filed its "Exceptions to the Administrative Law Judge's Decision and Request for Oral Argument" and brief in support thereof (REB).

First, the cases on which it relies (*Storer Commc'n*, 297 NLRB 296 (1989)) and *Vic Koenig Chevrolet*, 263 NLRB 646 (1982)) state only that the Board may make independent credibility determinations, not that it must.

Second, and more importantly, one need not have been in the room in order to conclude that the GC's witnesses were credible while Respondent's witnesses were not. The veracity of the GC's witnesses is enhanced by the fact that they all testified pursuant to subpoena rather than voluntarily and were subject to a sequestration order. Many of the GC's witnesses were still employed by Respondent at the time of their testimony, further enhancing the reliability of their testimony.[3] *Gold Standard Enter.*, 234 NLRB 618, 619 (1978). The GC's witnesses strove earnestly to truthfully answer all questions posed to them. See Tr. 125, 128-29, 2403, 2678, 2684, 2519, 3078, 3119-20. In stark contrast, Respondent's witnesses, all of whom were supervisors or managers, displayed a pattern of agreeing with the leading questions asked by Respondent counsel while offering countless variations on "I don't recall", "I don't know" and other evasions throughout cross examination by GC and the Union.[4] The stark contrast between the GC's forthcoming, genuine and subpoenaed witnesses and the unsupported, scripted and conclusory "party line" testimony from Respondent's managers and supervisors literally jumps off the page.

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[3] Corina Molina, Dolores Hill, Lori Ann Acocella, Carmen Vasquez, Niels Larsen, Daniece Atencio, Octavia McBride, Carolyn Brown, Ken Everett, Samuel Yoo, Christine Escamilla and Crystal Javier were current AAA employees at the time that they testified.

[4] Respondent HR Director Michelle Faas either did not know or could not recall an answer on cross examination a whopping **126** times: Tr. 4372-4457. Respondent investigator David Craig either did not know or could not recall an answer on cross examination an incredible **76** times: Tr. 5326-5420. Fellow Respondent investigator Tito Medeiros either did not know, was not aware, or could not recall an answer on cross examination **64** times. Tr. 4753-4902. Respondent witness Veronica Gallo asked for questions from GC to be repeated an astonishing 22 times (Tr. 5480-5509) and either did not know or could not remember an answer to a question asked on cross-examination **39** times. Tr. 5464-5508. Former Stockton and current Folsom BM Jon Berglund either did not know or could not remember an answer to a question asked on cross-examination **54** times. Tr. 3408-3587. Perhaps most egregiously, the highest ranking official of Respondent to testify, Chief Retail Officer Osh O'Crowley, either did not know, was not aware, could not recall or could not remember when asked questions on cross-examination or by the ALJ **102** times. Tr. 4094-4217.

While Respondent argues that "consistency among multiple witnesses describing the same rationale is evidence of credibility, not concealment," [5] the opposite is true here. Even a cursory review of the record suggests that Respondent's witnesses were coached to keep their stories straight on direct while using the "don't know" or "don't recall" crutches when asked any question on cross examination that made them uncomfortable. See *Oncor Elec.Delivery*, 364 NLRB 677, 686 (2016); *Kinney Drugs*, 314 NLRB 296 (1994); *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1042-1043 (7th Cir. 2006).

Third, there is a solid foundation for abiding by the ALJ's credibility determinations and the inferences which he appropriately drew from the record as a whole. In *Juniper Industries*, 311 NLRB 109 (1993), the ALJ who presided over the hearing died before issuing a decision. The parties, as here, agreed without objection to allow a new ALJ to issue a decision without having been present to personally observe the witnesses. When the employer subsequently excepted to the new ALJ's credibility findings, the Board made clear that while the full force of *Standard Dry Wall Prod.*, 91 NLRB 544 (1950) deference to credibility determinations may not apply, "where the parties have agreed to waive their right to have the judge view certain witnesses and have him render a decision on the written record before him, they have effectively agreed to permit credibility resolutions as well as findings of fact and conclusions of law to be determined by one who did not observe the demeanor of witnesses at the hearing. In those circumstances, deference is due the judge's credibility resolutions." 311 NLRB at 109; *Allen-Stone Boxes*, 252 NLRB 1228 (1980). In *Allen-Stone*, the ALJ who heard the case died before issuing a decision. The Board subsequently adopted the ALJD issued by a different ALJ and did not disapprove of the ALJ's comments that despite not having observed the witnesses in person, "I am persuaded on the basis

5 *Doug Hartley, Inc. v. NLRB*, 669 F.3d 579, 582 (9th Cir. 1982).

of the printed record as a whole that a reasoned judgment may be made as to the general credibility of the witnesses" and the falsity of the testimony of the respondent's president "leaps out at the reader from the printed page." 252 NLRB at 1229.

The Board accordingly need not accept Respondent's invitation to make its own credibility determinations. However, even in the event that the Board accepts this invitation, GC is confident that the open, unrehearsed, candid testimony from GC's subpoenaed witnesses frequently supported by documentary evidence as contrasted with the coached, evasive and outright false testimony from Respondent's witnesses not supported by documents (that would have been uniquely within Respondent's possession and control), will leap out from the printed pages of this record.

III. LEGAL ANALYSIS

A. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) of the Act By Refusing to Tell Employee Lielonnie Lewis the Subject Matter of Her Investigatory Interview and By Refusing to Permit Her to Caucus with her Union *Weingarten* Representative During the Investigatory Interview (Respondent Exception 1)

The ALJ correctly found that Respondent violated the *Weingarten* rights of bargaining unit sales agent Lielonnie Lewis by not informing her and her Union representative Tom Woods about what an investigatory interview was about even after the interview began. Tr. 2269; ALJD p. 4. There is ample evidence in the record of Respondent intentionally refusing to inform employees under investigation what they are being investigated for, instead telling the employees that it will become clear to them once they hear the questions. Tr. 2406, 4829. Respondent is technically correct in its argument that *Climax Molybdenum Co.*, 227 NLRB 1189 (1977) involved an employer that prohibited an employee from consulting with a *Weingarten* representative before an investigatory interview. The ALJD correctly cites *Climax Molybdenum* for this proposition. ALJD, p. 4. However, the ALJ is equally correct that the logic of the *Climax Molybdenum* decision applies to consultation during the interview and not merely before. That logic is particularly compelling

in a case such as this one with a Respondent that tells employees as little as possible before and in the early stages of an interview. When an employer intentionally provides as little information as possible to the target employee and union representative, the ability of the employee and the union representative to meaningfully confer in preparation for the investigatory interview is eliminated and knowledgeable representation during the investigatory meeting is made impossible. Board law does not establish that the only time that caucusing may occur is before the investigatory interview, and it would be contrary to the purpose of *Weingarten* to interpret the right to caucus in the highly circumscribed manner properly rejected by the ALJ. In such utter ignorance, every preparatory meeting before an investigatory interview would consist of meaningless speculation about what the investigation might be about. The Board in *Colgate-Palmolive Co.*, 257 NLRB 130, 133 (1981) noted: "Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of 'knowledgeable union representative' the Supreme Court meant to put blinders on the union representative."

Weingarten rights ensure that union representatives are allowed to provide knowledgeable assistance and counsel to an employee who is being interrogated, and an employer may not totally silence a union representative during an investigatory interview. *Southwestern Bell Tel. Co.*, 251 NLRB 612, 613 (1980) (union representative has no right to collective-bargaining or adversarial confrontation, but cannot be ordered to remain silent). There is no credible evidence that Union representative Woods transformed Lewis' investigatory interview into an adversarial proceeding

or in any way prevented Respondent from obtaining information from Lewis.[6] [7] Respondent characterizing Woods' behavior as disruptive speaks to the thin-skinned and uniformed nature of the pertinent Respondent actors who had no particular knowledge of or experience with *Weingarten* rights. Tr. 4389-95, 4854. Finally, the ALJ was correct to conclude that *USPS*, 371 NLRB No. 7 (2021) does not support Respondent's position herein. The Union in the instant case did not make a full-blown written request for information (including for the questions that the employer intended to ask at the investigatory interview) in anticipation of the investigatory interview as occurred in *USPS*. Neither *USPS* nor *Pacific Telephone & Tel. Co.*, detract from the ALJ's finding that an employer must provide some indication of the matter being investigated before an investigatory interview can lawfully occur, and Respondent's "you'll understand once you hear our questions" tactic does not meet even that minimal standard.

B. The ALJ Correctly Found that Subparagraph d(iv) of AAA's Confidentiality Policy Violated Section 8(a)(1) of the (Act) (Respondent Exception 2)

It is undisputed that from at least March 4, 2021, and continuing to date, Respondent maintained a confidentiality policy in its Team Member Handbook[8] (GC Exh. 103 at 9, 17, 61; GC Exh. 104 at 12, 21, 25-26; Tr. 1732) which stated in pertinent part "employees may not engage in . . . [u]nauthorized viewing, accessing, disclosing or influencing others to view, access, or disclose information pertaining to you, your family members, or other Team Members concerning their Membership, insurance, travel, employment or any and all other data." Id.

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[6] Respondent investigator Michelle Faas equated Woods' mere efforts to be able to caucus with Lewis as displaying an "aggressive tone" (Tr. 4307), thus reflecting animosity towards the exercise of *Weingarten* rights. Notes of the interview prepared by Vincent Garcia, which Faas stated were relied on as part of Respondent's investigation, make no mention of any aggressive or disruptive conduct by Woods. Tr. 4314-4315; R. Exh. 52. Further, Faas's claim that she perceived Woods to be aggressive is undermined by the fact that she could not recall whether it was Woods or Lewis who was asserting the right to caucus during the interview. Tr. 4390-4391.

[7] Respondent's reliance on *NJ Bell Tel. Co.*, 308 NLRB 277, 279-280 (1992) in its exceptions is unavailing. REB, p. 36-37. Unlike the *Weingarten* rep in *NJ Bell*, Woods did not continuously interrupt the interview by repeating questions, continuously object to and instruct the employee not to answer the investigator's questions, or essentially impeded the employer's right to conduct the interview.

[8] The policy is titled: Standards of Conduct, Information Technology Policies, and Code of Conduct

The ALJ correctly found that subsection (d)(iv) expressly prohibits employees from discussing or disclosing their wages. ALJD at 5. There is no room for interpretation. If a rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Therefore, irrespective of and prior to its enforcement against former employee Priscilla Gaines-Holladay as discussed elsewhere in the ALJD, the ALJ correctly found section d(iv) of the Respondent's confidentiality policy to be facially unlawful in violation of Section 8(a)(1).[9]

C. The ALJ Correctly Concluded that Respondent's Subpoenas Duces Tecum to the Union and Discriminatees Violated Section 8(a)(1).(Respondent's Exception 3).

The ALJ correctly found that the subpoenas duces tecum (SDT) issued by Respondent to the Union and the five terminated discriminatees in this case (Priscilla Gaines-Holladay, Patrick Stallone, Yasmin Weston, Jason Ortiz, and Frank Dollosso) violated Section 8(a)(1) of the Act.[10] ALJD at 5; ALJ Exh. 5-6, 10-11, 13. Respondent now argues that the SDT provisions were narrowly tailored, litigation-driven and carefully circumscribed.[11] Respondent also makes the misleading claim that "the subpoenas neither sought authorization cards, internal union strategy, communications with Board agents, communications with the Union, nor communications among employees concerning organizing activity." As to the first two "straw man" items, that Respondent did not explicitly subpoena even more private information in no way lessens the impact of the SDT. As to the remaining items, Respondent <u>did</u> effectively subpoena communications with Board agents when it sought from all five discriminatees paper

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9 Respondent's policy is unlawful on its face as a facially unlawful restriction on core Section 7 rights whether under *Boeing Company*, 365 NLRB 1494, 1497, 1508 (2017) or *Stericycle, Inc.*, 372 NLRB No. 113 (2023), which the General Counsel urges the Board to overturn.

10 The pertinent subpoena paragraphs are: 3, 4, 10 (Gaines-Holladay), 4, 5, 11 (Dollosso) 3, 4, 10 (Ortiz) 3, 9 (Stallone), 4, 5, 6, 12 (Weston), 27 (Union). The objectionable language is largely overlapping and/or identical.

11 The GC does not dispute that Respondent is entitled to subpoena "post-separation damages" (REB, p. 49) information so as to ensure that terminated employees have sought to mitigate their damages by engaging in a good faith search for other work after their allegedly unlawful terminations.

documents, electronically stored information (ESI), audio/video recordings "you provided to the National Labor Relations Board (NLRB) during the investigation of your unfair labor practice charge." Further, Respondent subpoenaed communications with the Union and communications among employees concerning organizing activity when it subpoenaed from Dollosso and Ortiz paper documents, ESI, audio/video recordings "related to the claim that, during your employment with AAA NCNU, you 'engaged in concerted activities,'" as well as when it subpoenaed from Gaines-Holladay and Weston paper documents, ESI, audio/video recordings "related to the claim that, during your employment with AAA NCNU, you 'engaged in Union activities.'"

