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

GOTHAM NYC MANAGEMENT LLC d/b/a GOTHAM

and

ROBERT ANTHONY GRIFFITHS JR., AN INDIVIDUAL

Case Nos.
29-CA-362395
29-CA-363762
29-CA-365607
29-CA-367094
29-CA-374041

and

RETAIL WHOLESALE AND DEPARTMENT STORE UNION, UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 338

GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE[1]

This case concerns the duplicitous and illegal actions of Gotham NYC Management LLC, d/b/a Gotham ("Respondent"), which wanted the valuable benefit of a retail license to sell cannabis in the State of New York while avoiding the concomitant obligation to remain neutral in the face of its workers' union activities. When employees at the Gotham retail cannabis dispensary in Williamsburg, Brooklyn initiated a campaign in 2025 to organize with Retail, Wholesale and Department Store Union, United Food and Commercial Workers Union, Local 338 ("Union"), Respondent, under CEO Joanne Wilson's direction, reacted with a countervailing, relentless campaign of threats, coercion and retaliation, including the termination of five employees that were key Union supporters, in violation of the National Labor Relations Act ("Act").

To acquire a license to sell retail cannabis products in New York, Respondent disingenuously entered a labor peace agreement with the Union, promising neutrality in response to employee organizing and voluntary recognition of the Union upon a showing of majority support among employees, even though Respondent staunchly opposed the Union and had no intention to remain neutral in the face of employee unionization. Its CEO Joanne Wilson – in both online statements and direct comments to employees – repeatedly expressed her contempt for the Union and the very idea that employees might benefit from union representation.

One of the employees leading the Union organizing drive, Robert Griffiths, actively promoted the Union and exposed Gotham's anti-union stance on social media, which Respondent found "threatening." Company executives Kenny Anderson, Daniel Bortner and Marta Maciejewski tried to silence Griffiths' pro-union voice online by pulling him off the shop floor,

[1] All factual citations are from the official hearing record. Citations to the Transcript will appear as "Tr. ___," denoting the particular the page(s) cited in the Transcript. Citations to exhibits in the record will be denoted as "GC ___" for General Counsel exhibits, "R ___" for Respondent exhibits, "J ___" for joint exhibits, or "ALJ ___" for exhibits introduced by the administrative law judge.

out of the store and into a separate building where they questioned whether he still liked his job and asked him to explain his social media posts. When Griffiths refused to back down and continued making pro-union posts online, Respondent fired him on March 17, 2025.[2]

However, Respondent's attempt to nip the Union campaign in the bud by summarily firing Griffiths backfired, as the remaining pro-Union employees, led by Henry Gold, Toni Del Sorbo, Trevor Burt and Charles Palmer redoubled their efforts to unionize the Gotham Williamsburg store after Griffiths was terminated. Gotham, in turn, increased its retributive response. In about mid-April, Store Manager Nadine Rosario invited employee Gold to an afterwork meeting at a local restaurant, where she warned Gold that employees would suffer reduced wages if they unionized. On April 22, CEO Wilson convened a store-wide captive audience meeting during which she threatened to reduce employees' benefits if they supported the Union. Immediately following the meeting, Wilson interrogated employee Gold about his Union sentiments, directed him to get coworkers to vote against the Union in an upcoming representation election, and threatened adverse consequences if the store went Union. Store Manager Rosario on April 22 likewise interrogated employee Del Sorbo about the Union campaign and again threatened employees with reduced wages, and Store Manager Javon Ashmeade also interrogated employee Burt about his Union sentiments. By the end of the day on April 22, there was little doubt that Respondent knew that Gold, Del Sorbo and Burt strongly supported the Union.

Gotham then purged the workplace of the lead union supporters, firing Gold, Del Sorbo and Burt on April 30, each on dubious grounds. Respondent discharged Gold based on a customer complaint, which Respondent failed to investigate in any meaningful manner. Respondent terminated Del Sorbo when a coworker accused her of "bullying" based on her pro-Union

[2] All dates are in Calendar Year 2025, unless otherwise stated.

advocacy, which Respondent again failed to meaningfully investigate. Respondent laid off Burt citing low sales performance, while inexplicably excusing other lower performing employees.

In May, while Respondent continued threatening employees to dissuade them from joining the Union in advance of a representation election, Respondent targeted yet another known Union supporter, employee Charles Palmer, based on his protected activity. Respondent issued a final warning against Palmer on May 25 because he spoke about Respondent's workplace investigation of him with coworkers. When issuing the discipline, General Manager Brian Cherchiglia chillingly warned Palmer that Gotham was watching employees closely to find things for which the company could punish them. On June 2, Respondent discharged Palmer because he continued to engage in the protected concerted activity of discussing the company's treatment of him with coworkers.

Despite Respondent's ruthless retaliation and staunch anti-union animus, employees voted overwhelmingly in favor of Union representation in a June 11 election. However, for months thereafter, Respondent refused to accept the results of the election. CEO Wilson ranted online about how unions were ruining the cannabis industry, and when the Union asked to meet with Respondent to bargain a contract for the newly-certified bargaining unit, Respondent declined to agree to a meeting until ***over six months*** after the Union's request. Meanwhile, Respondent failed and refused to provide relevant information requested by the Union.

By these actions, Respondent repeatedly violated Sections 8(a)(1), (3) and (5) of the Act, as alleged by the General Counsel in this case. To remedy these unfair labor practices, each of the discharged employees must be made whole and offered reinstatement to their former positions, Respondent must be compelled to bargain with and furnish information to the Union, the Union's certification period should be extended, and broad dissemination of a remedial order is required to reassure employees that their rights under the Act, which have been so thoroughly trampled upon in this case, will be protected by the Board and respected by Respondent.

The case comes before the Board upon an Amended Consolidated Complaint ("Complaint") and Notice of Hearing issued by the Regional Director for Region 29 of the Board, based on various unfair labor practice charges, or amended charges, filed by the Union and Charging Party Griffiths, which were served upon Respondent within six months of date of the violations asserted in the charges. GC 1(a)-(r). The Complaint, as subsequently amended at trial,[3] alleges that Respondent committed numerous violations of Section 8(a)(1) of the Act, including maintaining overly broad work rules that restrict employees' Section 7 rights under the Act, threatening employees with the loss of wages and benefits, as well as other threats of reprisals, interrogating employees about their Union sentiments and activities, and creating the impression the employees' union activities were under surveillance. GC 1(v), GC 85. The Complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Griffiths, Gold, Del Sorbo, Burt and Palmer because they engaged in union activities and/or protected concerted activities, and that Respondent violated Section 8(a)(5) of the Act by unreasonably delaying meeting with the Union to negotiate a collective-bargaining contract and by failing and refusing to timely provide relevant information requested by the Union. Respondent filed an Answer in which it has denied that it violated the Act in any way and that the relief sought in the Complaint is appropriate. GC 1(cc).

The case was tried before Administrative Law Judge Michael Silverstein ("ALJ") during an administrative hearing which began on April 14, 2026, and concluded on June 9, 2026, after eleven days of hearing. Based on the record evidence described herein and the weight of Board law, the ALJ should find that Respondent violated the Act as asserted in the Complaint and recommend that the Board order appropriate remedies to address Respondent's multiple violations.

[3] During the hearing, the ALJ granted the General Counsel's motion to amend the Complaint to conform it with the evidence presented at trial and add in several more unfair labor practice allegations. ALJ 2, GC 85.

II. FACTS

A. Respondent's Operations

Gotham operates a chain of retail cannabis dispensaries located in New York City and Hudson, New York. GC 1(cc), Tr. 85-89. The company sells cannabis products derived from cannabis grown in the State of New York in accordance with New York law, in addition to non-cannabis "lifestyle" products such as Bongs, pipes, rolling papers, t-shirts and candles. Tr. 135-36, 139, 142.

Gotham operates three stores in New York City and one in Hudson. Respondent's first store in the lower east side area of Manhattan, known as the Bowery store, opened in May 2023. Tr. 87, 2044. Respondent opened its Hudson store in September 2024 and another store in the Williamsburg section of Brooklyn in October 2024. Tr. 85, 88, 1860. Respondent opened a fourth store in the Chelsea neighborhood of Manhattan in June 2025. Tr. 88-89. This case concerns events at the Williamsburg store, although events that occurred at the Bowery store provide background that give context to the events in Williamsburg in question here.

Under New York law, the New York State Cannabis Control Board grants licenses to businesses that allow them to operate legal cannabis retail shops within the state. Tr. 138. Gotham needed to partner with separate entities to gain access to the cannabis retail license. Tr. 79, 81-83. An entity called Hybrid LLC owns the license under which Respondent operates the Williamsburg store. Tr. 78-80. Although Hybrid carries the license, Gotham administers the retail operation in Williamsburg under Hybrid's license, directly employs all store employees and managers, and solely determines labor relations. Tr. 79, 85, 1115-16.

1. Management Structure

Respondent maintains a corporate office located in the West Village area of Manhattan, where company executives who have managerial responsibility over all Gotham stores are based.

Tr. 1139. Joanne Wilson founded the company and is its Chief Executive Officer. Tr. 89-92. A variety of executives work under Wilson, including Chief Operating Officer Kenny Anderson, Chief of Strategy Alexandra O'Daly, Vice President of Retail Daniel Bortner, Human Resources Director Marta Maciejewski, Associate HR Director Danielle Chan, Director of Content Rachel Bell, and Marketing Director Jess Holmes. *Id*.

CEO Wilson is the ultimate decision-maker for Gotham and is an admitted agent of Respondent under Section 2(13) of the Act. Tr. 1292, 1472, 2282; GC 1(cc). Respondent further admits that COO Anderson, VP Bortner, and HR Director Maciejewski are supervisors under Section 2(11) of the Act and agents of Respondent under Section 2(13). Tr. 202-05. Anderson works with Bortner to oversee the profitability of each Gotham store and determine the appropriate staffing levels. Tr. 1858-59, 1892-93. Bortner is responsible for determining which individuals will staff the stores. Tr. 2048-52. Maciejewski administers HR and employee relations functions and makes recommendations regarding employee disciplinary matters. Tr. 1292. Director of Content Rachel Bell manages Gotham's social media activity to help promote and market the company online and monitors content related to Gotham on social media. Tr. 1473-74. The current Director of Marketing Jess Holmes was preceded by Geraldine Hessler, who held that position in 2025 and monitored social media activity on behalf of Gotham at that time. Tr. 90-91, 158.

Underneath the executives based in the West Village corporate office, the company hierarchy has managers who work at the individual store level. Gotham staffs each store with its own general manager (GM), store managers subordinate to the general manager, and a group of "supervisors." Tr. 91-92.

2. <u>Supervisors and Employees at Respondent's Williamsburg Store</u>

    a. *Supervisors and Managers*

From the time the Williamsburg store opened in October 2024 until about February 2025, Joel Logan was the GM of the store, and Respondent admits that Logan was a supervisor and agent of Respondent under the Act during that period. Tr. 95, 206. From the time Logan left the Williamsburg store in February until late April, Gotham had no GM at the store and relied more heavily on the store managers to oversee the facility. Tr. 95, 143, 394, 559-60. Logan was ultimately replaced as Williamsburg GM by Brian Cherchiglia, who started in that position on April 29. Tr. 91-92, 1670. Respondent admits that Cherchiglia is also a supervisor and agent of Respondent under the Act [Tr. 207], and Cherchiglia explained at trial how the GM acts as the in-store embodiment of corporate leadership, testifying that CEO Wilson, "always says the GMs are an extension of [corporate] HQ . . . like we're the store representatives of HQ." Tr. 1674.

Below the GM level, Respondent employs several Store Managers at the Williamsburg facility. During the period in 2025 relevant to this case, Javon Ashmeade and Nadine Rosario were the store managers in Williamsburg who managed customer-facing employees, and both are admitted supervisors within the meaning of Section 2(11) of the Act. Tr. 92-93, 143, 203, 205-06. Rosario resigned from her job with Gotham in about July 2025, while Ashmeade remains employed as Williamsburg Store Manager. Tr. 1673, 1304. Inventory Manager Sudanisis Cruz manages non-customer facing employees in the "back of house" where products are received and stored, and customer orders are processed and packed. Tr. 2216.

Gotham also employed a collection of "supervisors" to help oversee Williamsburg store employees. Tr. 96. During the period relevant to this case, there were about 5 or 6 supervisors at the store. Tr. 144. CEO Wilson could not describe the role of the supervisors and testified that their purpose was "questionable" [Tr. 96], but employees testified that supervisors were there to support sales associates or "budtenders" by addressing problems and facilitating product returns, as well as counting receipts and assigning employees to different positions and/or tasks on the sales floor.

Tr. 144-47, 610. Supervisors were required to manage store operations when no GM or Store Manager was present, a circumstance which occurred regularly, about twice per week for two hours at a time. Tr. 147.

Among the tasks that supervisors would independently assign to employees was working part of his/her shift at either security or the "concierge" desk. Gotham requires customers to show photo identification upon entry to the store and has a security guard at the entrance to check IDs. Tr. 145, 824. While Gotham employed several dedicated security staffers at the Williamsburg store, there were times when there was no dedicated security employee available. Tr. 381-82, 144, 908-10, 2086. In those instances, multiple employees testified that supervisors or store managers assigned sales associates to work security. Tr. 144, 626, 824. After presenting their ID at security, the customer would then proceed to a desk where a "concierge" would greet them, ensure that Gotham had their contact information and tell them about any promotions or special offers the company had at the time. Tr. 147-48, 824. There was no dedicated staffer routinely assigned to work concierge, so supervisors and managers at the store would assign budtenders to work stints at the concierge desk for parts of their shifts. Tr. 624, 148-49. The supervisor or manager "running the floor" would determine when an employee's concierge duty ended. Tr. 624-26.

Supervisors' authority to assign employees to security and concierge duty significantly impacted budtenders' ability to generate sales, which in turn affected their standing in the company and ability to remain employed with Gotham. Budtenders were unable to generate sales while they worked security or concierge because those positions did not involve registering customer orders on Respondent's point-of-sale register system, which Gotham uses to track individual employee sales. Tr. 149-50, 624, 887, 890. Employees preferred not to be assigned security or concierge because it would prevent them from generating sales, which they feared would make it appear to management "like you didn't do anything" during the shift. Tr. 624. In addition, budtenders would

sometimes receive tips from customers, and they would not be able to earn any tip income while working concierge or security, such that the assignment of an employee to those tasks adversely impacted their earnings. Tr. 891-92.

Supervisors also had independent authority to reward employees with free cannabis products for good performance. Tr. 160-61. Employee Griffiths testified that a supervisor may award a budtender with a bag of pre-rolled cannabis cigarettes or "vape" products if the employee was top in sales for the day or the month, or if they sold a unique or difficult-to-sell lifestyle item. *Id*. Employee Burt similarly testified that he observed supervisors give employees pre-rolled cannabis cigarettes as a reward for good behavior or completing trainings. Tr. 831.

Gotham itself internally classified supervisors at the Williamsburg store as part of store "Leadership" – separate from rank-and-file employees and alongside the GM and Store Managers – in its weekly staffing schedules. Tr. 411-12, R 3. Respondent further agreed in a stipulated election agreement in NLRB Case No. 29-RC-364487 that workers classified as "Supervisors" at the Williamsburg should be excluded from the bargaining unit of all non-supervisory employees eligible to vote in the Union election. GC 2(b).

One of the supervisors at the Williamsburg store in 2024 and during the early part of 2025 was Wiley Kimelman. R 3, Tr. 239-40. Kimelman, like other supervisors, assigned employees to work concierge and security duty and rewarded employees with free products. Tr. 147-49, 161, 825.

b. *Rank-and-File Employees*

Most of the workers employed at the Williamsburg store are sales associates, also known as "Cannaseurs" or budtenders. Tr. 95, 141, 2046, R 3, R 4. Gotham employs budtenders on both full-time and part-time bases, with full-timers defined as those regularly working at least 32 hours per week. R 3, Tr. 869-70. Full-time associates received company-sponsored health insurance and 4 weeks paid time off (PTO), whereas part-timers did not get these benefits. Tr. 2061-62.

Budtenders at the Williamsburg store were primarily responsible for selling products to customers, which involved building relationships with customers, listening to their needs, showing customers different products, and advising them on appropriate products they should buy. Tr. 141-42, 436, 459, 800. Budtenders, therefore, were required to know Gotham's products very well so that they could converse with customers about them to drive sales. Tr. 437-38. Additionally, budtenders were responsible for keeping the store tidy and decorated, as well as restocking products. Tr. 459.

GM Logan implemented a rotation system that governed the order in which budtenders would deal with customers as they came into the Williamsburg store as a means of fairly distributing opportunities for associates to generate sales. Tr. 149, 508. Budtenders would form a "queue," and the next employee in the queue would deal with the next customer that came in. *Id*.

In addition to budtenders, Gotham employed inventory and delivery associates, who worked in "the back of the house," out of customers' view. Tr. 94, 1561.

3. Sales Expectations

Gotham emphasized the need for budtenders to constantly generate sales and focused on a variety of metrics to evaluate their success. Tr. 281, 656. Employee Griffiths recalled that GM Logan "drilled" into employees the importance of certain metrics like "Items per cart" or units per transaction (UPT) (i.e., the number of products in each customer order) and "cart size" or average order value (AOV) (i.e., the dollar value of each order). Tr. 281. Employee Del Sorbo likewise testified that Logan told employees to aim for AOV of at least $75 and UPT of 2.5 items per cart. Tr. 282. Employee Palmer similarly recalled that GM Logan emphasized a goal for budtenders to keep their AOV above $75 and that Logan also spoke about achieving overall daily sales of at least $1,000. Tr. 1058-61. Overall sales per hour was not a metric that employees were trained to focus on or told that they would be evaluated on. Tr. 282, 657.

Employees found Respondent's guidance on sales expectations confusing and "convoluted," as the goals were not well defined or explained. Tr. 281, 656. Gotham had no written policies regarding minimum sales expectations. Tr. 659, 806, 1176, 1248, GC 63. It was unclear to employees whether they were being evaluated based on their cannabis sales or their lifestyle product sales, or both. Tr. 281, 385. However, Williamsburg store GM Logan assured employees that they would not be terminated based on their sales numbers. Employee Griffiths testified that Logan held an impromptu meeting at the store in December 2024, and told employees, "I know some of you are scared that your job is dependent on your sales. I just want to tell you that it's not." Tr. 445. Employee Del Sorbo similarly recalled that Logan "said very explicitly to all of us no one was going to be fired based on their sales performance." Tr. 460.

Respondent used a point-of-sale software system called Dutchie, which tracked sales at the store, as well as sales generated by individual employees. Tr. 649. Budtenders were able to monitor their sales in real time, as managers and supervisors would leave a computer at the store with the administrator version of Dutchie open, which displayed various sales statistics, and they would invite employees to check their sales numbers. Tr. 280, 649-50, 801-02. The Dutchie system would show employees' relative sales rankings, and Respondent encouraged managers to use the rankings to foster competitions among employees as a means of boosting sales. GC 38(b).

4. Employee Evaluations and Discipline

Per its Employee Handbook, Gotham required managers in its stores to engage in monthly conversations with employees, called Monthly Touchbases, which were intended to "ensure that every employee receives regular feedback and support," with managers discussing with employees constructive feedback on performance, discussing achievements, and addressing any concerns management may have with their performance. GC 64, 1158. Although the policy required Touchbases on a monthly basis, the feedback sessions were much less frequent in practice. Tr.

538, 1157. At the Williamsburg store, Touchbases were conducted primarily by Store Managers Rosario and Ashmeade. Tr. 537-38. The managers were instructed to make a record of each Monthly Touchbase they had with an employee, and Respondent had a special form they used to document the meetings. Tr. 1158, GC 40.

In Williamsburg, the Touchbase records were stored locally in paper files maintained at the store and not centrally maintained in the corporate HR files. Tr. 1158-59. GM Cherchiglia testified that Rosario had kept meticulously organized, color-coded paper records inside the manager's office at the store, which were in place when Cherchiglia started at the store in April and which Cherchiglia has tried to maintain. Tr. 1814-18. However, inexplicably, Respondent failed to produce any monthly Touchbase records pursuant to the subpoena General Counsel issued to its Custodian of Records. Tr. 1164. HR Director Maciejewski, whom Respondent designated as its Custodian of Records, claimed that she asked Cherchiglia and Williamsburg Store Managers to search their files for records of Monthly Touchbases, but they told her they had none. Tr. 1167.

At Gotham, decisions regarding whether and when to discipline employees were made by the store General Manager, Maciejewski and VP Bortner on a collaborative basis. Tr. 1292. In all disciplinary cases, except for those involving mere time and attendance infractions, Maciejewski was obliged to consult with and get approval from COO Anderson and CEO Wilson before taking action *Id*. Wilson made the final decisions regarding discipline and may overrule Maciejewski's recommendations. Tr. 1292, 1472, 2282.

Respondent's Employee Handbook establishes multiple levels of disciplinary actions the company may take against employees – verbal warning, written warning, final written warning, suspension and termination – which progressively escalate in severity, depending on the nature of the infraction and prior discipline. GC 64. Notably, the policy requires Respondent to provide an employee subject to discipline with "an opportunity to explain their actions and provide any

relevant information during the disciplinary process." Further, the policy requires records of the disciplinary actions Respondent takes to be maintained in the employee's personnel file. *Id*.

Respondent's disciplinary policy included a means for discipline issued against an employee to reduce in severity or effect over time if the employee did not repeat the problematic behavior. Per the Handbook, behavioral or performance related final warnings remain "active" for only 6 months. *Id*. Managers and executives further explained to employees that all disciplinary warnings they might receive would reduce in level of severity every 30 days. Tr. 584-86. Employee Del Sorbo recalled that VP Bortner explained to employees in connection with discussing the Employee Handbook that Gotham's disciplinary "philosophy" was to make discipline less of a punishment, by establishing ways for the employee to redeem herself. That was why, Bortner explained, for every 30 days that a behavior that has already been disciplined didn't happen, that discipline would become lesser in severity and effect. *Id*. Similarly, employee Gold testified that different managers expressed this philosophy and practice to him whereby discipline would "downgrade" or "phase out" over time if the disciplined employee maintained good behavior and performance. Tr. 646. 787. A disciplinary warning issued against a Williamsburg store employee on April 11, 2025, apparently by Store Manager Rosario, confirms this policy of reducing disciplinary warnings after 30 days of good behavior. GC 75. In the "Supervisor Comments" section of the disciplinary form, Rosario noted, "Every 30 days without incident lessens the disciplinary step you are at." *Id*.

5. <u>New York State Law Required Respondent to Maintain a Labor Peace Agreement with a Labor Organization, Which Respondent Opposes</u>

Under the New York State law that established legal cannabis retail operations within the state, cannabis retailers are required to enter a labor peace agreement (LPA) with a bona fide labor

organization. NY CANNBS. §§28-29.[4] Accordingly, the third-party cannabis licensees with whom Gotham partnered to operate its stores entered LPAs with the Union. GC 5, GC 6, Tr. 98, 104. CEO Wilson acknowledged that Gotham effectively entered these LPAs, even though they were signed by Respondent's third-party licensee partners, as she admitted "we had to sign it in order to be issued a license from the state of New York. . . That's the only reason we signed it." Tr. 97. Wilson authorized Hybrid LLC to enter LPA with the Union that applies to the Williamsburg store so that Hybrid could acquire the cannabis retail license and Gotham could operate under that license. Tr. 104.

Under the LPA applicable to the Williamsburg store, Gotham as the employer under the agreement, was required to "take a neutral approach to unionization of employees," meaning that the company "will neither help nor hinder the Union's organizing effort." GC 6. The LPA further required Gotham to permit Union representatives access to the Williamsburg store for the purpose of meeting with employees and distributing Union materials. It also required Respondent to conduct a card count and voluntarily recognize the Union upon a demand for recognition by the Union based on a majority of employees at the store having signed Union authorization cards. *Id*.

Respondent opposes the LPAs it entered with the Union. In 2025, it filed a lawsuit against the State of New York challenging the legality of the provision in New York cannabis law that requires Gotham to enter any LPA. Tr. 104-07.

6. Respondent Maintains an Employee Handbook and Issues Employees Offer Letters that Restrict Their Ability to Discuss Adverse Working Conditions

Respondent's Employee Handbook contains a "Media" policy, which establishes the following work rule applicable to Gotham employees at all locations:

[4] Wilson testified to her erroneous contention that the New York cannabis law requires Gotham to enter an LPA with only RWDSU Local 338. Tr. 97. The language of the statute shows this is false.

> "Employees shall not to (sic) make any statement or criticism, whether openly or anonymously, that is adverse to the interests of, or disparages or impugns the reputation of, the Company, its partners, officers, or employees (including, without limitation, concerning the Company . . . or take any action, whether openly or anonymously, that may reasonably cause the Company, its partners, officers or employees to be held in disrepute by the public or their respective customers or employees. . . The Company will not tolerate any statements about Gotham, its employees, or others that are defamatory, obscene, threatening, or harassing. . . " GC 63, Tr. 1147.

Gotham additionally sent incoming new employees an offer of employment letter that similarly purports to restrict employees' ability to criticize or complain about the company or their working conditions. GC 8, GC 65. Employee Griffiths testified that Associate HR Director Danielle Chan sent Griffiths the offer letter shortly before he started his employment with Respondent and told him that he needed to sign the document as part of the hiring process. Tr. 174-75. In addition to the letter Respondent issued to Griffiths, the record contains virtually identical offer letters issued to employees Del Sorbo, Gold and Palmer. Each of these letters contains a "Mutual Non-Disparagement" provision which requires the following of employees:

> "You agree that you will not, nor will you cause or cooperate with others to publicly criticize, ridicule, disparage or defame the Company or its . . . policies, directors, managers, officers . . . or employees, with or through any written or oral statement or image. . . ." GC 8, GC 65.

B. The Union Tried to Organize Respondent's Bowery Store in 2024 and CEO Wilson Responded by Threatening Employees with "Repercussions"

In 2024, employees at Respondent's Bowery store attempted to organize with the Union. Tr. 115. In connection with that organizing drive, Gotham and the Union sought to administer a card count to verify the Union's claim of majority support. GC 44. To facilitate the card count, a Union attorney on about June 24, 2024, sent Bowery store employees an email asking them to reply with their name and a photocopy of their physical signature. *Id*., Tr. 749. The next day, June 25, 2024, CEO Wilson sent Bowery employees the same email, except that she added the following

statement at the end: "We will support the decisions made by the employees, but do understand there are repercussions to this that I am happy to talk to any of you about." *Id*., Tr. 785-87, 2221.

Wilson admitted that by using the word "repercussions," she was advising employees that there were consequences of their decision to unionize, but she dubiously asserted that the word does "not necessarily" carry a negative connotation. Tr. 116. She explained that her email to Bowery employees was intended to convey her belief that bringing a union into the workplace "changes the entire dynamics" of employees' relationship with management. Tr. 2222. However, she declined to give this explanation to employees [Tr. 2255] and instead left them with the impression that Respondent planned to impose "repercussions" on them if they chose Union representation. The Union ultimately withdrew its demand for recognition at the Bowery store. Tr. 466,

C. Before the Williamsburg Store Opened, General Manager Logan Warned Employees Not to "Come Together"

Before the Williamsburg store opened in October 2024, Respondent had employees whom it hired to staff the new store undergo extensive training conducted at a dance studio in midtown Manhattan. Tr. 239. The training took place from September 16 through October 10, 2024, and involved instruction on various cannabis and lifestyle products and brands. *Id*. At one point towards the end of this training period, GM Logan invited a group of about 12 select employees to a ferry ride and a lunch as a reward for their hard work in training and to convey that he felt this group of employees comprised potentially high performing "All Stars." Tr. 484-85, 607-08.

Employee Del Sorbo was one of the employees Logan selected for this reward. *Id*. Del Sorbo testified that during the ferry ride, Logan spoke with her under the stairs leading up to the top deck of the ferry with no one else present. Tr. 485-86. Logan began by complimenting Del Sorbo and telling her that he saw great potential in her as a salesperson, and he noted that Gotham had decided to make her a full-time employee instead of part-time because of that potential. *Id*.

Then Logan shifted the conversation and cautioned Del Sorbo that employees at the store should not "come together." At first, Del Sorbo did not understand what Logan was talking about, so she gave him a confused look. Del Sorbo recalled that Logan then explained, "I'm not really supposed to say this, but just you guys, you and your friends, you shouldn't come together. It won't go well for you, that thing that people do where they come together." *Id*. Del Sorbo testified that "a light bulb went on" for her at that point, which made her realize that Logan was warning her that unionization or other collective activity by workers at the store would not be welcome by Gotham. *Id*. Del Sorbo was surprised by Logan's comment and "didn't know where it was coming from" because there had been no talk of organizing among employees at that time. *Id*.

a. Vice President Bortner Echoed General Manager Logan's Warning Against Employees Engaging in Concerted Activities in Relation to a Human Resources Investigation

In January 2025, several months after the Williamsburg store opened, employee Griffiths recalled that VP Bortner held a series of meetings with store employees, one of which Griffiths attended, in which Bortner told employees that they were prohibited from discussing a workplace investigation. Tr. 212-14. Griffiths testified that employees learned that GM Logan was involved in an investigation into a "personal issue" another employee had. *Id*. Logan sent all store employees a copy of notes generated by an artificial intelligence program during a meeting between Logan and HR about the employee's situation, apparently in error. Soon after Logan had sent the email, VP Bortner and HR Director Maciejewski came to the store and met with employees in groups of about five at a time. Griffiths testified that during the meeting, Bortner directed employees to delete the email he said Logan had mistakenly sent and warned them that if they discussed the matter, they would be terminated. Bortner assured the group that the employee involved in the investigation was okay and declared that Logan had done nothing wrong, before ending the meeting and directing employees to return to work. *Id*.

D. Respondent Knew Its Williamsburg Store Was Unprofitable and Overstaffed Soon After the Store Opened yet Declined to Lay Off Employees Before There Was Union Activity at the Store

According to COO Anderson, when Respondent opened its Williamsburg store, it anticipated the store would generate massive sales. Tr. 1862-63. Anderson projected Williamsburg to immediately generate more than $15 million in annual revenue. *Id*., R 26. Bortner recalled that CEO Wilson predicted "$18-20 million out the gate." Tr. 2047. But within two months of the store's opening, in December 2024, it was apparent to Respondent that sales numbers were much lower than expected. Tr. 1866, 1884. Moreover, by December 2024, Anderson recognized that labor costs at the Williamsburg store were "extremely high." Tr. 1866-67. Gotham used a metric called personnel percentage – or the ratio between labor costs and revenue – to evaluate whether it was spending appropriately on labor at the Williamsburg store. R 26, Tr. 1878. Anderson explained that the metric "helps give us an idea of if we are too high with our labor count or if we're too low." Tr. 1878. Gotham targeted a personnel percentage of 30%, but it stood at 83% at the Williamsburg store in December 2024, which Anderson found "alarming." R 26, Tr. 1878, 1891-93, 2057-58.

It was thus clear by no later than December 2024 that Gotham needed to dramatically reduce its labor costs at the store. Tr. 1891. Bortner testified that by the end of that month, he recognized that the store was "completely overstaffed." Tr. 2054. As the situation failed to improve in January, Borner understood that staffing levels in Williamsburg were "completely unsustainable." *Id*.

Despite actual labor costs nearly double projections for the ensuing fiscal quarter, Respondent initially tried to lower labor costs at the store by simply reducing employee hours. R 26; Tr. 1893-94, 2055. Bortner directed GM Logan to cut full-time employee hours from 40 to 32 per week and cut part-timers to as low as 8 to 5 hours per week. Tr. 2058-60. However, Anderson

quickly determined that cutting employee hours was insufficient to meet Respondent's labor cost projections. Tr. 1895-96. He testified, "A reduction of hours was minuscule to what we needed to actually accomplish," which he realized by late January or early February. *Id*. He knew then that layoffs were likely necessary. Tr. 1992.

But Respondent declined to implement layoffs immediately, hoping that sales would increase over the summer. Bortner testified that Respondent chose not to "reduce heads" in January because management wanted to "see what the summer months would do" for store sales. Tr. 2082. However, Respondent abruptly short-circuited this plan in April and determined that layoffs were needed at the end of that month – instead of waiting to "see what the summer months would do." *Id*. Bortner explained that Respondent reversed course on its layoff strategy because the weather was "already warming up… and we were not seeing our sales increase." *Id*. But in addition to the weather changing in April, Respondent also knew at that time that Williamsburg store employees were organizing with the Union.

E. Employees at Respondent's Williamsburg Store Began Organizing with the Union in Early 2025

Starting in about February 2025, employees at the Williamsburg store began discussing bringing the Union into the workplace. Tr. 178. Employee Griffiths was familiar with the Union because he had previously worked at another cannabis dispensary that was organized by the Union, and Griffiths had supported that organizing drive. Tr. 176-78. Employee Gold had transferred from Gotham's Bowery store, where he had been actively involved in the 2024 effort to bring the Union into that store. Tr. 663-67. When Gold transferred to Williamsburg, he found that working conditions were worse there than at Bowery and felt that the Union would help improve the situation. Tr. 683-84. When GM Logan, whom Gold understood was extremely anti-union, left the store and transferred to Bowery in February, Gold decided it was the right time to launch an

organizing campaign in Williamsburg. *Id*. He discussed contacting the Union with Griffiths, and they both reached out to their respective contacts at the Union and said that they wanted the Union to organize their store. Tr. 178-80, 685. Gold connected with Union representative Tom Hegeman who had been involved in the 2024 Bowery campaign, and Hegeman asked Gold to set up a meeting between Hegeman and store employees interested in the Union. Tr. 685-87. Gold then organized a "core peer group." *Id*.

