UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE PURPLE EAGLE LLC
d/b/a THE VIDEO GAME CAVERN

and **Case 10-CA-343133**

ROMULUS ELIJAH LOFINK, an Individual

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

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I. STATEMENT OF THE CASE

On July 10, 2026, Administrative Law Judge (ALJ) Jeffrey P. Gardner issued his decision (ALJD) in this case. He found that Respondent Purple Eagle LLC, d/b/a The Video Game Cavern (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) maintaining an unlawful non-disclosure agreement that contains prohibitions on protected concerted activity; (2) discharging the Charging Party, Romulus Lofink, pursuant to that unlawful agreement; and (3) discharging Lofink for engaging in protected concerted activity.

Respondent filed 41 exceptions to the ALJD including exceptions to his jurisdictional finding, credibility determinations, findings of fact, conclusions of law, and remedial order. The brief in support of exceptions is procedurally and substantively deficient. It fails to specifically identify which exceptions it is arguing by number, fails to argue certain exceptions listed in the Exceptions, and raises arguments for the first time which were not raised before the ALJ. The arguments it does make are not supported by the record or Board law.

The ALJ presented a well-reasoned and in-depth analysis for each of his findings, based on the specific facts of this case. A preponderance of relevant record evidence supports the ALJ's credibility determinations, findings of fact, and conclusions of law.

This Answering Brief is filed pursuant to Rule 102.46 of the Board's Rules and Regulations. For the reasons explained herein, the Board should affirm the ALJ's decision and adopt his recommended Order.

II. SUMMARY OF FACTS

The material facts of this case are correctly stated and discussed in the ALJD, and the ALJ's findings of fact are fully supported by the record. Below is a summary of the relevant facts.

A. Background

Respondent is a video game retail store in Taylors, South Carolina. (ALJD 2:17; Tr. 21). Respondent's operations include buying, selling, and trading video games and related merchandise. (ALJD 2:17; J. Ex. 7). Robert Potts has been the owner of the Video Game Cavern since January 1, 2024. (ALJD 2:17; Tr. 92). Paul Andrew Case was Respondent's General Manager since about October 2023.[1] (ALJD 2:20; Tr. 66). Daniell Cadell (Tr. 78) was the assistant manager at all material times. (ALJD 2:20; GC Ex. 1(i)). At all material times, Potts, Case, and Cadell have been supervisors and agents as defined by Section 2(11) and 2(13) of the Act. (ALJD 2:22; GC Ex. 1(i)). At all material times, Respondent employed three non-supervisory employees, who all held the title Sales Associate. (ALJD 2:20; Tr. 22). The sales associates were Romulus Lofink (the Charging Party), Tiffany Shoptaugh, and Kayla Bridwell. Id. Every supervisor and employee testified at the trial, except for Kayla Bridwell.

Romulus Lofink began working at the Video Game Cavern in September 2022. (ALJD 2: 25; Tr. 20). As a sales associate, Lofink assisted customers, input inventory, ran the register, handled trade-ins, and repaired consoles. (ALJD 2:25; Tr. 21). When Potts acquired ownership in January 2024, he retained Lofink as an employee. (Tr. 93). Prior to discharging Lofink on May 13, 2024, Respondent had never disciplined Lofink. (Tr. 41).

B. Respondent's Non-Disclosure Agreement

When Pott's acquired ownership in 2024, he required all employees to sign a non-disclosure agreement (NDA) as a condition of continued employment. (ALJD 2:28; Tr. 24—25,

[1] Counsel for the General Counsel concedes Respondent's Exception # 4 and agrees that the ALJD incorrectly states that "Case had been hired by Potts shortly after he purchased the business." (ALJD 2:22). The record shows that Case was hired shortly *before* Potts purchased the business. (Tr. 66). However, this fact is not relevant to any of the issues or legal findings in this case, and Respondent does not argue that it is.

96; J. Ex. 4). Lofink signed the NDA on January 3, 2024, after Potts told him that he must do so to continue working for Respondent. (ALJD 2:30; J. Ex. 4; Tr. 24—25).