Under the Act, employees have a right of privacy and confidentiality with respect to their union or other protected concerted activities. See, e.g., *Veritas Health Serv., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012); *Nat'l Tel. Directory Corp.*, 319 NLRB 420, 421-422 (1995); *Pain Relief Ctr.*, 371 NLRB No. 143, slip op. at 3 (2022). The ALJ correctly applied the standard set forth in *Nat'l Tel. Directory*. Given that the subpoenas expressly sought information with respect to discriminatees' contacts with Board agents, the ALJ properly found a violation. *Interstate Mgmt. Co.*, 369 NLRB No. 84, slip op. at 2 (2020) ; *Nash v. Fla. Inds. Comm'n*, 389 U.S. 235, 238 (1967); *Tracy Toyota*, 372 NLRB No. 101 (2023); *Starbucks Corp.*, 373 NLRB No. 101 (2024); *Pain Relief Ctr.,* 371 NLRB No. 143, slip op. at 3 . While Respondent correctly notes that the Board will consider whether an employer's need for the subpoenaed information outweighs the employees Section 7 rights, the ALJ correctly found that Respondent failed to such a showing. The 50-day duration of trial in the instant case demonstrates that Respondent had more than a full and fair opportunity to mount its defense notwithstanding its inability to obtain these ostensibly crucial subpoenaed documents.[12]

[12] The ALJ also properly found that the subpoena to the Union violated 8(a)(1). While Respondent makes much of the fact that the discriminatees were not necessarily aware of the existence of Respondent's subpoena to the Union

D. The ALJ Correctly Inferred Animus Based on the Record as a Whole and Correctly Discredited Respondent Witness Tracy Taylor (Respondent's Exception 4).

Contrary to Respondent's claim that it is the GC's burden to show individualized anti-Union animus towards each of the five terminated discriminatees in this case, the ALJ correctly found that unlawful discrimination against one pro-union employee based on antiunion animus often supports an inference that the same animus motivated its actions against other employees. ALJD p. 2, 7; *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003); *NLRB v DBM,* 987 F.2d 540 (8th Cir. 1993*); Reeves Distrib. Serv.,* 223 NLRB 995, 998 (1976). Direct evidence of an anti-union motive in discharge cases is rare, and for that reason, reliance on circumstantial evidence and reasonable inferences derived therefrom is appropriate and often necessary. *Guardian Auto. Trim*, 340 NLRB 475, 482 (2003).

The ALJ properly inferred animus in this case given the overwhelming evidence of disparate treatment of the five terminated discriminatees. Disparate treatment is a long-established basis on which to infer animus. *Lucky Cab Co.*, 360 NLRB 271 (2014); *Manor Care Health Serv. of Easton*, 356 NLRB 202, 204 (2010). In the instant case, GC produced evidence that Respondent disparately treated Gaines-Holladay in relation to other employees found to have divulged confidential information.[13] GC similarly produced evidence of Respondent's disparate treatment of Frank Dollosso in relation to other employees found to have purchased gift memberships or

(REB, p. 10), there is no requirement that the discriminatees be aware of the subpoena to the Union in order for the subpoena to infringe upon their Section 7 rights, particularly when the subpoena sought all evidence that the Union submitted to the Region during the investigation of all 15 ULP charges underlying the instant consolidated complaint.

[13] Respondent only issued a Disciplinary Action Form (DAF) to Eureka branch Member Experience Associate (MEA) Gina Piazza even though she had multiple instances of divulging confidential and private information. GC Exh. 246. Likewise, Hayward MEA Joyce Maxion only received a DAF rather than a termination even after being found to have sent personal identifying information to someone outside of Respondent unrelated to legitimate business reasons. GC Exh. 253. Mountain View branch MEA Malik Reid only received a PIP after he disclosed DMV proprietary information to a member which "put AAA assets and proprietary information at risk and jeopardized our partnership with the DMV." GC Exh. 258.

used personal credit cards to purchase memberships.[14] GC produced evidence of Respondent's disparate treatment of Patrick Stallone in relation to other employees accused of writing new memberships rather than reinstating existing memberships.[15] GC produced abundant evidence of Respondent's disparate treatment of Jason Ortiz in relation to other employees found to have engaged in phishing.[16]

In its exceptions, Respondent argues for an unduly strict and stingy interpretation of disparate treatment, asserting that disparate treatment evidence is to be given no value unless employees are "similarly situated in all material respects." REB p. 26. Respondent cites no case for this extreme proposition. Respondent also rehashes its argument (REB p. 22) that a valid comparator cannot hold a different job classification from the discriminatee. Tr. 4873-78; 4912-20; 5701-03. This artificially contorted reading of disparate treatment is readily disproven by cases

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[14] Redding branch agent Traci Reginato only received a DAF for using her personal funds for an employee's membership upgrade. GC Exh. 280. Similarly, Redwood City sales agent Evelyn Lowenthal King only received a Performance Improvement Plan (PIP) after violating Respondent's gift membership policies and apparently not being honest during her investigation. GC Exh. 244.

[15] Redwood City branch MEA Maria Betancourt only received a PIP when she was found to have written new memberships instead of reinstating existing memberships. GC Exh. 260. Los Altos branch agent and known anti-Union employee Joan Pena only received a last chance agreement rather than being terminated. Tr. 2582; GC Exh. 147. Similarly, Respondent only issued a DAF to Daly City Member Experience Generalist (MEG) Ernesto Vistan, Jr. even though he engaged in the same type of alleged failure to comply with membership reinstatement protocols as did Stallone. GC Exh. 243; ALJD p. 16. As to Newark branch MEA Harris Nawaby (R. Exh. 111), he is not an appropriate comparator. GC submits that the membership-related conduct of Nawaby (involving multiple situations in which he cancelled existing memberships and wrote new memberships by adding the middle names of members, resulting in a customer complaint to the branch about having to pay for multiple memberships) is far more egregious than that of Stallone in the Eileen Pearce incident in which there is no evidence that Pearce complained or was dissatisfied with the service she received from Stallone.

[16] Newark branch agent and anti-Union employee Samuel Yoo only received a DAF, as discussed further below.Tr. 2506-2507; GC Exh. 172. Similarly Sonoma branch agent Sean Morris engaged in and acknowledged engaging in phishing well outside the zip codes covered by his branch yet received only a PIP rather than a DAF or termination. GC Exh. 275. Berkeley branch agent Michael Elie only received a PIP even though he was found to have engaged in phishing. GC Exh. 265. Fellow Berkeley branch agent Daniel Urrutia also only received a DAF for his phishing outside the branch's assigned zip codes. GC Exh. 237. Lodi branch agent Sandeep Mathur and Southwest Las Vegas branch agent Joe Brown only received DAFs after being found to have engaged in phishing. GC Exh.. 273-274, 287. Respondent did not interview let alone administer any discipline to known anti-Union, pro-decertification employee Patty Rocha after a phishing complaint about Rocha was received on the ethics hotline. Respondent instead took the word of Rocha's manager Whitley Robertson that the ethics hotline complaint was merely driven by a vendetta that pro-Union employees had against Rocha for Rocha's anti-Union beliefs. Tr. 1340, 1342, 1349, 1356, 2513-2514, 2529, 2534, 2549, 4818-4819, 4964-4965; GC Exh.. 84, 85, 174, 319 and 320.

such as *Coradian Corp.*, 287 NLRB 1207 (1988); *Hilltop Baking Co.*, 93 NLRB 694, 712-14; *FCA US*, 371 NLRB No. 32 (2021) and others which establish that even supervisors can constitute valid comparators despite obviously serving in different job classifications than pertinent discriminatees. What matters in order to have a valid comparison is that all employees regardless of classification be subject to the same rules and policies, which Respondent's employees unquestionably are. GC acknowledges the desirability of conducting the most "apples to apples" comparison possible, but Board case law does not require absolute identicality. See *GenPak, LLC*, 372 NLRB No. 76 (2023); *Keller Mfg. Co.*, 237 NLRB 712, 715, 736 n. 5 (1978).

The ALJ also properly inferred animus on the basis of Respondent tightening up rules and policies that were loosely enforced or not enforced at all in the past. ALJD p. 6-7, 19. The Respondent's sudden attention to and strict enforcement of previously dormant and ignored rules and policies is the unifying theme that connects the five unlawful terminations in this case with the slew of punitive unilateral changes also found by the ALJ. The ALJ was plainly correct in citing cases such as *Jennie-O Foods*, 301 NLRB 305, 311 (1991), *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), *Kitsap Tenant Support Serv., Inc.*, 366 NLRB No. 98, slip op. at 21 (2018), and *St. Johns Cmty. Serv. of N.J.*, 355 NLRB 414 (2010) for the settled propositions that a prima facie case of discriminatory motive is established when an employer begins to enforce rules it never enforced previously or starts enforcing them more strictly after learning of a union organizing campaign, and that an employer cannot meet its burden of establishing a defense under *Wright Line* by relying on rules that it began to enforce more strictly after its awareness of union activity.[17]

[17] As an illustration, Stockton BM Jon Berglund claimed during direct examination that his July 7, 2021 meetings with agents and confirming July 9, 2021 emails were merely for the purpose of reaffirming rules and policies that had been in place since Berglund's arrival at Stockton in December 2020. Tr. 3254. Berglund's testimony was impeached

The ALJ correctly found that Respondent possessed animus towards the unit for having unionized based in part on the testimony of former long-time Redding assistant branch manager (ABM) Pam Felix who worked for Respondent for over 32 years. ALJD p. 7; Tr. 2067-68. While Respondent describes Felix as "disgruntled" (REB, p. 49), Felix did not testify in an angry or embittered way, such that Respondent's characterization appears to be based on nothing more than Felix testifying truthfully and adversely against Respondent. Respondent is technically correct to note that the ALJ was not entirely accurate in concluding that Felix's testimony about statements made by Regional VP Tracy Taylor were not denied by Taylor. See ALJD, n. 7.[18] The ALJ was nevertheless correct to credit Felix given that the denial elicited from Taylor by Respondent counsel at Tr. 5968-69 was in response to entirely leading questions. Moreover, Felix was one of several managers at the key meeting at which Taylor, still reeling from Respondent's election defeat, made her animus-driven statements about tightening up rules so as to punish the unit members for having organized. Tr. 2080-82.[19] Respondent could have called any of the numerous managers in attendance at the meeting where Taylor made the statements testified to by Felix, who presumably remain employed by Respondent, but did not. In light of Respondent's conscious decision not to call witnesses who purportedly could have corroborated Taylor and impeached

when he was confronted by Respondent's February 8, 2022 position statement (GC Exh. 302) after which he conceded that he had been lenient in enforcing Respondent's rules as he adjusted to the Stockton branch. Tr. 3525.

[18] The ALJ's mistake appears to have flowed from Respondent citing the wrong transcript pages (Tr. 5973-5975) in its post-hearing brief to the ALJ p. 106, rather than the correct transcript pages of Tr. 5968-5969.

[19] Nor is Respondent correct in describing the evidence from Felix as hearsay. REB p. 2, 14. The statements made by Taylor that were directly heard by Felix are admissible as party admissions. As to the steps that Redding BM Scott Linn took in order to carry out Taylor's instructions, while it is true that Felix was not present for Linn's one-on-one meetings with employees that followed Taylor's meeting with Linn, Felix, and other BMs, Felix was nevertheless in a position to observe and did observe with her own eyes front line employees providing less assistance to sales agents than they had previously provided. Tr. 2087. In fact, one front line employee expressed gratitude to Felix that this employee no longer had to endure the burden of assisting unit sales agents. Tr. 2088. Felix correspondingly observed visible frustration on the part of the Redding sales agents about no longer receiving the type of help from front line employees to which the agents had become accustomed and reliant. Tr. 2088-2089.

Felix, the ALJ correctly credited Felix rather than Taylor. Consequently, there is no merit to Respondent's exception 4.

E. The ALJ Correctly Found Respondent's High-Level Animus Towards Employees' Union Activities (Respondent's Exception 5).

The ALJ correctly concluded (ALJD p. 17) that the record established Respondent's animus towards employees' Union activities at the highest level of Respondent's management structure. The correctness of this finding is most clearly demonstrated by the testimony of the two highest ranking Respondent officials to testify, Chief Retail Officer Osh O'Crowley and Chief Financial Officer Clay Creasey (Tr. 2297, 4031-34).