Gold and Griffiths, accompanied by coworkers Del Sorbo and Angelina Santiago met with Union representative Hegeman on about March 1 at a restaurant near the Williamsburg store called Martha's Country Bakery. Tr. 180, 405-06, 463-64, 685. During the meeting, the employees discussed their workplace complaints, and Hegeman discussed a plan to unionize the store. Tr. 180-81, 465-66. Hegeman told the employees that the Union preferred to use electronic signatures, as opposed physical authorization cards, because he felt Gotham had frustrated the card count process using physical cards at the Bowery store in 2024. Tr. 466, 686. Hegeman distributed the electronic authorization cards to the employees at the meeting but told them that he wanted to meet with each of their coworkers before they signed the cards. Tr. 181. Hegeman said that he and/or another Union agent would go to a café a short walk from the Gotham Williamsburg store multiple times per week, where they would be available for employees to meet and have their questions about the Union answered. *Id*.

The four employees at the initial meeting with Hegeman then divided up the task of speaking with their coworkers about the Union. Tr. 466, 687. As they engaged coworkers, other employees began assisting the organizing effort. Gold spoke with employee Trevor Burt at the store the day after the initial meeting with Hegeman, and Burt agreed to help spread the word about the Union to inventory workers in the back of the house with whom Burt was familiar. Tr. 689-90. Burt had positive views about unionization based on his prior experience working in unionized

settings – both in cannabis and the hotel industry – and he openly shared those views and experiences with coworkers in support of the Union campaign at Gotham Williamsburg. Tr. 222-24, 409, 690, 809-11. Gold recalled that Burt was "a loud guy" who spoke openly in favor of the Union to employees on the sales floor and in the break room in the back of the store. Tr. 690-91. Burt's pro-union experience and stance was known to Respondent as early as January or February, before the organizing campaign, as GM Logan at that time asked Burt about his union experience while Burt was working at the concierge desk, and Burt replied that he thought having a union made work easier for both employees and managers because everyone's roles were well defined, which Burt found relieved a lot from dealing with employees. Tr. 809-11, 904-06. Logan replied with a verbal "Huh" without say anything further, and the conversation ended there. *Id*.

Gold, Griffiths and Del Sorbo actively engaged other coworkers in support of the Union on the sales floor, in the break room and outside of work via text messages, encouraging coworkers to meet with Hegeman and the Union to sign a card. Tr. 182-83, 462-63, 688, 692. Del Sorbo told employee Charles Palmer about the Union campaign, and he was immediately supportive. Tr. 947. Palmer then joined the organizers' efforts to engage coworkers in favor of the Union, attempting to educate colleagues about the Union and convince them to support the campaign, primarily through conversations with coworkers immediately outside the store during break periods, but also on the shop floor. Tr. 629, 950-52. Several of the organizing employees, including Palmer, Burt, Gold and Griffiths, spoke with store supervisors about their support for the Union campaign. Gold, Griffiths and Burt recalled speaking with supervisor Wiley Kimelman, and Griffiths testified that he even walked a supervisor named Jalen to the café near the store to meet with Union representatives, while Palmer testified that he spoke with a supervisor named Jalal in support of the Union. Tr. 189, 692-93, 703-04, 822-23, 953-56. Palmer, Del Sorbo, Gold, Griffiths and Burt each signed a Union authorization card in about March. Tr. 184, 468, 686, 814, 949.

F. Employee Robert Griffiths Used His Prominent Social Media Platform to Express Support for the Union and Promote Union Organizing

Griffiths was active on social media before he started working for Gotham. Tr. 151-53. He operated an account on Instagram ("IG") called "@Brooklynbudtender" which he started in September 2022. *Id*. When he began working at Gotham, Griffiths used his IG platform to publicize cannabis products sold by Respondent, as well as promotional and training events Gotham hosted. *Id*. Griffiths would "tag" Gotham's own IG account in his posts – meaning that he would incorporate Respondent's IG account name into his posts, which caused Respondent to receive a notification on IG stating that Griffith's account had posted something about Gotham. *Id*. Griffiths IG posts were very popular. *Id*. Based on the statistics he received from the IG platform, Griffiths estimated that each of his posts received between 1,500 to 7,000 views, and he had as many as over 500,000 views per month. *Id*.

Griffiths published images, video and messages on IG via both "posts" and "stories." Tr. 155-56. Whereas a post on IG remains published on the account of the poster indefinitely, a story on IG can be viewed for only 24 hours after it was published. *Id*. While the platform allowed Griffiths (and other creators) to include in posts a written message alongside the image or video he published, complete with "hashtags" – i.e., words following the "#" symbol, which help the IG algorithm recognize the nature of the post and push it out to more people – stories on IG consisted only of the image or video Griffiths created. Tr. 156-57. The IG platform shared with Griffiths a list showing the name associated with each account that had viewed any one of his stories. Tr. 169-70. The app did not allow him to determine which individual accounts had viewed his posts, unless the viewer had "interacted" with the post by liking it, leaving a comment, saving or re-sharing the post. Tr 155.

Griffiths' Instagram activity was well known at Gotham and widely discussed in the workplace. Co-workers, including store supervisors, frequently discussed Griffiths' posts with him because they were interested in the cannabis products he featured. Tr. 157-58, 819, 863-64. Several Gotham officials, including at least four Williamsburg store supervisors, "followed" Griffiths on IG – meaning that they affirmatively chose to have IG send them each of Griffiths' posts through the follower's "feed" when Griffiths posted them. Tr 170-71, 176. GM Logan also monitored Griffiths' IG page. GC 68. Even CEO Wilson followed Griffiths on Instagram, beginning shortly after he started working for Respondent. Tr. 2242-43. IG users who did not follow Griffiths' account could still view his content by simply searching for his username, as none of his account was private. Tr. 176. VP of Creativity Rachel Burks, who monitored Gotham's IG account, and Director of Marketing Geraldine Hessler also frequently viewed Griffiths' IG content, and Hessler sometimes posted positive reactions, including emojis. Tr. 162, 169.

When Griffiths used his IG platform to promote Gotham products and events at the outset of his employment, management was very pleased with his conduct. Director of Marketing Hessler complimented Griffiths for being an "IG Star" and rewarded him for his social media activity by issuing him points via a system called Bonusly, which Gotham used as a way to reward employees for good behavior or performance. Tr. 158-60, 1944-45. Wilson testified that she discussed Griffiths' IG activity with Hessler, and they mutually believed that it would help drive Gotham sales. Tr. 2259-60. Wilson further testified that she thought Griffiths' posts featuring Gotham products and events were "great" and believed that his IG activity would "breed a whole new group of people that will come into the store and customers." Tr. 2247. COO Anderson also testified that he knew about Griffiths posts showing Gotham "in a positive way" long before Griffiths was fired, and Anderson thought it was "cool" and "great." Tr. 1913, 1943.

However, in early 2025, Griffiths began posting pro-union material on his Instagram page, which Respondent did not view so favorably. In January, Griffiths changed his IG profile page or the homepage of the account where users can find the account holder's photo and biographical information, to include a statement in his bio noting that he was "Pro-Union" and a text bubble above his photo stating "unfair labor practices." Tr. 226-28, 231-33, GC 10-11. Then, on about February 13, Griffiths started publishing posts and videos expressly advocating for unionization. Griffiths testified that he was motivated to start posting explicitly in support of unionization after supervisor Wiley Kimelman shared with Griffiths on February 13 that GM Logan, during pre-store opening training at the dance studio in midtown Manhattan, had told supervisors that if store employees were to unionize, then Gotham would fire all of the supervisors. Tr. 237-40. Griffiths was incensed by Kimelman's account of Logan's threat.

The same evening after Kimelman informed Griffiths that Logan had threatened supervisors with termination as the repercussion of employees unionizing, Griffiths made a video of himself talking as he walked on the street. Tr. 240-42. In the video, which Griffiths posted on February 13, he makes the following statement:

> "These dispensaries got it twisted. You got dispensary owners who are telling their upper management to tell middle management that if the hourly paid budtenders decide to unionize, then they're all going to lose their jobs. Good, I hope you fucking do! You know why? Because your position is not fucking necessary. The budtenders do all the work, and the owners make all the money. You're just in the fucking way. **And if you get in the fucking way of me trying to unionize, I will fucking end you!**" GC 12.

Griffiths testified that he posted this video because he had been through a union organizing campaign at his prior workplace during which management made employees feel "uneasy and fearful," and with supervisor Kimelman expressing Gotham's intent to retaliate against staff members because of employee organizing, Griffiths wanted to express that such fear and intimidation tactics by Gotham would not stop Griffiths from trying to unionize. Tr. 242-44. He

testified that by saying "I will fucking end you," he was conveying his sentiment that "I'll do anything that I need to do to complete this task, that no one's going to stand in my way from unionizing." *Id*. Griffiths clarified that he did not intend to threaten violence against anyone, but he candidly acknowledged, "I could see how that post could be threatening." *Id*.

Several days later, on February 18, Griffiths published a story on IG, which displayed a photo of Griffiths' hand holding two cannabis products sold at Gotham with the words "If you try to stop me from unionizing I'll split your skull" imposed onto the lower right-hand side of the photo. GC 13, GC 91, Tr. 246-48, 2342-45, 2357-58. Griffiths testified that, here again, as he had done in his February 13 video, he was attempting to convey the message that "if anyone tries to stop me from unionizing, I will go to the fullest extent of the law to ensure that my freedom and my right isn't inhibited." Tr. 249-50. He denied that he was expressing any intent to bash someone's head or otherwise commit violence and noted that it was unreasonable for an IG user to conclude that he was making a violent threat with this story because almost all other content he posted was "very positive." *Id*., Tr. 418-19.

Coworker Del Sorbo followed Griffiths on IG and saw his February 13 "End You" video and his February 18 "Split Your Skull" story. Tr. 615-17. Del Sorbo testified that she was surprised to see Griffiths making these stridently pro-union postings, which she characterized as "very aggressive." *Id*. Although she felt that the postings could be interpreted as threatening violence, she testified that she was never afraid of Griffiths and never thought that he might become violent in the workplace or towards any coworkers. *Id*., Tr. 622. While Del Sorbo didn't fear Griffiths based on these posts, she worried that his clear public embrace of unionization might jeopardize his job with Gotham, given Respondent's opposition to unionization. Tr. 622-23.

Griffiths made numerous additional IG posts advocating for unionization at Gotham. For example, on March 2, he published a post calling out Respondent for what Griffiths perceived as

the company's failure to honor its labor peace agreement with the Union by showing a screenshot from the NLRB website regarding a representation case concerning the Bowery store, which the NLRB website listed as "Status: Open – Blocked." GC 14, Tr. 253-55. Griffiths captioned the screenshot in his post with the text, "When workers expect a company to follow their Labor Peace Agreement and remain neutral but they block your organizing effort. . ." GC 14. Griffiths explained that with this post, he wanted to show his audience that Gotham workers had previously tried to unionize but were thwarted by opposition from the company. Tr. 254-55.

On March 6, Griffiths posted a video on IG in which he showed a piece of paper bearing the Union's name and "The Unionization Process" at the top, and Griffiths stated, "I don't always unionize my workplace, but when I do, I make sure it fucking happens." GC 15, Tr. 258. In the video, Griffiths then turned the paper to show its backside, and read from the paper, "Say yes to a better life," before he raised his hand and chanted, "Local 338!" *Id*.

On March 11, Griffiths published another post on IG calling attention to the fact that Gotham had retained the same law firm that Starbucks – who committed numerous unfair labor practices found by the Board in response to its employees' organizing efforts – had used to counter unionization at its retail stores. GC 16, Tr. 262-65. The post showed a screenshot from an online news article Griffiths had seen about Starbucks hiring "the anti-union law firm Littler Mendelson" in response to its employees organizing and a second screenshot Griffiths took from the NLRB website showing that an attorney from Littler Mendelson was representing Gotham. *Id*. Griffiths included a caption which stated, "Wow . . . @starbucks uses the same anti-union law firm (Littler Mendelson) as @gotham.ny." Griffiths testified that he felt that he and his co-workers were going through some of the same adversity that Starbucks workers had endured in their unionization efforts, and Griffiths wanted to highlight the similarities. *Id*. Griffiths tagged Gotham in the post

to ensure that the company would receive notification of it. Tr, 265. One viewer of the post commented, "Yikes for Gotham… this doesn't look good." GC 16.

On March 12, Griffiths decided to wear to work at Gotham Williamsburg a distinctive red t-shirt with "RWDSU" written on the front and "LOCAL 338" and "UNION STRONG" displayed in large letters on the back around a Union logo. GC 17, GC 18, Tr. 271. Griffiths took a photo of himself wearing the Union shirt and made an IG post out of it, as a "show of solidarity" and to express that he was not afraid to openly support the Union, despite Gotham's high-powered anti-union attorneys. Tr. 271. Neither Griffiths nor any other Williamsburg store employee had ever worn a Union shirt or any other Union insignia to work at the store before Griffiths did so on March 12. Tr. 273, 471. Del Sorbo recalled that the rest of the workers at the store had been too nervous to make an open display of their Union support inside the store at that point in time. Tr. 471. Griffiths, of course, was not so constrained. He posted the photo of his red Union shirt on IG in the morning on March 12 before he began his shift, and he wore the shirt throughout the shift. Tr. 276. In his post, Griffiths included a caption explaining why Union supporters wear red as a sign of solidarity, and he embedded music in the post so that the song "There Is Power in a Union" by Billy Bragg played as the viewer looked at the post, such that the viewer would hear the lyrics, "Which side are you on" and see the song's name and artist. Tr. 271, GC 17.

When Griffiths wore the red Union shirt inside the Williamsburg store on March 12, coworkers, including the Store Manager, clearly noticed. Griffiths recalled that employee Jared Freschman told Griffiths that he liked the shirt, and Store Manager Ashmeade looked at Griffiths' shirt with a shocked expression, showing "raised eyebrows [and] eyes open wide." Tr. 275. The evidence suggests that Ashmeade immediately notified Respondent executives about Griffiths' Union shirt, as COO Anderson recalled receiving an electronic message from Ashmeade at that time about Griffiths wearing the shirt. Tr. 1999-2001.

G. Respondent Was Immediately Aware of Griffiths' "End You" and "Split Your Skull" Posts Yet Waited Over a Month to Take Any Action to Address the Perceived Threats

GM Logan saw Griffiths' February 13 "End You" video the same day he posted it and notified HR Director Maciejewski. Tr. 1209-15. Maciejewski then emailed a weblink to the video to CEO Wilson, COO Anderson, VP Bortner, Chief of Strategy Alexandra O'Daly, and Logan. *Id*., GC 68. Maciejewski noted in her email that Griffiths had recently requested to transfer to Respondent's soon-to-open Chelsea location and that she didn't think Griffiths was aware that managers had seen his video. *Id*. Wilson was the first to reply to Maciejewski's email, stating "Omg. This is insane. Where is this coming from?" GC 68. Logan responded next saying that Griffiths "has regularly posted very negative and unprofessional things on Instagram and Linkedin regarding the cannabis industry." Logan added that Griffiths "won a payout from his old dispensary for union busting a couple of weeks ago" and speculated that Griffiths "might be emboldened by his victory," but Logan conceded that he was "uncertain what specifically has occurred in the last 24hrs to enrage [Griffiths] to this level." *Id*. Logan shared that Griffiths and other employees disagreed with many decisions Logan made regarding "selling with a KPI mindset" – or Key Performance Indicators focusing on metrics. *Id*., Tr. 1212, 1472. Logan then addressed Griffiths statements regarding unionizing and claimed that Williamsburg managers had "never mentioned anything regarding the union." GC 68. In a nod to Gotham's anti-union position, Logan said that he didn't think the Union "was an impending threat to us" since it had "not been on our radar." *Id*. Logan recommended that Gotham transfer Griffiths to Chelsea "as soon as possible for our safety." *Id*. Wilson replied that Gotham should move anyone who disagreed with Logan's management in term of KPI "out of the company." *Id.*

Maciejewski then chimed in that she thought that Griffiths' video must have been in reference to "his old job" because she believed that Gotham has had "no contact from the Union

at Williamsburg." *Id*. Maciejewski invited Logan, Bortner and Anderson to a meeting the next morning to discuss the matter and asked Wilson whether they should get counsel involved because Griffiths "made comments about the Union." *Id*. Logan responded urging, "I need to know if Robert is referencing me or not." Logan said he didn't want to "be affiliated with staff that speak this way" and shared a screenshot of comments from Griffiths' Instagram page where, in response to a viewer asking him if his video was about Gotham, Griffiths stated "anywhere I work." *Id*.

Maciejewski then took Logan off the email chain because she felt the conversation had "pivoted to something more than just Robert." She discussed concerns she had about Logan misinterpreting situations, making mistakes and saying "unprofessional things." Maciejewski stated that she did not perceive any "clear, blatant act of defiance with concrete examples of inappropriate behavior" by Logan, which would support terminating him, but she concluded "Robert, however ... needs to go! He is a major risk." *Id*. Maciejewski testified that she was "afraid, terrified" by Griffiths video post, and she was worried for her safety because she believed Griffiths was threatening to kill her and/or other Gotham managers. Tr. 1398. Maciejewski also testified that she was concerned about Logan's safety because he was scheduled to continue working alongside Griffiths. Tr. 1465-66.

The Director of HR thus recommended Griffiths be discharged on February 13, and his General Manager requested he be transferred as soon as possible for "safety." Yet Respondent took no immediate action, whatsoever, in response to Griffiths "End You" video. COO Anderson, as of February 13, did not think that Griffiths' video was in reference to Gotham managers and was reluctant to fire Griffiths immediately because Anderson believed Griffiths was still "posting positively" about Gotham and boosting its brand online. Tr. 1915-16, 1950-51. Griffiths was also a top seller among employees at the Williamsburg store at a time when Respondent was desperate to improve sales at the store. Tr. 278-81, 963, 1921-22. So, instead of addressing the safety

concerns raised by Griffiths' statements, Respondent chose to spend weeks conferring with their attorneys, trying to ensure that they were "doing the right thing," as Maciejewski put it, treading carefully because Griffiths "made a union reference." Tr. 1402, 1460, GC 78-79. Accordingly, despite supposedly fearing that Griffiths would physically attack or even kill someone in the workplace, Respondent allowed Griffiths to continue working his regular shifts without any extra security measures and declined to discuss the matter with him for an entire month. Tr. 1586-88, 1998.

Respondent took a wait-and-see approach to Griffiths, and what they came to see was Griffiths escalating his pro-Union Instagram activity and publicly calling out Gotham for opposing unionization at its stores. Maciejewski instructed Associate HR Director Danielle Chan to monitor Griffiths' IG activity and save to his personnel file any posts that were "threatening" to Gotham. Tr. 1512, 1633-34. Chan,[5] in turn, saved numerous posts by Griffiths advocating for the Union. GC 81, Tr. 1513. Maciejewski recalled feeling like Chan, Director of Content Rachel Bell, and other management colleagues were sending her such posts by Griffiths "all the time." Tr. 1633-35. Maciejewski further testified that she frequently discussed Griffiths' IG posts with CEO Wilson after February 13, but that she couldn't recall any specifics of what they discussed. Tr. 1399, 1596-98.

Anderson testified that he became more concerned about Griffiths IG activity "as the different posts began to accumulate" and Griffiths "continued to do more and more and more posting . . . in reference to unions," which crystallized for Anderson the fact that Griffiths was advocating for unionization at Gotham. Tr. 1916. Anderson testified that Respondent's view of Griffiths' posts "did change at that time, and it became very concerning" because "now he's calling out our firm and also speaking to Gotham specifically." *Id*., Tr. 1957. Wilson testified that she concluded that

[5] The evidence shows that Chan is a supervisor of Respondent within the meaning of Section 2(11) of the Act because she independently managed employee recruiting and transfers and made effective recommendations regarding hiring. Tr. 1648-50.

Griffiths "went rogue" in his IG activity because, instead of promoting Gotham products, he was "dismissing us and amplifying the Union," which Wilson found "scary." Tr. 2247-48.

Just as Respondent saw Griffiths' February 13 "End You" post the same day he published it, their increased monitoring of his IG activity after February 13 shows that the company became aware of Griffiths' posts almost instantaneously. Respondent thus was almost certainly aware when Griffiths published the "Split Your Skull" photo story on February 18. Tr. 2342-45, GC 91. Still, Respondent took no action to enhance store security or sequester Griffiths from coworkers.

1. Store Manager Rosario Told Griffiths "We Know Where You Stand" with Respect to the Union

Rather than taking action to address Griffiths' supposed threats, Respondent, by Store Manager Rosario, cryptically suggested to Griffiths that management was watching his union activities. Griffiths testified that in about early March, he was opening the store with coworker Burt, and they were the only employees present with Rosario as the manager on duty. Tr. 191-93, 403-04. Griffiths and Burt were at the concierge desk talking about the Union, and Griffiths recalled that he said something positive about the Union. *Id*. Rosario, who had not been part of the conversation, came over and interjected, telling Griffiths, "We know where you stand with the Union." *Id*. After Rosario made the statement, she walked away from the concierge desk toward the manager's office. *Id*. Neither Griffiths nor Burt said anything in response to Rosario's statement. Tr. 194.

Burt largely corroborated Griffiths' account of this event. Burt recalled having a conversation with Griffiths at the concierge desk about unions when they were alone inside the store preparing for opening, while Rosario was walking around and overhead them. Tr. 815-16, 923. Burt recalled that he was expressing to Griffiths a positive view towards unions, when Rosario interjected to say that unions were not all they are cracked up to be. Tr. 921-22. According

to Burt, Griffiths then said "something showing a little light support" for the Union, to which Rosario replied "Oh, I know where you stand." Tr. 816-17. Burt testified that he felt uncomfortable by Rosario's interjection into the union conversation, so Burt exited the conversation. *Id.*

Respondent did not call Rosario to testify at the hearing, so the testimony of Griffiths and Burt regarding Rosario's statement stands unrebutted.

2. COO Anderson and Executives Bortner and Maciejewski Removed Griffiths from the Shop Floor and Tried to Intimidate Him about His Social Media Activity

On March 11, an employee named Sylvan a/k/a "Zoom" Small emailed GM Logan to call Logan's attention to a social media post by Griffiths, which Small believed might violate Gotham policies. GC 69, Tr. 1217-19. Small noted that the post "includes an image from an NLRB filing along with remarks that could reflect poorly on the company." GC 69. Logan replied to Small, stating that management would handle the matter, and then Logan forwarded Small's email to Maciejewski, Anderson and Director of Operations Cory Cartee, noting that it was "Another post from our favorite Brooklyn budtender!" *Id*. Maciejewski testified that the managers discussed the specific Griffiths post that Small had forwarded to Logan, but Maciejewski could not recall which post it was. However, the record shows that on March 11, Griffiths posted a news article and a screenshot from the NLRB website while calling attention to the fact that Gotham was using the same law firm that Starbucks had used in its campaign opposing unionization at Starbucks stores. GC 16. This post matches Small's description of the post he was referring to management on March 11. Maciejewski testified that Logan expressed to her that he found Griffiths March 11 post "scary," and she agreed. Tr. 1219.

Respondent decided to meet with Griffiths the next day, March 12, to discuss his social media activity. Maciejewski testified that they wanted to "start off with a conversation" with Griffiths, tell him he was making people feel "unsafe" and "give him an opportunity to explain."

Tr. 1404. Anderson testified that they wanted to meet with Griffiths on March 12 as "a consultation of sorts" to find out what his concerns were. Tr. 1917-19.

While Maciejewski, Anderson and VP Bortner met with Griffiths on March 12, they did not ask him about his concerns, did not describe Griffiths' conduct that was supposedly making people feel unsafe, and thus did not provide him with a reasonable opportunity to explain his conduct. Notably, the meeting occurred at the end of the day after Griffiths had posted the photo of himself wearing the distinctive red Union shirt in the morning and Store Manager Ashmeade had reported Griffiths' shirt to Anderson. GC 17, Tr. 276, 288, 1999-2001.

Towards the end of his shift on March 12, Bortner approached Griffiths on the sales floor and directed Griffiths to follow him to the front entrance. Tr. 275-76, 288. Griffiths obliged, and he saw Anderson by the front door, where they briefly discussed Griffiths' approved transfer to the Chelsea location.[6] Anderson and Bortner then escorted Griffiths out of the store and took a short walk down the street, where they entered a building known as the Domino Sugar Refinery. Tr. 276-78. They walked past a manned security desk before Anderson and Bortner used their "key fob" to gain access to the elevators. *Id*. The managers used the key fob again to access the 9th or 10th floor of the building, where they brought Griffiths to a conference room in which Maciejewski was waiting. *Id*. Maciejewski and Anderson testified that Gotham was renting the conference room primarily for executive meetings and extra storage. Tr. 1493-94, 1919. Griffiths had never been in the space before. Tr. 277, 287.

After they sat down at the conference room table, Griffiths testified that Anderson began by asking Griffiths whether he liked working for Gotham. Tr. 429. Griffiths answered that he did. Bortner added that Griffiths was one of the best salespeople in Williamsburg. Griffiths testified

[6] Associate HR Director Danielle Chan approved Griffiths' request to transfer to Chelsea on February 27. GC 22-23.

that Anderson then said, "it's come to our attention that you've been making employees fearful and scared. Do you have anything to say about that?" *Id*. Griffiths did not know what Anderson was talking about because Anderson "didn't provide me with any context." Tr. 419, 423. Confused, Griffiths responded to Anderson by asking, "What, about Chelsea?" because he had briefly discussed the transfer with Anderson before they left the store to walk to the Domino Sugar building. Tr. 429. Anderson answered, "No, about the Instagram posts." *Id*. Anderson did not clarify which of the numerous IG posts by Griffiths he was addressing. Still unsure what this was about, Griffiths responded, "No, I don't have anything to say about that." *Id*. Anderson then paused, looked at Maciejewski and Bortner and then said, "Okay, I believe this meeting is over." Griffiths then began getting up to leave, but before he did, he promised the executives that he would continue to work hard for the company. *Id*. Bortner then got up and used his key fob to let Griffiths out of the room and into the elevators, since Griffiths could not open the conference room door or access the elevators without the key. Tr. 278-79. Throughout the encounter, which lasted less than 10 minutes, Griffiths was wearing his red Union shirt underneath his work apron, with the words "LOCAL 338" and "UNION STRONG" visible on the back of the shirt. Tr *Id*., Tr. 1477-78.

Maciejewski, Anderson and Bortner largely corroborated Griffiths' account of their March 12 meeting, except that Anderson denied that he started off by asking Griffiths if he liked working for Gotham. Tr. 1404, 1921-24, 2098. Instead, Anderson testified that he asked Griffiths whether he had any concerns he wanted to express. Tr. 921-22. However, neither Maciejewski nor Bortner corroborated that Anderson asked Griffiths to share his concerns, while Bortner recalled Griffiths telling Anderson that he liked working at Gotham in response to Anderson's questions. Tr. 2098.

Maciejewski and Anderson testified that they deliberately declined to discuss any specific Instagram posts with Griffiths based on advice they had received from counsel and because they assumed he would somehow know what they were referencing. Tr. 1404, 1920-21, 1969.

Maciejewski further explained that the executives decided to have the meeting at their rented conference room in the Domino Sugar building – a space where Gotham had never held a meeting with an employee before or since – instead of within the Williamsburg store because they were concerned about how Griffiths would react to the meeting. Tr. 1405. However, they were not scared that Griffiths would become violent. Rather, Maciejewski testified that they worried that Griffiths would yell something that other employees or customers in the store would hear, and Anderson agreed that they had the meeting at the Domino Sugar building because they "didn't want to disturb what was going on in the store space." Tr. 1494-95, 1919. Ensuring their physical security was plainly not a priority for the executives, as they bypassed having the meeting in the store where there was a security worker on site and instead met with Griffiths inside a locked room where Maciejewski testified she had no idea whether or not there was security guard present on that floor of the building. Tr. 1499. Maciejewski admitted that that she didn't even think about acquiring additional security for the meeting. Tr. 1589.

The executives came away from the meeting with a different view of Griffiths than what they had assumed about him based on his IG posts. Maciejewski testified that Griffiths was "completely different" in person relative to how he presented on IG. Tr. 1582-83. Whereas online, Griffiths acted bold, brash and "vulgar," Maciejewski found that he was quiet and calm in person and "didn't say much at all." *Id*. Griffiths' behavior on March 12 confirmed that management had nothing to fear physically from Griffiths. Indeed, Respondent admits that Griffiths never exhibited any violence or erratic behavior in the workplace. Tr. 1601-02.

After the meeting on March 12, Griffiths returned to the store by himself, feeling scared, intimidated, and "chilled." Tr. 279, 284. He saw Store Manager Ashmeade soon after he came back to the sales floor, and Ashmeade remarked "I liked working with you, Robert, I really did"

or "It was nice working with you," as if Griffiths had already been discharged. Tr. 279, 424-25. Griffiths then quietly finished the remainder of his shift and left the store. Tr. 279.

H. Respondent Discharged Griffiths After He Continued Posting Pro-Union Messages on Social Media

Respondent's meeting with Griffiths did not cause him to stop advocating for the Union on Instagram. On his way home from work after his shift on March 12, Griffiths made a video of himself speaking in Union Square in Manhattan. GC 18, Tr. 283-84. In the video, which he posted to IG immediately after he made it, Griffiths stated, "This is just a reminder that if you try to unionize your workplace, you will be pulled aside like I was today." *Id*. Griffiths described how "C-suite" executives "took me right off the floor" and said that he was intimidating his colleagues and making them feel unsafe. GC 18. The video then shows Griffiths remove the coat he was wearing to reveal the red Union shirt he had on underneath. Griffiths then turned his back to the camera to show the "LOCAL 338" and "UNION STRONG" words on the back of the shirt, as he shimmied his torso in a mocking dance. *Id*. Griffiths then faced the camera again and said, "That's what we about! That's what we about! Workers' rights! Can't wait to talk to you soon." *Id*.

Griffiths testified that he posted this video to let his coworkers know that Gotham executives had tried to coerce, intimidate and harass him by requiring him to attend the March 12 meeting. Tr. 284. He testified that he ended the video with "Can't wait to talk to you soon" because he knew that Gotham was preparing to discharge him. *Id*.

Respondent executives quickly became aware of Griffiths' March 12 video post. Tr. 1412. Anderson saw the video and thought what Griffiths described was "the complete opposite" of what occurred during the March 12 meeting, although Anderson was unable to explain how Griffiths' description was inaccurate. Tr. 1926-27, 1970. Anderson testified that he was also disturbed that

Griffiths spoke about the Union in his video because Anderson had been careful to avoid mentioning the Union during the meeting. Tr. 1970.

The following day, March 13, Griffiths posted another video on IG lambasting Gotham for its treatment of employees. GC 19. The video shows Griffiths speaking from inside a gym or fitness club. Tr. 291-94. His speech in the video was intended to mimic CEO Wilson and parody what Griffiths imagined she might say or believe. *Id.* Channeling Wilson, Griffiths stated, "I claim to be progressive. I claim to have good ethos. But I'll be damned if I let my workers unionize and try to take more of the pie than I think they deserve." GC 19. Griffiths then stated that Wilson did not want her money "going to peasants" but rather preferred to support "philanthropic causes" that would make her look good, while she ignored the needs of "the fucking peasants who sell my bud." *Id*. Maciejewski saw this video post and again felt "threatened" by it. Tr. 1414, 1485-86.

On either March 13 or 14, Griffiths observed on his IG account that the account associated with CEO Wilson had viewed one of the stories Griffiths had posted of a video in which he was wearing his red Union shirt. Tr. 298-99. Griffiths cannot recall what he said in the video, but he is certain that it had to do with the Union. *Id*. Griffiths took a screenshot of what he saw on his IG page that made him conclude that Wilson had viewed his story, and he added a caption on the screenshot stating, "Love when you watch me." *Id*., GC 20. Griffiths testified that he posted this image to show his viewers that the Gotham CEO was actively monitoring his pro-union activity on IG and to let them all know that he was aware of it. Tr. 298-99, 2371-72. He testified that he also wanted to gather evidence of Respondent's knowledge of his union activities, in case he may eventually need it "for court" if and/or when Gotham illegally fired him. Tr. 2378.

Maciejewski saw Griffiths' "Love When You Watch Me" story soon after he published it, and she testified that it made her "very uncomfortable." Tr. 1480. She confirmed that she understood Griffiths was trying to show people that he knew Wilson was watching his IG activity.

Tr. 1486. Wilson testified that she, too, saw Griffiths' "Love When You Watch Me" story contemporaneously and concluded that Griffiths was "baiting" her and "going right after" her by pointing out how she was watching him. Nevertheless, she testified that she somehow found it "scary." Tr. 2249, 2266-67.