The NDA contains the following provisions:

1. Company's Trade Secrets

   In the performance of Employee's job duties with Company, Employee will be exposed to Company's Confidential Information. "Confidential Information" means information or material that is commercially valuable to Company and not generally known or readily ascertainable in the industry. This includes, but is not limited to:
   (a) information concerning Company's business, including cost information, profits, sales information, accounting and unpublished financial information, business plans, markets and marketing methods, customer lists and customer information, purchasing techniques, supplier lists and supplier information and advertising strategies;
   (b) information concerning Company's employees, including salaries, strengths, weaknesses, and skills;
   (c) information submitted by Company's customers, suppliers, employees, consultants or co-venture partners with Company for study, evaluation or use; and
   (d) any other information not generally known to the public which, if misused or disclosed, could reasonably be expected to adversely affect Company's business.

2. Nondisclosure of Trade Secrets

   The Employee shall keep Company's Confidential Information, whether or not prepared or developed by Employee, in the strictest confidence. The Employee will not disclose such information to anyone outside Company without Company's prior written consent. Nor will Employee make use of any Confidential Information for Employee's own purposes or the benefit of anyone other than Company.
   . . .

(ALJD 2-3; J. Ex. 4)(emphasis added).

C. Lofink and his Coworkers Discussed General Manager Case's Work Performance and Salary.

General Manager Case and Assistant Manager Cadell both performed many of the same duties as sales associates. They both worked on the floor regularly manning registers, restocking shelves, cleaning, and assembling the inventory. (Tr. 23, 51). Case also had some behind the scenes duties including tracking and pricing incoming inventory. (Tr. 23).

Beginning around early 2024, Employees began noticing weaknesses in General Manager Case's job performance, which created more stress and work them. (Tr. 25—28, 52; ALJD 3:16-29). They were concerned that he neglected his duties and made frequent mistakes. (ALJD 3; Tr. 25, 52). For example, he frequently neglected to properly update the order tracking system, and often didn't label, or mislabeled, new inventory. (ALJD 3; Tr. 26-27, 52). This forced other employees to step away from normal duties to figure out pricing, which slowed down operations. (ALJD 3:20-23; Tr. 27). Between February and May 2024, Lofink discussed these concerns frequently with his coworkers Tiffany Shoptaugh and Kayla Bridwell, as well as Assistant Manager Cadell. (Tr. 28-32, 53-55; ALJD 3:31-37).

In the context of their discussions about Case's weaknesses as a manager, employees sometimes expressed the sentiment that Case was overpaid. (ALJD 3:25; Tr. 34-35, 54-55). Case told both Lofink and Cadell that he made $80,000 per year, which the employees felt was too much considering his poor work performance. (ALJD 3:25-29; Tr. 33-34).

On at least two occasions, Lofink told his coworkers that he planned to bring their concerns about Case's performance to Potts. (Tr. 29-30; ALJD 3:36-37). Lofink raised the employees' complaints about Case to Case himself on a few occasions and brought their complaints to Potts once. (Tr. 35-36; ALJD 3:39-42).

D. Respondent Discharged Lofink

"In early May 2024, Potts ran into some regular customers of the store while on a shopping errand, and after exchanging pleasantries, the customers remarked to Potts that they were surprised at how much he was able to pay Case. When Potts inquired where they had heard about Case's pay, the customers reportedly told Potts that they overheard Lofink talking about it while they were in Respondent's store, and that Lofink was also speaking negatively about Case's work performance." (ALJD 4:11-16; Tr. 93:21-94:14). Potts then told Case what he had heard, who in

turn asked Cadell if he had ever heard Lofink saying these types of things at work. Cadell confirmed to Case that Lofink and other employees, and Cadell himself, had discussed Case's performance and salary at work. (ALJD 4:17-22; Tr. 70-73, 94-95.)

On Monday, May 13, 2024, when Lofink arrived at work, Respondent called him into the office to speak with Potts, Case, and Cadell. (ALJD 4:24; Tr. 28). Potts told Lofink that an unidentified customer had said that Lofink told them that Case was "making $80,000, that he was not doing his job very well, and that he was on his phone a lot." (Tr. 38). Potts accused Lofink of searching through his papers for Case's salary information. (Tr. 39). Lofink explained that he knew Case's salary because Case told him, and Cadell later confirmed it. (ALJD 4:26; Tr. 39). Potts then told Lofink that he was in breach of Section 1(b) of his NDA and gave him the choice to either resign or be terminated. (ALJD 3:29; Tr. 38). Lofink initially resigned but went back the next day, May 14, and asked to be discharged instead. Id. On May 14, Potts provided Lofink with a discharge notice, and a copy of his signed NDA. (ALJD 4:24-36; Tr. 39; J. Ex. 5; J. Ex. 4).