It was O'Crowley who immediately jumped into action in February 2021 sending emails to sales agents discouraging unionization. He sent an email to all sales agents on February 12, 2021 expressing his awareness that some agents had begun signing Union authorization cards. GC Exh. 309. He also sent a February 8, 2021 email touting the 'great things' Respondent had done in the past year and changes in policies "that were implemented to protect" Respondent's employees. GC Exh. 148. He similarly sent a February 11, 2021 email to all sales agents claiming to have "spent time actively listening to" sales agents and consequently eliminating minimum production requirements and reinstating the COE trip. GC Exh. 76. Mountain View agent Octavia McBride, who Respondent asked nothing of on cross examination (Tr. 1522), credibly testified she had a discussion with O'Crowley when he visited the branch in which McBride asked him where her COE plaque was and he told her that "you have to negotiate that in" because you're in the Union now. Tr. 1508-09, 1589. He was similarly dismissive of employee concerns in his conversation with Tracy branch employee and Union organizing committee member Daniece Atencio (Tr. 1452; GC Exh. 86), another credible employee who Respondent did not bother to cross-examine (Tr. 1478), when he told Atencio to take it up with her union when she inquired as to why she had not

received a milestone years of service award. Tr. 4192-93. The ALJ correctly inferred animus given O'Crowley's extremely evasive testimony and Respondent's failure to cross examine the GC witnesses who testified about him.

While the ALJ did not expressly mention Creasey in his decision, there is also ample evidence from Creasey that supports the ALJ's conclusion of Respondent's animus towards the Union at the highest levels. (ALJD p. 17). Creasey admitted that at an April 13, 2022 bargaining session, he announced to Woods and the employee members of the bargaining committee that one consequence of unionizing is it is like tearing up a contract and starting from scratch. Tr. 2362-64. While Creasey claimed not to recall that he made a motion with his hands as if to signify the tearing up of a document as he made this remark, his inability to recall is not credible and the remark objectively has the power to coerce employees who hear it even in the absence of the accompanying gesticulation. Tr. 2362. While Creasey denied that it was his intended inference, the remark could have been objectively and reasonably interpreted by the employees present to indicate that Respondent did not have any obligation to maintain the status quo and that the employees themselves had destroyed the status quo by unionizing. Tr. 2364, 2387-2388. See *Arc Bridges I*, 355 NLRB 1222, 1223-25 (2010) (employer's explanation that a wage increase "had to be negotiated back by the union" properly treated as an admission that the increase was denied to union represented employees because they chose union representation).[20] *Coach & Equip. Sales Corp.*, 228 NLRB 440, 440-441 (1977); *Textron, Inc.*, 199 NLRB 131 (1972) ('bargaining from scratch' comments may unlawfully convey an intent to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing employees for choosing collective representation); *Hecla Min. Co. v. NLRB*, 564 F.2d 309, 314 (9th Cir. 1977)

[20] Creasey's unalleged 8(a)(1) statement can be used to demonstrate animus. *Mammoth Coal Co.*, 354 NLRB No. 83,at 19 n. 27 (2009); *Stoody Co.*, 312 NLRB 1175, 1182 (1993).

(supervisor violated 8(a)(1) by telling employees that electing a union 'would not help workers because they already had everything they could hope for').

Respondent in its exceptions tries to overcome this evidence of corporate animus towards the Union by asserting that that generalized corporate animus at the corporate level does not satisfy *Wright Line* as to any individual discharge. REB, p. 14. In so arguing, Respondent seeks to rely on the incorrect or imprecise language found in *Tschiggfrie*, and overlooks the clarification of *Tschiggfrie* set forth in *Intertape Polymer Corp.*, 372 NLRB No. 133 (2023). As made clear in *Intertape Polymer*, the *Wright Line* analysis does not contain a fourth element by which the General Counsel must demonstrate a link or nexus between an employer's anti-union animus and a specific adverse employment action. More importantly, *Intertape Polymer* clarified that the Board in *Tschiggfrie* did not revise the *Wright Line* framework by adding a requirement that the GC must show particularized motivating animus towards an employee's own protected activity in order to meet its *Wright Line* burden. 372 NLRB No. 133, slip op at 12-13. An employer violates 8(a)(3) and (1) by taking adverse actions against employees to encourage or discourage union or other protected activity, and it does not matter whether the activity is that of the particular employee against whom the employer has taken action. Id. General retaliation by an employer against some, or all, of its workforce can discourage the exercise of Section 7 rights just as effectively as adverse actions taken against only known union supporters. Such conduct is unlawful regardless of the individual union sentiments or activities of the affected employees and even though not all union adherents were adversely affected. Id. Because the proverbial "smoking gun" is seldom available, the Board and courts have long held that animus and a causal connection may be inferred from circumstantial evidence based on the record as a whole. Id. at 13; *Kava Holdings*, 85 F.4th 479 (9th Cir. 2023) (evidence of animus that is general in that it is not tied to

any particular employee, may be sufficient to give rise to a reasonable inference that a causal relationship exists between the employee's protected activity and the employer's adverse action). The record is replete with the types of evidence on which the Board has routinely inferred animus such as contemporaneous unfair labor practices, shifting, false or exaggerated reasons offered for the action, failure to conduct a meaningful investigation, departures from past practices, disparate treatment of the employee, and reliance on pretextual reasons for the action. These factors are discussed as applied to the discriminatees in this case further below.[21]

F. The ALJ Correctly Concluded that Respondent Violated 8(a)(3) and 8(a)(1) of the Act in Terminating Lakeport Agent Frank Dollosso (Respondent's Exception 6) [22]

The ALJ correctly determined that Respondent violated 8(a)(3) of the Act by terminating Lakeport agent Frank Dollosso. ALJD p. 9. It is undisputed that Dollosso was outspokenly pro-Union in meetings with Respondent's anti-Union consultants during the organizing campaign and in later meetings that Respondent held with front line employees when Respondent was concerned that they, too, were seeking to unionize. Tr. 1022-1023,3840-3841. Dollosso also invoked his *Weingarten* rights when confronted with an investigatory interview. Tr. 1026, 2230, 1034, 2231, 2234. Knowledge of his Union activities was well established. Tr. 1026, 3841, 2230.

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[21] Respondent's denials that the identified decisionmakers possessed specific animus towards the discriminatees fail. First, there were severe credibility problems with Berglund and DeLuna, involved in the terminations of Gaines-Holladay and Weston respectively, such that their denials of animus and knowledge were properly discredited by the ALJ. ALJD at 20, n. 18; Tr. 5155. Second, as the ALJ properly found that Respondent repeatedly failed to meet its burden of establishing who exactly was involved in making the pertinent termination decisions. See ALJD at 8, 12. Finally, *Intertape Polymer* makes clear that the Board imputes the knowledge of other supervisors and managers to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation. 372 NLRB at 13, n. 85; *G4S Secure Sol.*, 364 NLRB 1327, 1330 (2016); *Vision of Elk River, Inc.* 359 NLB 69, 72 (2012).

[22] It is undisputed that upon termination, sales agents immediately lose access to any emails or instant messages on Respondent's equipment. Tr. 820-21, 847, 4402. This interferes with providing documentary evidence to the Board during the investigation of ULP charges. It is appropriate to credit anecdotal testimony from discriminatees even if not fully corroborated by documents they lost access to before charges were or could ever be filed.

On November 8, 2021, investigator David Craig conducted an investigatory interview of Dollosso. Tr. 1034, 2231, 2234. Respondent told Dollosso and Woods that the subject of the meeting was an ethics hotline complaint about memberships but did not provide any more details. Tr. 1033. Importantly, early in the interview Dollosso made clear his understanding that it was prohibited for agents to pay for the insurance policies of others but that there was no corresponding prohibition on paying for the memberships of others. Tr. 1038-39. Dollosso also explained how Respondent had consistently encouraged agents to sell memberships to friends and family in the past. Tr. 1039, 2243-44, 657; GC Exh. 67-68. Dollosso admitted that he bought/gifted memberships for family, friends, and/or church acquaintances on many occasions. Tr. 1039.

It is undisputed that the situation that originally gave rise to the investigation was that Lakeport branch manager (BM) Tom O'Rourke learned of a day on which Dollosso sold five associate memberships at one time on one day. Tr. 1047, 1050, 2247; GC Exh. 71. O'Rourke admitted that the sale of that many memberships by one agent on one day was "not unheard of." Tr. 3793. Dollosso explained that situation while on the stand. Tr. 1040-47. Dollosso was friendly with Blake Miller and his wife Katie Miller, and Blake communicated to Dollosso that he wanted all five of he and Katie's children to be added to the primary membership of Katie. Tr. 1041-42, 1050.[23] Dollosso carried out Blake's request to have the five children added as associate members, as Dollosso had no reason to believe that Blake was not qualified to speak on behalf of his wife. Tr. 1046. When Blake's credit card did not go through, Dollosso used his personal credit card to pay for the memberships. Tr. 1047, 1050, 2247; GC Exh. 71 p. 3. There is no evidence that Dollosso had ever been disciplined or even spoken to about using his personal credit card to buy or gift memberships or that he was aware that such a practice was prohibited or even disfavored.

[23] Two of the children had special needs, and Blake wanted to ensure that all of his children could get roadside assistance even when they were passengers in the vehicle of a non-member of Respondent. Tr. 1050, 2245-46.

Tr. 1039. O'Rourke conceded that he was not aware of any agents who were investigated regarding the sale of gift memberships prior to the Union's election. Tr. 3865-66.

Respondent now attacks Dollosso calling his conduct "fraud-adjacent" and as only benefitting him. REB p. 30. To the contrary, Respondent and the Miller family benefited but Dollosso hardly did. In the event that Dollosso needed the five associate memberships in order to satisfy his monthly membership quota, Dollosso credibly testified that he did not believe he had done anything wrong regarding the Miller transaction and that if he had thought he was doing something wrong, he would not have proceeded to jeopardize his job solely to meet a monthly quota. Tr. 1055. In any event, Dollosso didn't even qualify for any insurance sales related bonus for the month of September 2021. R. Exh. 77. Dollosso's testimony about not taking membership-related actions that could jeopardize his career is credible given the paltry amounts paid under agents' comp plans for selling memberships. GC Exh. 2 p. 5.[24]

Respondent now asserts in its exceptions that it terminated Dollosso for three alleged instances of misconduct (only one of which was the Miller incident described above). REB p. 28. Initially GC notes that Respondent, by dredging up prior disciplines, has offered a shifting defense insofar as its own termination summary mentions only the Miller situation and no prior disciplines. R. Exh. 78. Respondent claims it was initially considering a discipline less than termination but that Respondent opted to terminate once a previous PIP from 2018 and DAF from 2020, neither of which were membership related, were taken into account. Tr. 3799.[25] Shifting defenses are a classic basis on which to infer animus. *Steve Aloi Ford*, 179 NLRB 229 (1969); *Intertape Polymer*,

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[24] $0 incentive for selling 0 to 19 memberships per month, $2 incentive per membership for selling 20 to 49 memberships per month, $4 incentive per membership for selling 50 to 79 memberships per month, and $6 incentive per membership for selling 80 or more memberships per month.

[25] Given Respondent's admission that PIPs usually last no more than 30 days and the absence of any evidence that Dollosso's PIP lasted more than 30 days, it is noteworthy that Respondent had to reach back to 2018 to concoct a rationale for terminating Dollosso in December 2021. Tr. 3826.

supra, 372 NLRB. at 13. Relying on GC Exh. 280, 244, 228, 243 and 251, the ALJ correctly found that Respondent did not have a uniformly enforced rule that a prior disciplinary record would lead to termination of agents found to have violated Respondent's policies with respect to the sale or payment for gift memberships. ALJD p. 9.

The ALJ legitimately relied on the valid comparators supplied by the GC.[26] The ALJ also correctly found that the record does not accurately set forth when, why, and by whom Respondent decided to terminate Dollosso. ALJD p. 8. The ALJ appropriately drew an adverse inference against Respondent for failing to identify and call the unnamed HR representative who supposedly initially recommended a DAF rather than a termination. Id. Also, the discrediting of O'Rourke is warranted. While O'Rourke now professes outrage over Dollosso's gifting memberships, he was impeached with respect to his past encouragement to gift memberships.[27]

Respondent cannot demonstrate that it would have terminated Dollosso in the absence of his Union activities. Respondent did not provide examples of other employees terminated for using their personal credit cards for membership transactions. Respondent's historic focus was to sell as many memberships as possible, not on the method by which they were purchased. For all these reasons, the ALJ appropriately found that Respondent's termination of Dollosso violated 8(a)(3) of the Act.