On March 15, Griffiths made and posted on IG still another video supporting the Union. Tr. 302, GC 21. In this video, Griffiths sampled a cannabis product, but before doing that, he displayed a flag which he received during his service with the U.S. Navy. GC 21. Griffiths said that the flag represented "the death of union busting." He continued, saying, "If you work for a company that union busts, and you know they union bust, and you don't do anything about it, you're garbage." *Id*. He then points to the flag and asks, "What's this mean to you?" *Id*. The video then shows Griffiths using a cannabis product, and after he inhales and exhales the product, he points to the camera and states, "I want you!" – echoing the recruitment message traditionally used by the U.S. military. *Id*.

Maciejewski testified that when she saw Griffiths' IG posts after the March 12 meeting, she knew that Griffiths had to be fired, especially after the "Love When You Watch Me" story singling out Wilson. Tr. 1496-98, 1600. Anderson similarly testified that Griffiths' posts after the March 12 meeting gave Respondent sufficient basis to terminate Griffiths because he was "making comments against Joanne." Tr. 1930-31.

At the Williamsburg store on March 17, after Griffiths had returned from his lunch break, Anderson approached him and asked Griffiths to come to the back of the store for a meeting. Griffiths followed Anderson to the lifestyle merchandise overstock room, where Maciejewski and Bortner were waiting. Tr. 315-16, 1416. They all sat down on chairs inside the room, and Griffiths asked whether he could record the meeting, which Anderson allowed, and Griffiths began recording using his cell phone. Tr. 316. Anderson then handed Griffiths a termination notice,

which stated the "Reason for Termination" as "inappropriate behavior or actions that undermine the safety and well-being of colleagues." GC 25. The recording Griffiths took during the meeting, which he posted on IG on March 17, shows that Anderson told Griffiths that he was being terminated immediately, read the reason for termination set forth on the termination notice, and said, "As an at-will company, we have the ability to deliver this message to you in this way" and that there was nothing more Anderson wanted to say. GC 24. He directed Griffiths to gather his belongings and leave the premises. *Id*. Griffiths asked if he should clock out, and Anderson answered, "Absolutely." *Id*. Griffiths said, "You got it," and then left the room. *Id*., Tr. 317. Griffiths had received no prior discipline from Gotham before he was discharged. Tr. 446.

Upon leaving the room following his termination, Griffiths proceeded unaccompanied through the back of the store towards the lockers, where he retrieved his personal belongings. Tr. 317-19. As he packed up, Griffiths realized that he needed a bag to hold all his things, so he walked to the sales floor where both Store Managers Rosario and Ashmeade were present, and he grabbed a retail bag, before returning to the lockers in the back. Griffiths then gathered his belongings in the bag and walked out of the store. *Id*. Griffiths did not speak with any coworkers as he gathered his things. *Id*. He remained unaccompanied in the store for about five minutes and left unescorted. *Id*.

I. After He Was Discharged Griffiths Continued Posting Pro-Union Messages Calling Out Respondent for Unfair Labor Practices and Prompting Respondent to Threaten to Sue Him

Almost immediately after he was fired on March 17, Griffiths posted on Instagram that Gotham had illegally fired him because of his union activities. He published a post on March 17 featuring the recording he had made during the termination meeting and included in the caption "Gotham sent a strong 'chilling' message today to all 4 of its locations, that union support will not be tolerated!" GC 24. He also posted on March 17 a photo of his termination letter with the caption, "Gotham terminates Budtender for showing unwavering union support. Budtender is currently

filing unfair labor practices…" GC 25. Griffiths then posted a screenshot of the unfair labor practice charge he filed with the NLRB and tagged the personal IG accounts for both Wilson and Anderson to ensure that they would see it. GC 26, Tr. 328. Griffiths testified that he made these posts to show his coworkers how he was responding to his firing by filing a ULP charge and to demonstrate that they, too, could file charges in response to perceived violations by Gotham. Tr. 330.

On March 18, Griffiths created a story, which he published on IG, featuring an image Griffiths found online from the novel "Uncle Tom's Cabin." GC 27, Tr. 331-32. The image shows a Black man standing in a cotton field holding a farming tool. *Id*. Griffiths imposed text on top of the image stating, "Chief Operating Officer" and a separate block of text in the middle of the image mocking Anderson's statements during Griffiths' termination meeting and stating, "We are an 'at-will' company, you gotta go." *Id*. Griffiths included in this story a song by Pete Seeger, "Which Side Are You On," so that viewers would hear the classic pro-union hymn when they saw the story. *Id*. Griffiths testified that he made the story was in reference to Anderson, who is Black, and intended to convey Griffiths' belief that Anderson slavishly followed whatever CEO Wilson demanded, including firing Griffiths. Tr. 332.

On about March 18 or 19, Griffiths posted on a different social media platform called Threads a photo of CEO Wilson alongside the caption, "She breaks the law with vigor. She is a SCAB" and tags for Wilson's account, Gotham's account and the NLRB. GC 28, Tr. 333-34. Griffiths testified that after he was discharged, he posted on Threads regarding what he perceived as Gotham's union busting and unfair labor practices "with the same level of intensity" as he did on IG. *Id*. After Griffiths had made numerous posts about Gotham on Threads, Respondent disabled its Threads account entirely. Tr. 334-36.

During the last week of March, Griffiths posted a video story on IG showing him speaking about how he was unlawfully fired before his transfer to the Gotham Chelsea location. GC 29, Tr.

339, 342. Griffiths claimed in the video that when he gets his job reinstated "by the judge," he will be returning to work at Chelsea, where Griffiths stated the first thing he plans to do is "unionize that bitch!" GC 29. The video then shows Griffiths making exaggerated winking faces, before he stated, "I miss you, Kenny" and blew a kiss at the camera. Then, in clear reference to his experience with Anderson escorting him to the Domino Sugar building for the March 12 meeting, Griffiths stated, "You wanna take me to the 10th floor of the sugar refinery tonight?" before making another exaggerated winking face. *Id*., Tr. 339-40 Griffiths then ended the video by saying, "You can key me up. All the way up," while he raised his eyebrows and rolled his eyes back, again in an exaggerated manner. *Id*.

In late March or early April, Griffiths posted another video story on IG in which he spoke about Wilson. Tr. 343-45, GC 30. Griffiths noted in the video that Gotham and Wilson had recently blocked Griffiths from tagging them on IG. *Id*. Griffiths further stated, "You're no fun, Joanne. As soon as I try to start a union, you fire me." *Id*. Then, referencing an affluent area of Long Island which Griffiths had heard Wilson visited, he stated, "Did you have fun in the Hamptons?" *Id*. And referencing Wilson's husband, whom Griffiths believes is a multi-billionaire, Griffiths stated, "Give Fed a little kiss for me. Actually, give him 4 billion kisses," as he repeatedly blew kisses at the camera *Id*.

Around the same time, Griffiths posted another video story on IG referencing Maciejewski. In this video, Griffiths warned viewers, "Don't trust HR. Certainly, don't trust Marta." GC 80. He described how Maciejewski attended the March 12 meeting with Anderson and Bortner, as well as Griffiths' termination meeting, and said nothing. He stated her conduct was "disgusting" and equated it with "union busting," before he advised "anyone at Gotham, if you have a problem, don't go to Marta." *Id*. Griffiths then repeated, "Don't go to Marta!" and held his mouth open while wiggling his tongue. *Id*.

Griffiths' incessant posting was clearly undermining the company's public image and harming its reputation. IG users commented on Griffiths' posts that they would be sure to avoid Gotham because of what Griffiths was sharing. GC 24. By April 4, Gotham had seen enough and attempted to coerce Griffiths to stop posting about the company.

On April 4, the law firm Feuerstein Kulick LLP, on behalf of Gotham, sent Griffiths a letter demanding that he "immediately cease and desist from engaging in any further defamatory actions and unlawful conduct directed towards Gotham, its principals and its employees," including by making social media posts that "are harmful, false or threatening in nature." GC 31. The letter accused Griffiths of making online posts that were "racially charged, sexually suggestive, threatening and defamatory," and it specifically cites the IG story Griffiths published featuring the image from Uncle Tom's Cabin in reference to COO Anderson. *Id*. Respondent's attorneys then invoked the provision of the offer letter that Griffiths signed at the start of his employment with Gotham, which purports to prohibit employees from criticizing or disparaging the company, and warned Griffiths that his "actions are clearly in violation of this obligation." *Id*. The lawyers demanded that Griffiths stop posting anything on social media related to Gotham, its principals or its employees, remove previously posted content about Gotham, and refrain from "further actions that could damage the reputation" of Gotham and/or its principals and employees. *Id*. The letter warns that failure to comply with these demands "will result in legal action, including but not limited to, claims for defamation, harassment, and other appropriate remedies." *Id*.

Griffiths had no prior contact with the Feuerstein Kulick law firm before he received this letter. Tr. 346. Maciejewski testified that Gotham instructed its lawyers to send the April 4 letter in response to the posts and stories that Griffiths published on social media after his termination, described above. Tr. 1502-04. Griffiths did not respond to the letter, but he did post a copy of it on IG on April 4 and continued to post about Gotham thereafter. Tr. 346-47.

J. Employees Led by Gold, Del Sorbo, Burt, and Palmer Intensified Their Union Activities in the Wake of Griffiths' Discharge

Griffiths was so widely known among Gotham employees that Respondent felt it was necessary to convene a company-wide teleconference meeting on March 20 to address Griffiths' termination. Maciejewski stated in a March 19 email to Wilson, Anderson, VP Bortner, and Chief of Strategy O'Daly that it was "crucial" for Respondent to convey its messaging regarding Griffiths' discharge to employees across the company "as quickly as possible." GC 70. She and Anderson developed a plan to hold brief "virtual Zoom meetings" where Respondent would concisely address Griffiths' termination and limit employee questions. *Id*. Managers at the different stores were instructed to split their staff into two groups, with one group attending the meeting while the other group kept working, and then the groups would swap places. *Id*. In line with Gotham's repeated stance opposing employee concerted activity, Respondent decided not to hold in-person meetings with employees at the stores to avoid giving employees "too much time to discuss things amongst themselves and potentially spread misinformation." *Id*.

Employee Burt attended one of these teleconference meetings, which consisted of Wilson speaking to employees for about 3 minutes and directing them to return to work without taking any questions, and Burt recorded it using his cell phone. Tr. 833-34, 859-60, GC 47. During the meeting, Wilson said, "some team members feel really uncomfortable and unsettled by certain posts that have been made recently online," without mentioning Griffiths or his posts. GC 47, 47(b). She stated that Gotham strives to ensure "the safety and the well-being and the respect" of everyone in the workplace and warned employees that any behavior that undermined the "safety and supportive environment" Respondent aims to foster "will not be tolerated." *Id*.

Although Wilson was careful not to mention Griffiths or his online advocacy for the Union, employees instantly knew that was what she was addressing. Tr. 471-72, 862-63. Williamsburg

store employees widely discussed Griffiths' termination and their shared belief that he was fired because he posted pro-union messages on Instagram. Tr. 698, 818-20. But rather than being cowed by Respondent's retaliation against Griffiths, the firing "energized" employees and caused them to "double down" on in their efforts to unionize. *Id*. Employees feared that since Respondent was willing to fire a talented, top-selling employee like Griffiths, none of their jobs were safe, which motivated employees to unionize immediately as a means of protecting themselves against further retaliation. Tr. 818, 964.

Thus, in the wake of Griffiths' discharge, the remaining employee advocates at the store, including Burt, Del Sorbo, Gold and Palmer, redoubled their effort to get employees to meet with Union representatives and sign authorization cards. Burt recalled becoming a vocal "cheerleader" for the Union after Griffiths was fired, becoming more active in recruiting employees to join the Union campaign. Tr. 820-22. The employees quickly succeeded and got a majority of their coworkers to sign cards by April 1.

1. <u>The Union Demanded Voluntary Recognition on April 1, 2025, and Respondent Refused</u>

On April 1, Union Director of Cannabis Services Saul Gurerro sent the principal for Gotham partner Hybrid LLC and Gotham attorney Theo Gould a letter demanding that Respondent immediately recognize the Union as the bargaining representative of Williamsburg store employees based on a majority of employees at the store having signed authorization cards. GC 53, Tr. 1072. Citing the LPA that Gotham, via Hybrid, had entered with the Union, Guerrero stated that Gotham must recognize the Union within 14 days by confirming its majority status or request that a neutral third party perform a formal card check. GC 53.

Gotham declined to respond in any way to the Union's April 1 demand for recognition. Tr. 1073. Respondent thus disregarded the Union's request for recognition and card check, utterly

flouting the requirements of the LPA. *Id*., GC 6. After Gotham failed to respond, the Union on April 24 filed an "RC Petition" with the NLRB seeking an election among employees at the Williamsburg store. Tr. 1073, GC 2(a). Respondent and the Union subsequently entered a stipulated election agreement setting an election at the store on June 11. GC 2(b).

2. Griffiths Posted Photos on Instagram Showing Employees Prominently Wearing Union Pins in the Workplace

On April 11, after the Union had demanded recognition, employees and Union representatives organized an event, known as Pin Day, in which employees at the Williamsburg store wore Union pins during their work shifts and posed for a picture wearing the pins. Tr. 473, 562. Employee Gold coordinated the event with Union Organizer Hegeman, and Gold and Del Sorbo distributed pins they got from Hegeman to their coworkers at the store. Tr. 699-701. The idea behind Pin Day was to publicly signal that a majority of store employees wanted Union representation and Respondent to recognize their Union. *Id*. Participating employees gathered on the sales floor during the middle of the day on April 11, each wearing a Union pin that displayed the Union's logo and the words "RWDSU Local 338 Cannabis Workers Union." They posed for two different pictures, which Del Sorbo sent to Griffiths, authorizing him to publish the photos online. Tr. 347-48, Tr. 475, GC 82. Griffiths made a post on IG featuring the Pin Day photos on April 11. GC 82, Tr. 350, 562-63. Griffiths included a provocative caption, which stated, "This is what SOLIDARITY looks like!" and noted that Gotham Williamsburg employees were "coming together today" and wearing Union pins "showing management that they will not back down!" GC 82.

Burt, Del Sorbo, Gold, and Palmer are each clearly seen in the Pin Day photos Griffiths posted on his IG account. *Id*., Tr. 349-50. Burt appears on the right side of the first photo Griffiths posted, pointing directly at his Union pin. *Id*. Palmer is shown in the first photo lying on the floor while making a hand gesture next to his Union pin. Gold and Del Sorbo are shown smiling widely.

Id. In total, 12 employees are pictured wearing Union pins in that first photo posted by Griffiths. *Id*. Employees posed for a second Pin Day photo to ensure that each participating coworker was included in at least one of the pictures. Tr. 1521-22, GC 82. Ten employees are pictured in the second photo, and Burt, Del Sorbo, Gold, and Palmer were among only a handful of employees who appeared in both Pin Day photos. *Id*.

Maciejewski testified that she saw Griffiths Pin Day post featuring these photos in April, and Wilson confirmed that she saw the post and photos on IG around the time it was posted on April 11. Tr. 1535, 2279-80. Wilson recalled seeing Gold pictured in the photos and concluding that he was supporting the Union, a fact which Wilson, who knew Gold, was previously unaware. Tr. 2279-80. Wilson was also able to identify Del Sorbo in the photos when she saw Griffiths post online. Tr. 2280-81. Wilson admitted that she discussed the Pin Day post and photos with Gotham executives during their weekly meetings, but she declined to describe what they discussed. *Id*.

3. Store Manager Rosario Met with Employee Gold Outside the Workplace and Threatened Employees with Reduced Wages if They Supported the Union

Gold testified that during the week leading up to CEO Wilson's April 22 captive audience meeting described below, on or about April 18 or 19, Store Manager Rosario invited Gold to meet her after work at a local restaurant named Mekelburg's, which Gold accepted. Tr. 705-09. When they sat down at the restaurant, Rosario first engaged in brief "small talk" before they "got down to it," as Gold recalled. *Id*. Rosario told Gold that Wilson was preparing to hold a meeting with Williamsburg employees to discuss the company's lawsuit against the State of New York challenging the validity of the LPA, as well as Gotham's position against employees' campaign to unionize the store. *Id*. Rosario said that she wanted to speak with Gold about this subject because she knew he was supporting the Union and was involved in the organizing process. *Id*. Rosario warned Gold that Gotham would drastically cut store employees' pay from $26 to $18.50 per hour

if they chose to unionize and that employees would likely lose most, if not all, of their PTO benefits. *Id*. Gold replied that he wasn't sure that what Rosario was saying was correct, but he let her continue speaking without challenging her further. *Id*. Rosario didn't specify how Gotham was going to reduce PTO benefits, and Gold understood that the $18.50 per hour wage rate that Rosario had mentioned as the outcome of unionization equaled the general pay rate for cannabis workers in New York City. *Id*.

Rosario further told Gold that Wilson was planning to solicit questions from employees during the upcoming April 22 meeting and ask them if there was anything Respondent could fix or improve in the store to make the job better for employees. *Id*. Rosario suggested that when Wilson solicits questions like this, Gold or another employee should complain about Store Manager Ashmeade and demand disciplinary action against him. Gold replied that he would discuss with his coworkers Rosario's thoughts about the Union and Wilson's April 22 meeting. *Id*. He and Rosario then moved on to discuss logistics for the upcoming "4/20" sales event at the store. *Id*. Gold recalled the meeting lasted about one hour. *Id*.

Del Sorbo testified that on April 21, Rosario separately told her and other employees that Wilson was coming to their store the following day to discuss why employees wanted the Union, and Rosario at that time – as she had said to Gold days earlier – encouraged employees to tell Wilson that they were upset with Store Manager Ashmeade. Tr. 477-78. Del Sorbo's corroboration of Gold's recollection of Rosario's statements lends credibility to Gold's testimony. Meanwhile, Respondent did not call Rosario to testify, so Gold's account of her statements to him at Mekelburg's restaurant stands unrebutted.

4. CEO Wilson Held a Captive Audience Meeting on April 22 to Tell Employees She Was "Very Upset" about Their Union Activities and Threaten Them with the Loss of Benefits

On April 22, as Rosario had foretold, Respondent held a mandatory meeting for employees at the Williamsburg store where CEO Wilson spoke to employees about the Union. Wilson brought in an attorney named Katie Lev, who assisted Wilson in making her presentation. Tr. 114-15. At the time of the meeting, Store Managers rounded up employees and directed them to report to the merchandise overstock room in the back of the facility. Tr. 478-81, 710-13, 870-72. All employees on duty were directed to attend the meeting while the store managers worked the sales floor, and no one was told they could opt out of the meeting. *Id*. There were no chairs set up in the meeting room, so everyone stood throughout the event, with employees arrayed in a horseshoe shape around Wilson and attorney Lev. *Id*. Gotham executives including Anderson, Bortner, Maciejewski and Danielle Chan were present. *Id*. Employee Gold made an audio recording of the meeting using his cell phone, and a transcript of his recording is in the record. *Id*., GC 7, 7(b).

During the meeting, Wilson told employees that she was "very upset" about their desire to unionize. GC 7, 7(b), Tr. 118. She disclosed that Gotham opposes the LPA that it entered with the Union, and Wilson shared that when she read it, she thought, "What the fuck is this?" and characterized the LPA as "bullshit." *Id.* She described how she believed that Gotham already provided employees with great pay and benefits and told employees that she was taking such good care of them that the idea that they would want a union to negotiate better terms and conditions of employment was "just mind boggling" to her. *Id*.

Wilson eventually turned to discuss the prospect of collective-bargaining negotiations in the event that employees selected the Union. GC 7, 7(b). Wilson brought up the "salaries," "health benefits," "vacation benefits," 401(K) accounts with matching employer contributions, opportunities for upward mobility, the ability to work at other Gotham stores, and bonuses that

employees currently enjoyed. Wilson then stated, "***all of those things change***" if employees were to bring in the Union, adding, "***you go back basically back to Ground Zero and start again***." *Id*. (emphasis added). Lev, whom Respondent hired to ensure that Wilson didn't "say something wrong" during this meeting [Tr. 132], quickly interjected and pivoted to encouraging employees to talk to management about any questions they may have about the Union. GC 7, 7(b).

Towards the end of the meeting, Wilson and Lev invited employees to raise questions or comments, but no one responded. *Id*. When it became clear that no employee was going to come forward and say anything, Gold stated, "All right, let's go sell some drugs!" *Id*., Tr. 714-15. Gold then abruptly walked out of the meeting room before anyone else had left. *Id*. Gold's comment effectively ended the meeting, as the others started filing out of the room once Gold exited. Tr. 873. Wilson testified that she found Gold's behavior at the end of the meeting so "incredibly disrespectful" that she "couldn't believe it," yet she declined to raise her concerns with Gold or anyone else, even though she spoke with Gold right afterward. Tr. 2236-38.

As employees were filing out of the room, Burt, who had attended the meeting, called out to coworkers that if anyone has questions about unions or Local 338, then they should speak with Burt because he was a Union member in the past. Tr. 872-73. Burt made this statement in response to Wilson and Lev repeatedly encouraging employees to speak with managers about the Union. *Id*. Del Sorbo, who was also present, recalled that Burt called this out "very loudly." Tr. 480-81. Wilson and the other company executives who attended the meeting were still in the room at the time, only a few feet away from Burt. Tr. 873-74. Although Wilson, Anderson, Bortner and Maciejewski were present at the meeting and testified at the hearing, none of them denied perceiving Burt make this remark revealing his pro-Union sentiments.

5. Respondent Managers and Executives Threatened and Interrogated Employees Following the Captive Audience on April 22

After the April 22 meeting ended, COO Anderson testified that he remained in the back of the store and met with Maciejewski, attorney Lev, VP Bortner, and Store Manager Ashmeade. Tr. 2004-05, 2031-32. They discussed employees' reaction to Wilson and Lev's presentation, which was uncertain to them because no employee said anything during the meeting. *Id*. Anderson recalled pressing Ashmeade to provide information regarding what employees wanted that would make them support the Union and how employees at the store felt about unionizing. *Id*., Tr. 2035-36. While Anderson remained in the back prying Ashmeade for information about employees' union sentiments, Wilson and Rosario were in the front of the store threatening and interrogating employees.

a. CEO Wilson Met with Employee Gold after the Captive Audience Meeting and Made an Additional Threat against Employees, Interrogated Gold about His Union Sentiments, and Directed Him to Persuade Coworkers Not to Support the Union

Gold testified that shortly after he returned to the sales floor following the April 22 meeting, he saw Wilson on the floor speaking with an employee. Tr. 718-22. Gold approached Wilson and the employee and said the employee was needed on the sales floor, leaving just Gold and Wilson to talk. *Id*. Gold recalled that Anderson was present at that time, standing about 3 to 4 feet away, but not directly part of the conversation. Wilson began by asking Gold how he was doing and whether he had any suggestions for improving the store that he wanted to raise while Wilson was there. *Id*. Gold suggested that Gotham close the store earlier on Sundays because customers rarely came late on Sundays, when the store was open until 11 p.m. *Id*. Gold said that closing earlier would be an efficient way to cut employee hours without upsetting workers, who generally agreed the store was open too late on Sundays. *Id*., Tr. 439-40. Anderson apparently heard Gold's suggestion, as Gold

recalled Anderson chimed in that Gold had raised a good idea. *Id*. Wilson agreed, but she warned that if employees unionized then "that goes out the door." Tr. 721-22. Gold did not respond. *Id*.

Wilson then asked Gold how he thought the union election would turn out. *Id*. Gold replied that he believed the Union was going to win the election. *Id*. Wilson responded by saying, "I'm counting on you, Henry, to get all these people to vote no." *Id*. Gold, who was wearing his Union pin as the only pin on his apron, replied that he would see what he could do. Wilson did not comment on the pin. *Id*. Gold then excused himself from the conversation. *Id*. The interaction lasted approximately 5 minutes. *Id*.

Wilson confirmed that she spoke with Gold immediately after the April 22 meeting, but she admitted that she could not remember the conversation well. Tr. 2238-39. She denied that she discussed Sunday store hours with him or that she told him that Respondent would not consider changing the store hours if employees unionized. *Id*. Wilson also denied that she said that she was counting on Gold to get employees to vote against the Union. *Id*. She only recalled speaking with Gold about why employees wanted a union and asking him questions in that regard. On direct examination, Wilson testified that Gold was "very evasive," and she could not recall anything he said to her at the time, but she did recall him telling her that he expected the store would unionize. *Id*, Tr. 2240. However, on cross-examination, Wilson reversed herself and denied recalling that Gold told her that he thought the store would unionize. *Id*. Instead, Wilson stated that Gold simply "had no answers for me." Tr. 2293. While Wilson confirmed that Anderson was present in the area during this conversation with Gold [Tr. 2292], Anderson testified that he could not recall being present and believes that he was in the back of the store at the time. Tr. 1919.

b. <u>Store Manager Rosario Interrogated Employee Del Sorbo about Employees' Union Activities and Again Threatened Employees with Reduced Wages if They Unionized Immediately Following the April 22 Meeting</u>

Del Sorbo testified that immediately after the April 22 staff meeting ended, she went to work at the concierge desk at the front of the store. Tr 483-84. Del Sorbo was working at concierge by herself when Rosario approached and said to her, "I don't understand why you guys want to unionize, you know." Tr. 483, 607. Reiterating what she said to Gold days prior, Rosario continued, "Your pay rate's going to go down to like, minimum, and, you know, if you have problems, you should just go to HR like I am." Tr. 483-84. Del Sorbo replied that Rosario "didn't understand" and told her, "it's unionize or quit at this point." Del Sorbo reminded Rosario that employees had gone to HR before to no effect and were not going to rely on that anymore. Tr. 608. Again – Respondent did not call Rosario, so Del Sorbo's testimony regarding her statements following the April 22 meeting is unrebutted.

c. Store Manager Ashmeade Interrogated Employee Burt about His Union Activities on April 22

Hours after Wilson's group meeting on April 22, near store closing time when all employees and executives had left, except for Store Manager Ashmeade and employee Burt, Ashmeade approached Burt on the sales floor. Tr. 876-78. Earlier in the day, as described above, Anderson had probed Ashmeade for information about employees' union sentiments. Burt testified that when Ashmeade approached him, Ashmeade asked, "How do you feel?" Burt "aggressively and sarcastically" answered, "I feel great!" *Id.* Ashmeade then began saying he wanted to talk about "what's going on," and Burt interrupted him stating, "We have the votes, we have the support. You should recognize us." *Id.* Ashmeade asked Burt if he was "sure," and Burt answered, "I'm sure. You should recognize us." The conversation ended there. *Id.* Respondent declined to call Ashmeade to testify, even though he remains employed as Store Manager for Gotham [Tr. 1304], so Burt's testimony regarding Ashmeade's statements is unrebutted.

6. Days After the Coercive April 22 Captive Audience Meeting, Respondent Mass Purged Lead Union Supporters Gold, Del Sorbo and Burt on Pretextual Bases

On April 30, Respondent discharged in rapid succession three of the most active and outspoken Union advocates who remained at the Williamsburg store – Gold, Del Sorbo and Burt. Each of these employees' union activities were known by Respondent at the time it fired them, as set forth above, and in each case, Respondent relied on dubious bases and/or sham investigations to target these strong Union advocates during the period leading up to the representation election.

a. Respondent Fired Gold Based on a Customer Complaint that Respondent Failed to Investigate

Gold began working for Gotham in May 2023 as a budtender at the Bowery store. Tr. 632-33. He was consistently one of Gotham's top salespeople, which was recognized by CEO Wilson and COO Anderson. Tr. 651-54, 1902.

In February 2024, Respondent issued Gold a Final Warning after he made a sexually explicit and harassing comment towards a female coworker. GC 43, Tr. 644-46. Maciejewski, who led the investigation that preceded Gold's Final Warning, testified that she interviewed the complaining employee who experienced the harassment and got a corroborating statement from a separate witness. Tr. 1307-10. Maciejewski determined that Gold should be fired based on this incident, but the GM at Bowery advocated for Gotham to keep Gold employed because he was so good at sales. *Id*. When Maciejewski recommended Gold's termination to CEO Wilson, Wilson decided to "give him a chance" because "she liked him." *Id*. Gold thus kept his job with Gotham, but Respondent warned him that any further harassment complaints against him would result in his termination. Tr. 646.

However, in November 2024, another female coworker accused Gold of making a sexually harassing statement in the workplace. Tr. 1313-15. This time, Maciejewski and the Bowery GM aligned in their recommendation to fire Gold, which VP Bortner also supported. *Id*. But when

Maciejewski brought the recommendation to discharge Gold to Wilson, the CEO overruled her and insisted on keeping Gold with Gotham. *Id*. Maciejewski testified that Wilson did not want to let Gold go because she still liked him, felt he had strong "buy-in to Gotham in general" and believed he was "really a champion for Gotham." *Id*. Wilson testified that she chose not to discharge Gold in November 2024 because "he was an amazing salesperson" and she thought Gotham could use his skills to boost sales at the struggling Williamsburg store. Tr. 2228. Wilson decided to transfer Gold to Williamsburg instead of terminating him or issuing further discipline against him, as she wanted to give Gold a fresh start at a new store with a "clean slate." Tr. 2231-32.

Wilson and Anderson met with Gold in late November 2024 at the Bowery store and informed him that because he had "an HR problem" Respondent was transferring him to Williamsburg, and he could no longer work at Bowery. Tr. 633-34, 751-55. At the time, Gold was unaware of what "HR problem" the executives were talking about. *Id*. Wilson said she would have Maciejewski explain it to Gold. *Id*. The following day, Maciejewski met with Gold via Zoom, and she explained the nature of the sexually harassing statement at issue, which Gold didn't deny. Tr. 636-37, 753, 1318. They discussed how Gold would have to transfer to Williamsburg, which Gold accepted. *Id*. Maciejewski did not make any notes or record of this meeting, nor did Respondent document Gold's misconduct or his forced transfer. Tr. 643, 1320. Respondent claims that, despite failing to document it in any way, Respondent issued Gold a second final warning in November 2024. However, Wilson testified that "Every time we talk to an employee, we write this down and take records of what happened," suggesting that if there's no written record that Gotham issued Gold a second final warning, it is safe to assume that it didn't happen. Tr. 2277.

Gold began working at the Williamsburg store in December 2024, and quickly thereafter began organizing the Union at the store, as described above. Tr. 683-84. Store Manager Rosario knew that Gold supported the Union and was helping lead the organizing process and told Gold so

when they met at Mekelburg's restaurant in mid-April. Tr. 709. Wilson admitted that she knew Gold was pro-Union when she saw him in the April 11 Pin Day photo and when she saw him wearing the pin at the Williamsburg store on April 22, as well as how Gold acted during the captive audience meeting that day, which Wilson says she found especially troubling. Tr. 2279-80, 2236.

Thus, in about mid-to-late April when Store Manager Ashmeade told Maciejewski about a complaint he had received from a customer regarding Gold's behavior, Respondent knew that this was an incident of potential misconduct by a leader of the Union campaign it opposed. Tr. 1322-25. Maciejewski testified that Ashmeade told her that a frequent customer of the store named Chance, who is a woman "of color," complained to Ashmeade that Gold had belittled her by saying that a product she was interested in buying was too expensive. *Id*. Ashmeade shared that he had a text message exchange with Chance about the incident, and he sent a screenshot of the exchange to Maciejewski. *Id*. Ashmeade did not tell Maciejewski whether he was present at the store during the incident, and the only further information he shared about it was the text message exchange. Tr. 1531-32. Ashmeade had never before raised a concern to HR about a customer complaint regarding an employee. Tr. 1529.

The text exchange shows that Chance reached out to Ashmeade on March 31, writing, "Hey Sweets! Hoping your day is going well. I was in the store today….Henry is not allowed to speak to me. I really wanted to go in on him." R 8. Ashmeade replied, "He's on the spectrum smfh.[7] If he was absolutely disrespectful let me know I can definitely let the execs know wassup. Cause he's on thin ice already." *Id*. Chance then responded, "I got in his ass before I left. Entitled asshole….then said some off pocket shit when I saw that you had something that I asked for and he told me you didn't have it…he said some shit like well that one is $126 so, I said what does that have to do with

[7] Maciejewski testified that she understands "on the spectrum" as used in R 8 refers to someone who suffers from autism, and "SMFH" means "shaking my fucking head." Tr. 1530.

anything. He is an ASS!" Chance then concluded the exchange saying, "…no worries about going to the executive's I can handle his whack ass" and ending the text with a kissing face emoji. *Id*.

Gold testified that he believes he remembers having an interaction with a customer somewhat similar to what is described in Ashmeade's text messages with Chance. Tr. 725-26. Gold testified that the customer, whose name he did not know, was looking to buy a "vape" product and asked Gold about a specific device. *Id*. The customer mentioned that the product gave her headaches, and Gold tried to suggest alternatives, including more expensive items. *Id*. Gold told the customer that the product she had initially asked about was the least expensive vape Gotham had because it was not the best product, but the customer ultimately chose to buy that vape anyway. *Id*. Gold testified that the customer left the store without expressing any displeasure with her interaction with him. Tr. 731-32. Gold was shown the text exchange between Chance and Ashmeade at the hearing in this case, and Gold testified that he did not have any interaction with a customer like what was described there. *Id*. Gold testified that he never had any argument or altercation with a customer during his employment. Tr. 741.