III. Procedural Deficiencies in Respondent's Brief in Support of Exceptions

A. Respondent's Brief Should be Disregarded for Failing to Specifically Identify the Exceptions it is Arguing

Section 102.46(a)(1)(i)(D) and (a)(1)(ii) of the Board's Rules and Regulations require that each exception "[c]oncisely state the grounds for the exception" and mandate that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded." Section 102.46(a)(2)(ii) requires that the brief in support of exceptions contain "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." Respondent filed 41 Exceptions. Respondent's brief in

support of exceptions does not include a single reference to a specific exception to which any of the arguments relate. It also does not specify the questions involved.

This deficiency unduly hinders Counsel for the General Counsel in responding to Respondent's exceptions and brief because it is difficult to identify which exceptions are being explicitly argued. Because this procedural defect is engrained in the entirety of Respondent's Brief in Support of Exceptions, the arguments contained therein should be disregarded and stricken from the record as it is replete with violations of the requirements set forth in the Board's Rules and Regulations.

B. The Exceptions not Argued in Respondent's Brief are Waived.

Notwithstanding the foregoing deficiency, Counsel for the General Counsel has attempted to identify the exceptions which appear to topically correspond to the arguments in Respondent's brief. There are several exceptions[2] which have no logically corresponding argument in the brief.

This is in violation of Section 102.46(a)(2) of the Board's Rules and Regulations, which requires that a brief in support of exceptions must clearly lay out the facts and law which support Respondent's position on each exception. The Board has found that where a party fails to support its exceptions with argument in the brief, such exceptions are waived. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) (unsupported exceptions may be disregarded), enfd. 456 F.3d 265 (1st Cir. 2006); *Oak Tree Mazda*, 334 NLRB 110 fn. 1 (2001). As such, Respondent's unsupported exceptions should be disregarded as waived.[3]

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[2] This includes, but is not limited to, Respondent exception numbers 8, 23, 24, 28, 32, 35, 39, and 40. It is impossible for Counsel for the General Counsel to determine whether this list is exhaustive, as Respondent's procedurally defective brief fails to identify which specific exceptions it is arguing.

[3] Similarly, the Board's Rules and Regulations state that "Any exception to a ruling, finding, conclusion, or recommendation not specifically urged [in Respondent's brief] will be deemed to have been waived…" NLRB Rules and Regulations, Sec. 102.46(a)(1)(ii).

C. Arguments Raised for the First Time in Exceptions are Waived.

The Board has consistently held that a party waives exceptions whenever it has failed to first raise the argument before the ALJ. *Little John Electrical Solutions, LLC*, 368 NLRB No. 76, fn. 1 (2019), citing *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) ("A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus deemed waived"), enfd., 922 F.2d 832 (3d Cir. 1990). Respondent raises four exceptions which it failed to raise before the ALJ. Pursuant to Board precedent, those four arguments,[4] cited in the footnote below, have been waived by Respondent.

IV. ARGUMENT

An ALJ's decision, based on the evidence presented at the underlying hearing, should not be disturbed, even if one party takes exception to that decision, unless the ALJ's findings are unsupported by the facts and evidence found in the record. See *Standard Drywall Prod., Inc.*, 91 NLRB 544 (1950), enfd., 188 F.2d 362 (3d Cir. 1951). Here, the ALJ's decision is well supported by a preponderance of the record evidence and well-settled Board law.

A. The ALJ's Credibility Determinations Should not be Disturbed (Response to Respondent's Exceptions 4, 11, 12, 15, 16, 17).

Respondent excepts to the ALJ's credibility determinations that credit the testimony of Counsel for the General Counsel witnesses over contradictory testimony from Respondent's witnesses. It is the Board's established policy not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall*, 91 NLRB at 544. An ALJ may determine credibility by considering the testimony of all the witnesses in the context of their demeanor, the weight of the evidence, the

[4] Exceptions 8, 32, 39, and 40 all raise arguments not presented in front of the ALJ.

facts, the probability that the testimony was true, and the reasonable inferences that could be drawn from their statements. See *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003), citing *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility determinations made by an ALJ are afforded great deference because the ALJ "sees the witnesses and hears them testify, while the Board and reviewing court look only at cold records." *NLRB v. Walton Mfg. Co*., 369 U.S. 404 (1962); see also *USPS*, 365 NLRB 557, 557 fn. 1 (2017).