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[26] See fn. 19 above with respect to Dollosso comparators Traci Reginato and Evelyn King.

[27] While O'Rourke initially denied that branch sales was an element of his compensation, he relented when shown the 2021 Branch Management Incentive Plan. GC Exh. 305; Tr. 3843-48. Further, O'Rourke admitted the existence of a Target/Amazon gift card promotion and wanting Lakeport agents to utilize that promotion. Tr. 3849. However, he then denied that his own boss Justin McCray had been pressuring him to make greater use of the gift card promotion, and denied that he asked his agents to backdate some records to show that the gift cards had been offered to members who already purchased insurance policies. Tr. 3849. However, his emails to Lakeport agents show that he asked agents to backdate records to reflect use of the gift card promotion, resulting in an ethics hotline complaint against him. GC Exh. 305-07. There is no record evidence that the ethics hotline complaint against O'Rourke was ever investigated.

G. The ALJ Correctly Concluded that Respondent Violated 8(a)(3) and 8(a)(1) of the Act by Terminating Gaines-Holladay (Respondent's Exception 7).

The ALJ properly concluded that Respondent's termination of Priscilla Gaines-Holladay violated 8(a)(3) of the Act. ALJD p. 14-15. As the ALJ noted, Gaines-Holladay was a stellar employee with no history of serious prior discipline. Tr. 259. Gaines-Holladay engaged in significant Union activity including challenging outside labor consultants anti-Union rhetoric during mandatory meetings in the presence of Respondent managers. Tr. 115-18, 124, 127-28, 132, 134, 260-61, 2170-72, 2175. The denials by BM Jon Berglund of knowledge of Gaines-Holladay's Union activities or animus towards them are simply not credible. Tr. 122-26, 141-42, 154, 158-68, 170-71, 180, 182-85, 3484-86.

Where the ALJ ultimately and correctly found that Gaines-Holladay's termination was unlawful under a *res gestae* theory, the ALJ noted that Gaines-Holladay's termination was additionally unlawful under a *Wright Line* or *Atlantic Steel Co.*, 245 NLRB 914 (1979) analysis. Perhaps realizing it loses either way, Respondent now seeks to rely on an outlier case it never cited in its post-hearing brief to ALJ Ross but which it now declares is the controlling authority. REB p. 23 (citing *KHRG Emp'r, LLC*, 366 NLRB No. 22 (2018). While the Board in *KHRG* described the four factor *Atlantic Steel* test as "ill suited" to determine whether protection was lost by conduct not involving a workplace conversation with a supervisor or manager, the Board nevertheless made clear that it is still appropriate to look to the totality of the circumstances to determine whether an employee's misconduct was so egregious as to forfeit the Act's protection. 366 NLRB at 2, n.5. There is also no statement in *KHRG*, a *res gestae* case, or in or *Lion Elastomers*[28] that suggests that *KHRG* constitutes its own separately applicable standard. In any event, assessing the totality of the circumstances as purportedly required under *KHRG*, it is evident that Gaines-Holladay's

[28] 372 NLRB No. 83 (2023)

conduct was not in any way egregious and is materially distinguishable from the conduct of the terminated employee in *KHRG*. First, as appropriately noted by the ALJ, Gaines-Holladay only shared allegedly confidential information with her Union and *Weingarten* representative who had been privy to similar sensitive information at the investigatory interview the day before. ALJD at 14; Tr. 225, 234-36. The discriminatee in *KHRG*, by contrast, led a delegation of 20 people, not all of whom were employees and some who he did not even know the identities of, into a secured area of the employer hotel. 366 NLRB at 2, n. 6. The discriminatee in *KHRG* also obtained access to the secured area when he lied to a security guard and told them that the delegation consisted entirely of employees—a fact that the Board labeled "the dispositive point." Id. Here, Gaines-Holladay obtained her information through her lawful and customary access to Respondent's Connect Suite system. Id. at 2.

The ALJ endorsed GC's res gestae analysis when he correctly found that Gaines-Holladay's alleged violation of Respondent's confidentiality policy "was part and parcel of her Union activity in seeking Business Agent Woods' assistance in representing her in the investigation of associate memberships." ALJD p. 14. In other words, Gaines-Holladay would never have been in any position to be terminated for disclosing confidential information if she had not been improperly investigated for violating membership policies that Respondent never or hardly enforced before the Union campaign. GC adheres to its position that the act of copying Woods on Gaines-Holladay's email to Medeiros was itself protected Union activity even if it otherwise violated Respondent's rules or policies. Tr. 327.

Respondent's case against Gaines-Holladay is also heavily dependent upon the credibility of two of its most unreliable witnesses, BM Jon Berglund[29] and investigator Tito Medeiros.

[29] At the time of his testimony, Berglund was the Folsom BM.

Respondent's exceptions rely on testimony from Berglund and Medeiros that the ALJ explicitly discredited based on a record replete with examples of their lack of credibility. Notably, Berglund perjured himself when a tape recording reflected him saying something he had only moments earlier denied saying on the stand. Tr. 3499, 3565-66, 3569-75.

The ALJ properly inferred animus towards Gaines-Holladay based on disparate treatment. ALJD p. 13.[30] Respondent now seeks to differentiate between the supposedly "innocuous" information that GC's comparator employees disclosed and the "serious" information that Gaines-Holladay disclosed solely to her Union representative. Putting aside the problem posed by Respondent effectively asserting unfettered discretion to determine (and keep secret from agents) which types of disclosures of confidential information are innocuous and which warrant termination, the key point to be derived from the comparators, as the ALJ correctly found, is that there is simply no evidence of any sales agent ever being discharged for disclosing confidential information prior to the Union campaign or prior to Gaines-Holladay. ALJD p. 15.

Respondent also faults the ALJ for allegedly not considering the "willful" violation of Respondent policy by Gaines-Holladay. REB p. 20. Far from being willful, Gaines-Holladay believed she was engaging in protected activity when she merely supplemented the information from her investigatory interview solely to the persons who had *been in attendance* at the investigatory interview. If Gaines-Holladay's conduct was "willful," it is difficult to explain why she was baffled and legitimately had no idea what Respondent meant when it subsequently accused her of disclosing confidential information. Tr. 308-09, 2221.

The ALJ's analysis importantly focused on the language of the standard admonishment letters which Respondent has employees under investigation, including Gaines-Holladay,

[30] See fn. 18 above with respect to Gaines-Holladay comparators Gina Piazza, Joyce Maxion, and Malik Reid.

routinely sign. R. Exh. 88; ALJD p. 10, 13. That language states in pertinent part "it is critical that all components of this investigation remain as confidential as possible. Despite this request, you remain free to consult with an attorney, a doctor, a therapist, a priest, your spouse, or other privileged advisor." The ALJ construed Respondent's invitation in the admonishment letter as strongly suggesting that Respondent's confidentiality rules would not apply to the people described in that letter, and also concluded that Union rep Woods (the undisputed sole outside recipient of the confidential information) constituted a "privileged advisor" within the meaning of the letter. ALJD at 13. The ALJ's sense that Respondent's confidentiality concerns were pretextual rather than genuine is further demonstrated in that Respondent did not take any steps to make sure that the confidential information was not further disseminated, such as by asking Woods to sign a confidentiality agreement or to delete the relevant email from his computer. Tr. 286, 2198.[31] GC also notes that the "as possible" language in the admonishment letter suggests that Respondent's confidentiality rule is not absolute.[32]

Respondent's use of incendiary accusatory terms in describing Gaines-Holladay like "membership fraud", "indefensible and abusive", "leverage in defense of her unlawful acts" and as "weaponizing" confidential personal data (REB p. 22-24) falls flat. The record evidence shows that Gaines-Holladay's use and transmission of the information was defensive, not offensive, as Gaines-Holladay was simply questioning why she was being investigated for having multiple memberships when the practice was common amongst other employees (including managers).[33]

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[31] Given the complete absence of evidence that Woods used or disseminated the information received from Gaines-Holladay in any way, Respondent's hyperbolic claims about Gaines-Holladay's conduct facilitating "cybercriminals" committing a "multitude of crimes" should be disregarded. REB p. 23.

[32] The David and Goliath nature of the investigation tactics is reflected in the testimony of Medeiros that he would view it as a violation of Respondent's confidentiality policies if an shared the information with their own personal attorney. Tr. 4773, 4830.

[33] In a vivid illustration of the depths to which Respondent would sink in order to target Gaines-Holladay, Medeiros' answers on cross examination demonstrate that he did not care whether the associate memberships he was asking

The evidence fully supports Gaines-Holladay's testimony that by submitting the additional information to Medeiros, Gaines-Holladay did not intend to commence an ethics hotline complaint or to have any of the persons she named investigated. GC Exh. 9; Tr. 303-305. Gaines-Holladay was legitimately perplexed. The sudden strict enforcement of membership policies that Respondent previously showed no interest in is a subject of potentially great concern to employees. Respondent's reliance on *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011) is also misplaced. REB p. 22. Unlike Gaines-Holladay who merely included her Union *Weingarten* representative in an email, the relevant discriminatee in *Plaza Auto Center* in a raised voice berated his boss, calling him a "fucking mother fucking," a "fucking crook," an "asshole", "stupid" and said that nobody liked him and everyone talked about him behind his back. 664 F.3d at 290-91. This employee also pushed his chair aside and told the boss that if he fired him, the employer would regret it. Id. Such profanities and physical threats are a far cry from Gaines-Holladay's modest defensive conduct here.

H. The ALJ Correctly Concluded that Respondent Violated 8(a)(3) and 8(a)(1) of the Act in Terminating Pinole Agent Jason Ortiz (Respondent's Exception 8).

The ALJ correctly determined that Respondent's termination of Pinole sales agent Jason Ortiz violated 8(a)(3) of the Act. ALJD p. 19-20. The record fully supports the ALJ's finding that Respondent did not begin seriously enforcing its anti-phishing policies until after the onset of the Union campaign. As the ALJ noted, the fact that O'Crowley felt compelled to send out an email to all sales agents on August 6, 2021 forbidding them from phishing is exactly because Respondent knew that it had not been enforcing its phishing policies dating back to at least 2014, such that phishing was widespread. GC Exh. 36, 73, 315. Indeed, Respondent investigator Medeiros'

Gaines-Holladay about predated Gaines-Holladay's employment with Respondent. Tr. 4839-41, 4843. The notes taken of the investigatory interview by Berglund reflect that Medeiros asked Gaines-Holladay about the membership status of Gaines-Holladay's sister (Selena Leon) who began living with Gaines-Holladay in 2010, five years before Gaines-Holladay's employment with Respondent even began. GC Exh. 303; Tr. 3514-15.

November 2014 phishing report noted that some managers had not only freely allowed phishing but had taught sales agents how to phish. GC Exh. 315 p. 4. Further, even known anti-Union Newark sales agent Samuel Yoo testified under subpoena from the GC that he was not aware of any Respondent prohibition on phishing before his investigatory interview. Tr. 1635. Thus, any contention by Respondent that employees were aware of a consistently enforced policy against phishing is flatly wrong, and the ALJ was correct to conclude otherwise.

Respondent's description of its anti-phishing policy as a "zero tolerance" rule is absurd. REB p. 30. When phishing was engaged in by known anti-Union employees such as Fresno agent Patty Rocha, Respondent declined to even interview investigate the ethics hotline complaint against her, let alone discipline her. Tr. 1356, 2534, 2549, 4965; GC Exh. 320. Respondent instead took the word of Rocha's BM Whitley Robertson that any claim of phishing by Rocha could be attributed to pro-Union employees who disliked Rocha. While Respondent steadfastly claims that it does not consider employee Union sentiments when conducting disciplinary investigations, Respondent's contrasting treatment of Ortiz and Rocha screams otherwise. Further vitiating any assertion of "zero tolerance" are the numerous employees who received lesser forms of punishment than termination for their phishing. GC Exh. 275[34] GC Exh. 265, 237, 273-74. Pinole BM Paul Mulig was not credible in this regard, as he emphatically testified that phishing is always an automatically terminable offense notwithstanding all of the contrary examples noted herein, including one from his own Pinole branch. To the extent that Respondent now seeks to rely on an argument that an unbiased Mulig was the primary decisionmaker as to the termination, GC submits that the February 4, 2022 email[35] from Mulig to HR Director Faas is reflective of prejudgment and

[34] GC Exh. 265, 237, 273-74.

[35] Mulig first alerted Faas regarding alleged timecard fraud by Berkeley agent Lewis. In this email, he immediately recommended Lewis' termination and did not even request an investigation.

generalized animus towards unit members that Mulig also brought to bear on the Ortiz situation. REB p. 31; R. Exh. 58, Tr. 4428-29, 5655.