Respondent never spoke with Gold about the incident with customer Chance or any other problematic encounter he had with a customer before firing him. Tr. 783-84, 1329. Nor did Gotham reach out to Chance to have her better explain why she was upset with Gold. Tr. 1536. Instead, upon receiving Ashmeade's report and text messages, VP Bortner directed Ashmeade to gather more evidence of customer complaints against Gold.[8] Tr. 1186, 1326. At the time, Gotham used a system called Edge to track online customer reviews posted on Google. Tr. 732-35. Gold testified that employees had limited access to Respondent's Edge data and could see on Edge customer reviews that mentioned themselves, but not other employees. *Id*. Gold recalled having

[8] Notably, Respondent declined to elicit any testimony from Bortner regarding his role in the investigation that led to Gold's discharge, even though Maciejewski described his involvement.

seen dozens of positive customer reviews about him on Edge, but Ashmeade managed to find two negative reviews. *Id*., GC 46. Edge records show that on April 27, a customer posted a review stating that Gold had been "a bit impatient" while the customer was deliberating their purchases. GC 46. A second Edge review that Ashmeade apparently pulled in response to Bortner's direction to find negative reviews regarding Gold is dated March 28 and complains about a Williamsburg store employee who made the customer feel "rushed out," gave "snarky" answers or was unable to answer the customer's questions, failed to listen to the customer, and did not exhibit knowledge about the products for sale. *Id*. However, the review does not mention Gold, and it likely does not even relate to conduct by Gold because the evidence shows that Gold was a great salesman who had excellent product knowledge, and directly underneath the review, the document shows a prompt inviting the customer to "rate your experience with our team member Malachi." *Id*.

There is no evidence that Respondent sought to resolve these or other glaring inconsistencies during its investigation. Maciejewski never received, nor did she ask for, the full name of customer Chance who complained to Ashmeade about Gold on March 31 and never spoke with her. Tr. 1529-30. Nothing in the record explains why Ashmeade waited weeks to report the March 31 complaint and did so only after Respondent's knowledge of Gold's leadership of the Union campaign became apparent, as Respondent declined to call Ashmeade to testify. Maciejewski never inquired about the nature of Ashmeade's relationship with Chance and how they came to text each other in the informal manner exhibited in the March 31 exchange. *Id*. Maciejewski never found out if Chance had come back to the Williamsburg store after the incident with Gold and failed to inquire about the continuation of the text exchange between Ashmeade and Chance on April 4, which can be seen in the document Ashmeade shared with her. Tr. 1628-29, R 8. Even though Maciejewski believed that Ashmeade telling customer Chance that Gold suffered from autism was inappropriate, and Wilson testified that it was improper for Ashmeade to discuss

Gold's disciplinary history with a customer, Respondent never asked Ashmeade to explain his comments to Chance about Gold. Tr. 1613, 2325-26. Even Wilson expressed surprise at the paltry investigation her underlings conducted before recommending she fire Gold, testifying that it is "hard to believe that HR did not speak to [Gold] about this interaction with this customer." Tr. 2288.

Based on the scant information it had, Respondent leaped to the conclusion that Gold was "not only dismissive to but racist" toward customer Chance [Tr. 2236], even though there is no evidence that Gold made any racial remarks during this incident or referenced the customer's race in any way. Tr. 2283-84. Wilson testified that she assumed Gold had been racist toward Chance simply because she understood Chance is Black and Gold offered her a less expensive product. *Id*.

Respondent notified Gold of his discharge during a meeting at the Williamsburg store on April 30 led by Ashmeade, with Maciejewski and Bortner present. Tr. 722-27. Gold testified that Ashmeade read from a prepared document and stated that the reason for Gold's termination was that a customer had complained that Gold made her feel "ineligized" and this conduct did not meet Gotham standards. *Id*. Gold does not understand the word "ineligized" but speculated Ashmeade meant to express that Gold made the customer feel "unfancy" or unworthy of the store. *Id*. Respondent did not give Gold a copy of his termination notice, but he saw it in preparation for trial and testified that the "Reason for Termination" set forth in the document is the same as how Ashmeade described it, except Ashmeade used the word "ineligized" instead of "undermined" used in the termination notice. GC 45, Tr. 727-30.

Respondent admits that it had never fired or even disciplined any other employee based on a customer complaint. Tr. 1191. Wilson testified that, aside from Gold, she is unaware of Gotham ever investigating any employee based on a negative review from a customer. Tr. 2310-11. In other contexts, when Gotham came across negative customer reviews on Google, Wilson assumed that the reviews were fake and complained to Google about them, rather than investigating the

employee allegedly involved. Tr. 2306-07. The record shows at least one example of Respondent receiving a negative online review from a customer regarding a specifically described Williamsburg store employee at a specific time in February 2025, where the customer alleged the employee had treated them poorly and acted unprofessionally. GC 89. Although Gotham's marketing managers received this complaint and responded to the customer online, there was no investigation of the employee involved in the incident. *Id*., Tr. 2318.

b. Respondent Fired Del Sorbo Because She Engaged in Protected Union Activities that Respondent Mischaracterized as Bullying

Del Sorbo worked for Gotham since the initial staff training in September 2024 before the Williamsburg store opened. Tr. 458. On February 5, Respondent issued Del Sorbo a Final Warning for arguing with a coworker on the sales floor with customers present. GC 39, Tr. 516-17.

By March, Del Sorbo was very active in the Union campaign and spoke frequently with coworkers to advance the unionization drive. Tr. 462-70. At that time, she remained in good standing with Respondent, despite her Final Warning, and on April 1, Store Manager Rosario had a Touchbase meeting with Del Sorbo in which she gave Del Sorbo a glowingly positive performance review, noting how she was supportive of coworkers and a "point person" for several of them. Tr. 523-24, GC 40.

As the Union drive heated up in late March and April after Griffiths' discharge, Del Sorbo discussed with coworkers their mutual fear of retaliation, which caused employees to speculate that one budtender, Jared Freschman, did not support their organizing efforts and would inform management about employees' union activities. Tr. 488-90, 769, 926-27. Del Sorbo testified that she expressed to fellow organizers throughout the campaign that she did not think Freschman would support the union effort and debated whether to include him in any such discussions. Tr. 488-90. Her suspicions about Freschman's intentions grew when employees observed that

Freschman appeared to eavesdrop on employees' union discussions. Tr. 489-90. Del Sorbo discussed with coworkers their shared concern that Freschman may be leaking information to management about the Union campaign. *Id*., Tr. 768, 927.

Del Sorbo attested that on March 25, Freschman approached her in the employee breakroom and told her that he was upset that Griffiths had blocked him on Instagram and that Griffiths wrongly believed Freschman was responsible for his termination. Tr. 491-92. Del Sorbo told Freschman she was sorry that happened and tried to "calm him down." *Id.* Del Sorbo later texted Griffiths about the exchange, writing, "Jared was pretty broken up about you blocking him. Says he wasn't the one who told management he was uncomfortable and said he thought you two were friends…seems only management was uncomfy." R 6. Del Sorbo also told other employees in the store that Freschman proclaimed he was not involved in Griffiths' termination. Tr. 492.

On Pin Day on April 11, Gold and Del Sorbo both recalled that Freschman expressed he felt left out and wanted to be included in the group photos employees took, even though he wasn't wearing a Union pin. Tr. 497. Although the Pin Day photos were only for participating employees wearing pins, Del Sorbo and Gold compromised by allowing Freschman to pose for a photo to avoid making him feel left out. Tr. 497-98, 701. Del Sorbo denied that she told any of her coworkers not to talk to Freschman because she believed he opposed the Union. Tr. 507.

Five days after the Pin Day incident, on April 16, Freschman sent an email to Maciejewski claiming that he was experiencing "bullying and isolation" at the Williamsburg store because he decided not to join the union. R 7. Freschman complained about a rumor going around the store that he had informed company executives about the Union, which Freschman said was false. He added, "I am unsure if these rumors are originating from [Griffiths] himself or someone else within the dispensary. However, yesterday I did overhear Toni Del Sorbo talking badly about me and circulating these rumors further within the workplace." *Id.* Maciejewski replied by email and

scheduled two meetings with Freschman, the first for April 17 and a second with Bortner the following Wednesday, April 23. *Id.* Maciejewski promptly forwarded the email chain to Wilson, who quickly replied asking Maciejewski if she had found out who was "harassing" Freschman. *Id*. Maciejewski replied that she had not yet been able to meet with Freschman to find out, but she assured Wilson, "I'll let you know right after I talk to him!" *Id.*

On April 17, Maciejewski met with Freschman virtually. She testified that Freschman told her he felt he was being bullied because he didn't support the Union, and that Del Sorbo was the "main one" driving what Freschman felt was an isolating "you're with us or you're against us" environment. Tr. 1439, 1543, GC 83. Freschman thus revealed to Respondent that Del Sorbo was a leader of the Union campaign, to the extent Respondent didn't already know.

Maciejewski testified that Freschman reported to her on April 17 that Union-supporting coworkers were making him feel like he's "the odd one out" and that he doesn't belong with them. Tr. 1439. Maciejewski recalled that Freschman raised a particular instance where Del Sorbo was talking to a "group of individuals" and pointed at Freschman, who told Respondent that he heard Del Sorbo say at that moment, "something along the lines of like . . . him [Jared] being the reason that Robert was fired." *Id.* Maciejewski took notes during her April 17 meeting with Freschman, but the notes make no reference to a specific instance of Del Sorbo pointing at him or engaging in any other particular conduct against Freschman. GC 83, Tr. 1543.

Maciejewski testified that she met with Freschman again on April 23, this time joined by VP Bortner, where Freschman purportedly told Bortner about the same issues previously discussed with Maciejewski. Tr. 1544. Respondent called Bortner to testify but declined to elicit any testimony from him corroborating Maciejewski's account of the April 23 meeting with Freschman, or his role in terminating Del Sorbo. Maciejewski testified that at some point prior to terminating Del Sorbo, which she couldn't specifically recall, she spoke with Manager Rosario who told her

that she had observed Del Sorbo "saying something bad" about Freschman. Tr. 1440. Maciejewski could not recall anything further about her discussion with Rosario about Del Sorbo and Freschman, where the conversation occurred, or even what statements Rosario told her she heard Del Sorbo say. *Id*., Tr. 1545-46. Maciejewski made no documentation regarding her conversation with Rosario, nor did she ask Rosario to write a statement. *Id.* When pressed regarding whether she could recall generally what kinds of things Rosario said she overheard Del Sorbo say, Maciejewski testified she could not, and admitted that she did not "remember exactly what was brought up" in her discussion with Rosario. Tr. 1543-45. Of course, Respondent did not call Rosario to testify to clarify what Del Sorbo supposedly said about Freschman, nor did it call Freschman to testify, even though Freschman remains employed at the Williamsburg store. Tr. 1639.

Maciejewski testified that she attempted to somehow verify Freschman's and Rosario's claims by reviewing video footage of Del Sorbo pointing at Freschman, even though the video does not have audio. Tr. 1441. Maciejewski could not recall who showed her the footage, but testified, "…I remember seeing it, and I do remember seeing the moment where Toni Del Sorbo points, is laughing, like leaning a little bit like this at [Freschman]." *Id.* On cross-examination, Maciejewski testified that she reviewed the soundless footage to identify witnesses but admitted she did not interview any of the employees with whom Del Sorbo appeared to be speaking in the video, nor could she recall who the witnesses were. Tr. 1538-41. Maciejewski explained that the other employees Del Sorbo was speaking to were obscured from view on the camera angle she viewed and she "mostly just saw [Del Sorbo]," yet Maciejewski declined to seek out another view of the footage. *Id.* Thus, the only people Maciejewski actually spoke with about the alleged incident – Freschman and Rosario – were standing apart from Del Sorbo, and there is no evidence that they heard her conversation. *Id*.

Wilson, who immediately recognized Del Sorbo when she saw her in the Pin Day photo on April 11 [Tr. 2280-81], made the decision to terminate Del Sorbo when Maciejewski recommended discharge on April 28. Tr. 1442-43. Although Maciejewski had told Wilson via email on April 16 that she would speak with Wilson right after she met with Freschman as part of her investigation, Maciejewski downplayed Wilson's involvement in the investigation and claimed she could not recall whether she spoke with Wilson about Del Sorbo's case until she recommended termination. Tr. 1549.

On April 30, after Del Sorbo returned to the Williamsburg store from her lunch break, Store Manager Ashmeade directed Del Sorbo to follow him into the manager's office, where Maciejewski and Bortner were waiting. Tr. 526. Ashmeade told Del Sorbo she was being terminated and read off a prepared termination notice, which states in relevant part, "You are being terminated due to continued violations of company policy following a final written warning issued on January 30, 2025… Since that warning, employees have reported that you engaged in further inappropriate conduct, specifically gossiping and behavior classified as bullying under our workplace conduct policy." GC 41, Tr. 527. Del Sorbo testified, and Maciejewski admitted that no one in management told Del Sorbo what specific conduct she was being terminated for, and that, prior to firing her, no one in management met with Del Sorbo as part of their investigation, asked her what she may have said about Freschman, or discussed with her any concerns regarding bullying or gossiping or any incident involvement Freschman at all. Tr. 528, 1195.

After she left the store following her discharge, Del Sorbo texted Rosario informing the manager that Del Sorbo and others had been terminated. GC 42. Rosario responded that the decision made "no sense" and questioned why Gotham would terminate "top players," offering that the only termination she knew about was part-time employee Nora Seide's. Rosario later wrote, "This sucks so do they expect Von to sell as much as you and Henry did hahahaahha" –

acknowledging the absurdity of Respondent firing two of its top sellers as it struggled to become profitable. *Id.*

On cross examination, Wilson blamed Del Sorbo, along with Griffiths, for creating a culture she found "very disturbing" by bullying employees who did not want to support the union, thus crystalizing the CEO's involvement in the decision. Tr. 2333-34. Respondent presented no evidence that it has terminated any other employee based on reports of bullying or gossip, despite producing documents showing complaints from multiple employees, including Charles Palmer and Inventory Manager Sudanisis Cruz on behalf of employee Malichi Peterson, who reported feeling harassed and bullied by their Store Manager Ashmeade. GC 49, GC 67. Yet Respondent declined to discipline Ashmeade based on these or any other complaints against him, despite evidence establishing that Respondent issues written discipline to its supervisors and managers. Tr. 1613, GC 73, GC 84.

c. Respondent Laid Off Burt for Low Sales Performance While Bypassing Lower Performing Workers

Burt was one of Gotham's initial hires to open the Williamsburg store and worked as a full-time budtender there throughout his employment. Tr. 796-98, 896-70. Prior to joining Gotham, he had worked at another cannabis dispensary that had been organized with the Union, and Burt had been a member. Tr 799. He also had experience working as a manager in a hotel with unionized employees. Tr. 690, 809-11. Burt spoke often with store staff about his prior union experience, including a conversation with GM Logan in about January or February during which Burt told Logan that he liked working as a manager in a unionized workplace because it made the job easier. *Id*., Tr. 904-06.

On April 22, as set forth above, Burt made it explicit to Respondent that he supported the Union campaign in Williamsburg, even though management had previously seen him proudly

pointing at his Union pin in the Pin Day photo on April 11. Thus, when Respondent decided to select Williamsburg employees for layoff in mid-to-late April, as VP Bortner testified, they knew about Burt's key role in the Union drive. Tr. 2060-62.

Bortner and COO Anderson determined to use total sales per hour worked as the metric to evaluate which employees to lay off because they believed it reflected how productive an employee was. Tr. 1899, 2062-63. Bortner compiled data on employee sales and on-the-clock hours from January 1, 2025 to date and prepared a spreadsheet, which lists each employee's "Net AOV," sales per hour, cannabis sales, lifestyle sales, total sales, and hours worked, in addition to separating full-time from part-time employees. Tr. 1363-67, 2066, 2070-71, R 18, R 27, R 28. Bortner used this spreadsheet to determine which employees would be subject to layoff, but he excluded from consideration two employees, whom Bortner testified were "on leave." *Id*., Tr. 2077. Crucially, the two employees whom Bortner excluded from consideration for layoff had the lowest sales per hour of all full-time employees at the Williamsburg store. R 18. Bortner could not recall what type of leave either of the excluded employees were on, but he testified that HR had instructed him that he "needed to protect their job[s]," and he could not recall why. Tr. 2077, 2082. Maciejewski – whom Respondent called to testify twice – failed to give any testimony regarding the basis of this instruction to exclude the two low-performing employees, and Respondent introduced no evidence to support Bortner's contention.

Burt testified that towards the end of his employment, starting in February or March, supervisors and managers at the store were assigning him to work security more frequently. Tr. 886-87. The supervisors asked him to work security for hours at a time during his shifts, and the total time he would spend at security would amount to up to half his shift or more. *Id*. A part-time budtender named Jordin was also frequently assigned to work security. Tr. 888, 941. Nevertheless, when Bortner analyzed his spreadsheet to determine layoffs, he excused Jordin's low sales because

he worked security, yet he made no such consideration for Burt. R 18, Tr. 2078, 2084. Bortner explained that he only excused Jordin's low sales because Jordin was sometimes assigned full shifts at security, and he did not consider budtenders' time spent assigned to security for parts of their shift. *Id*.

Even though Bortner and Anderson testified that they wanted to base layoffs on sales per hour to weed out the least productive employees [Tr. 1899, 2062-63], Bortner's spreadsheet shows that two part-time employees – "Patrick J" and "Jared F" – worked about the same number of hours as Burt but had lower sales per hour. The spreadsheet shows that Burt worked 390.57 hours, while Patrick J worked 413.43 hours, and Jared F worked 388.3 hours. R 18. Burt's sales per work was $122.97, while Patrick J's was $111.08, and Jared F's was $122.63. *Id*.

In addition to Burt, Respondent decided to lay off part-time employees Nora Siede and Jilisa Denny – both of whom had dramatically lower sales per hour relative to Burt.[9] Tr 1374, R 19-20, R18. Respondent had not previously laid off any staff. Tr. 1379-81. Subsequently in June, Respondent laid off employees from its Chelsea store, but in making those layoffs, Respondent notably did not rely exclusively on the sales per hour metric to determine who should be laid off. Tr. 1383. Instead, at Chelsea Respondent considered sales per hour in addition to a variety of other factors based on manager surveys of each employee's time and attendance record and behavioral performance. *Id*. Respondent offered no explanation as to why it used the more nuanced and detailed evaluation for the Chelsea layoffs.

Ironically, a few hours before laying him off for poor sales on April 30, Respondent awarded Burt with a free t-shirt in recognition of his sales of lifestyle products. Tr. 879-82. Later that day, Ashmeade called Burt to the back of the store, and Burt immediately knew that he was

[9] Siede had sales per hour equaling $79.20, and Denny's sales per hour equaled $67.50, compared with Burt's $122.97 sales per hour figure. R 18.

going to be fired, after he had seen Gold and Del Sorbo fired earlier. *Id*. Burt followed Ashmeade to the back, but before he left the sales floor he called out in a loud voice, "I'm about to get fired for union busting!" *Id*. Maciejewski, Bortner and employee Nora Siede were waiting in the manager's office when Burt arrived. *Id*. Ashmeade led the meeting and said that Respondent was restructuring and had identified employees with the lowest sales numbers for layoff, and because Burt and Nora were the lowest performers, the company was laying them off. *Id*. Burt contested the notion that he had the lowest sales among store staff and pointed out that no one had ever warned him that there was a problem with his sales. *Id*. The record confirms that Respondent had never warned or disciplined Burt about his sales, and no one from management had ever said about the need to reduce staffing levels at Williamsburg or that budtenders with low sales numbers may be laid off. *Id*., Tr. 806-09, 885. Burt could not recall what, if anything, Ashmeade said in response to Burt challenging the idea that he had the lowest sales. Tr. 882-84. The other managers in attendance said nothing. *Id*. They gave him a copy of his termination notice. *Id*., GC 48. The managers then turned to address Siede, and Burt asked her if she wanted him to stay, but she declined. *Id*. Burt then left the manager's office and went to gather his belongings. On his way out, he announced to the sales floor that he had just been fired due to "union busting" and heard "audible gasps" in response. Tr. 885.

7. Respondent Unsuccessfully Continued to Coerce Employees Against Supporting the Union, But Employees Selected the Union Nonetheless

After purging nearly all the original leaders of the Union campaign, Respondent attempted to further coerce employees into rejecting the Union in the upcoming NLRB election, with CEO Wilson hosting events at which she continued to threaten employees with adverse consequences if they unionized. The attempt failed dramatically.

a. CEO Wilson and COO Anderson Hosted a Lunch for Employees at the Store Break Room Where They Warned Employees that the Union Would Take Their Wages and Benefits

Employee Palmer testified that sometime in May, Wilson and Anderson came back to the Williamsburg store to host an informal, voluntary lunch with employees who wanted to speak with them. Tr. 959-60, 1022-23. Palmer wanted to eat a free lunch, so he went to break room with coworker Malachi, where Wilson and Anderson were seated at a table filled with food. Tr. 959-60. The employees felt obliged to sit down with Wilson and Anderson in order to get the food. Tr. 1024. Palmer testified that after he and Malachi sat down and began eating, Wilson started speaking to them about why they should not support the Union. Tr. 959-60, 1025. Palmer described Wilson's comments as follows:

> "she basically spoke to us about how we shouldn't unionize and how the union effort would be detrimental to us and it's not great having to negotiate with a third party about things, and how they would be taking all our wages and all our benefits and they won't be, like, they really won't advocate for us. It will be just, like, somebody here to just make things harder and take our money." *Id*.

Palmer recalled that Wilson made a statement regarding wages "that if we unionized, it would be taking most of our wages and we wouldn't be able to make as much as we were making." Tr. 1026-27. Palmer testified that Anderson chimed in during Wilson's speech and reiterated her points using different words. Tr. 960, 1028. Neither Palmer nor Malachi said anything while Wilson and Anderson disparaged the Union. *Id*., Tr. 1024-25. Palmer was wearing his Union pin during the approximately 15-minute meeting. Tr. 961.

b. Respondent Hosted a Town Hall Event Where CEO Wilson Warned Employees that She Would Not "Take Care" of Them in the Same Way if They Unionized

On May 12, Respondent held what Maciejewski described as a company-wide, "all hands meeting with a little get together afterwards at a . . . crab shack somewhere in Brooklyn." Tr. 1238.

Respondent closed all its stores for the meeting to ensure all company personnel attended. *Id*. It wanted to convene employees to discuss the direction of the company and convey that the stores were "not making budget." *Id*.

Wilson delivered an address to the meeting attendees and read from prepared notes, which Respondent produced to the General Counsel under subpoena. *Id*., GC 77. Wilson testified that she read directly from the notes during the town hall event, and the words in the notes reflect what she said. Tr. 2293-95. The notes show that Wilson first discussed why she believes Gotham is a great company and her own leadership of various non-profit organizations. GC 77. She then spoke about the need for company employees to show "mutual respect from showing up on time, being respectful to your peers and managers regardless of something you might not agree with," before adding, "And of course you have to sell." *Id*. She went on to warn employees:

> "If you want a third party to come in and represent you then I won't be able to have the same relationship with you as I do now. I won't take care of you like we do now [because] everyone will be treated like [how] all the other dispensaries treat and pay their employees because I want to have a directly relationship with all of you and with a third party, I won't be able to have that."

Wilson's reference to "a third party" clearly refers to the Union. Next, Wilson told employees that "I am well aware that many Black and brown people in our city have been marginalized - and that is what you will get with a third party. I know this for a fact and that is why I care. That is why we sued the state of NY." *Id*. Her speech went on to address other subjects before the notes reflect that she turned the floor over to Anderson to field questions from the audience. *Id*.

c. <u>Employees Voted Overwhelmingly in Favor of the Union on June 11 Despite Respondent's Threats and Coercion</u>

The NLRB conducted an election at the Gotham Williamsburg store on June 11 pursuant to a stipulated election agreement between Respondent and the Union.[10] GC 2(b), 3. Despite Respondent's effort to dissuade employees against unionization, the Union won the election by an overwhelming tally of 18 to 3. GC 3. On June 25, the Regional Director for the Board certified the Union as the exclusive collective-bargaining representative for all full-time and regular part-time non-supervisory employees at the Williamsburg store. GC 4.

On June 12 – the day after the Union's resounding election victory – Wilson posted a message on her personal online "Gotham Gal" blog titled "Cannabis Is a Sinking Ship." Tr. 2256-59, GC 86. Wilson expressed frustration with the way the New York State government was administering the fledgling cannabis industry. She wrote that she felt "disgusted, saddened, frustrated, and angry at the lack of any intelligent decisions being made at the government level." *Id*. At trial, she admitted that the Union's election victory contributed to her disgust, sadness, frustration and anger. *Id*. She testified that things like the Union campaign in Williamsburg would "ruin the cannabis industry." *Id*. In her June 12 blog post, she wrote that "Incompetence, unions, corruption, and stupidity reign in cannabis at the government level, and unfortunately, all of us suffer." *Id*. At trial, she confirmed that she believes that unions will make everyone in the cannabis industry suffer. *Id*.

8. General Manager Cherchiglia Threatened Employee Palmer that Respondent Was Watching Employees to Find Reasons to Discipline Them and Issued Palmer a Final Warning on May 25 Because He Engaged in the Protected Concerted Activity of Discussing a Workplace Investigation with Coworkers

On April 30, Respondent awarded prizes to five employees for their performance in a lifestyle sales competition. Tr. 2123, R 15. Employee Tony Harris was one of the employees who

[10] The Parties stipulated that "Sales Floor Supervisors, Delivery Supervisors, [and] Inventory Supervisors" were excluded from the unit of eligible voters. GC 2(b).

received a Gotham-branded t-shirt prize from Inventory Manager Sudanisis Cruz. Harris testified that he was uninterested in the shirt and initially left it in a bag on top of the employee lockers in the back of the store because he did not want to represent Gotham outside of work. Tr. 839-40. Harris testified that he told his coworkers, including Charles Palmer, that he didn't want the shirt. Tr. 840-841. Harris was speaking with Manager Cruz about two weeks later and mentioned that he that could no longer find his shirt and hadn't seen it "in a minute." Tr. 843. Harris testified that he specifically told Cruz that he didn't want anyone to get in trouble over the shirt, and he did so because he believed that management was looking for "any reason" to terminate employees and saw the potential for Respondent to use the situation to sow conflict between sales associates. Tr. 845. Harris testified that no one in management other than Cruz ever spoke to him about the shirt. Tr. 847. Harris testified that he did not care whether someone else took the shirt. Tr. 847-48.

On May 13, Respondent began investigating employee Charles Palmer for stealing Harris's t-shirt. R 15. Cruz initiated the investigation after concluding from Harris' remark that his shirt had been stolen. Tr. 2123, R 15. On May 13, Cruz emailed Gotham executives Maciejewski, Danielle Chan, Bortner, new GM Cherchiglia, Store Manager Ashmeade, and Retail Manager Danny Tecaxco with the subject line "Theft Incident 5/6/25," writing that Harris reported his lifestyle contest t-shirt was stolen. R 15. Cruz reviewed camera footage showing employee Palmer taking the shirt out of its bag in the presence of three other employees, including Margaux Robin, who Cruz wrote "seems to have potentially enticed [Palmer]" to put the t-shirt in an unidentified locker which Robin had also placed her own shirt in. *Id.* Cruz wrote that she checked the locker shown on the camera footage and found Harris' missing t-shirt. Cruz admitted she never spoke to Palmer about the incident.[11] Tr. 2145. On May 14, Bortner emailed Cruz and asked her to send the

[11] Despite admitting the T-shirt never left the store between April 30 and May 13 (a full week after Palmer looked at the shirt), Cruz testified that she still thinks Palmer stole the shirt. Tr. 2160.

video footage. R 15. Later that week, Bortner and Maciejewski met with GM Cherchiglia, whom they tasked with handling the rest of the investigation. Tr. 1562.

Palmer testified that on May 22, Cherchiglia called him into the manager's office, where Store Manager Rosario was also present. Tr. 991. Palmer testified that Cherchiglia began the conversation by saying, "there's this thing coming from Gotham upper management, like Gotham higher ups, and it's not coming from [me]." *Id.* Palmer testified that Cherchiglia told him there was a report of Palmer tampering with employee property and upper management was considering terminating him, but he was fighting for Palmer not to get fired, and he wanted to talk to Palmer and get his explanation on what was happening in the video. *Id.*

Palmer testified that he reviewed security footage with the two managers and told them that he was just looking at the shirt that employee Harris had won and was not stealing anything.[12] Tr. 991-92. Palmer informed Cherchiglia that Harris said he didn't want the shirt and offered it to whoever wanted it. *Id.* Palmer testified that he also did not want the shirt but just wanted to look at it. *Id.* Palmer testified that Cherchiglia then said that optics are important and [Palmer] should be mindful of optics and the cameras are watching. *Id.* Palmer testified that Cherchiglia continued, stating that upper management is looking for a reason to penalize people and terminate people, so Palmer should be very mindful of that and of where he is, and of what he is doing every time he is at Gotham. *Id*. Palmer testified that Cherchiglia also said that "upper management" mentioned that when more than two employees are in the break room when the store is closed and no one is

[12] The security camera footage, which does not have audio, highlights several deficiencies in Respondent's investigation of the suspected theft. GC 51. For example, employees Luci Roman and Jodi Belton are observed on camera and appear to be engaging with Palmer for most of the video. Tr. 983-984. At 3:58 in the video, Roman appears to point at an area right before Palmer reaches to take a bag off the top of the lockers. Yet neither manager involved in the investigation spoke with either employee about their role in the situation, and there is no evidence that Respondent otherwise spoke with either employee about the incident. Tr. 1818, 2163. Around 3:05, Store Manager Von Ashmeade also enters the breakroom, which evokes no visible response from any of the employees present, as would normally be expected from employees engaged in misconduct. GC 51.

eating, it looks to management like they might be "up to something," even though Manager Cruz testified that it was not unusual for employees to congregate in the breakroom after a closing shift. Tr. 993, 2138. Palmer testified that Cherchiglia told him he was going to have the same conversation with coworker Margaux Robbin. Tr. 994.

Palmer left the meeting believing that Respondent was investigating him for stealing the shirt, but he was confused by the accusation since the shirt never left the break room and was a giveaway item that, from his perspective, no one cared about. Tr. 995. Palmer testified he wasn't sure "what we were even doing talking about this in the first place." *Id.* When he left the meeting, Palmer went to the sales floor and told employee Margaux Robbin what had just happened and warned Robbin that Cherchiglia and Rosario were probably going to meet with her next. Tr. 996-97. Two other employes were present. Palmer testified that he told Robbin it felt like Respondent was accusing him of stealing, based on the phrasing and the tone of the meeting he had with Cherchiglia and Rosario. *Id.* Robbin said that she didn't know what Respondent would want to talk to her about because she was looking at her own shirt she won in the same sales contest. *Id.*

About an hour later, Cherchiglia called Palmer back into his office, where Rosario was again present. Tr. 998. Palmer testified that Cherchiglia told him he heard Palmer through the walkie talkies telling people that he was being accused of stealing. *Id.* Cherchiglia said that Palmer shouldn't "go out there on the floor talking shit to people. . . about [Cherchiglia] and about being accused of stealing" because Cherchiglia said he wasn't accusing Palmer of stealing. *Id.* Palmer didn't say anything in response. *Id.*

Three days later, on May 25, Respondent issued Palmer with a final warning. Tr. 998-999, GC 50. The warning cites Palmer for removing Harris's t-shirt from the bag Harris had put it in and failing to leave it "in its rightful place." GC 50. The warning goes on to explain that "[d]espite being explicitly told that you were not being accused of theft, you spread false information to

others by claiming that you were. This behavior is considered malicious and unprofessional." *Id*. Palmer testified that in delivering the discipline to him, Cherchiglia repeated that he had nothing to do with it, and he fought for Palmer to upper management. Tr. 999.

Cherchiglia testified that he reviewed the security footage (GC 51) before interviewing Palmer and concluded that it did not appear Palmer stole anything. Tr. 1687. Cherchiglia testified that during his meeting with Palmer, he told him "several times" that he didn't "see any theft" but that he saw someone taking an item that wasn't his and messing with it and then not putting it back in the way that it was found. Tr. 1688. Cherchiglia testified that his purpose in speaking with Palmer and Margaux on May 22 was to "put a bow on this" and "let everyone get back to their lives" because he didn't think that either employee engaged in misconduct warranting discipline. Tr. 1727-28. Cherchiglia considered the situation concluded after initially speaking with Palmer. Tr 1689.

However, shortly after Cherchiglia spoke with Palmer, Store Manager Ashmeade informed him that Palmer "hit the sales floor" and told employees that Cherchiglia had accused him of theft. Tr. 1691. Cherchiglia disagreed with Palmer's description of the investigation into the t-shit incident and that is why he summoned Palmer back to the managers off on May 22 and confronted him about Palmer's comments to coworkers, telling him that "it's BS, that you know I didn't say any of that" and instructed Palmer not to tell employees he was accused of theft. Tr. 1692. Cherchiglia testified that Palmer appeared "embarrassed" and apologized. Tr. 1962-63.