"A demeanor-based credibility resolution is itself a basis for a finding of fact." *Atlantic Veal & Lamb, Inc*., 342 NLRB 418, 420 (2004) enfd. mem. 156 F. Appx. 330 (D.C. Cir. 2005). There is no Administrative Procedures Act (APA) requirement that there be a sub-explanation of the demeanor-based credibility resolution. Id. The Board's policy is therefore to attach great weight to an ALJ's credibility findings "insofar as they are based on demeanor." *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1231 (2006); see also *Standard Drywall*, 91 NLRB 544.

Demeanor can be assessed by steady tone of voice, facial expressions, spontaneous manner of testimony, and positive attitude even on cross-examination. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Eastern Engineering & Elevator Co. v. NLRB*, 637 F.2d 191, 197 (3d Cir. 1980); see also *Atlantic Veal.*, 342 NLRB at 420 (2004), (the Board allows ALJs to make "demeanor-based" credibility determinations based on "nervousness of the witness, self-contradiction, and evasiveness" while testifying).

1. The ALJ's finding that Romulus Lofink was a credible witness should not be disturbed.

The ALJ "found Romulus Lofink to be a credible witness. He was straightforward in his testimony, with a solid recollection of detailed facts. He did not hesitate to acknowledge facts that could be perceived as negative, and his demeanor remained the same during cross-examination." (ALJD 5:14-19). Respondent argues that this finding should be overruled because (1) Lofink's

testimony was contradicted by Respondent's witnesses; and (2) Lofink's testimony was "internally inconsistent." (R. Br. 8-9).

The only material facts in dispute in this case are how Lofink learned Case's salary, and whether the number was accurate. The ALJ correctly found, as Lofink testified, that "[i]n early to mid-January, Case had remarked to Lofink that he had taken a pay cut to come work for Respondent, a $30,000 pay cut from a prior job making $110,000. Caddell later confirmed in a conversation with Lofink that Case was making $80,000 working for Respondent." (ALJD 3:26-29; Tr. 33-34).

First, Respondent says that Lofink's testimony that he learned Case's salary from Case himself, as well as Cadell, was contradicted by the testimony of Case and Cadell. Respondent argues that the ALJ did not "meaningfully [address] why he rejected the mutually corroborating testimony of Case and Cadell . . ." (R. Br. 8-9). However, this is circular reasoning; conflicting testimony is the reason there is a need for a credibility determination, which the ALJ appropriately made based on his observations of each witness's demeanor, the probability the testimony was true, and reasonable inferences.

Second, Respondent argues that Lofink's testimony was "internally inconsistent." (R. Br. 8-9). In support of this, Respondent mischaracterizes the record to argue that Lofink initially claimed Case himself told him his salary but later asserted that Cadell told him. However, Lofink's consistently testified that Case and Cadell *both* made statements to him about Case's salary. (Tr. 33). The record reflects that Lofink repeated this exact explanation of how he learned Case's salary at least three times. This is the explanation he gave when Respondent confronted him about it on May 13, 2024. (Tr. 33-34, 69). It is the explanation he gave under oath at the unemployment

hearing.[5] (J. Ex. 3 32-33). And again, in his testimony at this trial, Lofink told the same story. (Tr. 33-34).

The credibility of this assertion is bolstered by not only its consistency, but its specificity and details. "[W]hen one witness testifies with specificity about an event, and an opposing witness advances merely a vague or generalized account about that same event, the account of the first tends to be inherently regarded as the more reliable one." *Precoat Metals*, 314 NLRB 1137, 1150 (2004) (citing *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987) (crediting the "specific and detailed testimony" about an event over the blanket denial from the opposing parties witness); *Emerson Elec. Co v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981); and *Mastercraft Casket Co. v. NLRB*, 881 F.2d 542 (8th Cir. 1989).