The ALJ's conclusion that Respondent unlawfully terminated Ortiz was also strongly supported by Respondent's disparate treatment of Ortiz in comparison to Samuel Yoo. The evidence does not support Respondent's argument that the circumstances of Yoo and Ortiz were materially different or that Yoo displayed "acceptance of responsibility" while Ortiz did not. REB p. 32. Indeed, as discussed below, the ways that their circumstances differed favor Ortiz, not Yoo. As to similarities, Yoo phished right up to the moment of his investigatory interview, just as Ortiz did up to the moment that he read O'Crowley's August 6, 2021 email regarding phishing. Both Yoo and Ortiz admitted to having phished during their investigatory interviews. Tr. 1635-36; 1155. As to differences, Ortiz was an outspoken Union supporter who frequently discussed union issues with coworkers in the presence Respondent managers and agents. Tr. 2849, 1136-37, 5686, 1137-40. Ortiz also asserted and utilized his *Weingarten* right. Tr. 1145. In contrast, there is no evidence that Yoo was ever a Union supporter or ever informed any managers he was a Union supporter. Tr. 1642-44, 1684-85, 2506, 2964. Yoo did not invoke his *Weingarten* right. Tr. 1633, 5383.

Another difference is that Ortiz confined his phishing solely to the zip codes that his own branch served, genuinely believing that he could provide better service to these local customers than they could obtain from sales agents at Respondent's out of state call centers, whereas Yoo admitted that he phished for leads for customers who were closer to other branches than to Yoo's Newark branch. Tr. 1635-1636. Finally, Respondent continues to seek to differentiate between Ortiz and Yoo on the basis of contrition or "acceptance of responsibility". REB p. 32. While Ortiz admittedly made one flippant remark during his investigatory interview (Tr. 4326, 5407-5408), which Faas testified was a reason why Ortiz was punished more harshly than Yoo, the record

reflects that Ortiz was contrite and in fact begged for his job during the investigatory interview. GC Exh. 72; Tr. 5385-86. In contrast, investigator David Craig's June 17, 2021 report about the Yoo investigatory interview asserted that Yoo was not fully cooperative during the interview, Yoo left the interview room twice without authorization, and omitted key information. GC Exh. 220; Tr. 4432-33, 4900-02. During the investigatory interview, Yoo refused to provide Craig with a name "even if it means I lose my job." Tr. 4900, 5382; GC Exh. 220. Notwithstanding Yoo's defiance he merely received a DAF and lost one month's bonus while Ortiz's contrition and promise to never phish again got him fired. Tr. 4900, 5382; GC Exh. 220.

While the ALJ referenced but did not expressly rely upon the issue of alleged phishing by call center agents (ALJD at 19), the evidence adduced by GC as to this issue further supports the ALJ's conclusion that Ortiz's termination was unlawful and puts the lie to Respondent's assertion that it genuinely cares about and enforces phishing policies. In February 2022, Yoo and Newark coworker Elsa Canal discovered a recurring phenomenon in which the same phone number kept showing up for multiple different customers, which phone number turned out to be for one of Respondent's out of state call centers. Tr. 1650-51, 1688-89. Yoo and Canal suspected that some call center agent or agents were intentionally inputting the call center phone number rather than the customer phone number into the system, so that California agents would not have the correct contact information needed to reach California-based customers, thereby indefinitely expanding the period in which call center agents have "first dibs" on a lead far beyond the intended first five days from the initial customer contact. Tr. 1653-54, 2914-15. It thus appeared that call center agents were stealing leads and customers from California agents for an indefinite time period, i.e., as long as the incorrect phone number remains in Respondent's systems.

Canal informed Woods, and Woods asked Respondent to investigate. Tr. 1689, 1707; GC Exh. 218(a). Rather than conduct a meaningful investigation, and rather than alert out of state call center managers of the possibility of such mischief, Respondent, by Williams, instead kept insisting that the Union provide more information so Respondent could investigate.[36] While Investigator Craig testified that he investigated the out of state call center agents, there is no indication that Respondent ever disciplined or meaningfully investigated any such agents or that Respondent ever asked any of the supervisors or managers of call center agents to conduct any investigation. Tr. 1709; 5394-95.[37] [38] Respondent did not introduce any documents from Craig's investigation or ever inform Woods of any of the results of this investigation. Tr. 2910-13.[39]

As the evidence discussed above establishes, Respondent utterly failed to prove that it had a consistent and uniformly enforced phishing policy prior to the Union campaign. *Hyatt Regency Memphis*, 296 NLRB 259, 262 (1989); *Dynamics Corp.*, 286 NLRB 920 (1987). Given that the GC amply demonstrated the tightening enforcement of phishing policies, Respondent was required to show that enforcement was motivated by considerations unrelated to employees' Union

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[36] Respondent maintained its insistence even after the Union made clear that it believed that having any employee obtain and provide such information to the Union when responding to Williams' inquiry would cause them to be fired for disclosing confidential information like Gaines-Holladay. Tr. 1712-13; GC Exh. 218.

[37] To the extent Craig concluded that the inputting of wrong numbers wasn't intentional, the motivation of the call center agents was irrelevant: inputting incorrect customer phone numbers indefinitely prevented California unit sales agents from contacting such customers regardless of malicious intent on the part of the call center agents.

[38] Respondent advanced the dubious claim at hearing that it had no ability to discipline or investigate call center agents based outside of California. Tr. 1693. This claim is contradicted by Williams' request that the Union provide information so that Respondent could investigate. GC Exh. 218; Tr. 3206, 488-89. Respondent's indifference is distressing since California agents and call center agents compete for the same customers. It is unclear why Respondent was not alarmed that manipulation could have deprived California agents of sales opportunities.

[39] While the ALJ referenced but did not expressly rely upon the disparate treatment of Los Gatos agent Joan Pena in comparison to Ortiz (ALJD at 19), the evidence adduced by GC further supports the ALJ's conclusion that Ortiz's termination was unlawful. Pena made clear that he did not support the Union. Tr. 2570-72. At the investigatory interview of Pena, for allegedly entering inaccurate annual mileage estimates for his customers, Pena was so dishonest and combative at the interview that Woods suggested that he consider looking for another job rather than continuing to defend the conduct which Woods viewed as indefensible. Tr. 2574-78. Despite this stubborn and dishonest lack of contrition, Pena only received a last chance agreement (at Respondent's suggestion) instead of being terminated like Ortiz.

activities. Respondent failed to make such a showing. As the ALJ correctly found, there is no evidence that Respondent fired any employee for phishing before the Union. ALJD p. 19-20.

I. The ALJ Correctly Concluded that Respondent Violated 8(a)(3) and 8(a)(1) of the Act in Terminating Capitola Agent Yasmin Weston (Respondent's Exception 9).

The ALJ correctly found that Respondent violated 8(a)(3) in terminating Yasmin Weston. ALJD at 22.[40] Initially, Weston's Union activity and Respondent's knowledge of it were well established. Weston prominently displayed at her cubicle a pro-Union sign from early 2022 until her termination in September 2022. Tr. 804-05, 2802-03; GC Exh. 42. Weston credibly testified that both BM Chucky De Luna and ABM Lupe Garcia saw and would have seen the pro-Union sign at Weston's desk. Tr. 805-06. The ALJ properly discredited DeLuna's denial that he had seen the pro-Union sign in Weston's cubicle (ALJD p. 20, n. 18). It is incorrect to now assert that the DeLuna's testimony that he was unaware of Weston's Union activities is "undisputed". RBE, p. 35. De Luna conceded that he regularly went around the branch to chat with sales agents and that anyone in the office would have been able to see the pro-Union sign on Weston's desk. Tr. 5155. Weston also regularly wore a Union pin on her jacket or blouse. Tr. 806. Finally, Weston invoked and utilized her *Weingarten* rights. GC Exh. 51. Weston was also vigilant in reporting any potential unilateral changes in working conditions to Woods, which culminated in the filing of ULP charges that Respondent likely knew were instigated by Weston (e.g., 32-CA-294816; Complaint paras. 1(l), 11(n) and 19(d)). Tr. 831-33, 2701-06, 2803; GC Exh.. 43-47.

The termination of Weston should also be considered in the context of Respondent's other hostile treatment of Weston after her Union activities began. After the Capitola PTO charge 32-CA-293816 was filed, BM DeLuna stopped chatting with Weston about non-work-related matters as he had always done before. Tr. 834-35. Respondent IT investigator also investigated Weston in

[40] While the ALJ gave no weight to the unemployment decision in favor of Weston (ALJD at 21, n. 21; Tr. 936; GC Exh. 61), it further supports the ALJ's conclusions and undermines Respondent's *Wright Line* defense.

July 2022 regarding her accessing the Hagerty Insurance website.[41] Tr. 836-837, 1573, 5735; GC Exh. 48-49. There is no evidence that any Capitola employees were ever contacted by any IT investigators about their internet usage, even though Respondent tolerated employees accessing external websites. Tr. 1571-72, 848-49, 5172. Subjecting Weston to such unique treatment further demonstrates Respondent's animus towards her.

Respondent asserts that it terminated Weston for binding an Aracelli Hernandez insurance policy without having spoken to her. REB, p. 33-34. However, Weston testified that she did speak her, and Respondent admits that it never spoke to Hernandez and did not call Hernandez as a witness at trial. Tr. 859-61, 960; GC Exh. 57. The ALJ correctly concluded, and it is undisputed, that Respondent investigator Medeiros never spoke to Hernandez, Watsonville agent Sarah Morales, or lender Sergio Angeles during his investigation. ALJD p. 21; Tr. 4861. The ALJ correctly credited Weston. While the ALJ correctly found that Respondent had failed to establish whether it was Watsonville BM Veronica Gallo or agent Morales who initiated the ethics hotline complaint against Weston, the important point is that the ethics hotline complaint was not initiated by Hernandez, as the ALJ correctly found. Id. If Hernandez had complaints about Weston or had a preference for working with Morales, Weston immediately canceled Hernandez's policy as requested without issue. Tr. 867.[42] Further, Weston repeatedly tried to speak to Hernandez but she was not returning Weston's calls. Tr. 862. Weston had no reason to doubt the representation by lender Angeles that Hernandez had asked that the insurance policy be sent to Angeles' office rather than directly to Hernandez since she would be present with Angeles' to sign both insurance policies

[41] Respondent offers Haggerty Insurance products relating to insuring classic cars.

[42] Canceling a policy is not an unusual occurrence that would trigger any kind of internal investigation. Tr. 868.

and loan documents. Tr. 862-63.[43] Weston understood Angeles to be acting upon Hernandez's request. Tr. 864-865.[44]

Respondent argues in its exceptions that the Act does not require an employer to prove that it previously discharged another employee for precisely the same misconduct before imposing discipline. REB, p. 36.[45] However, while claiming that the ALJ held it to an inappropriately high standard, Respondent does not point in its exceptions to any examples of any employees being terminated for any of the conduct in which it claims that Weston engaged. Thus, the ALJ correctly found that "there is no evidence that Respondent ever terminated anybody for violating the rules violated by Weston prior to the Union campaign". ALJD p. 22. Respondent's failure, when conjoined with the stricter enforcement of policies that led to the terminations of Gaines-Holladay, Stallone, and Dollosso, demonstrates that the ALJ correctly concluded that Weston's discharge was part and parcel of Respondent's crackdown on the enforcement of its rules after it discovered employees' Union activities. ALJD at 22.

Respondent also piles on by claiming that it concluded that Weston had been dishonest during Respondent's investigation "by falsely claiming that she possessed some evidence proving her innocence" REB at 35. The record does not support this contention. Confident that she had done nothing wrong, Weston informed investigator Medeiros that she would send a copy of an email from Hernandez denying that Hernandez had made a complaint against her, and phone call

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[43] While a hearsay objection was sustained, Tr. 863-64, GC maintains that the testimony was offered as context for the state of mind and future conduct of Weston and is not hearsay. Out of court statements introduced to show the effect on the listener are not hearsay. *LA Svc. v. CBS Bcast'g, Inc.*, 305 F.3d 924, 935 (9th Cir. 2002); *Salem Hospital Corp.*, 363 NLRB 515 n. 1 (2015); *Soft Drink Workers Union Local 812*, 304 NLRB 111 n. 1 (1991).

[44] Situations frequently arise in which agents send policies to persons other than the insured. See Tr. 317-18. Respondent did not point to any situations where employees have been disciplined or terminated for doing so.