Cherchiglia admitted that he issued the final warning to Palmer not because he mishandled Harris' t-shirt, but rather because Palmer told coworkers that Respondent was investigating him for theft. Cherchiglia testified that by the time Respondent decided to issue the Final Warning, it was "no longer about the t-shirt, right, it's more or less about how the situation was handled and there was never any theft, it was all about the reaction to it and how team members were treated after the fact." Tr. 1695, 1697, 1701, 1746. HR Director Maciejewski confirmed that Palmer's

Final Warning was not motivated by the "t-shirt incident," but by Palmer talking to his coworkers about being accused of theft. Tr. 1346, 1568, 1571. Manager Cherchiglia repeatedly testified he found Palmer's discussion with his coworkers about his investigation hurtful and insulting to him personally. Tr. 1692, 1701, 1709, 1747, 1749. He admitted that Respondent did not discipline employee Robbin for her involvement in mishandling Harris's t-shirt because Respondent concluded Robbin did not tell other employees she was accused of theft. Tr. 1751-52.

Cherchiglia denied that he told Palmer during their May 22 meeting that upper management was watching the cameras and looking for reasons to retaliate against employees, or that Palmer needed to be mindful of optics. Tr. 1733. Cherchiglia also denied telling Palmer that he was fighting against upper management for Palmer to keep his job. *Id.* In this regard, Cherchiglia testified that he told Palmer during their May 25 meeting that he fought for him to receive a written warning instead of a final, but the group decision was made that Palmer's conduct warranted a final warning. *Id.* Yet at the hearing, Cherchiglia repeatedly distanced himself from Respondent's investigation into Palmer, testifying that he asked to meet with Palmer and Robbin because he "didn't see any theft and wanted to prove that there wasn't [any]." Tr. 1702. Cherchiglia admitted that as a new GM, he felt uncomfortable being thrust into the investigation, testifying that he, "didn't start this, and really [didn't] think [he] should be the one ending it." Tr. 1739. When asked if he interviewed Tony Harris as part of his investigation, Cherchiglia again deflected, testifying that "Sudanisis led the investigation" and that he was instructed to be "observational," before being redirected by the Administrative Law Judge to answer the question, which he then answered in the negative. Tr. 1793. Moreover, although Cherchiglia denied that Respondent was considering terminating Palmer over the suspected theft, he later testified on cross examination that his motivation for speaking with Palmer about the footage was to "clear his name" and "protect him from termination." Tr. 1732.

Cherchiglia testified that he, Maciejewski, Cruz, Bortner, and Ashmeade were all involved in the decision to issue Palmer the Final Warning.[13] Tr. 1697. Cruz, however, testified that she did not have any involvement in Palmer's discipline and was unaware he received the Final Warning. Tr. 2155. Cherchiglia testified that he "put himself out on a limb" by recommending to the other managers that Palmer receive a written warning instead of a final, and "everyone else was adamant that it should be a final." Tr. 1699. Maciejewski directly contradicted Cherchiglia in this regard and testified that she and VP Bortner asked for Cherchiglia's recommendation, and he recommended a final warning, with which they agreed. Tr. 1575. Maciejewski testified that she and Cherchiglia both concluded Palmer had not stolen anything, and that Cherchiglia wanted to discipline Palmer, "more for… going on the sales floor" and discussing Respondent's investigation with coworkers. Tr. 1346.

Cherchiglia admitted that Gotham employees regularly discussed a variety of work and non-work-related subjects on the sales floor, but no one other than Palmer was ever disciplined for such "gossip." Tr. 1788-89. Cherchiglia testified he has no problem with employees discussing their dating lives but takes issue with an employee complaining about a workplace dispute, which he believes is "completely different." Cherchiglia explained, "It's an issue. Yeah, yeah of course. It's an issue when – when someone is gossiping about a colleague. It's absolutely an issue when an employee is discussing something inappropriate on the sales floor." *Id*.

9. Respondent Discharged Employee Palmer on June 2 Because He Continued to Engage in the Protected Concerted Activity of Discussing a Workplace Investigation with Coworkers

On June 2, Palmer asked coworker Jodi Belton to borrow a lighter before Palmer went on break. Tr. 1000-01. Palmer testified that Belton told him he could grab one out of Belton's locker.

[13] Cruz testified that she did not have any involvement in Palmer's discipline and was unaware he received the May 25 final warning. (Tr. 2155).

Id. As Palmer went into the locker room to retrieve Belton's lighter, it reminded him of the t-shirt incident that prompted his Final Warning. *Id.* After he got the lighter, Palmer walked back toward the front entrance, where Belton and Store Manager Ashmeade were both sitting, and showing the lighter, he said, "Jodi, this is your lighter. I'm not stealing anything. I'm borrowing it. Von, you're my witness. Jodi gave me permission to go in his locker to grab the lighter." *Id*. Palmer recalled that Ashmeade objected that Palmer was "doing too much," to which Palmer responded, "I understand what you're saying, but I just got a write up for something like this not a week ago, and I would like to avoid any other unnecessary disciplinary action or being terminated." *Id*. He told Ashmeade he wanted him as a witness because "I'm not tampering with anybody's stuff. Jodi gave me full permission to grab this lighter. When I'm finished with it, I'm going to give it back to him after my 15-minute break is done." *Id*. Palmer then left with the lighter, but when he returned from his break, Belton told him Ashmeade felt offended by what Palmer had said. *Id*.

Palmer was then summoned to the manager's office where Cherchiglia and Rosario were already sitting. Tr. 1001-03. Palmer testified that Cherchiglia told him he was being terminated for screaming "I am not a thief, I am not a thief" on the sales floor in front of customers and employees. *Id.* Palmer denied the accusation and asked Cherchiglia who this was coming from. Cherchiglia replied that he was not at liberty to discuss. Palmer then asked Cherchiglia to call Ashmeade or Belton into the room so they could tell Cherchiglia what actually happened, but Cherchiglia replied, "No, we're not going to do that." *Id*. Palmer stated that there should be some type of investigation instead of terminating him for something he didn't do, to which Cherchiglia replied that it was out of his hands, and Rosario proceeded to read a prepared termination letter from her laptop. *Id*.

Despite the accusation that Palmer ranted about not being a thief in front of customers, Palmer testified that the store was not full at the time he spoke to Ashmeade and Belton, and no

one else was at the concierge desk. Tr. 1004, 1049. Respondent admitted that no one from management spoke with Palmer regarding his remarks to Belton and Ashmeade about the lighter prior to terminating him. Tr. 1819. Cherchiglia further admitted he never spoke to Belton about the incident, and neither did HR. Tr. 1820, 1780.

Inventory Manager Cruz testified that she observed Belton and Palmer near the concierge desk, when Palmer said "something to the effect of like, you know, look, Sudanisis, I want a witness. I'm returning Jodi's lighter. I'm not taking anybody's things." Tr. 2146-48. Cruz testified that she didn't think anything of Palmer's remark and assumed it was a joke since, "as stoners we kind of always steal each other's lighters." *Id*. Cruz could not recall if any customers were present and confirmed that the concierge area was one where employees were predominantly situated, not customers. *Id*. Cruz admitted Palmer was not speaking loudly, and any customers who may have been on the sales floor were unlikely to hear him. *Id.* Cruz testified that she never spoke to Palmer about the incident. *Id.*

Cherchiglia testified that Cruz reported Palmer's comment about the lighter to Cherchiglia, and advised, "you got to do something about this. This is getting out of control." Tr. 1768-72. Cherchiglia testified that shortly thereafter, Ashmeade came into his office and reported that, Palmer was acting "weird" about borrowing a lighter from Belton. Cherchiglia recalled that Ashmeade said that Palmer "went around to people, was like, 'Hey, just so you know, I'm borrowing this lighter. I am not stealing it. I am borrowing this lighter.'" *Id*. Cherchiglia testified that Cruz told him that Palmer was saying these things in front of customers, even though Cruz testified she didn't believe customers were around. *Id*. Cherchiglia testified that he spoke with Cruz about Palmer and the lighter for only about 15 seconds, and he didn't take the time to ask what she specifically observed Palmer doing. *Id*. He simply called Maciejewski and Bortner to recommend terminating Palmer. *Id*.

Cherchiglia testified that he and Ashmeade then briefly reviewed footage showing Palmer brandishing the lighter, but he did not save the footage or share it with HR. *Id*. He admitted that he only reviewed security camera footage showing the concierge desk, and the angle showed no customers in view. Tr. 1774, 1777. Cherchiglia ultimately admitted that Palmer's was not terminated because there were customers nearby when he discussed the lighter with Belton and Ashmeade. Tr. 1778-79. Cherchiglia agreed that Palmer was fired for continuing to discuss his discipline and Respondent's investigation of him with coworkers, which Gotham considered prohibited "gossip." *Id*.

10. After the Union's Election Victory, Respondent Failed and Refused to Meet with the Union to Bargain a Contract for More than Six Months

On June 26, 2025, the day after the Union was certified as the exclusive bargaining representative of Williamsburg store employees, Union attorney Christopher Baluzy sent a request via email and U.S. mail to Respondent attorney Theo Gould requesting to commence bargaining and that Respondent provide the Union with information necessary to prepare for bargaining. Tr. 1073, GC 55. Gould replied on June 26 and that he would be representing the Respondent in contract negotiations. *Id*. On July 31, after receiving no further response, Baluzy called Gould, who did not answer, and emailed him again requesting bargaining dates in August. Tr. 1077, GC 54. Gould responded on August 1, and they scheduled to speak via phone call on August 5. *Id*.

Baluzy testified that during the August 5 phone conversation, Baluzy stated the Union's desire to begin bargaining immediately. Tr. 1078. Baluzy also asked Gould to send the requested information. *Id.* Baluzy testified Gould said that the Employer needed time to gather the information because the Union was "asking for a lot of stuff," but he did not specify how long Respondent would need to furnish the requested information. *Id*. Baluzy testified that Gould claimed that certain unnamed Respondent officials were away on vacation, which would delay

Respondent's ability to gather the information. *Id*. Gould did not object to any specific request as burdensome or irrelevant. Tr. 1080.

On August 26, Baluzy emailed Gould and proposed to meet for negotiations on September 29 or 30. Tr. 1081, GC 54. Gould did not respond to Baluzy's August 26 email. Tr. 1082. On September 12, Baluzy emailed Gould again, proposing additional bargaining dates on October 1 through 3, and informing Respondent that the Union was no longer available September 30. Tr. 1082, GC 54. Baluzy sent a second email also reiterating his request for information. GC 54, Tr. 1085. On September 17, having still heard nothing from Gould, Baluzy emailed him again requesting bargaining on September 29, October 1, and/or October 2 and proposing the parties meet at the Union's office. *Id*. Baluzy also asked again when Gould or his client would be sending the requested information. GC 57. Gould replied within minutes stating, "thank you: [I] have a call into the client and am awaiting instructions. Thanks." *Id.* Gould did not respond further by September 19, prompting the Union to file its unfair labor practice charge in Case No. 29-CA-374041 at issue herein. Tr. 1085-86, GC 1(q).

Despite the Union's charge, Respondent continued to fail and refuse to engage substantively with the Union or provide information for months, with Gould failing to respond to Baluzy until November 21, when Gould emailed Baluzy:

> "Good afternoon. Somewhere along the way during the shutdown we lost track of this. I would like to get it back on track. I have a Board trial starting on 12/1 but would like to set up a start to negotiations after that. Could you please provide some dates in either mid-December or January? I will make sure that we have provided the employee information before our meeting to provide time for you to draft proposals." GC 56.

Baluzy replied on December 2, proposing bargaining dates on December 9 and 10 and reiterating his previous requests for information. *Id*. Gould replied on December 3, stating that he was busy with another matter and was unsure of his availability to meet for negotiations, but he would ask his client about possible dates and get back to Baluzy. Nearly a week more went by, and

Gould still failed to propose any dates. On December 9, Baluzy emailed Gould again to ask if Respondent would be available to commence bargaining the week of December 15, and he once again requested, "Please also send responsive information to the information request ASAP." Tr. 1092, GC 56. Gould did not contact Baluzy again until December 17, when he emailed and stated that Respondent was again unavailable to meet with the Union at any time in December due to vacation schedules. However, for the first time on December 17, Gould offered a specific bargaining date, proposing that the parties meet for their first negotiation session on January 8, 2026, via Zoom. GC 58. Baluzy replied the same day and agreed to meet on January 8, and the parties ultimately held their first bargaining session on that date, ***nearly seven months*** after the Union's election victory. Tr. 1094.

Baluzy testified that the Union's lack of information hurt its ability to develop initial proposals, leading to inefficiencies in bargaining. Tr. 1099, 1110. By delaying bargaining, Respondent spent months signaling to employees that it did not recognize their choice for Union representation and effectively operated the Williamsburg store as if there was no union. During this time, employees resigned or were terminated before they had any chance at enjoying the benefits of union representation, causing employees to disconnect from the Union. Tr. 569-70. Del Sorbo testified that no employed sales associates are part of the Union bargaining committee. Tr. 622.

Respondent presented no evidence in defense of its refusal to bargain for more than six months. It elicited testimony from Baluzy on cross-examination establishing that the bargaining delay also included the 6-week long federal government shutdown, but Respondent failed to present any evidence showing that the government shutdown affected the Parties' ability to meet for the purpose of bargaining. Tr. 1117-18.

11. Respondent Failed and Refused or Unreasonably Delayed Providing Relevant Information Requested by the Union

As noted above, Baluzy requested that Respondent provide the Union with information when he first reached out to Gould on June 26. GC 55. Respondent never questioned or objected to the relevance of these requests because each of the 28 categories of documents requested pertained to the Williamsburg bargaining unit.[14] Tr. 1080.

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[14]The Union requested the following categories of information regarding Unit employees: **(1)** First name (both legal and/ or chosen), last name, suffix (if any), and pronouns; **(2)** Mailing address, email address, home phone number, cellular/ mobile phone number; **(3)** Date of hire; **(4)** Job title, department, status (FT/PT); **(5)** Schedule, both shifts and weekly hours, for each of the past twelve (12) weeks from the date of this letter; **(6)** Current hourly rate of pay or salary for each employee showing regular and overtime pay for the past twelve (12) weeks; **(7)** Since the opening of the Gotham Brooklyn store, the date of all wage increases and amount; **(8)** If an employee is scheduled to receive a wage increase, the date and amount of the increase and the reason for the increase; **(9)** All benefits covering the employee, both statutory and voluntary, including the medical plan offered, the employer's and the employee's contributions, and the type of plan they are enrolled in (such as single, single +, family, high-deductible/low deductible, etc.); **(10)** Copy of the policy or summary plan of benefits for medical plans available to bargaining unit employees; **(11)** All paid time off (PTO) to which each employee is currently entitled or eligible to participate; **(12)** For each employee, all disciplinary records, if any, including all write-ups, corrective actions, and performance improvement plans and progress reports, both official and informal or unofficial; **(13)** For each employee, any bonuses provided, the date the bonus was provided, gross amount of the bonus, and the reason for the bonus (if any); **(14)** All documented Policies and/or Work Rules governing bargaining unit employees and any Employee Handbooks currently in use by Gotham (e.g., including policies pertaining to employee scheduling, attendance, and membership rewards); **(15)** Policies and/or Work Rules governing bargaining unit employees and have been made available to bargaining unit employees in use by Gotham that are specific only to the Gotham Brooklyn store; **(16)** All documented sales goals communicated to bargaining unit employees by Gotham management from September 2024 to present; **(17)** All documented sales metrics of bargaining unit employees from September 2024 to present; **(18)** The days of the week making up the payroll period and pay date; **(19)** All policies and documentation pertaining to benefits and pay guidance available to both benefits-eligible and non-benefits-eligible staff; including, but not limited to PTO (sick, holiday, jury duty, bereavement, vacation, etc.), all forms of leaves of absence (personal, medical, FMLA, NYS Paid Family Leave), transportation benefits/ reimbursement, etc. – any benefits mandated by local, state, or federal law; **(20)** Written policies and training materials related to discrimination, harassment, workplace safety, and any other related issues, including all incident reports, however characterized by Gotham, involving at least one bargaining unit employee; **(21)** A copy of job descriptions and/or job duties for all titles in the bargaining unit; **(22)** Pending and anticipated bargaining unit employee transfers between Gotham store locations, departments, or job titles; **(23)** Pending promotions of all unit members, both within and outside of the bargaining unit; **(24)** A list of all laid-off or terminated bargaining unit employees from September 2024, and reason for termination or separation and the amount of severance paid, if any; **(25)** Plan descriptions of employee benefits, including medical, life, vision, dental, retirement, and tuition reimbursement programs, regardless of current enrollment; **(26)** All sales incentives, either Gotham or vendor-provided, free or discounted product trials, training programs, both on and off-site, and any other fringe benefits currently available to bargaining unit employees; **(27)** All policies and procedures pertaining to merit raises and market adjustments and relevant frequency; including, but not limited to: factors contributing to merit raises, reference tables and ranges used for percentage calculation, process to determining performance rating and reference used to qualify performance factors, and tenure factor; and **(28)** Number of seasonal, casual, and/or temporary workers currently employed at the Gotham Brooklyn store, including their status (temporary, casual, seasonal) and job department where employed. For seasonal and temporary employees, please also state their end dates of employment. GC 55.

Baluzy specifically asked Respondent to make alternative arrangements to ensure timely provision of the information, despite the summer vacation schedule. Baluzy wrote to Gould on June 26, "I recall that you'll be out of the country in early July. If another attorney at your firm can assist with this request, please send responsive documents or information on a rolling basis to me by email or through a shared web-based folder (e.g., Dropbox, Google Drive, OneDrive), and as soon as possible, but no later than July 11." GC 55. Respondent failed to comply by July 11 and repeatedly ignored numerous subsequent requests by Baluzy to furnish the requested information.

Respondent did not provide the Union with ***any*** of the information it had requested on June 26 until January 5, 2026. Tr. 1097-1099, 1107-1108, GC 59. On that date, over six months after the request, Respondent provided only some information responsive to requests 1 through 4, 6, a partial response to request 9 regarding employee benefits plans, and information responsive to request 25 regarding plan descriptions of employee benefits plans. *Id*. Respondent orally responded to request 18 regarding the payroll period during the bargaining session on January 8. Tr. 1105.

On January 12, 2026, Baluzy emailed Respondent counsel identifying the information it considered unfurnished and outstanding from its original June 26 request. GC 59. Other than Respondent's vague assertion on August 5 that Gotham personnel were on vacation and would need some additional time to respond, the record shows the Respondent provided the Union with no explanation or justification for its delay and failure to provide the requested information. Tr. 1099. Respondent delayed furnishing specific information until January 29, 2026, without explanation to the Union as to the reason for the delay. On January 29, 2026, Respondent furnished information responsive to requests 11, 14, 19 and 21. Tr. 1099-1100, 1105-06. On April 16, Respondent furnished information responsive to request 5, again failing to explain the cause of the

delay. Tr. 1095-96. Respondent also provided information responsive to requests 12, 16, 17, and 24 in the same April 16 email.[15]

At the time of the hearing, the Union had still not received information responsive to requests 7, 8, 13, portions of 14, 15, 20, 22 through 24, or requests 26 through 28. Tr. 1097-98, 1100, 1103, 1106-07, GC 59. Respondent failed to notify the Union that these requested categories of information did not exist or otherwise provide justification for its failure to produce the materials. Tr. 1100, 1103, 1106-07. Respondent's unexplained delay in providing the information – like its nearly seven-month refusal to schedule contract negotiations – further hampered the bargaining process. *Id*.

III. CREDIBILITY DETERMINATIONS

To determine the merits of the violations alleged in the Complaint, the ALJ must resolve several key credibility issues. Primarily, Respondent managers and executives who testified at the hearing denied that anti-union animus played any part in the company's decision to discharge Griffiths, Gold, Del Sorbo, Burt or Palmer. Their denials should be discredited by the ALJ not only because the overwhelming weight of the factual record, as set forth above, demonstrates that unlawful anti-union considerations motivated Respondent's actions, but also because Respondent's witnesses were evasive in concealing the truth of their conduct and were generally unreliable witnesses. The ALJ must also make critical credibility determinations regarding threatening and coercive statements by Gotham officials, which employees witnesses described at trial, sometimes refuted by testimony from Respondent managers or executives but often unrebutted. For the reasons explained below, in each instance where there is a credibility dispute,

[15] Baluzy testified that an attorney for Respondent represented that she had initially emailed this information on April 13, but the email did not send because of the file size and was resent successfully on April 16, 2026. (Tr. 1095-1096).

the ALJ should resolve the dispute in favor of the employee witnesses, who gave thorough testimony, supported by extensive detail and corroborating evidence, and had strong recollections of important events, in sharp contrast with Respondent's witnesses.

A. The Employee Witnesses Had Clear Recollections and Gave Detailed and Forthright Accounts of All Relevant Events Corroborated by Other Witnesses and Evidence

The testimony of each employee witnesses called by the General Counsel – Griffiths, Del Sorbo, Gold, Burt, Harris, and Palmer – should be fully credited. They each provided earnest, detailed accounts of their actions and communications with Respondent and other employees in a direct, consistent and convincing manner. They were forthright witnesses, who each made a sincere effort to provide the ALJ with his/her honest and complete recollections of what the witness did and what was said at each critical event about which they testified.

Critically, the employee witnesses recalled important meetings and conversations with management officials consistently and in meticulous detail. This is especially true of Griffiths, who remained laser-focused throughout his lengthy time on the witness stand, over multiple hearing days, to respond accurately and completely to any question he was asked. Griffiths recalled precisely how Store Manager Rosario casually told him that "We know where you stand" with respect to the Union in early March, and his account of that event was largely corroborated by Burt, who was also present. Griffiths remembered in painstaking detail what COO Anderson said to him during the March 12 meeting at the Domino Sugar building. Del Sorbo similarly gave a detailed account of the warning by GM Logan during initial training before the Williamsburg store opened that employees must not "come together," including the precise location and full description of what was said at the time. The same goes for Del Sorbo's recollection of Rosario's questioning of her at the front of the store immediately following CEO Wilson's April 22 captive audience meeting, where Del Sorbo specified the exact location, circumstances and content of

Rosario's statements. Gold also recounted in crisp detail the circumstances and content of CEO Wilson's remarks to him right after the April 22 captive audience meeting.

The credibility of the employee witnesses is bolstered by the fact that they often mutually corroborated each other on key points. As noted, Burt largely corroborated Griffiths regarding Rosario's "know where you stand" remark. Gold's testimony about statements Rosario made to him at a restaurant in April strengthened the credibility of Del Sorbo's account of Rosario's April 22 statements at the store, and vice versa, because each employee testified that Rosario similarly told them in different settings that Respondent would reduce employees' wages if they unionized. Burt's testimony that he called out to coworkers as the April 22 meeting was ending – and in front of company executives – that employees should speak with him if they wanted true information about the Union (as opposed to speaking with managers) was confirmed by Del Sorbo who was present at the time and supported Burt's testimony in that regard. Similarly, Palmer testified that coworker Harris authorized Palmer to look at and even take the t-shirt Harris had won and left on top of the lockers at the store, which Harris corroborated completely.

Unlike the other alleged discriminatees, Palmer was soft-spoken during the hearing to the point that his answers were not always audible. However, his quiet nature should not be mistaken for lack of candor. Palmer testified in a succinct and straightforward manner on both direct and cross examination, maintaining his composure throughout, even in response to intrusive and irrelevant questions about his romantic relationships and drug use at work. As it did with other witnesses, Respondent tried unsuccessfully to undermine Palmer's credibility using the affidavit Palmer gave to the Board during the investigation of the underlying charge, only to reveal that Palmer's testimony was consistent with the affidavit, establishing that Palmer did not scream or shout at coworkers when he spoke with them about borrowing employee Belton's lighter on June 2. Tr. 1047-48.

Respondent was repeatedly unable to reveal cracks in the employee witnesses' credibility through cross-examination, as each employee, like Palmer, withstood rigorous cross-examination by Respondent counsel without revealing any significant inconsistencies with their testimony on direct. The employee witnesses candidly answered difficult questions, even when the answers might make the witness look bad or hurt the General Counsel's case. For instance, Griffiths admitted under questioning by the ALJ that he understood how his February 13 "End You" video post might be seen as threatening. Tr. 242-44. Del Sorbo honestly acknowledged that Griffiths "End You" video and his February 18 "Split Your Skull" Instagram story were "very aggressive" could "definitely" be interpreted as threatening physical violence, even though she felt no reason to fear Griffiths based on her experience working with him. Tr. 616-17. Gold openly admitted to making mistakes in his conduct towards female coworkers that made them feel sexually harassed and caused Respondent to discipline him. Tr. 645-46, 636-37. These employees clearly intended to give truthful accounts, even if the truth might be uncomfortable for them, which strongly reinforces their overall credibility as witnesses. The employees who testified proved themselves to be honest witnesses with robust recollections of the critical events in this case, and the testimony of each of them should be fully credited.

B. Respondent Managers and Executives Were Unreliable Witnesses Who Failed to Recall Critical Details, Made Implausible Denials, Fabricated Events, and Gave Inconsistent Testimony

In dramatic contrast to the candor and detailed recollections of employee witnesses supported by corroborating evidence, the company officials called to testify by Respondent were evasive, repeatedly failed to recall key events, made implausible denials, offered testimony that was internally inconsistent or at odds with other evidence presented by Respondent, and even completely fabricated events that did not occur, just to make themselves look better. The ALJ

should, therefore, not credit the testimony of CEO Wilson, HR Director Maciejewski, COO Anderson, VP Bortner, or GM Cherchiglia.

1. Wilson

Wilson was called to testify both by the General Counsel and by Respondent and throughout, her testimony was riddled with dubious denials concerning her anti-union beliefs and conduct. Despite the overwhelming evidence showing that Wilson disparaged the Union online and in-person to employees [GC 7, GC 86], was "very upset" that employees supported the Union [*Id*.], and threatened employees with dire consequences if they unionized [*Id*., GC 44, GC 77], Wilson inexplicably denied that she opposed unionization at Gotham stores and that Gotham failed to take a neutral approach to unionization as promised in its LPAs with the Union. Tr. 111. Before being confronted with the audio recording of the April 22 meeting, where she derided the Union and threatened employees with benefits cuts, she even denied that she had such a meeting with Williamsburg employees to express her opposition to the Union campaign. Tr. 114. Similarly, Wilson initially denied telling employees that the benefits they enjoyed would change if they selected the Union during the April 22 captive audience meeting [Tr. 128-29], but Gold's recording of the meeting establishes the falsity of Wilson's claims. GC 7.

Wilson gave wildly inconsistent answers regarding her views about unionization, severely damaging her overall credibility. On direct examination by Respondent counsel, Wilson testified, "I have no problems with employees unionizing, particularly . . . when there are employers that don't take care of their employees." Tr. 2252-53. Her speech during the April 22 captive audience meeting shows that she believes Gotham took exceptionally good care of its employees, which was why Wilson was "very upset" about the Union campaign at Williamsburg. GC 7, 7(b). However, on cross examination, Wilson refuted her prior statement that she has "no problem" with unionization, particularly where employees are not treated well, per the following exchange:

"Q: So you have no problem with employees unionizing, correct?"
[WILSON]: Yes
Q: But that's only if you think that the employers don't take care of them?
A: No
Q: No? Okay. But particularly so?
A: No. Tr. 2255

Wilson appeared to flip-flop on other critical issues, too. When she testified on direct denying that she coercively interrogated and threatened employee Gold following the April 22 staff meeting, Wilson recalled that during the exchange with Gold on the shop floor, Gold told her that he thought the store would unionize. Tr. 2240. However, on cross-examination, Wilson reversed herself and said, "I don't recall that" when asked whether Gold stated that the store would unionize during their April 22 interaction. Tr. 2293.

At certain points, Wilson's testimony was farcically implausible. She testified that she believes that the people who work for Gotham are "the most educated, lovely group of people" that it is "impossible" for anybody who goes into a Gotham store to be dissatisfied with their experience and post a negative review online. Tr. 2304-05. Thus, she testified that she believes that any negative reviews about Gotham found on Google must be fake or from a competitor trying to undermine her company, even after confronted with detailed Google reviews citing specific employee misconduct at specified times. *Id*., GC 89. Wilson, however, suspended her distrust of negative customer reviews when it came time to terminate Gold, testifying that she found it "impossible" that a customer would be dissatisfied with their Gotham experience, "Except, of course, in the case of Henry." Tr. 2304-05.

Wilson shamelessly tried to bolster Respondent's case in other respects, even going as far as fabricating a story about misconduct by Griffiths in a misguided and feeble attempt to support Respondent's claim that it fired Griffiths for misconduct, as opposed to firing him for his pro-Union advocacy online. Wilson testified that Maciejewski informed her at some unspecified time

that Griffiths was "bullying" coworkers in-person at the store regarding the Union, and Maciejewski had warned Griffiths not to do that. Tr. 2274-77. Wilson testified that this supposed bullying by Griffiths reflected a serious violation of company policy warranting discipline. *Id*. However, neither Griffiths nor Maciejewski testified about this alleged bullying or warning because they simply did not occur. Respondent called Maciejewski back to the witness stand to testify for a second time just to clarify that Wilson had entirely made up the story about Griffiths bullying coworkers at the store. Tr. 2340.

Wilson's fabrication on this point epitomizes her overall untruthfulness and propensity to mislead the ALJ. Her testimony should not be credited, and the ALJ should disregard Wilson's denials about her anti-union animus and motives and credit Gold over Wilson regarding Wilson's statements following the April 22 captive audience meeting.

2. Maciejewski

Maciejewski testified at length during the hearing, as she was not only called twice by Respondent but was also called during the General Counsel's case in chief. Throughout her testimony, Maciejewski repeatedly concealed important information, failed to recall critical conversations she had with fellow managers and other details about the Union campaign and gave inconsistent testimony about her knowledge of employee union activities and Wilson's anti-union animus, establishing that she in an unreliable witness who should not be credited.

Time and again, Maciejewski failed to recall details of the events about which she testified, especially when it came to the Union campaign. She couldn't remember whether she discussed union organizing in Williamsburg with Wilson or Anderson when they realized it was happening by viewing Griffiths' Instagram posts. Tr. 1453. When she initially discussed Griffiths' "End You" post on February 13 via email with fellow executives, Maciejewski stated her intent to have a meeting with Anderson and Bortner the next day to discuss this development [GC 68], yet she

failed to offer any testimony explaining what she discussed with Anderson and Bortner at that time. Maciejewski ultimately admitted that she spoke regularly with Wilson and Anderson about union activity in Williamsburg during their weekly meetings but failed to recall a single detail about anything they discussed. Tr. 1468-69, 1472-73, 1537. Maciejewski attended Wilson's April 22 captive audience meeting at the Williamsburg store but testified that she couldn't recall discussing the meeting with Wilson, either before or after the event. Tr. 1549, 1558.

Maciejewski claimed she couldn't recall any specifics about the various conversations she had with Wilson and Anderson about Griffiths' pro-Union posts online, aside from vaguely describing them discussing "an overall sentiment, like he's posting this and this relates to Gotham and he has made us feel unsafe." Tr. 1596-98. She equivocated regarding whether she saw Griffiths' "Split Your Skull" post before or after she, Anderson and Bortner met with Griffiths on March 12 at the Domino Sugar building, first acknowledging that she became aware of that post a few days after Griffiths February 13 "End You" video [Tr. 1478], before realizing that it was better for Respondent's case if Griffiths' "Split Your Skull" post came after Respondent met with him on March 12. Upon returning from a lunch break, Maciejewski reversed herself and erroneously testified that she was confident that the "Split Your Skull" post was after the March 12 meeting. Tr. 1491, 1591. Griffiths' testimony and documentary evidence introduced on rebuttal firmly establishes the falsity of Maciejewski's claim in this regard. Tr. 2342-45, 2357-58, GC 91.

Maciejewski used her memory failure to try to help Respondent's case in other respects. She admitted that she saw the Pin Day photos Griffiths posted on April 11, but she claimed to not recall whether she saw the photos revealing employees' Union support before she began investigating customer complaints regarding Gold. Tr. 1535. Maciejewski further failed to recall the details of what she discovered during her investigation of alleged bullying by Del Sorbo, failing to remember any employee witnesses she identified by reviewing video footage as part of the

investigation or virtually anything that Manager Rosario told her about Del Sorbo's comments about coworker Freschman, even though she relied on Rosario's statement to recommend Del Sorbo's discharge. Tr 1545-46. Maciejewski herself acknowledged the unreliability of her testimony, admitting that it was difficult for her to remember the relevant events in this case because they happened over a year prior to the hearing. Tr. 1473.

Maciejewski made implausible denials regarding her knowledge of union activity that occurred right in front of her face. She denied seeing Griffiths wearing the red Union shirt when she met with him on March 12, even though, the shirt had "LOCAL 338" and "UNION STRONG" printed in big bold letters on the back, which was not covered by Griffiths' work apron during the meeting, and Maciejewski saw Griffiths' back as he left the meeting. Tr. 1477-78.

Her testimony was also internally inconsistent in numerous important respects. For instance, Maciejewski admitted that Wilson disfavored the Union because Wilson believed that the Union had violated the LPA during the 2024 Bowery campaign [Tr. 1616], but Maciejewski subsequently contradicted herself, claiming that Wilson never said she was against the Union. Tr. 1639. Maciejewski also claimed that Griffiths' IG post on March 13 or 14 highlighting Wilson's IG account viewing Griffiths' stories with the words, "Love when you watch me" [GC 20] made her realize that he was posting about Gotham, even though Respondent had already met with Griffiths on March 12 because they had determined his posts were about Gotham. Tr. 1480.