Case confirmed at the unemployment hearing that he once remarked to Lofink that he took a pay cut, while denying that he provided the specific numbers. He did not provide any further details as to when or in what context that conversation happened. (J. Ex. 3 32-33). He did not testify about this conversation at trial but instead blanketly denied telling Lofink his salary. That blanket denial should be given comparatively little weight compared to Lofink's version. Case also notably did not testify as to (1) what his actual pay was, or (2) how much of a pay cut he had taken when he came to work for Respondent. Either of those facts could have credited or discredited Lofink's version of events. By failing to enter them into evidence, there should be an adverse inference that they would have confirmed Lofink's testimony.

[5] On June 24, 2024, there was an unemployment hearing before the South Carolina Department of Employment and Workforce concerning Lofink's discharge (the "unemployment hearing"). (Tr. 40-41; J. Ex. 2, 3). That hearing was recorded. (J. Ex. 2, 3). Lofink, Potts, Case, and Cadell all testified under oath at that hearing. (Tr. 40-41; J. Ex. 2, 3; ALJD 4:42-45). The parties stipulated to enter the recording as Joint Exhibit 2, and the transcript, as Joint Exhibit 3.

The Board should uphold the ALJ's well-reasoned determination that Lofink was a credible witness, and the factual conclusions based on that determination.

2. *The ALJ's finding that Robert Potts was only a mostly credible witness should not be disturbed.*

The ALJ "found Robert Potts to be a mostly credible witness." (ALJD 5:39-6:2). However, he also noted that Potts "was not credible when he sought to hedge his earlier sworn testimony given in Lofink's unemployment hearing about his understanding of the law regarding an employee's right to discuss salaries. His explanation was inconsistent with his prior testimony, and he appeared to know that what he had said was problematic, but his attempt to distinguish it was not credible." Id.

Respondent argues that this "reflects improper speculation about Pott's subjective intent and demeanor." (R. Br. 12). Past inconsistent statements are appropriate and commonly used evidence of a witness's incredibility. In fact, in encouraging ALJ's to give a more specific basis for credibility findings, the board includes self-contradiction as an example. *Atlantic Veal,* 342 NLRB at 420. The ALJ's accurate observation that Potts appeared to know his prior statement was an unfavorable fact, is another way of saying he appeared defensive, which is a determination of his demeanor. This is an appropriate observation for the ALJ to consider in making credibility determinations.

3. *The ALJ's finding that Daniell Caddell was a less credible witness should not be disturbed.*

The ALJ found that "Daniel Caddell appeared less credible. His answers tended to ramble when asked about specifics. He also appeared defensive while testifying about his prior friendship with Lofink and his acknowledgement of their conversations about Case's salary, denying that he had ever told Lofink about Case's salary but apparently incurious as to where his then-friend may have gotten that information." (ALJD 5:33-37).

Respondent first argues that the characterization of Cadell's testimony as rambling is not supported by the record and is an improper basis for a credibility determination. (R. Br. 10-11). Rambling is a reasonable characterization of some of Cadell's answers on direct. For example, he tended to repeat himself unprompted. (Tr. 80:7-13; 81:9-22). ALJ's regularly consider the nature of a witness's testimony including findings that testimony was "mechanical," "rehearsed," or "evasive" to weigh credibility. *Advoc. S. Suburban Hosp. v. N.L.R.B.*, 468 F.3d 1038, 1047 (7th Cir. 2006); see also e.g., *Cintas Corp.*, 372 NLRB No. 34, slip op. at 6 (2022). The rambling nature of Cadell's testimony falls in the same category of observations as "rehearsed" or "evasive" and is an appropriate observation to weigh on credibility.

Respondent also takes issue with the ALJ's observation that Cadell was "apparently incurious as to where his then-friend may have gotten that information." (ALJD 5:36-37; R. Br. 11). Respondent argues this reflects improper speculation and does not bear on his credibility. Id. However, it is proper for the ALJ to consider "the probability that the testimony was true, and the reasonable inferences that could be drawn from their statements." See *Double D Construction.*, 339 NLRB at 305. The ALJ made a reasonable inference that someone would normally be curious as to how their friend learned their supervisor's salary. Based on that inference, the ALJ appropriately weighed the probability that Cadell's testimony was truthful against Lofink's version of events, and soundly, credited Lofink's testimony.