[45] Respondent's assertion that it is not reasonable or required to have completely identical situations to point to to justify a discipline is ironic and disingenuous given its simultaneous insistence that GC's disparate treatment examples should not be considered unless they are "similarly situated in all material respects" (REB p. 26).

records between them. Tr. 910. Weston promptly provided the materials to Medeiros. Tr. 912-13; GC Exh. 56-7.[46] She also readily explained the other policies/customers she was asked about during her interview. Tr. 901-07; GC Exh. 55. Weston's forthright responses during her trial testimony and her investigatory interview belie any characterization of her as dishonest. For all these reasons, the ALJ correctly found that the termination of Weston violated 8(a)(3) of the Act.

J. The ALJ Correctly Concluded that Respondent Violated 8(a)(3) and 8(a)(1) of the Act in Terminating San Rafael Agent Patrick Stallone (Respondent's Exception 10).

The ALJ correctly found that Respondent violated 8(a)(3) in terminating San Rafael agent Patrick Stallone. ALJD at 17. The record reflects that Stallone was a stellar employee from 1998 until his termination in February 2022. ALJD p. 15; Tr. 652-53; GC Exh. 28, 29, 31-33, 35. Stallone qualified for the COE trip 10 times during his employment. Tr. 656.[47] Stallone was known for speaking out in meetings with Respondent's anti-Union consultants and regularly brought concerted concerns to BM Karagianes and Executive O'Crowley. Tr. 664-670.

Respondent claims that its "thorough" investigation of Stallone uncovered serious misconduct (REB p. 24) but the alleged thoroughness of its investigation is dubious. Initially, the investigation was arguably tainted by the undisputed fact that manager Trami Pham, present for Stallone's investigatory interview, was texting the very manager who had accused Stallone of misconduct, that being ABM Melissa Albanese-Burgett, throughout the entire interview. ALJD p. 15-16; Tr. 2418-24, 5272.[48] Furthermore, it is undisputed that Respondent never contacted the

[46] The phone number shown on GC Exh. 56 corresponds to the number shown for Hernandez on her July 19, 2022 email to lender Angeles. GC Exh. 52. However, Weston subsequently realized that she had sent Medeiros an incorrect screenshot showing an incorrect number for Hernandez. Tr. 960; GC Exh. 65. Medeiros nevertheless already had the correct number for Hernandez and proof of Weston having spoken to Hernandez in GC Exh. 57; Tr. 961.

[47] Stallone was also the insurance agent for Union rep Tom Woods' father, a fact readily ascertainable in Respondent's systems. Tr. 661, 2402, 5938.

[48] Respondent did not call Albanese-Burgett as a witness even though she presumably remains ABM at San Rafael and even though Respondent's initial investigation into Stallone was premised on crediting Albanese-Burgett's version of what she understood from Pearce that Pearce wanted while discrediting the version from Stallone of what Pearce directly told him that she wanted.

customer (Eileen Pearce) whose experience with Stallone allegedly gave rise to the original ethics hotline complaint (which notably was not filed by Pearce but rather by BM Karagianes who was out of town during the events involving Pearce). Respondent argues that its investigation unearthed that Stallone had written 15 memberships as new memberships when he instead should have reinstated prior memberships; however, the record evidence shows that Stallone was only asked about four situations, not 15, at his investigatory interview, all of which he explained in detail either at the investigatory interview or in a subsequent written supplement that Stallone provided to Respondent's investigator. Tr. 2412-18, 5275; GC Exh. 40.[49]

Stallone at all times maintained he had handled the Pearce situation correctly and in accordance with Pearce's wishes, and there is no evidence from non-witness Pearce to the contrary. Indeed the September 28, 2021 email from BM Karagianes suggested that the matter had been fully resolved, and gave no inkling that she would be initiating an ethics hotline complaint against Stallone the next day. Tr. 704, 4651; GC Exh. 38. While Respondent asserts that the decision to fire Stallone was made by Faas, Karagianes and Vacaville BM Antoinette "AJ" James, all of whom Respondent asserts are unimpeachable, such evidence cannot be trusted. As previously noted, Faas either did not know or could not recall an answer on cross examination **126** times.[50] Karagianes followed this pattern of evasion and false claims of confusion. On direct examination, she readily told counsel exactly what he wanted to hear. See Tr. 4625. On cross, however, Karagianes, despite having worked at three different California branches as well as in Arizona, professed to be unaware

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[49] Stallone at Tr. 697 testified that he and other branch agents typically rely upon the representations made by the customer in front of them and are not aware of any requirement that the consent of every possible associate member is necessary before any changes can be made to membership status.

[50] As to James, there is record evidence of her animus insofar as she sent an email to then Vacaville sales agent Leticia Hanna about how sales agents were not eligible for the COE and would have to request it at the bargaining table and successfully negotiate it back. GC Exh. 83; Tr. 1283-1284. *Arc Bridges I*, 355 NLRB 1222, 1223-1225 (2010) (employer's explanation that a wage increase "had to be negotiated back by the union" properly treated as an admission that the increase was denied to union represented employees because they chose union representation)

of any situations in which any employees approached her or any managers under her for guidance on how to deal with a basic situation in Respondent's Connect Suite system. Given Karagianes' breadth of experience, her denial is not credible and reflects only her insistence on toeing Respondent's party line. Tr. 4660-4661.[51]

The ALJ correctly found that Respondent did not produce sufficient evidence of having terminated other agents for creating new memberships rather than reinstating lapsed memberships. ALJD p. 17. Nor did Respondent produce sufficient evidence to dispel the impression of Respondent's historically lax enforcement of membership rules, as best illustrated by the Executive Summary Findings Report (ESFR) regarding the membership history of Respondent manager Tonya Pierce (GC Exh. 300), a document on which the ALJ appropriately relied. ALJD at p. 10, 12. The gist of GC Exh. 300 is that a high-level manager confirmed that she freely manipulated associate memberships on her primary membership knowing that Respondent either did not enforce or at most haphazardly enforced membership policies, knowing that nothing would come of it. It is only because Gaines-Holladay brought Pierce's membership practices to the attention of investigator Medeiros that Respondent investigated Pierce at all. Tr. 546, 4953-54; GC Exh. 8. During the investigation of Pierce conducted by David Craig, Pierce admitted that "AAA had not traditionally enforced membership eligibility requirement . . . but had focused more on increasing [AAA's] overall membership count by adding associates to anyone who would buy them." GC Exh. 300.[52] The ultimate finding of the investigation determined that Pierce violated

[51] On cross examination, Karagianes confirmed that Respondent's membership policies are found in several different places rather than in one centralized location. Tr. 4659. Such evidence is highly suggestive of Respondent having unfettered discretion to enforce or not enforce membership policies as it pleases.

[52] Respondent's attempt to explain away GC Exh. 300 at REB p. 23, n. 12 is of no merit. GC offers the Tonya Pierce ESFR as evidence of Respondent's historical non-enforcement of membership policies, not as a comparator with Gaines-Holladay on any confidentiality issue.

company policy but "she did so in keeping with what was accepted at the time. . ." *Id*. at 4.[53] Despite Respondent's eagerness to terminate Stallone for his membership practices, the credible evidence suggests that in the pre-Union period Respondent strongly encouraged the sale of memberships without regard to whether such memberships complied with nominal Respondent rules. Tr. 193-96, 3513 (Testimony of Berglund regarding not knowing of a single instance where Respondent refused to accept payment for and process an associate membership because the associate was not a spouse or dependent of the primary); GC Exh.. 32, 224, 242-48, 251. If Respondent had truly enforced its membership policies in a consistent manner and clearly informed its employees of its supposed preference or requirement that old memberships be reinstated rather than new memberships created, then the October 28, 2021 incident involving Albanese-Burgett and agent Angelo Lancelotti would likely never have occurred.[54] With respect to the terminations at issue in this case, not limited to Stallone, Respondent seeks to paint a picture of thoughtful and deliberate group consideration of termination decisions. Putting aside Respondent's failure to even establish who participated in at least two of the key termination decisions ((ALJD p. 8 (Dollosso) and 12 (Gaines-Holladay)), there is a larger problem with Respondent's argument. Critically, over 50 days of trial, none of Respondent's witnesses were able to point to a single instance in which the recipients of an Executive Summary Findings Report (ESFR) at the conclusion of an investigation disagreed with an investigator's finding of misconduct. Tr. 4406, 5381, 5402, 4948. Indeed, none of Respondent's witnesses were able to

[53] Medeiros admitted that Craig had no reason to lie when he summarized Pierce's statements about the "accepted practice" of non-enforcement of membership restrictions prior to the Union campaign. Tr. 4954.

[54] On October 28, 2021, Albanese-Burgett shouted at Lancelotti, the longest tenured agent in the bargaining unit, that he needed to reinstate an old membership rather than write a new membership, no matter how long the membership had been expired or lapsed. Tr. 711-12. Stallone confirmed in his Question & Answer document (GC Exh. 39) that Albanese-Burgett's statement to Lancelotti was the first time that Stallone had heard of any ostensible Respondent preference for reinstating old memberships rather than writing new memberships.

identify a single instance in which the recipients of an ESFR even went back to an investigator to request more investigation or the shoring up of a fact or two. Tr. 4402, 5382, 4948. This deference and reliance suggests Respondent treated its investigators as infallible, a dubious practice at best given the nature of the trial testimony of investigators Medeiros and Craig discussed elsewhere herein. Tr. 5001. Respondent witnesses such as Faas, Craig, and Medeiros were not able to point to a single instance in which Respondent in a direct one to one credibility dispute opted to credit the unit sales agent rather than a BM or ABM—further demonstrating Respondent's bias. Tr. 4408-09, 4945-47; 5378-80; GC Exh. 317-18. In short, biased and shoddy investigations were rubber-stamped by management, thus satisfying a well settled basis for inferring anti-Union animus with respect to all of the terminations in this case.

The comparators to Stallone that the ALJ relied on were appropriate and relevant. ALJD p.16. The termination of Stallone after his written supplement to the investigator that sufficiently explained all the situations which he was confronted about during his investigatory interview simply defies explanation and violates 8(a)(3) of the Act.

K. The ALJ Correctly Concluded that Respondent Violated 8(a)(5) and 8(a)(3) by Making Unilateral Changes to PTO, Counter Duty, and Clocking In Policies in Stockton (Respondent's Exception 11).

Preliminarily, as to all of the unilateral changes pled in this case, whether found meritorious by the ALJ or not, Respondent never once sought to defend itself by claiming that it had provided advance notice of or bargained over the unilateral change at issue. Instead, Respondent has rigidly denied that any changes occurred, no matter how many employees testify to the contrary. On the rare occasions it admits the existence of some small change, it asserts it was only temporary, situational or not material, substantial or significant enough to constitute an 8(a)(5) violation. Respondent could have saved itself considerable trouble by simply notifying and bargaining, but the thought never seems to have crossed its mind.

The ALJ correctly found that the changes which Respondent implemented at its Stockton branch in July 2021 almost immediately after the certification of the Union violated both 8(a)(5) and 8(a)(3) of the Act. ALJD p. 25, 29. The Board should readily dismiss and disregard Respondent exception 11 and affirm the ALJ's conclusions since Respondent makes no argument in support of this exception in its brief, other than a footnote claiming that any Stockton issues are moot given the closure of the Stockton branch. REB p. 10, n.5. From a remedial standpoint, the ALJ is correct that the remedy for the violations with respect to counter duty, the need for approval of PTO in advance, and the consequences of failing to clock in on time is somewhat mooted given the closure of the Stockton branch in July 2022 (Tr. 393; GC Exh. 180; ALJD at 25). However, given the ALJ's correct reliance elsewhere in his decision on the evidence of Respondent's systematic tightening up of previously unenforced rules and policies (ALJD, p. 10, 13, 17, 22, 25, 30), which the conduct of Respondent at Stockton readily demonstrates, the Stockton allegations have importance transcending the limited impact of a mere notice posting.

In any event, even if Respondent's exception is addressed on the merits, it plainly fails. Given the lack of credibility of Berglund, combined with Respondent's failure to call ABM Maria Ramos as a witness, as well as the lack of documentary evidence, the ALJ was correct to discredit him and find the violations as alleged. ALJD p. 25, 29.

L. The ALJ Correctly Concluded that Respondent Violated 8(a)(5) and 8(a)(3) by Making Unilateral Changes to Work from Home and Flextime Practices at its Tracy and Turlock Branches (Respondent's Exception 12).

The ALJ correctly found that Respondent violated 8(a)(5) by making unilateral changes to work from home (WFH) and flextime practices at its Tracy and Turlock branches without notice or bargaining. ALJD p. 25-26. In its exceptions, Respondent's central argument against the ALJ's finding is that "the record clearly shows that the WFH program was temporary, and any employees who did work from home did so as a temporary privilege – not as a right or entitlement. REB, p.