These inconsistencies and her repeated failure to recall critical matters render Maciejewski an utterly unreliable witness. Her testimony should be discredited.

3. Anderson

Anderson, like Maciejewski, exhibited extremely poor recollection, especially when it came to matters involving the Union campaign. He also claimed not to remember anything executives discussed regarding Griffiths' pro-Union IG posts. Tr. 1948-49. Anderson admitted

that Store Manager Ashmeade notified him that Griffiths wore a Union shirt to work on March 12, but he claimed not to recall how Ashmeade communicated this to him or what the store manager said when he did. Tr. 2001, 2023, 2028. Like Maciejewski, Anderson prevaricated regarding the timing of Respondent's knowledge of Griffiths' "Split Your Skull" post, initially admitting that he saw it before the March 12 meeting at the Domino Sugar building [Tr. 1929, 1961-62], only to reverse course to fit Respondent's narrative and claim that he saw the post after the meeting "because this is when things were escalating." Tr. 2027-28.

Anderson also gave internally inconsistent testimony regarding his knowledge of employee union activity in Williamsburg. Anderson admitted that Respondent fired Griffiths after Anderson had realized that Griffiths' "End You" and "Split Your Skull" posts, in addition to many others, were referencing union organizing at Gotham. Tr. 1916, 1957. Yet Anderson later testified that he was not aware that Williamsburg store employees were organizing a union until he saw the Pin Day photos in April after Griffiths was fired. Tr. 1977-78.

Anderson disingenuously tried to minimize the coercive nature of his March 12 meeting with Griffiths at the Domino Sugar building by denying that he started the meeting by asking Griffiths whether he liked working for Gotham. Tr. 1924. However, Wilson subsequently exposed Anderson's lie, testifying that Respondent's lawyers recommended that Anderson speak with Griffiths on March 12 "in regards to was he not happy with his employment at Gotham." Tr. 2244.

The record thus shows that Anderson tailored his testimony to fit Respondent's narrative, while concealing unfavorable facts, and the testimony should not be credited. Therefore, the ALJ should discredit Anderson's claim that he was not motivated by anti-union animus in recommending Griffiths' discharge, as well as his assertion that Respondent's decision to implement layoffs in April was unconnected to the Union activity in Williamsburg.

4. Bortner

Bortner also falsely testified that Respondent's decision to implement layoffs at the end of April was based solely on poor sales performance at the Williamsburg store. But just like the other management witnesses, Bortner's testimony was internally inconsistent or plagued by faulty memory in critical ways. He testified that Respondent refrained from laying off Williamsburg employees in early 2025 because management wanted to see if sales would improve during the summer of that year. Tr. 2082. Inexplicably, however, Bortner testified that Respondent decided to proceed with layoffs in April – long before summer sales results came in – and only explained the decision by citing the warming weather. *Id*.

Bortner also claimed that he excluded from consideration for layoff two employees who were supposedly "on leave" based on directions Bortner had received from HR. However, HR Director Maciejewski failed to offer any testimony supporting this contention, and when Bortner was questioned about HR's direction to him, he couldn't recall what HR told him about the leaves or the need to exclude the two low-performing employees when he determined who should be laid off. Tr. 2077, 2082. The ALJ should discredit Bortner's vague and uncorroborated testimony regarding why he excluded employees "Angelina S" and "Tyrell H" from layoff consideration and find that he did so to target known Union supporter Burt. R 18.

5. Cherchiglia

Cherchiglia was evasive about his role in the Palmer investigation and shifted responsibility to other managers in contravention of other record evidence. For example, Cherchiglia testified that Store Manager Rosario was "the most aggressive" and "insistent on severe punishment" issuing to Palmer and was "much more a part of" the investigation into Palmer than he was, despite no evidence Rosario was included in any communications regarding the incident and the undisputed fact that Respondent put Cherchiglia in charge of the Palmer

investigation. R 15, Tr. 1699, 1744-1755. Cherchiglia oddly claimed that he "was the quietest" in the meeting where Respondent decided to terminate Palmer [Tr. 1826] and asserted that Ashmeade and Cruz were both present, despite Cruz testifying that she had no further involvement in Palmer's discipline after speaking with Cherchiglia briefly on May 22. Tr. 2175.

Cherchiglia also failed to answer questions directly and veered instead into irrelevant subjects. For example, when asked to confirm that the only reports he received regarding Palmer's conduct on June 2 were from Ashmeade, Cherchiglia seemingly dodged the question answering, "I remember that [audio] feedback over the walkie-talkie. Yes, I do. Horrendous." Tr. 1754. Cherchiglia did not answer the substantive question until it was asked twice more. *Id.* When asked whether, as of May 25, he was aware there was a union election on June 11, Cherchiglia again failed to give a straight answer, testifying instead, "I don't know if I was aware on the 25th but funny enough, like that's my birthday. So, when I did find out that was happening? I had a PTO planned in advance. My mom came into town, so we went to the beach together. But no, I wasn't aware at that time of any of that." Tr. 1765. Cherchiglia's head-scratching response is dubious on its face, but even more so considering the pervasiveness of Respondent's anti-Union campaign.

Cherchiglia also tended to exaggerate details about Palmer's conduct, repeatedly recalling that Palmer was "talking shit" and "making a scene" in the presence of customers on June 2, despite no evidence this was reported to him, or that he observed it. Tr. 1710, 1755. When asked if he observed any customers in the footage he reviewed of Palmer on June 2, Cherchiglia demurred that they reviewed it only briefly and that was "more of a question for Von than [him] but [he] was more or less taken back by everything that was happening once again…" Cherchiglia testified in a rambling manner before ultimately admitting that he did not observe any customers in the footage, while still insisting it was likely there were customers just out of frame. Tr. 1774. Cruz

later contradicted Cherchiglia and testified that there were no customers near concierge, the only area they would have been likely to hear Palmer.

Cherchiglia's denial that he threatened Palmer during their May 22 meeting was also not credible. Tr. 1733. Cherchiglia had an obvious motive to deny this allegation at the trial, since his admission would have likely resulted in his discipline or even termination. Just two months before testifying, Cherchiglia received a written warning for, among other things, "distancing [himself] from company decisions or portraying them as directives coming solely from executive leadership or HR." GC 84. Thus, Cherchiglia understandably denied these statements, despite the evidence strongly implying he shared their sentiments: Cherchiglia testified repeatedly that he did not agree with the severity of the discipline issued to Palmer, nor the necessity of the investigation in the first place. This clear contradiction only makes Palmer's version of the events more trustworthy.

Similarly, Cherchiglia's testimony regarding Palmer's reaction to his unlawful termination also appeared fabricated. Initially, Cherchiglia testified that Palmer started screaming and picked up his phone saying he was going to start recording while saying he "didn't do shit" and "you know this is wrong," which Cherchiglia testified he found "violent and aggressive." Tr. 1715. Then, Cherchiglia testified that Palmer repeatedly punched the wall and slammed a chair, before throwing a lock at the trash can, all while screaming and cursing. Cruz, who recalled working that day, and testified that she generally worked until 6:30 p.m., did not corroborate this account. Moreover, the lurid details Cherchiglia testified to were not reported in the email he sent to Maciejewski on June 2 at 6:05 p.m. recapping the termination meeting, in which he wrote that Palmer's termination merely "didn't go great" and he could "tell Palmer wanted to hit somebody." In the same email, Cherchiglia wrote that Palmer "got super animated and intense" and "went at Von" on his way out the door, although Cherchiglia admitted at trial he did not witness Palmer

lunge at Ashmeade but embellished that detail because he imagined that was something Palmer would do. Tr. 1784.

HR seemingly disregarded Cherchiglia's false report about Palmer's reaction to his discharge, as Maciejewski did not review or retain any of the footage that would have shown Palmer's purportedly aggressive behavior, nor did she ever confirm whether Palmer had caused the damage to the trash can. Tr. 1577-79. While Palmer admitted he was "naturally" upset at being terminated, he denied engaging in any violent or threatening behavior toward Cherchiglia or any other manager, and his testimony should be credited over Cherchiglia's exaggerated and uncorroborated story.

C. Respondent Failed to Call Witnesses or Elicit Testimony Refuting Evidence of Its Animus and Unfair Labor Practices Warranting Adverse Inferences

The evidence establishes that former Gotham GM Logan – who remained GM of the Bowery store until May 27 and was involved in Respondent's investigation of Griffiths [GC 76, GC 68] – openly opposed unionization when he was GM of the Williamsburg store and warned employees that they should not "come together" and engage in concerted activities. Respondent failed to call him to refute this evidence or explain his role in the Griffiths investigation.

The evidence shows that former Store Manager Rosario repeatedly threatened employees with pay cuts if they supported the Union, gave employees the impression that their union activities were under surveillance, texted Del Sorbo on April 30 expressing shock that Respondent had engaged in a mass purge of its top performing employees [GC 42], and supposedly gave a statement to Maciejewski supporting Del Sorbo's termination. Respondent failed to call Rosario, either, so the evidence establishing her statements stands unrebutted and unexplained.

Respondent even failed to call current Store Manager Ashmeade, even though the evidence establishes that he interrogated employee Burt about his union activities and played a key role in

both the Gold and Palmer investigations. It is well-settled that the ALJ may draw an adverse inference from a party's failure to call a witness that would reasonably be assumed to corroborate the party's version of events, particularly where the witness is the party's own agent or supervisor. *See e.g.*, *United Parcel Service, Inc.*, 372 NLRB No. 158, slip op. at 16, fn. 68 (2023) (citing *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987)); *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 9–10 (2018); *Dayton Newspapers, Inc.*, 339 NLRB 650, 664 (2003). Such an inference is warranted here, and the ALJ should infer that had Respondent called Logan, Rosario or Ashmeade, they would not have supported Respondent's defenses.

IV. ARGUMENT

The facts established by the record evidence and the reasonable inferences drawn therefrom, combined with the necessary credibility determinations explained above, compel the conclusion that Respondent repeatedly violated the Act as alleged in the Complaint.

A. Respondent Maintained Unlawful Work Rules in Its Employee Handbook and Offer Letters in Violation of Section 8(a)(1) of the Act

At all relevant times, Respondent's "Media" policy in its Employee Handbook prohibited employees from making "any statement or criticism. . . that is adverse to the interests of, or disparages or impugns the reputation of, the Company, its partners, officers, or employees" and further prohibited employees from taking "any action. . . that may reasonably cause the Company, its partners, officers or employees to be held in disrepute by the public or their respective customers or employees." GC 63. The policy makes clear that Respondent does not tolerate any statements by employees that the company finds "threatening." *Id*. In addition, Respondent sent incoming new employees an offer letter, which included a "Mutual Non-Disparagement" provision that purports to prevent employees from publicly criticizing, ridiculing or disparaging Gotham or its "policies, directors, managers, officers. . . or employees." GC 65.

It is well settled that employees are protected under the "mutual aid or protection" clause of Section 7 of the Act when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). This includes the right to publicly criticize their employer, its policies, ownership, and/or management in regard to employees' terms and conditions of employment. *Alaska Pulp Corp.*, 296 NLRB 1260 (1989) (employee writing a letter to a newspaper to criticize his employer and elicit public support during a labor dispute protected); *Valley Hosp. Med. Ctr.*, 351 N.L.R.B. 1250, 1252 (2007) (employees "have a Section 7 right to communicate online with each other and the public to improve employment terms and conditions or otherwise improve their lot as employees" including by criticizing employer policies or practices).

The Board and courts have long recognized that an employer's maintenance of overbroad work rules may chill employees in the exercise of such § 7 rights. *See, e.g.*, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *see also*, *Whole Foods Market*, 363 NLRB 800, 803 n.11 (2015) ("[e]mployees, who are dependent on the employer for their livelihood, would reasonably. . . refrain from engaging in Sec. 7 activity for fear of running afoul of a [company work] rule"). The General Counsel disagrees with the Board's current framework for evaluating the legality of work rules set forth in *Stericycle, Inc.*, 372 NLRB No. 113 (2023) because it fails to strike an appropriate balance between protecting employees' Section 7 rights and safeguarding employers' legitimate business interests. But under any standard that has been applied by the Board, the Respondent policies at issue in the present case are unlawful.

In *The Boeing Co.*, 365 NLRB 1494 (2017), the Board held that the lawfulness of a work rule is evaluated based on "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." *Id*. at 1496 (emphasis in original).

When analyzing a rule's impact on employees' § 7 rights, any potential ambiguity in a rule is construed against the employer. *St. Joseph's Hospital*, 263 NLRB 375, 377 (1981).

Respondent's Media policy in its Employee Handbook and the "Mutual Non-Disparagement" provision of its offer letters expressly restrict employees' § 7 rights on their face and fall into the third category of cases identified as unlawful by the *Boeing* Board because "the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." *Boeing*, 365 NLRB at 1497. Respondent's policies broadly prohibit employees from making any sort of statement or action that would harm Gotham's public image, including employe complaints about pay or working conditions. Indeed, the evidence establishes that Respondent invoked the "Mutual Non-Disparagement" rule to threaten employee Griffiths with litigation because he spoke out about Respondent's opposition to the Union campaign at the Williamsburg store. GC 31. The Board has affirmed that similar work rules prohibiting employees from publicly criticizing their employer violate the Act. *See e.g.*, *Quicken Loans, Inc.*, 359 NLRB 1201, 1205 (2013), reaffirmed in 361 NLRB 904 (2014) (rule stating that employees may not ". . . publicly criticize, ridicule, disparage or defame the Company or its products, services, policies . . . through any written or oral statement" unlawful).

Respondent presented no evidence that these rules advance a legitimate and substantial business interest which cannot be served by a more narrowly tailored policy that does not put a blanket prohibition on employee criticism of the company. Respondent does not have a legitimate business interest in preventing employees from saying anything negative about it in public, as the Act grants employees the right to do just that regarding their working conditions. Respondent's policies afford no room for employees to engage in protected concerted activities in public. Thus, Respondent's prohibitions against employee public speech contained in its Media policy and

Mutual Non-Disparagement policy are overly broad and unlawfully restrict employees' § 7 rights, in violation of Section 8(a)(1) of the Act.

B. Respondent, by Store Manager Rosario, in Early March Created the Impression that Employees' Union Activities Were Under Surveillance in Violation of Section 8(a)(1) of the Act by Telling Employee Griffiths "We Know Where You Stand"

An employer unlawfully creates the impression that its employees' union activities are under surveillance when a supervisor makes a statement from which employees would "reasonably assume" that their union activities had been placed under surveillance. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004). The Board finds unlawful impression of surveillance when a supervisor tells employees that the employer is aware of employees' protected activities but fails to tell them the source of that information, because it causes the employees to reasonably conclude that the information was obtained through employer monitoring. *McClain & Co.*, 358 NLRB 1070, 1073 (2012) (citing *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009)).

The unrebutted evidence establishes that in about early March, Store Manager Rosario – an admitted § 2(11) supervisor – overheard employees Griffiths and Burt talking about unions near the concierge desk at the Williamsburg store and interjected to tell Griffiths, "We know where you stand with the Union." Tr. 403-04. Rosario's comment unmistakably conveyed to Griffiths and Burt that Respondent was monitoring Griffiths union activity and keeping track of whether he supported the Union, as Rosario failed to mention how she or others in Gotham management knew about Griffiths' union sentiments. She just cryptically informed him, "We know where you stand." Both Griffiths and Burt were startled and taken aback by Rosario's remark, which appeared to come out of nowhere, causing them to quickly end their conversation about the Union. Tr. 194, 816-17. The employees' response to Rosario's statement illustrates its coercive effect. The Board should find that through this conduct by Rosario, Respondent unlawfully created the impression of surveillance in violation of Section 8(a)(1) of the Act.

C. Respondent Intimidated and Coerced Employee Griffiths on March 12 in Violation of Section 8(a)(1) of the Act

There is no dispute that on March 12, COO Anderson and VP Bortner escorted Griffiths out of the Williamsburg store and brought him to an upstairs conference room in the nearby Domino Sugar building to meet with HR Director Maciejewski. Griffiths credibly testified that Anderson began the meeting by asking Griffiths whether he still liked working for Gotham. Tr. 429. After Griffiths answered affirmatively, Anderson told him – without mentioning unions or any specific posts – that Griffiths' online posts about unionizing were making people in the workplace uncomfortable and unsafe. Anderson asked Griffiths if he had anything to say about that, and when Griffiths answered he didn't, Anderson abruptly ended the meeting.

Anderson and Maciejewski claimed that wanted to have this meeting with Griffiths to allow him to express his concerns and explain his social media activity that troubled Respondent, yet they declined to ask Griffiths what his concerns were or tell him what online activity Respondent found problematic, so he had no legitimate opportunity to explain his conduct. Anderson, Maciejewski and Bortner were aware of the numerous posts Griffiths had published supporting the Union but deliberately kept it vague during the March 12 meeting to avoid disclosing that they were really disturbed by his strident public Union advocacy. The conduct of the executives during this incident reveals that they were not having a good faith meeting to understand Griffiths' concerns or to tell him that he may not make threats online, but rather they intended to remove Griffiths from the workplace and bring him to a strange, isolated conference room to intimidate and coerce him by vaguely questioning him about his pro-Union social media activity in general and implicitly warning him to stop.

Anderson's question to Griffiths at the start of the meeting, asking him whether he still liked working for Gotham in the context of his pro-Union social media activity of criticizing the

company, coercively implied that Griffiths must not like working for Respondent and did not want to keep his job because he was making such posts online. In similar circumstances, the Board has held that such statements by a supervisor constituted an implied threat of discharge that violates Section 8(a)(1) because suggesting that an employee leave his job in response to his protected concerted activity "is coercive, because it conveys to employees that engaging in concerted activities and their continued employment are not compatible." *Bates Paving & Sealing, Inc.*, 364 NLRB 509, 519 (2016) (citing *McDaniel Ford*, 322 NLRB 956, 956 fn. 1 and 962 (1997)); *see also*, *Paper Mart*, 319 NLRB 9 (1995) (employer statement that if employee "was not happy he could seek employment elsewhere" was implicit threat of discharge); *Chinese Daily News*, 346 NLRB 906, 906 (2006) (suggesting that employee resign if she was not happy with her job amid protected activity is an unlawful implied threat of discharge).

Anderson thus set the coercive tone for the March 12 meeting at the outset and proceeded to further intimidate Griffiths because of his pro-Union Instagram activity by asking him to explain posts that Anderson refused to specify. The lack of specificity again demonstrates Respondent's intent to warn Griffiths about posting pro-Union materials online generally – Anderson didn't specify what posts were problematic because Respondent found all of Griffiths pro-Union messages inappropriate and contrary to the unlawful policy set forth in the Employee Handbook. Respondent brought Griffiths to the Domino Sugar building on March 12 to make it clear to him that management knew he was making online posts about unionization at Gotham, that management disapproved of that conduct, and that Griffiths should refrain from such conduct if he still liked his job and wanted to keep it. This constitutes conduct tending to intimidate, restrain and coerce employee Griffiths in the exercise of his Section 7 rights and reflects another Section 8(a)(1) violation by Respondent.

D. Respondent Discharged Employee Griffiths on March 17 in Violation of Section 8(a)(1) and (3) of the Act

It became immediately apparent to Respondent that its March 12 attempt to coerce Griffiths to stop posting online about unionization at Gotham had failed. After he left work that same day, Griffiths posted a video in which he described the March 12 meeting at the Domino Sugar building and defiantly demonstrated he would not stop his union activities by proudly showing his red Union t-shirt while doing a mocking shimmy dance and declaring "That's what we about! Workers' rights!" GC 18. Griffiths plainly showed his IG audience – including Respondent – that he was not backing down in the face of Respondent's scare tactics.

Griffiths spent the next several days repeatedly posting pro-Union messages that criticized Respondent for its anti-union opposition. On March 13, Griffiths posted a video mocking CEO Wilson as a phony progressive who donates to charities to make herself look good while refusing to share wealth with "the fucking peasants who sell my bud" – *i.e.*, Williamsburg store employees. GC 19. On March 13 or 14, Griffiths published an IG story showing his audience that Wilson was watching his union activity online with the message "Love when you watch me." GC 20. On March 15, he posted a video heralding "the death of union busting" and telling his audience that if they failed to do anything about union busting in the workplace then, "you're garbage" before concluding the video with a recruitment message in support of the Union campaign, "I want you!" GC 21.

These posts following the March 12 intimidation meeting came on top of the numerous pro-Union posts he had published prior to March 12, which had caused Respondent to bring him to the Domino Sugar building and coerce him to stop posting. The first pro-Union post by Griffiths that Respondent saw was his February 13 "End You" video, which Respondent discovered the same day. GC 12, GC 68. On February 18, Griffiths published his "Split Your Skull" photo IG story, which Respondent was also aware of at the time. GC 13, GC 91. Between February 13 and

March 12, Griffiths additionally published on IG numerous pro-Union messages, including a post about Gotham violating its LPA with the Union and blocking employee organizing at the Bowery store [GC 14], a video displaying Local 338 literature about how to organize with the Union and promising to "make sure [unionization] fucking happens" [GC 15], a post showing how Gotham used the same "anti-union law firm" that Starbucks had used to oppose unionization at Starbucks stores [GC 16], and a post proclaiming solidarity with the Union and showing Griffiths wearing his red Union shirt before he wore the shirt into work at the Williamsburg store [GC 17]. Respondent admits that it was aware of all these postings at the time it fired Griffiths.

Each of these IG posts by Griffiths constitutes union activity protected under the Act. In each post, Griffiths advocated for the Union, expressed his Union support, and denounced Respondent for trying to thwart unionization at its stores. The Board holds that such advocacy in support of a union organizing campaign is protected union activity. *See e.g.*, *Taylor Motors, Inc.*, 366 NLRB No. 69 (2018) ("statements advocating the Union constituted activity protected by the Act"); *Prescott Industrial Products Co.*, 205 NLRB 51 (1973) (expressing support for union during a staff meeting protected union activity); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015) (urging coworkers on social media to support a union protected). The Board holds that employees who disseminate protected concerted messages via social media are protected by the Act in the same way as when they communicate via other methods. *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014) (employees have the right to act for mutual aid or protection, "including by using social media to communicate with each other and with the public for that purpose").

Respondent contends that it discharged Griffiths because he made statements threatening violence in the course of his online union activity. However, the only posts Griffiths made that could reasonably be construed as threatening violence were his February 13 "End You" video and his February 18 "Split Your Skull" story published on IG. No other posts by Griffiths alluded to

violence in any way. Thus, the questions to be resolved by the ALJ – and ultimately the Board – are (1) whether Griffiths lost the protection of the Act, which he would have otherwise enjoyed, because he included threatening statements in his union activity; and alternatively, (2) whether the record supports Respondent's defense that it fired Griffiths for the threats, as opposed to his insistent union advocacy. As explained below, the answer to both questions is a resounding "No," and the Board should find that Respondent violated Section 8(a)(3) of the Act by discharging Griffiths because he engaged in protected union activities.

1. Griffiths Pro-Union Advocacy on Social Media Did Not Lose the Protection of the Act

The Board has long recognized that disputes over wages, hours, and working conditions – including whether to unionize – "are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130 (1986). "That is why misconduct in the course of Section 7 activity is treated differently than misconduct. . . that is unrelated to Section 7 activity." *Lion Elastomers LLC*, 372 NLRB No. 83 (2023). When an employee engages in intemperate conduct during his/her protected activity, the Board distinguishes between conduct exhibited "in a moment of animal exuberance," which will likely remain protected, and more "flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products*, 205 NLRB at 51-52.

In evaluating whether an employee's comments on social media related to § 7 activity retain protection of the Act, the Board applies a totality of circumstances test, which considers the following factors: (1) whether there is evidence of "antiunion hostility" by the employer; (2) whether the employer somehow provoked the employee's conduct; (3) whether the conduct was impulsive or deliberate; (4) the location of social media activity; (5) the subject matter of the post; (6) the nature of the post; (7) whether the employer considered language similar to that used in the post to be offensive in other contexts; (8) whether the employer maintained a specific rule

prohibiting the language at issue; and (9) whether the discipline imposed was typical of that imposed for similar violations. *Pier Sixty,* 362 NLRB at 506; *Lion Elastomers*, 372 NLRB No. 83.

Applying these factors to Griffiths' "End You" and "Split Your Skull" posts, there is extensive evidence of antiunion hostility by Respondent. Although the unfair labor practices Respondent committed in this case occurred after February 13 when Griffiths published his "End You" video, Respondent's fierce opposition to unionization and threats against employees engaged in union activities was nonetheless apparent. By that time, Wilson had already threatened Bowery store employees in June 2024 with "repercussions" if they organized with the Union and GM Logan had warned in October 2024 that employees should not "come together" to engage in concerted activities. Still, the instance of Respondent's antiunion hostility most proximate to Griffiths "End You" post – and what inspired him to make the video – was supervisor Wiley Kimelman telling Griffiths that GM Logan had previously warned Kimelman and other supervisors that if employees were to unionize, then Gotham would fire all the supervisors. Tr. 237-40. A Respondent supervisor[16] thus explicitly revealed to Griffiths the company's plan to terminate store staff in retaliation for employees exercising their right to join a union. The notion that Gotham would take such extreme retaliatory measures enraged Griffiths, who clearly cherished his Section 7 rights. He made the "End You" video in a moment of "animal exuberance" as he left work that same day thinking about what Kimelman told him. Tr. 242. Thus, the evidence shows that Respondent's conduct provoked Griffiths to impulsively react in his video, and the first,

[16] Kimelman was a supervisor of Respondent within the meaning of Section 2(11) of the Act because the evidence described above shows that he and other "supervisors" at the Williamsburg store had independent authority to assign employees to security and concierge duty, which affected their performance evaluations and ability to earn tips, and further independently rewarded employees for good performance with free cannabis products. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006) (assigning employees to a place or position and rewarding employees for good performance show supervisory status).. Notably, Respondent declined to call Kimelman to refute the evidence establishing his supervisory functions or Griffiths' claims about his statements.

second and third factors of the *Pier Sixty* totality-of-circumstances test favor finding Griffiths' conduct remained protected. *See Pier Sixty,* 362 NLRB at 506.

The fourth and fifth factors also favor continued protection. Griffiths made his video outside of the workplace while alone and walking on a public street. Although he posted it and the "Split Your Skull" photo on his public Instagram account, the *Pier Sixty* Board held that this "does not necessarily weigh in favor of finding that his comments lost the protection of the Act, especially in the absence of evidence that the post caused disruption to the Respondent's operations." *Id*. At 507 (citing *Sutherland Lumber Co.*, 176 NLRB 1011, 1020 (1969) (finding employee's use of profanity while engaged in protected activity remained protected where his comments did not disrupt normal business operations). Of course, neither Griffiths' "End You" video nor the "Split Your Skull" photo disrupted Gotham's business, as Respondent continued with its normal operations. Meanwhile, the subject matter of the posts was Griffiths' concerns about Respondent interfering with employees' union organizing. Thus, both the location and subject matter of the posts favor finding that it retained the Act's protection.

Even though Griffiths declared in the video, "if you get in the fucking way of me trying to unionize, I will fucking end you" and said in the post, "I'll split your skull," the nature of the posts does not show that Griffiths lost protection of the Act under relevant Board precedent. The Board has found that similarly crude and profanity-laced online tirades remained protected. For example, in *Pier Sixty*, an employee posted a message on Facebook which called his manager "a NASTY MOTHER FUCKER" before adding, "Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" The Board held that the nature of the post was not so opprobrious as to lose protection of the Act. 362 NLRB at 506-08. In *Triple Play Sports Bar*, an employee made a comment on Facebook characterizing her manager as "Such an asshole" in

the context of a protected concerted discussion, and the Board again held that the conduct remained protected. 361 NLRB at 312-13.

The Board has also found that employees who made impulsive statements that could be construed as threats of violence likewise remained protected. The Board's analysis in *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010) is particularly instructive here. In that case, the employer made an adverse change to its break time policy and threatened to discipline employees who violated the new rule, which prompted one employee to declare to his manager that if he lost his job over the issue, the situation would "get ugly" and the manager "better bring your boxing gloves," while another employee agreed and repeated that things would "get ugly." *Id*. at 710. The Board excused these employees' potential threats of violence as "single, brief, and spontaneous reactions" rather than "premeditated and sustained personal threats" against the manager and held the employees' comments were protected. The Board found that the words "get ugly" had non-violent interpretations and could mean nothing more than that the employer's enforcement of the changed break policy would "engender grievances or a labor dispute." *Id*. The first employee's "better get your boxing gloves" statement was found "more likely to have been a figure of speech" used to emphasize the employees' intense opposition to the employer's conduct "rather than a literal invitation to engage in physical combat." *Id*. The Board found no evidence to suggest that the employees' remarks "portended physical confrontation." *Id*.; *accord*, *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988) (employee's statement to a supervisor that "If you take my truck, I'm kicking your ass right now" made in the course of concerted activity retained protection because it was "a colloquialism that standing alone does not convey a threat of actual physical harm").

Here, as in *Kiewit Power Constructors*, Griffiths' video statement declaring that for unspecified managers who get in the way of him unionizing, "I will fucking end you" or "split your skull" was certainly not a "premeditated and sustained personal threat." *Id*. It was more likely a

"figure of speech" or "colloquialism" that Griffiths used to emphasize how much he opposed Respondent's perceived union busting and how, as Griffiths testified, he intended to "do anything that I need to do to complete this task" of unionizing the Williamsburg store and "do everything I can within the law to make sure that our rights weren't being impeded." *Id.*, Tr. 242-44. The non-violent interpretation of Griffiths' words is warranted because, as in *Kiewit Power Constructors*, there is no evidence that his comments "portended physical confrontation." Griffiths never exhibited violence or erratic behavior in the workplace. Tr. 622-23, 1601-02. There is no credible evidence that Respondent feared Griffiths would become physically violent, either, as Respondent kept Griffiths employed, failed to address the "End You" or "Split Your Skull" posts with him at any point, and implemented no additional security measures. Tr. 1586-89. Griffiths' online statements were decidedly not "so violent or of such a character as to render [him] unfit for further service," as Respondent kept him employed for over a month after he made the threatening statements. *See Prescott Industrial Products*, 205 NLRB at 51-52. Griffiths' posts should not be construed as a true threat of violence in accord with Board law, and the nature of his posts do not support removing his union advocacy from the protection of the Act. *See Pier Sixty*, 362 NLRB at 507.

Applying the final *Pier Sixty* factors, the evidence shows that Respondent tolerated profanity in the workplace, and CEO Wilson herself casually used the words "fuck" and "bullshit" during her April 22 captive audience meeting. GC 7. The record contains at least one instance where an employee at the Williamsburg store threatened to "deck [a coworker] in the face" and had to "be physically pulled away" from the coworker to avoid a violent escalation, yet Respondent declined to discharge the offending employee, showing that Respondent discharge of Griffiths was more severe than its response to other employee threats of violence. GC 72-73. The Gotham Employee Handbook prohibits discrimination and harassment based on a variety of protected classifications but does not address Griffiths' statements resisting Respondent's anti-union stance.

GC 63. There is no evidence that Respondent ever disciplined, let alone discharged, any employee for conduct outside the workplace. Thus, none of the *Pier Sixty* factors favor removing Griffiths' comments on Instagram from the protection of the Act. 362 NLRB at 507-08. Respondent discharged Griffiths for engaging in union activities which remained protected and therefore violated the Act.

2. Respondent Fired Griffiths Because He Repeatedly Posted Pro-Union Material Online and Not Because He Made Threats

Even if the ALJ or the Board were to break with the above precedents and find that Griffiths' "End You" video and "Split Your Skull" post lost protection, the record still supports finding that Respondent's termination of Griffiths violated the Act applying *Wright Line*, 251 NLRB 1083 (1980) because Respondent's reliance on Griffiths' alleged threats of violence is pretext. Griffiths clearly engaged in union activities which Respondent was aware of, and the record is replete with evidence of Respondent's antiunion animus, including its unlawful work rules that purported to prohibit employees from making the kind of public statements that Griffiths posted on IG and the coercive conduct, threats and antiunion statements various Gotham managers, led by CEO Wilson, perpetrated against employees.

Considering this evidence establishing a strong *prima facie* case of discrimination under *Wright Line*, the burden would shift to Respondent to prove that it would have fired Griffiths notwithstanding his union activities. *See Hunter Douglas, Inc.*, 277 NLRB 1179 (1985). Respondent simply cannot meet this burden based on the record in this case. Respondent was aware of Griffiths' "End You" video and "Split Your Skull" post for a month and did nothing in response until it fired Griffiths on March 17, without ever addressing the posts with him directly. Despite Gotham executives' disingenuous testimony that they were terrified of Griffiths, found his online conduct "threatening" and "scary" and feared what he might do, the evidence establishes

that Respondent disregarded the recommendations GM Logan and HR Director Maciejewski made on February 13 to either terminate or transfer Griffiths immediately and kept Griffiths working at the Williamsburg store alongside the very managers whose safety the executives supposedly feared was in danger. Still, Respondent implemented no additional security measures. Respondent did not truly believe that Griffiths "was going to hurt somebody," as COO Anderson dubiously claimed [Tr. 1998], as Anderson, Maciejewski and VP Bortner decided to meet with Griffiths inside a locked conference room at the Domino Sugar building on March 12, without even thinking about whether a security guard was present in the area. Tr. 1589.