39. The record demonstrates the contrary. First, 36-year Tracy sales agent Daniece Atencio testified that she had regularly worked from home and flexed her time dating back to the beginning of her employment in 2012 (eight years before start of the Covid-19 pandemic) establishes the status quo in this case, and also readily demonstrates that the WFH program at Tracy was neither "temporary" nor dictated by Covid-19 from the outset. Tr. 1447-48, 1452-55, 1463. Respondent even undisputedly provided Atencio with equipment for her to work from home. Tr. 1455-57, 1463. Given that Respondent did not even bother to cross-examine Atencio, the ALJ properly credited her and discredited the self-serving contrary testimony from Tracy BM Jane Drymon that there was no WFH before Covid-19 other than when sales agents were at car dealerships. Tr. 3944-45, 3948.

When Atencio and the other Tracy and Turlock branch employees returned to the branches from Covid-19 on a full-time basis in September 2020, Respondent had them review a written WFH agreement. Tr. 1464, 1466; GC Exh. 87. Crucially, this WFH agreement made no reference to Covid-19 and did not state that it was or was intended to be only temporary. Tr. 1464, 3994-95; GC Exh. 87. Atencio and the other Tracy and Turlock branch agents then received a supplemental WFH agreement from Respondent on November 9, 2020 which again made no reference to Covid-19 and did not say "temporary". Tr. 1467-68, 3994-95; GC Exh. 88.[55] Pursuant to GC Exh. 87-88, Atencio worked at home on a regular basis until mid-July 2021. Tr. 1469.

However, on July 20, 2021, less than a month after the Union was certified, Respondent through Drymon sent an email to all Tracy and Turlock sales agents informing them that

[55] In addition to the absence of the word "temporary" from GC Exh.. 87 and 88, the ALJ was correct not to rely on R. Exh. 37. REB p. 39-40; Tr. 3986. This document and its one spare reference to WFH being temporary is of little to no evidentiary value given that the witness through whom it was proffered could not testify to when it was issued, where it could be found, whether it was part of the Mountain West Group handbook, or, most importantly, whether it reflects the policy allegedly in place before the Union's certification or after the Union's certification. Tr. 3983-3986.

respondent was "pausing" the WFH policy because Respondent was of the view that agents were not making enough outbound sales calls while working from home. Tr. 1471, 2685-86; GC Exh. 89. Drymon's email again made no mention of Covid-19 and indeed described the ability to make more outbound calls from home as "the whole point" behind the WFH policy. GC Exh. 89. Drymon's email did not say for how long WFH would be paused, but it effectively ended WFH for all Tracy and Turlock agents as WFH has never been restored.

Even if one assumes contrary to the evidence that WFH was only established as a Covid 19-driven temporary measure, the 8(a)(5) violation is still established. Although not cited by the ALJ, *Los Robles Reg'l Med. Ctr.*, 372 NLRB No. 120, slip op. at 1, 11, 16-18 (2023) and *Metro Man IV, LLC*, 372 NLRB No. 37 (2022) (violation for unilaterally rescinding $2 pay raise implemented because of COVID even though economic exigencies excused pre-implementation bargaining) both make clear that an employer has a duty to bargain about the elimination of programs that it implemented as a result of Covid-19 on what it claims was a temporary basis. In *Los Robles*, the Board found that the employer violated 8(a)(5) both when it unilaterally implemented a special Covid-19 pay policy without bargaining and when it unilaterally rescinded it. 372 NLRB at 1, n. 2. The pay program, like WFH in the instant case, is an employee benefit and thus a mandatory subject of bargaining. Even though the union in that case understood that the Covid-19 pay program was temporary, that did not diminish or eliminate the employer's bargaining obligation. 372 NLRB No. 120, slip op. at 12. Lest Respondent argue that cases like *Los Robles* and GC's position in the instant case put employers in a frustrating "damned if you do, damned if you don't" situation, the easy answer and way out is to simply notify and bargain with the Union before making or rescinding the change. Respondent's argument that the record did not support a "definite, branch-wide precertification policy granting Tracy and Turlock employees a

continuing right to work from home" (REB p. 39) fails. The evidence from Atencio, as not even cross-examined by Respondent and not even addressed by Drymon, was sufficient. See *Starbucks*, 19-CA-303717 (ALJD July 23, 2024) (citing *Verizon NY, Inc.*, 360 F.3d 206, 210 (D.C. Cir. 2003) (that few if any employees used Covid-19 benefits in the three months before they were unilaterally terminated is of little consequence in determining whether a violation occurred. Employees may be entitled to paid vacations, but they are not always required to take them).

Finally, the ALJ also correctly found that Respondent's elimination of the WFH and flextime policies at Tracy and Turlock violated 8(a)(3) of the Act. The issue is as simple as the ALJ states it. There is no evidence that the problems that purportedly caused Drymon to issue her July 20, 2021 email eliminating WFH (i.e., sales agents not making enough outbound sales calls while working from home) did not exist before the Union's certification, and there is no indication that Drymon took any steps to rectify them until after the certification. ALJD at 26.

M. The ALJ Correctly Found that Respondent Violated Section 8(a)(5) and 8(a)(3) of the Act By Excluding Bargaining Unit Employees from the Circle of Excellence Sales Incentive Program (Respondent Exception 13)

For many years dating back to at least 1999, Respondent maintained a program called the Circle of Excellence (COE) designed to reward Respondent's top salespeople (often the top ten percent) with luxurious, all expenses paid trips, plaques, jewelry, watches and other perks. ALJD 27-29; Tr. 1500-1503, 258-259, 1225-27, 1230, 1402, 4045. Agents would even receive special event pay while on such trips and were permitted to bring another person. Tr. 1225, 1230, 1503. Respondent has estimated the value of the COE trips as approximately $25,000 per attending agent. Tr. 1232. For many years, the COE trip and perks were only available to sales agents rather than to front line employees. Tr. 1229, 1548. In fact, the majority of attendees were California-based sales agents, the same agents who ultimately unionized in this case. Tr. 1507. The COE trip for 2019 productivity to be taken in 2020 and the trip for 2020 productivity to be taken in 2021

were both canceled due to the Covid-19 pandemic. Tr. 1236; GC Exh. 77; ALJD at 27. Eligible agents received money despite the cancellation of the trips. Tr. 1505-06, 1523; GC Exh. 77.

However, after Respondent learned of the organizing campaign, O'Crowley sent an email to all sales agents on February 11, 2021 about how Respondent had been "actively listening" to agents and how Respondent would be reinstating the COE for 2021 with a trip planned for 2022. GC Exh. 76. On February 16, 2021, O'Crowley sent an email only to the California sales agents reiterating that the COE trip was "back", along with a similar email on March 29, 2021. GC Exh. 80, 82. Long time COE members such as L.Hanna and Larsen eagerly understood that they would now be able to go on the 2022 COE trip based on their 2021 sales. Tr. 1277, 1407, 1242.

The Union was certified on June 22, 2021. On August 20, 2021, O'Crowley sent another email to various employees which suggested both that sales agents were no longer eligible for the COE while simultaneously offering the COE trip to non-unit frontline employees (who generally do not sell insurance policies and are not licensed to do so) for the first time. GC Exh. 81; Tr. 1278, 1282, 1507, 4176.[56] It is undisputed that Respondent permitted non-union sales agents from other states such as Nevada, Arizona, and Utah to remain eligible for the COE trip and perks, excluding only the unit. Tr. 1292, 4066. Repeated inquiries by disappointed California agents were routinely met with the response that if sales agents wanted to be eligible for the COE, their union would have to successfully negotiate that at bargaining. Tr. 1283-84, 1287-88, 1508-09, 1589; GC Exh. 83. No California agents have gone on any COE trips since 2019 and none have received any corresponding COE perks since the Union was certified in 2021. Tr. 1292-93, 1403.

[56] Although O'Crowley's email was dated August 20, 2021, there is evidence suggesting that Respondent made its decision to for the first time include front line employees in the COE as early as July 26, 2021, only a little over a month after the certification of the Union. U Exh. 4.

Respondent asserts that the ALJ erred in concluding that the COE and agent eligibility for it were an established past practice, asserting that it was not sufficiently fixed, regular and certain as to timing and criteria. REB p. 45. Respondent also seizes upon the fact that the COE trip did not occur in two years due to Covid-19 as a basis for concluding that the status quo which Respondent was obligated to maintain did not include the COE trip. REB p. 46. Finally, Respondent points to the absence of the COE from sales agents 2021 compensation plans. REB, p. 46. None of these arguments have merit. The absence of the mention of the COE in 2021 compensation plans is insignificant given the abundant witness testimony about the COE and its rewards, and given that the COE was in existence since at least 1999 regardless if it was in the compensation plans for those years. The money paid to employees in lieu of the trips suspended by Covid-19 was not mentioned in any compensation plans either, but that did not make it any less real for the agents who received it. GC Exh. 77. Thus, it is hardly "axiomatic" that COE awards were not part of employees' wages as Respondent contends. REB p. 47.

Respondent, rather than bargain with or even consult the Union about restoring the COE, instead adopted a highly circumscribed and narrow definition of the status quo that isolated a single discrete moment in time which ignores important past practices developed over years or decades prior to the pandemic. Tr. 4067. The status quo to be preserved is not one artificial, isolated moment in time, but rather what would have existed but for a respondent's unfair labor practices. *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1226 (6th Cir. 1993); *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 240 (6th Cir. 1987) (rejecting technical interpretations of the status quo).

In short, the COE was sufficiently fixed, regular and certain as to timing and criteria. It always occurred the year following the year the sales were made, it always included the top percentage of salespeople, it was always all expenses paid to an exotic locale even if the locales

varied from year to year, and its value of up to $25,000 per person is plainly material, substantial and significant. While Respondent faults the ALJ for relying on the duration of the program and that certain employees had gone on many COE trips and valued the program, the ALJ was simply engaged in a common sense analysis that inevitably led to the conclusion that the sales agents had a reasonable expectation that the COE would continue for them. GC does not quibble with Respondent's contention that the *Wendt Corp.*, 372 NLRB No. 135 (2023) standard applies (i.e., a past practice must occur with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis). REB p. 47. However, in applying *Wendt* GC adheres to the view that the record evidence in this case easily demonstrates the "predictability required by law" that Respondent claims the COE lacks. The ALJ's application of *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) and *Wendt* to the instant case was appropriate.[57]

The ALJ also properly found that Respondent's elimination of sales agent eligibility for the COE violated 8(a)(3). In addition to the credible and credited testimony of Pam Felix regarding the statements made by Tracy Taylor when Taylor first met with a group of BMs after the election results, O'Crowley's assertions that Respondent did not take away the COE from sales agents because of their having unionized, made in response to leading questions, are simply not credible. Tr. 4067. Instead, as demonstrated by Creasey, Respondent wanted to punish the sales agents for destroying the status quo by having the audacity to unionize. Respondent told employees that one consequence of unionizing is it is like tearing up a contract and starting from scratch. Further, the

[57] Respondent cites *Shell Oil Co.*, 77 NLRB 1306 (1948) for the proposition that the ALJ relied on a mistaken premise that Respondent was obligated to extend COE eligibility to newly represented employees once it opened up the COE program to non-unit employees. REB p. 47. Respondent's reliance is misplaced. It is not clear from the ALJD that the ALJ's analysis relied in any way on the opening up COE eligibility to front line employees. His analysis could also have depended on the fact that Respondent continued to offer the COE to sales agents working in other states, as it had before the certification of the California unit, rather than the grant of the COE to any new group of employees. The ALJ's conclusions that "Respondent, by excluding unit employees from the COE program in 2021 also violated 8(a)(3) and 8(a)(1)" and "Respondent failed to establish a legitimate objective for discriminating against unit members" make no mention of the front line employees at the California branches.

noted statements made by O'Crowley and AJ James to employees McBride and L.Hanna regarding how the Union would have to successfully bargain the COE back in order for sales agents to ever be eligible again, sufficiently demonstrate Respondent's animus. See *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 6 (2018). Respondent's claim that the instant case does not involve any accrued or vested benefit falls flat, as it is just another way of asserting Respondent's dogmatic position that the COE benefits are not wages derived from the compensation plan, and again disregards reasonable employee expectations that are at the heart of Board law as to 8(a)(5) unilateral changes. Nor should the Board give any credence to Respondent's argument that the COE was a "gift" rather than a settled benefit. REB, p. 47. Rather than gifts, the COE benefits were part of the package of benefits Respondent provided to employees. *Ross Sand Co., Inc.*, 219 NLRB 915, 918n. 6 (1975) (Board has broadly construed Section 8(d) to "include all emoluments of value or other benefits accruing to employees out of their relationship with their employer."). The ALJ correctly found that Respondent discouraged present and future union activity by excluding unit employees from the COE benefit offered to non-unit employees in violation of 8(a)(3) of the Act.

N. The ALJ Correctly Found that Respondent Violated Section 8(a)(5) of the Act By Making Unilateral Changes to the Flexible Hours Policy at the Santa Rosa Farmers Lane Branch (Respondent Exception 14)

The ALJ correctly found the 8(a)(5) violation here. ALJD p. 30. Santa Rosa Farmers Lane branch sales agents Crystal Javier and Lori Ann Acocella testified consistently that prior to the Union, Farmers Lane agents were freely permitted to work from home and to work flexible schedules not requiring them to work the branch hours of 9:00 am to 6:00 pm. Tr. 2015, 2028-29, 1095, 1101-03; GC Exh. 122-123. However, in September 2021, BM Kent Evans convened an emergency meeting at the branch to inform agents they would no longer be permitted to work from home, would not be permitted to flex their time, and would instead have to be at the branch during

business hours. Tr. 2043, 1104-05, 1114. Evans would not put his guidance in writing. Tr. 1106.[58] These were clearly departures from past practice or Evans would not have needed to convene an impromptu meeting to announce them. The changes impacted Farmers Lane agents in significant ways. Tr. 2045-46. It has impacted their working conditions by forcing more tasks into fewer hours. Employees testified without contradiction that the changes have impaired their ability to provide quick and responsive service to their customers, which undoubtedly can affect sales, thus doing a "disservice" to Respondent's customers in being "behind all the time". Tr. 2046, 1120-22. It has also impaired their ability to take care of their children.[59]

Respondent argues in its exceptions that WFH at Farmers Lane never existed and that any provision of it was "always temporary" and Covid-19 driven. REB, p. 40. As with the Tracy and Turlock branches, the temporary Covid-19 rationale is a fallacy and, moreover, under cases like *Los Robles* and *Metro Man IV*, Respondent could not take the WFH benefit away from the Farmers Lane agents even if it was originally granted on a temporary basis due to Covid-19.

Respondent also seeks to downplay Respondent's prior treatment of Javier and Acocella as "occasional situational flexibility" rather than a settled widespread practice at the Farmers Lane branch. REB p. 41. However, Respondent failed to call any branch agents as witnesses to testify that Javier and Acocella were afforded privileges that other Farmers Lane agents were not. Respondent's approach would seemingly require GC to call every sales agent at a branch to testify to the existence of a practice before Respondent would even consider acknowledging it as a practice on which employees could lawfully insist and expect rather than mere "occasional

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[58] Given Respondent's failure to call Evans as a witness, all of the testimony from Javier and Acocella with respect to Evans' statements is uncontradicted.

[59] The Board has found it reasonably foreseeable that a change in hours can even create a hardship sufficient to result in resignation. *NC Prisoner Legal Services*, 351 NLRB 464, 470 10 (2007), citing *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004).

situational flexibility". Respondent's contention that there is no record evidence of Respondent altering its flexible scheduling practices after the Union arrived is patently false.[60] Given the consistent testimony of Javier and Acocella supported by documents, the coached, conclusory and non-firsthand testimony from Tracy Taylor that AAA never permitted Farmers Lane to deviate from established schedules was properly discredited by the ALJ. ALJD p. 26, n. 25.

O. The ALJ Correctly Concluded that Respondent Violated 8(a)(5) of the Act By Making Unilateral Changes to its PTO and Flex Time Policies at the Folsom Branch (Respondent's Exception 15).

The ALJ correctly concluded that Respondent made an unlawful change to the paid time off (PTO) practices at its Folsom branch. ALJD at 30-31. Folsom agents Christine Escamilla and Dolores Hill testified consistently that in the pre-Union period they were permitted to work flexible schedules and did not have to submit their PTO requests with any particular advance notice. Tr. 577-578. So long as counter duty was covered, there was no restriction on the number of employees that could be off on PTO at the same time. Tr. 1747, 577-78.[61] Escamilla, for example, would leave the Folsom branch early on Tuesdays to take her children to religious classes and would finish working at home in the evening, without using PTO so long as she was worked eight hours. Tr. 1748-49; GC Exh. 102. No supervisory approval was required. Tr. 1749-50.

However, on August 30, 2021, ABM Steve Garcia sent an email to all of the Folsom agents informing them that they would have to provide a minimum of two days' notice in order to use PTO, and that only one bargaining unit sales agent and one non-unit front line employee could be off on PTO at the same time. GC Exh. 13, 102; Tr. 581. Similarly, Senior Director of New Agent

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60 Examples include Folsom employee Christine Escamilla (Tr. 1749-50, 1763, 1769; GC Exh. 96, 102), Roseville employee Laura Volz (Tr. 2707-08, 2725, 2976-77; GC Exh.. 186-187); Tracy employee Daniece Atencio (Tr. 1454-57, 1478); and Stockton employee Priscilla Gaines-Holladay (Tr. 104-105, 175).

61 Respondent introduced alleged evidence of a so-called 20% rule (R. Exh. 2) in the form of an August 3, 2018 email from Vice President Member Experience Branch Operations Matt Ondrof. This email allegedly set forth a policy that not more than 20% of the employees of the Folsom branch could be off on PTO at the same time. However, the ALJ correctly found that this memo was not followed in actual practice. Tr. 3929-3930; ALJD p. 31.

Sales Ami Poncabare sent an email to the Folsom agents on September 7, 2021 (GC Exh. 14) in which she announced that going forward only one front line employee and one sales agent could be off on PTO at the same time. Such emails amounted to a unilateral change which, given the need to consult the calendar and make sure that front line employees were not off on PTO on the same date(s) on which a sales agent wanted to use PTO, made it far harder for sales agents to schedule vacations using PTO in Respondent's "use or lose" PTO system. Tr. 585-590; GC Exh. 16, 103-104.

As with the other unilateral changes in this case, there is no dispute that Respondent implemented the change without notice to or bargaining with the Union. Respondent once again sets up an artificial "straw man" standard, arguing that GC was required to show that Folsom agents "set their own schedules" and could "come and go as they pleased" prior to the Union in order for the violation to be established. REB p. 43. GC does not contend that the Folsom branch was this chaotic before the Union, but the evidence supports a key tightening and restricting of the ability to use PTO after the arrival of the Union, and the ALJ properly so found.

P. The ALJ Correctly Concluded that Respondent Violated 8(a)(5) of the Act By Diverting Bargaining Unit Work to Non-Unit Employees at the Folsom Branch (Respondent's Exception 15).

The ALJ correctly concluded that Respondent unlawfully diverted bargaining unit work to non-unit employees at the Folsom branch without notice to or bargaining with the Union based on the uncontradicted testimony of Folsom agents Christine Escamilla and Dolores Hill. ALJD at 32. Dating back to at least 2016, the Folsom branch used a separate email box for sales agents to seek help from front line employees for service requests and other tasks that do not require insurance licenses to perform. Tr. 1789, 593-594, 598, 3534-37; GC Exh. 19. The existence of this email box is consistent with the evidence throughout the record that in the period before the Union, Respondent wanted sales agents to focus on sales work, wanted frontline employees to focus on

non-sales front line work, and that Respondent implemented systems to carry out this philosophy. Tr. 399-401, 985 , 2073-74, 3822. Before the Union, Respondent encouraged sales agents to utilize non-unit employees to assist with administrative tasks such as issuing certificates of insurance, providing initial policy quotes, adding drivers to automobile insurance policies, and answering questions about billing. Tr. 592-596; 1788-94.

However, after the Union prevailed in June 2021, Respondent restricted agents' ability to utilize front line support which consequently limited Unit employees' opportunities to earn sales commissions and meet sales goals, all while Respondent overwhelmed agents with non-revenue generating, non-Unit work that consumed a majority of their workday. Tr. 598, 604, 613-14, 1801-02, 1870-73, 1878-82, 1885-88, 1896; GC Exh. 20, 21, 24-27, 100. Specifically, unit agents were directed to not send requests for front line assistance to the email box. GC Exh. 20, 24-27. On September 30, 2021, Respondent at Folsom also implemented a new policy that a walk-in customer needing or seeking a new primary or associate membership would no longer be directed to speak with Unit employees unless the customer was seeking an insurance quote. Tr. 550-552, 558-567, 570-573, 575-576; 1742, 1775-78, 1781-85; GC Exh. 12. In contrast, Respondent's prior policy heavily prioritized assigning walk-in new business requests to sales agents.

Respondent claimed but did not show that these changes were necessary because Folsom front line employees were already overworked while sales agents sat idle. Respondent again argues that its conduct was not a change but merely a "temporary request". REB p. 44. Temporary status is very much in the eye of the beholder, and employees have no way of knowing a change is only temporary when an employer does not announce the change is temporary when making it. There is no evidence from any employees that these changes ever ceased even if Respondent described them as a "pause" (GC Exh. 27). In any event, as the ALJ properly found, even if the changes were

necessary to reallocate work as between sales agents and front line employees, and even assuming arguendo they were not indefinite in duration, Respondent made no showing as to why it could not have notified the Union and given it an opportunity to bargain about the changes. ALJD at 32.

Q. The ALJ Correctly Concluded that Respondent Violated 8(a)(5) of the Act By Making Unilateral Changes to its PTO Policies at the Capitola Branch (Respondent's Exception 16).

The ALJ correctly concluded that Respondent made an unlawful change to the paid time off (PTO) practices at its Capitola branch. ALJD at 32. While Respondent's exceptions seek to characterize the finding as dependent upon "isolated former employee testimony," it is unsurprising that the primary witness to testify on the subject was former sales agent Yasmin Weston given that Capitola is a very small branch with few agents at least one of whom (Ken Everett) testified he rarely used PTO. That Weston may have been the primary employee affected by the adverse change does not render it "isolated" per se. See *Carpenters Local 1031,* 321 NLRB 30 (1996); *Ivy Steel & Wire*, 346 NLRB 404 (2006); *Caterpillar, Inc.*, 355 NLRB 521 (2010) (change affecting only one unit employee does not render it inconsequential or insubstantial).

The historical practice at Capitola before April 2022 was that an agent could contact BM Chucky DeLuna or ABM Lupe Garcia to request PTO use, often with little notice. Tr. 807, 1567-68. While Respondent introduced a memo (R. Exh. 91) purporting to show that a week's advance notice was required for PTO use, Weston, supported by documentary evidence, testified that the reality was that PTO was permitted as long as counter duty was covered, even with less than a week or even less than two days advance notice. Tr. 822-825, 1567-68, 5178-80; GC Exh. 45, 46. Given this clear documentary evidence, the ALJ correctly credited Weston and her Capitola coworker Ken Everett with respect to the past practice of obtaining consent to use PTO. Tr. 1566-70; 829-830. Because GC Exh.. 45 and 46 readily contradict DeLuna, as the ALJ appropriately

found, the April 2022 unilateral change requiring two weeks notice to use PTO or else would be charged for unpaid PTO (UPTO) constituted a unilateral change without notice or bargaining.

If the change was accompanied by a threat of discipline for excessive use of UPTO, the Board will find a violation without regard to whether the change is otherwise material, substantial or significant. *King Soopers, Inc.*, 340 NLRB 628 (2003); *USPS*, 341 NLRB at 687. While it is undisputed that accrual of an excessive amount of UPTO can cause an employee to be subject to discipline, multiple Respondent supervisors were asked exactly how much UPTO over how long a time period can or will subject an employee to discipline, but most did not know or were unable to provide a clear answer. Tr. 590, 1770, 3802, 3829, 5170, 3906, 3925. Given this lack of clarity and certainty from supervisors, unit employees were also uncertain as to how much use of UPTO could subject them to discipline. Tr. 829, 1770, 989-991. This real threat of discipline coupled with prohibitions on the ability to use PTO to deal with unforeseen emergencies make it an insult to unit employees for Respondent to now characterize this allegation as mere dissatisfaction when "management became less accommodating." REB, p. 48. While Respondent is free to characterize Weston as a "disgruntled" employee, the testimony of Weston and Everett as supported by authenticated documents says far more about the "actual practices" at Capitola than do the coached denials and evasions of DeLuna.

IV. CONCLUSION

For the reasons stated, the Board should deny all of Respondent's exceptions to the ALJD.

DATED AT Oakland, California, this 15th day of July, 2026.

Respectfully submitted,

/s/ *D. Criss Parker*

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D. Criss Parker
Amanda Brunt
Counsel for the General Counsel