Respondent was clearly not afraid that Griffiths would become violent. The evidence shows that what it really found "threatening" and "scary" was Griffiths organizing the Union at the Williamsburg store and undermining Gotham's public reputation by exposing its antiunion practices in front of his massive Instagram audience. That is why Respondent took no action following Griffiths' "End You" video and "Split Your Skull" post, waited over a month, and only determined that Griffiths' IG activity had gone too far when he kept posting strident pro-Union messages, even after Anderson, Maciejewski and Bortner tried to intimidate him to stop on March 12. The timing of Respondent's decision to discharge Griffiths relative to his alleged threats of violence strongly suggests the decision was motivated by unlawful considerations. *See Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995) ("Timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision") (quoting *Sawyer of NAPA*, 300 NLRB 131, 150 (1990)). Indeed, the evidence establishes that the posts Griffiths made after March 12, which inspired Respondent to decide termination was necessary, contained no threats of violence and were undoubtedly protected union activity. Respondent therefore cannot prove that it would have fired Griffiths even absent his union activity because his protected union activity was undoubtedly the proximate cause of Respondent's decision to fire him, and the alleged threats are

mere pretext concealing Respondent's unlawful antiunion motive. *See Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 659 (2007) (where it is shown that the employer's proffered reasons for an adverse employment action are pretextual, the employer "fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct").

E. After His Termination, Respondent Threatened to Sue Employee Griffiths to Stop Him from Engaging in Union Activities in Violation of Section 8(a)(1) of the Act

Even after terminating Griffiths, Respondent continued to interfere with his Section 7 rights, bolstering the conclusion that Respondent's true motivation behind discharging Griffiths was his protected activities. "The Board has long held that threatening to sue an employee for engaging in protected activity violates the Act." *NCRNC, LLC*, 372 NLRB No. 35 (2022) (citing *S.E. Nichols Marcy Corp.*, 229 NLRB 75, 75 (1977). "Such threats reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act." *DHL Express, Inc.*, 355 NLRB 680, 692 (2010) (citing *Postal Service,* 350 NLRB 125 (2007) and *Network Dynamics Cabling,* 351 NLRB 1423, 1427 (2007)). Especially in the context of an active union organizing campaign, the Act permits employees to "advance their views on unions, even in boisterous language, so long as their views are not maliciously false, that is, made with knowledge of their falsity or with reckless disregard for their truth or falsity." *Id*. (citing *Valley Hospital Medical Center,* 351 NLRB 1250, 1252-1253 (2007)). Moreover, "the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected." *Valley Hospital Medical Center*, 351 NLRB at 1253. Extreme speech, including "rhetorical hyperbole" "vigorous epithet," and "loose, figurative, or hyperbolic language" merit protection. *Jolliff v. NLRB,* 513 F.3d 600, 609-617 (6th Cir. 2008).

In the instant case, it is undisputed that Respondent threatened to initiate legal action against Griffiths, including lawsuits "for defamation, harassment, and other appropriate remedies,"

because he posted messages on social media critical of Gotham amid the Union campaign at the Williamsburg store. Respondent had its attorneys send Griffiths a cease-and-desist letter on April 4, demanding that he stop publishing social media posts that Respondent deemed "harmful, false or threatening in nature." GC 31. However, none of Griffiths' posts were maliciously false under Board law but rather reflected the type of "boisterous language," hyperbolic rhetoric and "vigorous epithet" that the Board holds to be protected. The April 4 letter further invoked the unlawful "Mutual Non-Disparagement" provision of Griffiths' offer letter and asserted that his "actions are clearly in violation of this obligation." *Id*. Griffiths, however, was undeterred by the threat of litigation and continued posting provocative messages in support of unionization at Gotham on various social media sites, yet Respondent declined to follow through on its threat to sue him.

The Board holds that reasonably based lawsuits against employees do not constitute unfair labor practices, even if they are filed in retaliation for protected activity, because employers have a constitutional right to petition the courts in good faith. *BE & K Construction Co.*, 351 NLRB 451 (2007); *see also*, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). But where an employer makes a mere threat of litigation, unaccompanied by an actual lawsuit, its constitutional rights are not implicated, and an unfair labor practice may be found. *DHL Express, Inc.*, 355 NLRB 680, fn. 3 (without an accompanying lawsuit, the mere threat of litigation is not "incidental" to petitioning the courts); *Postal Service*, 350 NLRB at 126 (finding violation because threat to sue was not incidental to lawsuit where no actual lawsuit was filed).

Accordingly, Respondent cannot successfully argue that it was permitted to threaten litigation against Griffiths in retaliation for his pro-Union social media posts as part of exercising its right to seek redress in the courts because it never pursued a lawsuit against Griffiths. Respondent has no valid defense, and its April 4 cease and desist letter issued to Griffiths

constitutes an unlawful threat restraining employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

Respondent further violated Section 8(a)(1) via its April 4 cease and desist letter to Griffiths by invoking the overbroad and unlawful "Mutual Non-Disparagement" provision of Griffiths' offer letter. It is well established that an employer's enforcement or application of an unlawful rule independently violates the Act. *Cellular Sales of Missouri, LLC*, 362 NLRB 241, 242 fn. 8 (2015) ("enforcement of an unlawful provision is, in itself, an independent violation of Sec. 8(a)(1)") (citing *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014) (overturned on other grounds by *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018)), *Republic Aviation Corp.*, 324 U.S. 793 (1945) and *Sahara Reno*, 262 NLRB 824, 824 fn. 2, (1982)). Respondent applied its unlawful "Mutual Non-Disparagement" rule to threaten Griffiths with costly litigation, which constitutes another independent Section 8(a)(1) violation.

F. Before, During, and After the Captive Audience Meeting on April 22, Various Respondent Managers and Executives Threatened and Coerced Employees in Violation of Section 8(a)(1) of the Act

a. Store Manager Rosario Threatened Employees with Reduced Wages to dissuade other employees from supporting the Union

Employee Gold credibly testified that Store Manager Rosario invited him to meet at a restaurant near the Gotham Williamsburg store in about mid-April several days before CEO Wilson's April 22 captive audience meeting. Tr. 705-09. During this meeting, Rosario threatened Gold that Respondent would lower employees' wage rate to match what workers at other cannabis dispensaries earned if they unionized and would further cut, if not eliminate, employees' PTO benefits. *Id*. Gold's testimony was unrebutted.

At the time she made these statements, Rosario was an admitted supervisor of Respondent within the meaning of Section 2(11). As a § 2(11) supervisor, Rosario's statements are imputed

to Respondent. *Ace Heating & Air Conditioning Co., Inc.*, 364 NLRB 218, 219 (2016) (citing *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986)). This principle applies, even if Rosario may have "expressed sentiments or engaged in conduct that communicated to employees that [her] sympathies were aligned with employees' organizing efforts or with the union." *Id*. Rosario's threat that Respondent would reduce employees' pay and benefits therefore constitutes an unlawful threat by Respondent under Section 8(a)(1) of the Act. *See Waste Mgmt. of Arizona, Inc.*, 345 NLRB 1339, 1344 (2005) (manager cited a wage rate $5 per hour less than what employees made at the time and suggested employees would receive the lower rate if they selected the union); *Spike Enterprise, Inc.*, 373 NLRB No. 41 (2024) (statement that employees would receive a pay cut if they unionized); *Ernst Enterprises*, 289 NLRB 565, 569 (1988) (threat to reduce wages and benefits).

b. CEO Wilson Threatened Employees with the Loss of Benefits if They Supported the Union

During the April 22 captive audience meeting, Wilson is recorded telling employees that if they selected the Union as their bargaining representative, Respondent would have to bargain with the Union regarding employee pay and benefits and that because of those negotiations, "all of those things [i.e., employee wages and benefits] change" and "you go back basically back to Ground Zero and start again." GC 7, 7(b).

The Board recognizes that such employer statements regarding bargaining from "zero" or from "scratch" is a "dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." *Coach and Equipment Sales Corp.*, 228 NLRB 440, 440 (1977). The statement is unlawful if it was made "in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union." *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994)

(citing *Belcher Towing Co.*, 265 NLRB 1258 (1982)). Conversely, a "bargaining-from-scratch" statement will be found lawful if "the clearly articulated thrust" of the statement is that "the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining." *Coach and Equipment Sales*, 228 NLRB at 440-41.

Wilson's statement that employee wages and benefits would "basically go back to Ground Zero" was made in the context of a captive audience meeting in which Wilson told employees how upset she was about their union activities and repeatedly disparaged the Union. It was also made in the background context of Respondent having fired Griffiths in retaliation for his pro-Union advocacy, as well as threats by Rosario and GM Logan. The statement was thus made in a coercive context, supporting its unlawfulness. *See Somerset Welding & Steel, Inc.*, 314 NLRB at 832. Wilson's statement was also delivered "in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union," providing further evidence that it was a coercive threat. *Id*. Wilson uttered the statement immediately after she listed what she viewed as the great pay and benefits that Gotham employees already received and said that because of negotiations with the Union, "all of those things change." GC 7. Her words clearly conveyed the message that employees would be deprived of their current wages and benefits if they selected the Union and would have to bargain just to get back to the *status quo ante*. Wilson made no reference, whatsoever, to the "give and take of good-faith bargaining" that the Board finds indicative of a lawful "bargaining-from-scratch" statement. *See Tufts Brothers Inc.*, 235 NLRB 808, 808 (1978). She simply told employees that the advantageous pay and benefits they had would change and they would have to bargain from "Ground Zero" with the Union. In line with Board precedent, this statement constitutes a threat in violation of Section 8(a)(1) of the Act.

c. CEO Wilson Interrogated an Employee Regarding His Union Sentiments, Directed the Employee to Dissuade Others from Supporting the Union, and Threatened to Refuse to Close the Store Early if Employees Unionized

The undisputed evidence establishes that shortly after the captive audience meeting on April 22, Wilson spoke with employee Gold on the sales floor of the Williamsburg store. In response to Wilson soliciting ideas for how to improve the store, Gold suggested that Respondent close the store earlier on Sundays because there was low customer traffic during the late hours on Sundays. Tr. 718-22. Wilson responded that Gold had a good idea, but that if employees selected the Union, then "that goes out the door." *Id*. Closing the store earlier on Sundays was something employees largely welcomed and had favorably discussed before. Tr 439-40. Wilson's statement that she would no longer consider making that change if employees selected the Union constitutes a threat to impose adverse consequences on employees in retaliation for their decision to unionize. *See Holy Cross Hosp.*, 370 NLRB No. 16 slip 93 op. at 1, n. 3 (2020) (threat of loss of scheduling flexibility without mention of the collective bargaining process unlawful).

Wilson then asked Gold directly how he thought the Union election would turn out. The Board holds that an unlawful interrogation occurs when, under the totality of the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees' Section 7 rights. *See generally*, *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). To determine whether an interrogation is unlawful, the Board looks to whether, under the totality of circumstances, the questioning reasonably tends to restrain, coerce, or interfere with rights protected by the Act. *Id* at 1178, fn 20.

Among the factors the Board considers includes: (1) the background, i.e. whether there is a history of employer hostility and discrimination; (2) the nature of the information sought; (3) the identity of the questioner and their position in the company hierarchy; (4) the place and method of interrogation, e.g. was the employee called from work to the boss's office; and (5) truthfulness of

the reply. *Westwood Health Care Ctr.*, 330 NLRB 935, 939–940 (2000); *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Another relevant factor is whether adequate assurances against reprisal were provided. *See RHCG Safety Corp.,* 365 NLRB 852, 853 (2017). These factors "are not to be mechanically applied," but rather provide "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, fn. 20.

Under the totality of the circumstances, Wilson's questioning of Gold regarding what he believed the results of the Union election would be was an unlawful interrogation. The background of hostility in which Wilson asked the question was palpable. Wilson had just subjected employees to an intensely anti-union captive audience meeting, which itself arose in the context of Griffiths' discriminatory discharge and Rosario's threats said to Gold days earlier. The question sought information regarding how Gold and other employees were likely to vote in the upcoming Union election, which the Board finds coercive. *See Service Spring Co.*, 263 NLRB 812, 818 (1982) (Board affirming interrogation where company president asked employee how he believed the outcome of a potential re-run election would turn out); *Tri-City Fire Prot. Servs., LLC*, 368 NLRB No. 114 (2019) (company owner unlawfully interrogated employees about how they were going to vote in an upcoming representation election). Wilson's identity as the CEO and unquestioned top authority of Gotham certainly enhanced the coercive nature of the questioning. *See America's Best Quality Coatings Corp.*, 313 NLRB 470 (1993) (company president's questioning an employee at his workstation tended to show coercion). Wilson provided no assurances that Gold would not face repercussions if he indicated that he and his coworkers supported the Union. *See RHCG Safety Corp.,* 365 NLRB at 853. Gold's truthful response that he believed the Union would win the election does not negate the highly coercive circumstances of Wilson's question. The ALJ should find that Wilson interrogated Gold in violation of Section 8(a)(1) of the Act.

Immediately after the interrogation, Wilson said to Gold, "I'm counting on you, Henry, to get all these people to vote no." Tr. 721. The Board has affirmed that it is unlawfully coercive for an employer to enlist employees to induce their coworkers to vote against the Union. *Wolfie's,* 159 NLRB 686, 700 (1966). Wilson's statement to Gold that she was "counting on you" to get employees to reject the Union was especially coercive coming from the company CEO, who Gold knew had given him a second chance by allowing him to transfer to Williamsburg when the HR Director wanted Gold fired for harassment back in November 2024. Gold likely understood, as any reasonable employee would, that he may be in trouble with Respondent if Wilson was "counting on" him and he let her down. Thus, her statement used the leverage of her authority over employees to pressure Gold to oppose the Union. Wilson's comment constituted an unlawful direction to dissuade Gold's coworkers to vote "No" and thus violated Section 8(a)(1) of the Act.

d. Store Manager Rosario Interrogated an Employee Regarding Employees' Union Activities and Again Threatened Employees with Reduced Wages if They Unionized

The unrebutted testimony of employee Del Sorbo establishes that shortly after the captive audience meeting on April 22, Store Manager Rosario approached Del Sorbo at the concierge desk in the front of the Williamsburg store and said, "I don't understand why you guys want to unionize, you know." Tr. 483, 607. The statement was akin to a question because it would reasonably elicit a response addressing why employees wanted the Union. The aforementioned *Rossmore House* totality-of-circumstances analysis applies to evaluate whether Rosario's statement constitutes an unlawful interrogation.

Applying those factors, Rosario approached Del Sorbo just minutes after the coercive staff meeting, again in an overall atmosphere of intimidation and retaliation. The nature of the information Rosario inquired about struck at the heart of the organizing effort—its purpose. *See Starbucks Corp*., 373 NLRB No. 90, slip op. at 1 (2024) (asking employee what she hoped to

gain through unionization was unlawful interrogation). Moreover, in the absence of a General Manager at the time, Rosario (along with Ashmeade) was the highest ranking official at the Williamsburg store. Although there is record evidence that some employees spoke to supervisors at the store about the Union effort, there is no evidence Del Sorbo ever approached or solicited support from Rosario, who was clearly management. Thus, the nature of the information sought, the presence of anti-union hostility, and the identity of the interrogator weigh in favor of a violation.

Furthermore, Rosario initiated the conversation with Del Sorbo while she was alone at the concierge desk. This was not a neutral setting as an employee would not have reasonably felt that they could simply leave their post and avoid the discussion. *See Montgomery Ward & Co.*, 146 NLRB 76, 85 (1964) (questioning employee without signaling that she may be free to leave heightens coercion). While Del Sorbo's response was truthful, she notably dodged the question Rosario implied when she initiated the conversation: why did employees want to unionize. Rather than respond directly, Del Sorbo simply pointed out that for her it was "unionize or quit." Tr. 608. Lastly, at no time did Rosario provide Del Sorbo with any assurances against reprisals for engaging in Union activity. Rather, in the same conversation, Rosario went on to threaten employees with a loss of pay if they unionized. Accordingly, considering all the circumstances, Rosario's questioning had a reasonable tendency to interfere with, restrain, and coerce an employee in their Section 7 rights and was an interrogation violating Section 8(a)(1) of the Act.

Likewise, Rosario's statement to Del Sorbo that employees' pay ***would*** decrease if they unionized is clearly an unlawful threat. Rosario did not convey a possibility about the unknowns of collective bargaining but rather stated, with certainty, that employees' wages would decrease. *See Tufts Brothers Inc.*, 235 NLRB at 808. This was essentially the same threat Rosario had made to employee Gold days earlier. The ALJ should find here another threat by Rosario to reduce employee wages if they supported the Union in violation of Section 8(a)(1).

e. Store Manager Ashmeade Interrogated Another Employee Regarding His Union Support

Employee Burt's unrebutted testimony establishes that near closing time on April 22, Store Manager Ashmeade was alone in the store with Burt, and Ashmeade initiated a conversation. Tr. 876-78. Clearly referencing the topics discussed during the captive audience meeting earlier that day, Ashmeade started by asking, "How do you feel?" When Burt answered, "I feel great!" Ashmeade said he wanted to talk about "what's going on" with respect to the Union campaign. Burt said that employees "had the votes" and Respondent should "recognize us," to which Ashmeade responded, "Are you sure?"

Under *Rossmore House*, Ashmeade's interaction with Burt reflects still another unlawful interrogation. In addition to the background atmosphere of coercion fostered by Gotham's virulent antiunion animus, Ashmeade approached Burt late at night when the store was about to close and no one else was around, adding to the coercive nature of the encounter. With no GM at the Williamsburg store, Ashmeade, like Rosario, was the highest-ranking person there. No assurances against retaliation were given. Ashmeade's "How do you feel" question to Burt was clearly intended to get him to reveal his Union sentiments, and the follow up "Are you sure" question was meant to coerce Burt to reconsider his Union support. The nature of the questioning was thus also coercive. The totality of circumstances establishes that Ashmeade interrogated Burt in violation of Section 8(a)(1).

G. Respondent Discharged Employees Gold, Del Sorbo and Burt on April 30 in Violation of Section 8(a)(1) and (3) of the Act

Just over one month after purging the most vocal Union advocate Griffiths from the facility, on April 30, Respondent mass purged the three leading Union advocates remaining at the Williamsburg store – Gold, Del Sorbo and Burt. Respondent asserts different reasons for discharging each of these employees, but the record establishes that each termination was

motivated by the employees' union activities and Respondent would not have terminated them but for this protected conduct.

a. Henry Gold

Respondent asserts that it fired Gold on April 30 because a frequent customer had complained about a single interaction she had with Gold on March 31 in which the customer expressed that she disliked how Gold spoke with her and mentioned that Gold said that a product she was interested in was too expensive. Respondent seized on this complaint – received by Ashmeade via text and shared with HR Director Maciejewski weeks after Ashmeade had received it – to launch a one-sided investigation targeted at finding evidence to support firing Gold, as opposed to understanding what happened in this customer interaction.

Wright Line, 251 NLRB 1083 provides the relevant framework for evaluating whether Gold's termination violated Section 8(a)(3) of the Act because Respondent asserts that it discharged Gold for reasons unrelated to his union activities. Under *Wright Line*, if the evidence shows that an employee engaged in union activities, the employer had knowledge of those activities, and the employer harbored animus against employees engaged in such activities, then there is a *prima facie* case of discrimination in violation of the Act, and the employer must prove that it would have taken the same action against the employee notwithstanding the union activities. *Id*.; *see also*, *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1, fn. 3 (2019); *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562, 563 (2004); *Hunter Douglas,* supra, 277 NLRB 1179.

Applying the *Wright Line* test to Respondent's decision to discharge Gold, there is a strong *prima facie* case of discrimination. Gold engaged in extensive union activities, which became known to Respondent by no later than April 11 when Wilson noticed Gold in Griffiths' Pin Day photo post on Instagram. Respondent's animus against the Union is well established in the record,

considering the repeated coercive and otherwise anti-Union statements and sentiments of CEO Wilson, GM Logan, and Store Managers Rosario and Ashmeade, in addition to the various other unfair labor practices discussed herein. Indeed, Wilson testified about how disturbed she was by Gold's dismissiveness towards her anti-Union pitch during Wilson's April 22 captive audience meeting at a time when she already knew he supported the Union. Tr. 2236-37. Whereas Wilson once favored Gold and believed he was a "champion for Gotham," her opinion of him drastically changed after she discovered his union activity. Respondent must therefore prove that it would have fired Gold based on customer complaints about him, even in the absence of any union activity. The record simply does not support Respondent's defense.

First, there is no evidence that Respondent had ever considered disciplining an employee based on a complaint received from a customer. Wilson testified that she believes that negative customer reviews regarding Gotham or its employees are invariably fake, "Except, of course, in the case of Henry [Gold]." Tr. 2304-05. Respondent's exceptional treatment of customer complaints regarding Gold reflects disparate treatment establishing unlawful motive and pretext. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (failure to discipline other employees for conduct similar to that cited as basis for discharge establishes unlawful motive); *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002) (evidence of disparate treatment establishes pretext). The evidence shows that Respondent was aware of customer complaints against other employees but failed to take any action against the employees whatsoever. GC 89, Tr. 2318.

In addition, Respondent failed to investigate the complaint customer Chance made against Gold in any meaningful way and instead conducted a one-sided investigation aimed at unearthing evidence of Gold's misconduct, rather than discovering what happened between him and customer Chance. Crucially, Chance texted Ashmeade to complain about her interaction with Gold on March 31, yet Ashmeade failed to report it to HR until weeks later in mid-to-late April, after Respondent

had acquired knowledge of Gold's support for the Union. Thus, before Respondent knew that Gold was assisting the Union campaign, Ashmeade – in line with Respondent's general disregard of customer complaints – did not think to report Chance's complaint. It became a matter Ashmeade felt obliged to report to HR after Gold's involvement with the Union became apparent.

Upon receiving the report of the complaint from Ashmeade, Respondent did not seek to interview witnesses or otherwise corroborate or substantiate customer Chance's complaint, in dramatic contrast to how Respondent investigated a previous employee complaint against Gold. When a coworker accused Gold of sexual harassment in February 2024, Respondent not only interviewed the complaining employee but also acquired a corroborating statement from a third-party witness. Tr. 1307-10. Instead of following its typical investigatory practice, Respondent charged Ashmeade with digging up more negative customer reviews about Gold to further support the pre-determination to fire him. However, the need for further investigation was particularly glaring here, as it is entirely unclear from the text exchange between Chance and Ashmeade what occurred between them on March 31 or what exactly Gold allegedly said or did to make her upset. Still, Respondent neglected to seek out Chance to have her explain her concerns, failed to interview Gold about his recollections of the interaction with Chance, and declined to ask Ashmeade any follow-up questions to learn more about the situation. Respondent was not interested in finding out what happened; it was interested in finding a reason to fire Gold. Respondent's failure to meaningfully investigate provides powerful evidence establishing pretext and unlawful intent. *See Sheraton Anchorage*, 363 NLRB 53, 57 (2015) (employer's "prejudgment of [the discharged employee] and lack of a full investigation" reflects the employer's "true discriminatory intent"); *Hospital Espanol Auxilio Mutuo de Puerto Rico, Inc.*, 342 NLRB 458, 477 (2004) (employer's failure to allow employee to explain or rebut allegations leveled against her establishes failure to investigate and supports inference that discharge was unlawfully motivated); *see also*, *East End*

Bus Lines, Inc., 366 NLRB No. 180, slip op. at *11 (2018) (employer's failure to adequately investigate and reliance upon inaccurate and inconsistent information to support employee's discharge demonstrated unlawful motive and "a rush to reach a conclusion, and seemingly an interest in reaching a particular conclusion").

Respondent used the meager information it had regarding the March 31 interaction between Gold and Chance to jump to the conclusion that Gold had been racist towards Chance, even though there is zero evidence to support that assertion. Moreover, even though racial discrimination is prohibited by Gotham's Employee Handbook [GC 63], Respondent did not initially cite racial discrimination as the basis for Gold's discharge in his termination notice. GC 45. Instead, Respondent shifted defenses and raised this for the first time at trial in a failed effort to make Gold's conduct look worse. The Board recognizes that such shifting or "piled on" defenses as evidence of pretext establishes a violation. *See e.g.*, *Enjo Contracting Co., Inc.*, 340 NLRB 1340, 1351 (2003) ("Shifting and piled-on defenses, such as those proffered by the Respondent, compel the inference that the Respondent's defense is a pretext"); *Rainbow Medical Transp., LLC*, 365 NLRB 785, 799 (2017) (citing *Lucky Cab Co*., 360 NLRB 271, 274 (2014) and *Naomi Knitting Plant*, supra, 328 NLRB at 1283 (shifting defenses provides "persuasive evidence of discriminatory motive [as well as] evidence of animus and pretext"); *see also*, *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 14-15 (2018) (employer's "effort to inflate and mischaracterize the nature of [the discriminatee's] conduct…" establishes animus).

Respondent may rely on the assertion that it fired Gold because he was under a final warning, so any further evidence of misconduct justified his termination. However, the record shows that further misconduct by an employee under final warning does not necessarily cause Respondent to discharge them. Gold had been under final warning for sexual harassment when he again engaged in more harassing behavior, and yet Respondent kept him employed, without even

issuing him any formal discipline. Furthermore, Respondent's disciplinary policy provides that an employee's final warning becomes inactive after 6 months [GC 64], and Gold had no final warning within 6 months of his April 30 termination.

The record thus shows that Respondent had no legitimate basis to discharge Gold, and its assertion that it decided to fire Gold based on an uninvestigated customer complaint is pretext masking its true motive to retaliate against Gold for leading the Union campaign. Gold's discharge violated Section 8(a)(3) of the Act.

b. Toni Del Sorbo

Respondent justifies its decision to discharge Del Sorbo by asserting that she bullied or harassed coworker Jared Freschman by speaking with other employees about her belief that Freschman opposed the Union campaign. Respondent thus admits that it fired Del Sorbo because she supposedly perpetrated misconduct in the course of her union activities, and the Board's analysis following *NLRB v. Burnup & Sims*, 379 U.S. 21 (1961) applies to evaluate whether the discharge violates the Act. *See Nexstar Broadcasting*, 370 NLRB No. 68, fn. 1 (2021) ("*Burnup & Sims*, not *Wright Line*, governs where . . . an employer disciplines an employee for allegedly engaging in misconduct during the course of union activity, and the General Counsel contends that the employee did not, in fact, engage in misconduct") (citing *La-Z-Boy Midwest*, 340 NLRB 80, 80 (2003)).

Under the *Burnup & Sims* analysis, the General Counsel has the initial burden to prove the employee was subjected to an adverse employment action for conduct occurring during protected activity. *Id.* Respondent must then show it has an honest belief that the employee engaged in serious misconduct. *Id.* The test for "serious misconduct" is whether the employees' activity is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate coworkers. *Clear Pine Mouldings*, 268 NLRB 1044 (1984); *see also Fresh & Easy Neighborhood*

Market, Inc., 361 NLRB 151, 153-154 (2014) (employee's § 7 activity does not lose protection merely because it makes other employees uncomfortable) (citing *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999)); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) ("[l]egitimate managerial concerns to prevent harassment do not justify … discipline on the basis of the subjective reactions of others to [employees'] protected activity"). The burden then shifts back to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. *See Garten Trucking LC*, 373 NLRB No. 94, 2 (2024); *Aqua-Aston Hospitality, LLC*, 365 NLRB 592, 596-597 (2019). "Thus an employer who disciplines an employee for misconduct within the course of protected activity will be found to have violated the Act where the evidence discloses that: (a) it did not honestly believe the serious conduct occurred; or (b) even if it did so believe, it was mistaken." *Aqua-Aston Hospitality, LLC* at 596.

Crucially, under a *Burnup & Sims* analysis, a failure to complete a meaningful investigation supports the finding that there was no good-faith belief of serious misconduct. *See S.E. Nichols of Ohio, Inc.*, 195 NLRB 939, 942 (1972) (employer's failure to conduct investigative interviews of discriminatees' reflected lack of meaningful investigation, thereby establishing that employer did not have a good-faith belief that the discriminatees engaged in the alleged misconduct); *see also Wells Aluminum Corp.*, 319 NLRB 798, 813 (1995) (employer did not have an honest belief in alleged misconduct where it decided to terminate discriminatee prior to sham investigative interview).

Applying this framework, the evidence establishes Del Sorbo was terminated for purported bullying or harassment alleged to have occurred as part of her union activity. Even assuming, *arguendo*, that Del Sorbo told employees she believed Freschman was an informer or blamed him for Griffiths' termination, the Board has repeatedly held that Section 7 of the Act protects an employee's right to warn coworkers about suspected anti-union informers in their ranks, even where the accusation may cause distress or adversely affects the accused employee's job

performance. *See Ivy Steel & Wire*, 346 NLRB 404, 421 (2006). In *Ivy Steel & Wire*, the Board affirmed that the employer violated the Act when it suspended and then discharged an employee who had accused another employee of being a company spy, even though the accused employee resigned in part because of the accusations. *Id*.; *see also*, *Hertz Corp.*, 316 NLRB 672, 692 (1995) (discipline unlawful even though subject of accusation became so upset that she left work early, cried on the way home, and complained that other employees would not want to work with her); *Bakersfield Memorial Hospital*, 305 NLRB 741, 746 (1991) (discipline of employee unlawful even though job performance of the accused employee was impacted). The Board recognizes that "union adherents…will seek to avoid contacting suspected pro-management personnel and will frequently warn each other to stay away from those employees for fear of being reported." *Somerset Shirt & Pajama Co.*, 232 NLRB 1103, 1109 (1977). This type of union activity is so common that the Board views it as "part and parcel of the organizing scene." *Id*.

Respondent failed to prove it had a sincere belief that Del Sorbo engaged in serious misconduct. Respondent failed to interview Del Sorbo or any of the employees Maciejewski testified she observed Del Sorbo speaking to on camera about Freschman. Maciejewski claimed that Store Manager Rosario confirmed that she observed Del Sorbo "saying something bad" about Freschman, but Maciejewski failed to document Rosario's statement and could not even remember what Rosario reported. Respondent thus clearly failed to investigate the alleged bullying by Del Sorbo, establishing that Respondent did not have a good faith belief that Del Sorbo engaged in serious misconduct. *See S.E. Nichols of Ohio, Inc.*, 195 NLRB 939, 942 (1972); *Wells Aluminum Corp.*, 319 NLRB 798, 813 (1995).

Moreover, the record establishes that Del Sorbo did not engage in serious misconduct but rather discussed with coworkers whether Freschman should be trusted with respect to the Union organizing effort based on employees' reasonable suspicions about his intentions. This is conduct

the Board finds protected under the Act, and it cannot be misconstrued as "bullying" or "harassment" under Respondent policies. *See Somerset Shirt & Pajama Co.*, 232 NLRB at 1109. Del Sorbo's termination reflects a violation of Section 8(a)(3) the Act under *Burnup & Sims*.

Alternatively, to the extent that *Burnup & Sims* does not apply, Respondent's decision to discharge Del Sorbo remains unlawful under the traditional *Wright Line* framework. Del Sorbo's union activities are well-established: as one of the lead union supporters, she recruited employees to sign cards and helped organize employees' first collective, public show of union support at the Williamsburg store on Pin Day. Tr. 473, 562. Her union activity also involved discussing with coworkers whether they should include employee Freschman in their union discussions and debating whether Freschman may be reporting information about the Union back to management. Tr. 488-90, 769, 926-27. The evidence establishes Respondent had knowledge of Del Sorbo's union support as early as April 11, when Del Sorbo first showed her support for the Union at work by wearing a pin. Freschman expressly informed Respondent of Del Sorbo's union activity when he emailed company executives on April 16, naming Del Sorbo a Union ringleader. R 7.

Respondent's general animus is well established by the myriad contemporaneous unfair labor practices it committed in response to employees' unionization. Respondent's particularized animus against Del Sorbo is also established, as Wilson and the other executives equated Del Sorbo's Section 7 activities to unlawful "harassment" and blamed her in part for the "disturbing" culture Wilson believed the union campaign had created. Tr. 2333-34; *see Michael Konig T/A Nursing Ctr. at Vineland*, 314 NLRB 947, 950 (1994) (general anti-union animus combined with particularized animus against the discriminatee provides strong inference that adverse employment action violates Section 8(a)(1) and (3)). Maciejewski attempted to exaggerate Del Sorbo's conduct, implausibly claiming that she observed Del Sorbo pointing and laughing at Freschman, which no other witness she spoke to reported. Such exaggeration further exhibits animus. *Con-*

Way Freight, Inc., supra, 366 NLRB No. 183; *see also*, *Supershuttle of Orange Cty., Inc.*, 339 NLRB 1 (2003) (employee misconduct discovered during investigation motivated by employee's protected activity did not render employee's discharge unlawful action lawful). Respondent's failure to meaningfully investigate the allegations against Del Sorbo is still more evidence of animus. *See Airgas USA v. NLRB*, 916 F.3d 555, 563 (6th Cir. 2019) (failure to investigate meaningfully is indicium of animus); *Lucky Cab Co.*, 360 NLRB 271, 274 fn. 13 (2014) (denying discharged employees the opportunity to explain their alleged misconduct is evidence of pretext); *B&B Safety Sys., LLC*, 370 NLRB No. 90, slip op. at 1 (2021) (failing to meaningfully investigate before deciding to discharge establishes pretext).

Respondent admits it discharged Del Sorbo based on Freschman's complaints about how Del Sorbo's union activities made him feel. Tr. 1439-1443, 1551. Respondent presented no evidence that Del Sorbo's purported "gossip" was of such odious character as to lose protection of the Act, as it is unclear exactly what Respondent concluded Del Sorbo had said about Freschman that constituted this "gossip." Maciejewski's testimony about her investigation leading up to Del Sorbo's discharge was vague and noncommittal, and relied heavily on hearsay which she could not recall in any detail. Tr. 1540-1541. Respondent failed to demonstrate that it would have discharged Del Sorbo absent her protected activity, and the ALJ should find that Del Sorbo's termination violated the Act under *Wright Line* and/or *Burnup & Sims*.

c. Trevor Burt

Respondent claims it discharged Burt pursuant to an economic layoff and selected him based on management's assessment that Burt was their lowest performing full-time budtender because he had the lowest sales per hour statistics. Given Respondent's asserted justification, *Wright Line* applies here. 251 NLRB 1083. Again, the evidence establishes a strong *prima facie* case of discrimination. Burt actively supported the Union campaign and was a "cheerleader" for

the Union at the Williamsburg store. Tr. 820-22. Respondent knew that Burt was supporting the Union because Burt had discussed his favorable opinion of the Union with GM Logan and, in the presence of numerous Gotham executives including Wilson, Anderson and Bortner, Burt called out to coworkers as they were leaving the April 22 captive audience meeting that employees should speak with him about the Union because he had been a Union member in the past. Burt further revealed his Union support later in the day on April 22 when Ashmeade interrogated him, and Burt confirmed that he was pro-Union and wanted Respondent to "recognize us." The extensive additional evidence of Respondent's anti-union animus needs no further explanation here.

Respondent's decision to implement layoffs on April 30 was motivated by anti-union animus. Respondent claims that it determined to make layoffs in April because the Williamsburg store was unprofitable and its labor costs were too high. However, the record shows that Respondent knew that the Williamsburg store was unprofitable and labor costs at the store were wildly beyond Respondent's "personnel percentage" target within two months of the store's October 2024 opening. By December 2024, the need to radically reduce labor costs given lower-than-expected sales was obvious, but Respondent decided not to implement layoffs at that time and simply cut employee hours, knowing that would be insufficient to solve the labor cost problem. Bortner testified that Respondent declined to lay off Williamsburg employees in January because the company wanted to "see what the summer months would do" in terms of increasing store sales. Tr. 2082. But Respondent did not wait until the summer before deciding that layoffs were necessary. Instead, it suddenly abandoned its plan to "see what the summer months would do" after the Union campaign at Williamsburg became known to Respondent. On April 1, the Union demanded recognition based on a majority of store employees signing authorization cards, and by April 11, when numerous store employees publicly revealed their Union support during Pin Day, Respondent could have no doubt that Williamsburg employees were trying to unionize.

Respondent admits that the decision to implement layoffs came quickly after these developments, which the Board holds establishes evidence of unlawful motive. *See Nitro Constr. Services*, 374 NLRB No. 120 (May 28, 2026) ("the close timing between the protected activity and the layoffs is indicative of animus"); *Evenflow Transportation, Inc.*, 358 NLRB 695, 697 *(*2012) (inference that layoffs were unlawfully motivated appropriate where layoff occurred "within a few weeks" of a renewed organizing campaign and soon after an unlawful interrogation).

Respondent then determined which employees would be laid off in the context of its knowledge of the Union campaign, Burt's support of the Union, and Respondent's overwhelming anti-union animus. Respondent claims that it sought to identify the least productive employees for layoff based on their total sales per hour worked metrics, but the evidence shows it passed over employees with lower sales per hour than Burt and selected Burt for layoff even though he did not have the lowest sales per hour. Respondent declined to lay off two part-time employees who had worked as many or more hours than Burt but had lower sales per hour. Respondent did not even consider laying off one of these supposed part-time workers and asking Burt to switch to part-time status. Most notably, Respondent also excluded from layoff consideration its two lowest-performance full-time employees – both of whom had sales per hour numbers significantly lower than Burt [R 18] – allegedly because they were on some sort of unspecified leave. Bortner testified that "HR" had directed him to exclude these two low-performers from layoff consideration because they were "on leave," but Maciejewski did not corroborate or even mention this supposed direction at all, despite being called by Respondent twice. The ALJ should draw an adverse inference against Respondent based on its failure to elicit testimony from Maciejewski about this critical issue and conclude that had Maciejewski testified about the exclusion of the two employees on leave, she would not have supported Bortner's account. *See United Parcel Service, Inc.*, 372 NLRB No. 158, slip op. at 16, fn. 68 (citing *International Automated Machines, Inc.*, 285 NLRB 1122,

1123 (1987) (adverse inference appropriate where respondent fails to call a witness within its control to support its defenses). Bortner's claim that HR directed him to exclude the lowest-performing full-time employees should not be credited, and the ALJ should find that Respondent selected Burt for layoff based on his union activity, even though he did not have the lowest sales per hour.

Considering the timing of Respondent's decision to implement layoffs, as well as the inconsistencies in which it determined the employees subject to layoff, Respondent cannot meet its *Wright Line* burden to show that it would have laid off Burt on April 30 absent his union activities. The Board should find that Respondent discharged Burt in violation of Section 8(a)(3) of the Act.

H. Respondent, By General Manager Cherchiglia, Threatened Employees with Unspecified Reprisals Because They Had Engaged in Union Activities in Violation of Section 8(a)(1) of the Act

On May 22, Brian Cherchiglia told employee Palmer that he should be mindful of optics and that the cameras were watching. Tr. 992. Cherchiglia further threatened Palmer by saying that upper management was looking for a reason to penalize and terminate employees, so Palmer should be very mindful of where he is and what he is doing while at work. *Id.* The totality of the circumstances supports the conclusion that Cherchiglia's statements to Palmer violated the Act.

The Board holds that statements similar to Cherchiglia's constitute threats of unspecified reprisal to discourage union or protected activity. In *Gaetano & Associates Inc.*, 344 NLRB No. 65, 1, 5 (2005), for example, the Board held that the employer violated Section 8(a)(1) of the Act by cautioning an employee to "be careful talking to [a union agent]." The Board noted it has consistently held similar "be careful" warnings unlawful because they convey the threatening message that union activities would place an employee in jeopardy. *See also*, *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003) ("be careful" statement by supervisor in context of

union activity held unlawful); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's statements such as "watch out" are unlawful implied threats).

Cherchiglia's statements to Palmer were even more coercive than those "be careful" warnings previous found unlawful by the Board. Palmer testified that in the wake of Respondent's firings of Griffiths, Gold, Del Sorbo and Burt, he felt that employees were being targeted and nobody was safe from retaliation. Tr. 964, 967. Thus, Cherchiglia's statements pointedly played on those fears. Cherchiglia admitted at trial that he felt there was "some sort of ulterior motive or a conflict that existed before [his] time that [he] was stepping into." Tr. 1748. By suggesting that Palmer be mindful of "optics" and warning him that upper management was looking to penalize or terminate people amid a union campaign where several employees had already been terminated, Cherchiglia's words were particularly threatening. Considering these circumstances, the ALJ should find Cherchiglia's May 22 statement to Palmer constituted an unspecified threat of reprisal and violated Section 8(a)(1) of the Act.

I. Respondent Issued a Final Warning Against and Discharged Employee Palmer Mere Days Before the Election Because He Engaged in Protected Concerted Activities and Union Activities in Violation of Section 8(a)(1) and (3) of the Act

On May 25, Respondent issued a final warning to employee Palmer for engaging in protected concerted activity which it mischaracterized as inappropriate behavior and gossiping. GC 50. On June 2, Respondent terminated Palmer's employment because he continued to discuss Respondent's unfair accusation against him and appealed to his coworker to help protect against further discipline. GC 52. In each incident, Palmer was engaged in Section 7 activity, and Respondent's discipline and discharge of Palmer in response to this activity violated Section 8(a)(1) of the Act.

It is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary

group activity." *Whittaker Corp*., 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). For example, in *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014), the Board held that an employee's solicitation of her coworkers in connection with her personal complaint of sexual harassment was concerted activity because she sought to enlist the help of other employees. *Id.* at 3-4. In addition, "the Board has long held that employee discussions in which advice about future action is sought or offered constitute concerted activity." *UniQue Personnel Consultants*, 364 NLRB No. 112, slip op. at 3 (2016) (citing *Jhirmack Enterprises*, 283 NLRB 609, 614-615 (1987), and *Cadbury Beverages*, 324 NLRB 1213, 1220 (1997), enfd. 160 F.3d 24 (D.C. Cir. 1998)). In *UniQue*, the Board found that an employee seeking a coworker's advice about how to deal with perceived unfair discipline was concerted activity. *Id*. Similarly, the Board has repeatedly held that an employee's warning to another employee that the latter's job is at risk constitutes protected concerted activity. *See e.g.*, *Food Services of America, Inc.*, 360 NLRB 1012, 1014 (2014); *Tracer Protection Services*, 328 NLRB 734, 740-741 (1999); *Jhirmack Enterprises*, *supra* at 609 fn. 2 (employee engaged in protected concerted activity by telling coworker that other employees complained to management about his performance).

In accord with this precedent, Palmer's May 22 conversation with coworker Robbin and others, in which Palmer told them that he felt he was being unjustly accused of theft and warned Robbin that the same thing was about to happen to her, constitutes protected concerted activity. The conversation took place in an atmosphere of widespread employee concerns about retaliation by Respondent. Tr. 845, 964, 967. Palmer addressed Robbin with the goal of preparing her for what he believed to be a bad-faith disciplinary investigation. Employees' need for mutual aid and protection was heightened by the fact that employees were just weeks away from a Union election

and were relying on each other's continued employment to secure a victory. Palmer's conduct strikes at the core of the rights protected under the Act.

Palmer's statements to employee Jodi Belton and Store Manager Ashmeade on June 2 regarding a lighter he borrowed from Belton also constituted protected concerted activity. By emphatically telling Belton and Ashmeade that he had express permission from Belton to borrow the lighter, Palmer sought to protect himself and Belton from becoming ensnared in another bogus workplace investigation. This was a logical outgrowth of his prior protected concerted activity with Robbin, as Palmer was continuing to raise concerns regarding management's unjust retaliation toward employees. *See NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (employee's "lone" conduct that "stems from" or "logically grew" out of prior concerted activity" is concerted); *Every Woman's Place, Inc.*, 282 NLRB 413, 413 (1986) (an employee's individual conduct in furtherance of a common complaint or concern is a continuation of the employee's protected activity).

Palmer asked Ashmeade to bear witness to the fact that Belton had given Palmer permission to borrow the lighter and invited Ashmeade to confirm this fact with Belton. In doing so, Palmer expressly appealed to Belton for protection against further unjust discipline. "[A]n employee who asks for help from coworkers in addressing an issue with management does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee." *Fresh & Easy Neighborhood Mkt.*, 361 NLRB at 155 (citing *IBM Corp*., 341 NLRB 1288, 1294, 1307 fn.13 (2004) (holding single employee engaged in protected concerted activity by requesting assistance from a coworker in connection with a disciplinary interview)).

Respondent expressly disciplined and ultimately terminated Palmer for engaging in the above protected concerted activity in violation of Section 8(a)(1) of the Act. Respondent may argue that it would have still disciplined Palmer for "tampering" with Harris's t-shirt, even in the

absence of his protected concerted activity, but the record does not support this claim. GM Cherchiglia repeatedly admitted that the true reason Respondent disciplined Palmer was his discussion of Respondent's investigation of him and Robbin with his coworkers, not what happened with the t-shirt. Tr. 1346, 1568, 1571. This is also demonstrated by Respondent's failure to fully investigate the t-shirt incident by declining to interview any of the other employees or supervisors who were present while Palmer was "tampering" with the t-shirt or speak with employee Harris about whether he had given Palmer permission to take the shirt. Respondent admits that it did not discipline Robbin for her role in "tampering" with the t-shirt because, unlike Palmer, she did not tell employees that management accused her of theft. Tr. 1751-52.

There is no evidence that Palmer's activity somehow lost the protection of the Act. Respondent may contend that Palmer knew he was not accused of theft and thus maliciously lied about the investigation, but this is belied by the evidence establishing that Cherchiglia and Rosario met with Palmer on May 22 to discuss suspected theft. R 15. Inventory Manager Cruz testified that she *still* believes that Respondent was investigating Palmer for potential theft. Tr. 2160. Moreover, Palmer repeatedly clarified that he told employees it ***felt*** like he was being accused of stealing. Tr. 995, 996, 1053, 1056. Moreover, nothing about Palmer's conduct during the lighter incident lost protection of the Act. Cruz, the only Respondent witness who had personal knowledge of the June 2 incident, did not testify that Palmer screamed, cursed, threatened, or engaged in any belligerent behavior. In fact, Cruz initially perceived Palmer to be making a joke about "stoners stealing lighters." Tr. 2147. Cruz also did not recall any customers nearby and admitted that it would have been very difficult for anyone other than those present at concierge to hear Palmer. Tr. 2149, 2175. Thus, there is no evidence that Palmer engaged in the sort of outburst that would call into question whether he lost protection of the Act. *See Atlantic Steel, Inc.*, 245 NLRB 814, 816 (1979).

In addition to disciplining and discharging Palmer expressly because he engaged in protected concerted activities, the evidence also established that Respondent discriminated against Palmer based on his union activities. Palmer openly showed his support for the Union at work by wearing a Union pin most days from the time he was prominently featured in both Pin Day photos posted on Instagram on April 11 until his termination. Palmer also actively spoke with coworkers about the benefits of unionization on the shop floor and immediately outside the store. Tr. 951-55. Manager Cruz admitted she knew Palmer supported the Union at the time she began investigating him for suspected theft. Tr. 2178. The timing of the discipline and discharge in the final days leading up to the Union election also supports the inference that Respondent was motivated by union animus to retaliate against Palmer. *La Gloria Oil*, 337 NLRB at 1124, supra. Respondent also failed to investigate the incident that led to Palmer's termination, failing to give Palmer an opportunity to explain his side of things or interview other witnesses, which infers animus and unlawful motive. *See Lucky Cab Co.*, 360 NLRB at 274 fn. 13, supra; *B&B Safety Sys., LLC*, 370 NLRB No. 90, supra. Accordingly, the evidence establishes that Respondent disciplined and discharged Palmer because of his union activities in violation of Section 8(a)(3) of the Act, as well.

J. Respondent Unreasonably Delayed Bargaining with the Union over a Collective-Bargaining Agreement in Violation of Section 8(a)(5) of the Act

From June 26, 2025, until January 8, 2026, Respondent repeatedly ignored responding to the Union's requests to meet and thereby delayed bargaining, refusing to accept the results of employees' decision to unionize for over 6 months. The undisputed evidence shows that Respondent did not propose a single bargaining date until December 17, 2025. GC 54, 56. Respondent's failure to offer any explanation for these severe delays further demonstrates that it did not approach its bargaining obligations in good faith. By this conduct, Respondent violated Section 8(a)(1) and (5) of the Act.

Section 8(d) of the Act employers to "to meet at reasonable times and confer in good faith" with their employees' designated bargaining representative. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958); *Burns Security Services*, 300 NLRB 1143, 1144 (1990). This obligation means that the parties are legally required to make "expeditious and prompt arrangements" to meet and confer, *Professional Transportation, Inc.*, 362 NLRB 534, 540 (2015), quoting *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), and to do so with the same "degree of diligence" as they "would display in . . . other business affairs of importance." *Quality Motels of Colorado*. 189 NLRB 332, 336-337 (1971) (quoting *J. H. Rutter-Rex*, supra). Since the Act's purpose is to "equalize bargaining power between employees and employers [it] does not permit an employer to secure, even unintentionally, a dominant position at the bargaining table by means of unreasonable delay." *Burgie Vinegar Co.*, 71 NLRB 829 (1946) (finding that employer violated Section 8(a)(5) by initially refusing to negotiate with the Union for nearly 6 months, notwithstanding the serious illness of the employer's president).

The Board has long recognized that bargaining delays such as the one engaged in by the Respondent here have the effect, and sometimes the purpose, of undermining the union's support among employees. *See e.g.*, *Fruehauf Trailer Services, Inc.*, 335 NLRB 393, 394-395 (2001); *Quality Motels of Colorado*, 189 NLRB at 336-337; *Sarasota Coca-Cola Bottling Co.*, 162 NLRB 38, 45-46 (1966). This is so because "the passage of time itself, while employees grow disaffected and impatient with their designated collective bargaining agents' failure to report progress, weakens the unity and economic power of the group, and impairs the union's ability to secure a beneficial contact." *Burgie Vinegar Co.*, 71 NLRB at 829-30, supra. Thus, a party who limits and/or delays bargaining sessions has not met its obligations to meet and bargain and, as such, violates Section 8(a)(5) of the Act. *Pro Transportation, Inc.*, 362 NLRB 534, 540 (2015).

The Board has repeatedly held that the six-plus months Respondent took to commence bargaining reflects a violation. In *Northeastern Indiana Broadcasting Co., Inc.*, for example, the Board held that an employer violated the Act where it delayed meeting for merely 5 weeks when the union asked to schedule negotiation dates. 88 NLRB at 1381-1382 and 1390-1391 (1950). In *Quality Motels of Colorado, Inc.*, the Board affirmed that the Respondent had violated its duty to meet at reasonable times when it delayed meeting again with the union for almost 2 months after the parties' first negotiation session. 189 NLRB at 336-337. In *Fruehauf Trailer Services, Inc.*, the Board found that the employer had violated Section 8(a)(5) based in part on the employer delaying bargaining for almost 3 months after the union's request for an initial bargaining session. 335 NLRB 393, 393 and fn. 5 (2001).

In the instant case, Union attorney Christopher Baluzy sent a request to Respondent attorney Theo Gould to commence bargaining on June 26 promptly after the Board's June 25 certification of the Union as the bargaining representative for Williamsburg store employees. *See Beaird Industries, Inc.*, 313 NLRB 735, 736 (1994) (obligation to bargain commences, at the latest, upon certification of bargaining representative). Gould received and acknowledged Baluzy's bargaining requests but failed to offer any dates for negotiations prior to January 2026, despite Baluzy repeatedly requesting earlier dates, with Gould not responding. Respondent presented various inadequate excuses for this inordinate delay, from its executives' summer vacations to a federal government shutdown which did not impact its operations, but the Board holds that being too busy to deal with the Union does not excuse Respondent's failure bargain. *See, e.g.*, *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 6 fn. 14 (2018); *Fruehauf Trailer*, 335 NLRB at 393; *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992); *O & F Machine Products Co.*, 239 NLRB 1013, 1018-1019 (1978); *Sarasota Coca-Cola Bottling Co.*, 162 NLRB 38, 46 (1966); ("The Act does not permit a party to

hide behind the crowded calendar of the negotiator whom it selects."). The evidence thus establishes that Respondent delayed bargaining with the Union in violation of Section 8(a)(5) of the Act.

K. Respondent Failed and Refused or Unreasonably Delayed Providing the Union with Relevant Information It Had Requested in Violation of Section 8(a)(5) of the Act

An employer's obligation to bargain includes the obligation "to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison*, 440 U.S. 301, 303 (1979). The Board has consistently held that "information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request." *Surgery Center of Northern California*, 375 NLRB No. 1, slip op. at 2 (2026) (citing *MetroHealth Foundation, Inc.*, 338NLRB 802, 803 (2002)); *see also, Red Rock Casino Resort & Spa*, 368 NLRB No. 52, slip op. at 2 (2019) (employee names, dates of hire, rates of pay, job classifications, personnel policies, and benefit plans presumptively relevant); *CVS Albany*, 364 NLRB No. 122, slip op. at 1-2, (2016), (employee work schedules and employment policies presumptively relevant).

When a union requests relevant information, an "employer has a duty to supply the information in a timely manner or to adequately explain why the information will not be furnished." *TDY Industries, LLC*, 369 NLRB No. 128, slip op. at 2 (2020) (quoting *Regency Service Carts*, 345 NLRB 671, 673 (2005)). The failure to provide information in a timely manner "is as much a violation of Section 8(a)(5) as a refusal to furnish the information at all." *Id*. (quoting *Linwood Care Center*, 367 NLRB No. 14, slip op. at 4 (2018)). In deciding whether the timing of a response is reasonable, the Board considers "the nature of the information sought, the difficulty in obtaining it, the amount of time the employer takes to provide it, the reasons for the delay, and whether the party contemporaneously communicates these reasons to the requesting party." *Id.* The Board has frequently found months-long delays unreasonable, particularly where the

requested information is straightforward, and the Employer's explanation for the delay is vague or unsupported. *See e.g., El Paso Electric Co.*, 355 NLRB 428, 458 (2010) (three-month delay in furnishing witness names, statements unreasonable).

Here, the Union requested information on June 26 in conjunction with its demand to begin contract negotiations. The requests sought presumptively relevant information related to bargaining unit employees and their terms and conditions of employment. Respondent did not dispute the relevancy of any of the requests. The information requested was not complex or outside of Respondent's control, and Respondent put forth no legitimate basis to explain its delay and refusal to provide the information. Respondent did not acknowledge the June 26 request until August 5, nearly 6 weeks later, at which time Respondent made only a general statement about the volume of information sought and told the Union that it would need more time to provide the items due to summer vacation plans. Tr. 1078-79. On September 12, the Union followed up but received no update from Respondent. GC 54. On September 17, the Union emailed yet again requesting to know when Respondent would be sending the requested information and Respondent failed to provide an explanation for the delay. GC 57. The Union reiterated its request again on December 2 and December 9 [GC 56], but Respondent did not furnish any information until January 6, 2026, when it provided only a partial response to some of the requests. Respondent never communicated any explanation for its delay in providing this information. Tr. 1099. Respondent thereafter continued to delay furnishing the additional requested information, as it was still providing responsive information during the hearing in this case. Tr. 1097.

The record shows that at the close of the hearing, the Respondent had still failed to furnish information responsive to requests 7, 8, 13, portions of requests 14, 15, 20, 22 through 24, and requests 26 through 28, and did not communicate to the Union that this presumptively relevant

information does not exist.[17] Respondent severely delayed providing information relevant to the remaining Union requests. The Board should find that Respondent here again violated Section 8(a)(1) and (5) of the Act.

L. There Is No Basis to Deny a Reinstatement Remedy to Either Griffiths or Palmer

Counsel for the General Counsel takes the position that the question of whether either Griffiths or Palmer lost their right to reinstatement via their post-termination conduct, is an issue for a future compliance proceeding and is not an issue presently before the ALJ. However, to the extent that Respondent may argue that Your Honor should not order reinstatement because of these employees' post-termination conduct, the evidence does not support Respondent's heavy burden to show that either employee engaged in conduct sufficiently egregious to justify the extraordinary measure of denial of the reinstatement remedy.

The Board has recognized that evaluating post-discharge employee conduct which potentially disqualifies an employee from full relief requires a "sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge."

[17] As set forth above, the following information was not provided as of the hearing: (7) Since the opening of the Gotham Brooklyn store, the date of all wage increases and amount; (8) If an employee is scheduled to receive a wage increase, the date and amount of the increase and the reason for the increase; (13) For each employee, any bonuses provided, the date the bonus was provided, gross amount of the bonus, and the reason for the bonus (if any); (14)A copy of the Employee Handbook, (15) Policies and/or Work Rules governing bargaining unit employees and have been made available to bargaining unit employees in use by Gotham that are specific only to the Gotham Brooklyn store; ; (20) Written policies and training materials related to discrimination, harassment, workplace safety, and any other related issues, including all incident reports, however characterized by Gotham, involving at least one bargaining unit employee; (22) Pending and anticipated bargaining unit employee transfers between Gotham store locations, departments, or job titles; (23) Pending promotions of all unit members, both within and outside of the bargaining unit; (24) A list of all laid-off or terminated bargaining unit employees from September 2024, and reason for termination or separation and the amount of severance paid, if any; (26) All sales incentives, either Gotham or vendor-provided, free or discounted product trials, training programs, both on and off-site, and any other fringe benefits currently available to bargaining unit employees; (27) All policies and procedures pertaining to merit raises and market adjustments and relevant frequency; including, but not limited to: factors contributing to merit raises, reference tables and ranges used for percentage calculation, process to determining performance rating and reference used to qualify performance factors, and tenure factor; and (28) Number of seasonal, casual, and/or temporary workers currently employed at the Gotham Brooklyn store, including their status (temporary, casual, seasonal) and job department where employed. For seasonal and temporary employees, please also state their end dates of employment. GC 55.

Alle Processing Corp. 369 NLRB No. 52 (2020) (quoting *Hawaii Tribune Herald*, 356 NLRB 661, 662 (2011)). Thus, the Board, supported by the Courts, is extremely reluctant to deny reinstatement to discriminatorily discharged employees for conduct consisting of statements made criticizing and even disparaging the business operations of the employer or the employer's officials, particularly where the statements were made in the context of protesting their unlawful terminations. *Hawaii Tribune-Herald*, supra (discharged employee criticized on a blog and at a meeting, employer's management practices); *Timet*, 251 NLRB 1180, 1180-1181 (1980) enfd. 671 F.2d 973 (6th Cir. 1982) (letter distributed by employee accusing employer of providing "false testimony" at hearing before judge and accusing employer of "expressed and implied tyranny" does not disqualify employee from reinstatement, particularly since statements were made in context of protesting his unlawful discharge); *The Mandarin*, 228 NLRB 930, 931-932 (1977), enfd. sub nom. 621 F.2d 336 (9th Cir. 1980) (discharged employee, after judge's decision, distributed letter to employees announcing judge's decision that ordered him to be reinstated and included various attacks on the manager referring to him as "pompous," "arrogant" and accusing him of "lying;" letter also made antisemitic references to a "Jewish boss," asserting manager was "exploited by his Jewish boss to oppress his own countrymen"). While the Board does not condone ad hominem attacks or racial or ethnic slurs by employees upset about their unlaw terminations, it holds that such comments are insufficient to disqualify the employee from reinstatement, particularly where they are made in protest of an employee's unlawful discharge. *The Mandarin*, 228 NLRB at 931-32.

It is therefore well settled that in order to obviate the reinstatement and backpay obligations engendered by an unlawful discharge, the employer must demonstrate that the employee's post-discharge conduct was "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant." *Hawaii Tribune Herald*, 356 NLRB at 662 (quoting *O'Daniel*

Oldsmobile, 179 NLRB 398, 405 (1969)). Denial of reinstatement is appropriate only in "extraordinary situations," such as a death threat, intentionally striking a supervisor with an automobile, and threatening to "report a probation violation in order to influence a witness's testimony during a Board hearing." *Fund for the Public Interest*, 360 NLRB 877 (2014) (citing *Timet*, 251 NLRB at 1180-1181 and related cases). Similarly, the Board does not find all physical conduct or minor acts of violence sufficient to render an employee unfit for further employment.

In cases involving violence or threats of violence, the Board has considered a variety of factors including temporal proximity between the outburst and the unlawful discharge, an employee's history or pattern of violent behavior, and the severity of the conduct itself. For example, in *Casa San Migu*el, 320 NLRB 534 (1995), the Board affirmed the administrative law judge's conclusion that an employee's attempted assault on the assistant director immediately following her discharge was a "spontaneous response…clearly provoked" by the unlawful discharge and therefore did not render the employee unfit for future service. By contrast, in *Family Nursing Home & Rehabilitation Center*, 295 NLRB 923 (1989), the Board found a discriminatee's post-discharge conduct sufficiently egregious to render her unfit for future employment, where the record established the discriminatee, after being terminated, came at her supervisor with a bowling trophy in hand, attempted to wrench away the chair the supervisor had grabbed for her protection, before grabbing a phone away from a manager who was attempting to call the police while exclaiming that no one was going to make any "fucking calls to the police on this phone." The employee in *Family Nursing Home* refused to leave the Respondent's facility until the police were called twice more, and in the meantime returned to the work floor and tore linens off patient beds. *Id.* at 928. After her termination, the discriminatee was arrested and found to have assaulted an officer who testified at the hearing to the discriminatee's violent conduct during the arrest. Based on this conduct, the Judge found, and the Board affirmed, that the employee was no longer fit to

care for vulnerable patients, and thus reinstatement was an inappropriate remedy. *See also*, *Fairview Nursing Home*, 202 NLRB 318, 325 fn. 36, (1973).

More recently, in *Alle Processing Corp.* 369 NLRB No. 52, *supra,* the Board affirmed the administrative law judge's finding that an unlawfully discharged employee who reached to grab a coffee carousel after cursing out his managers immediately following his unlawful discharge was still entitled to reinstatement. The Board agreed with the Judge that the employee's conduct was not so flagrant as to render him unfit for further services. *Id.* In her decision, the Judge also noted Respondent's failure to file police report or ensure records of meeting were prepared belied their belief it was deliberate threat of violence or attempt at intimidation. *See also Teen Triumph*, 358 NLRB 11 (2012) (employee's immediate post-discharge conduct, which included violent gestures toward chief financial officer, refusal to leave premises, and police being called, did not, alone, render him unfit for further service, but subsequent conduct months after the discharge in which employee followed a coworker in a parking lot and engaged in profanity-laced tirade about an unrelated matter made employee ineligible for reinstatement).

Respondent may contend that Griffiths' post-discharge social media posts about Respondent and its managers render him unfit for further employment. However, the record makes clear that these posts were provoked by and related to Griffiths' unlawful discharge and the subsequent unfair labor practices Respondent engaged in. Nearly all of Griffiths' posts cited or related back to the unfair labor practices at issue in this case and are thus clearly not of the sort that would render him unfit for further employment under Board law – even if Respondent found them insulting or personally derogatory.

Respondent also failed to establish that Palmer engaged in post-discharge misconduct sufficient to render him unfit for further service, either. As an initial matter, the evidence does not establish that Palmer engaged in violent misconduct following his discharge. Cherchiglia's

testimony that Palmer threatened violence by lunging at him was not credible as it was not mentioned in Cherchiglia's prior statement. Respondent did not present any other evidence, through footage or witness testimony, to corroborate Cherchiglia's testimony, and thus, given Palmer's denial and Cherchiglia's clear lack of credibility, Respondent has not sustained its high burden of proof to justify denying reinstatement to Palmer. Cherchiglia admitted that Palmer left Respondent's facility voluntarily after gathering his things, and that no police report was ever filed or considered. Cherchiglia's subjective impression that Palmer "looked like he wanted to hit someone" in response to his unlawful discharge does not show that he engaged in the type of violent misconduct the Board would consider rendering an employee unfit for future employment, particularly since any outburst was clearly provoked by the unlawful discharge itself.

Accordingly, in line with the above precedent, there is no basis to deny either employee reinstatement.

M. The Board Should Extend the Certification Bar to a New Election at Respondent's Williamsburg Store Because of Respondent's Unfair Labor Practices

The Board has long held that an employer's unlawful failure to bargain during the period following a union's initial certification is properly remedied by extending the prohibition against a new representation election or a withdrawal of recognition that could displace the union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964). Failure to bargain with a newly certified union deprives the union of the opportunity to bargain during the time of the union's greatest strength. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), (citing *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990)). Thus, extension of the one-year certification bar is a standard remedy where, as here, Respondent has refused to bargain for a significant part of the certification year. *See Whisper Soft Mills, Inc.*, 267 NLRB 813, 816 (1983), reversed on other grounds, 754 F.2d 1381 (9th Cir. 1984); *Dominguez Valley Hospital*,

287 NLRB 149, 149 (1987) (Board imposes remedies "to assure a period of at least a year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support").

In accord with these precedents, the certification bar against a potential withdrawal of recognition of the Union by Respondent or a new representation election at the Williamsburg store should be extended to remedy Respondent's nearly 7-month delay in starting negotiations, as well as its delay in furnishing information the Union needed to bargain effectively for an additional 3 months after negotiations commenced and its outright failure to furnish other relevant information requested by the Union. *See J.G. Kern Enterprises, Inc.*, 371 NLRB No. 91, 1 (2022), enfd. 94 F.4th 18 (D.C. Cir. 2024)) (ordering 6-month extension to the certification year based on a 3-month delay in bargaining combined with refusal to provide information).

V. CONCLUSION

The foregoing facts and analysis firmly establish that Respondent committed the numerous violations alleged in the Complaint. The General Counsel, therefore, respectfully urges the ALJ find that Respondent has violated Sections 8(a)(1), (3) and (5) of the Act as described in the Complaint and recommend that the Board order all remedial relief appropriate under the Act, including full equitable make whole remedies for each discriminatee and complete notice posting and distribution by electronic means to ensure that employees are reassured of their rights in the face of Respondent's egregious conduct and may be fully protected from future violations.

DATED this 4th day of September, 2026.

Matthew Jackson /s/ Sarah A. Crowley

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