The record evidence conclusively shows that the ALJ's factual findings were rooted in his well-reasoned credibility determinations and the logical inferences drawn from the testimony. Respondent has not met its burden to establish that the clear preponderance of the relevant evidence demonstrates that the ALJ improperly credited the General Counsel's witnesses. Therefore, the Board should not disturb the ALJ's well-founded conclusions regarding the

credibility of the witnesses and all of Respondent's exceptions based on the ALJ's credibility determinations should be dismissed.

B. The ALJ Correctly Found that Respondent's Non-Disclosure Agreement was Unlawful (Response to Respondent's Exceptions 18, 19, 20, 21, 22, 36).

The ALJ correctly applied *Stericycle* to find Respondent's NDA unlawful. *Stericycle Inc.*, 372 NLRB No. 113 at 3 (2023). However, *Stericycle* was wrongly decided, and the Board should overturn it in favor of a more balanced approach to analyzing allegedly unlawful workplace rules. The Board should affirm the ALJ's holding that Respondent's NDA is unlawful because it explicitly prohibits Section 7 conduct including salary discussions and therefore should be found unlawful under any analysis. However, if the Board upholds *Stericycle* and applies it here, it should affirm the ALJ's holding that the NDA is unlawful under that framework as well.

1. The Board should overturn Stericycle in favor of a more balanced and common-sense approach.

The Board is tasked with faithfully interpreting the Act by ensuring its enforcement remains within the parameters established by Congress. In this regard, the Board must strike a careful balance to safeguard employer and employee rights and interests simultaneously, without creating unnecessary conflict between them. When evaluating facially-neutral work rules, the Board should endeavor to preserve employees' rights to engage in Section 7 activities by prohibiting workplace policies that will genuinely coerce employees while empowering employers to maintain order, adhere to legal requirements, and foster productive environments. Instead of striking that proper balance, *Stericycle* encourages the reading of common workplace rules in a vacuum by adopting an excessively broad interpretation of Section 7 at the expense of congressional intent. Congress never intended for the Act to prevent employers from upholding safe and harassment-free workplaces or penalize companies for doing so. By stretching the scope of Section 7 beyond its

intended boundaries—and common sense—the ruling undermines the ability of employers to establish essential policies that protect employees' safety and maintain a respectful environment. Indeed, *Stericycle* fails to recognize employers' statutory and legal duties under federal and state laws to maintain safe environments, investigate allegations of harassment, uphold respectful workplace standards and safeguard confidential and proprietary information. The *Stericycle* framework thereby creates a dilemma by forcing employers to either comply with various legal and regulatory requirements or risk having every workplace policy challenged as potentially violative of the Act, leaving employers unable to enforce essential workplace rules without facing legal uncertainty and litigation. The *Stericycle* framework has made it increasingly difficult for employers to draft workplace policies with certainty, as nearly any rule may now be subject to challenge. This climate of regulatory uncertainty makes employers hesitant to uphold essential workplace standards for fear of having to litigate whether those standards could withstand Section 7 scrutiny under the broadest possible interpretation. Such uncertainty discourages investment while encouraging litigation and falls particularly hard on small businesses that may lack the resources to secure labor counsel. For these reasons, the General Counsel urges the Board to overturn *Stericycle* in favor of a more balanced approach that effectuates congressional intent and promotes industrial peace.

2. *Respondent's NDA is facially unlawful under any standard because it explicitly prohibits Section 7 Activities.*

The Board has applied various frameworks to analyze work rules, all of which have reflected the goal of balancing employees' rights to freely engage in Section 7 conduct with employers' rights to maintain order and productivity in the workplace. See e.g. *Republic Aviation Corp.*, 51 NLRB 1186, 1187 (1943); *Solo Cup Co.*, 144 NLRB 1481, 1481-1482 (1963); *Martin Luther Mem'l Home, Inc. (Lutheran Heritage)*, 343 NLRB 646, 646 (2004). Although the Board

has gone through several frameworks to analyze the legality of facially neutral work rules, it has consistently applied the principle that when a rule explicitly prohibits Section 7 conduct, it is unlawful. In *Lutheran Heritage*, the Board stated "our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful." *Lutheran Heritage*, 343 NLRB 646, 646 (2004). In *Boeing*, the Board replaced the *Lutheran Heritage* Standard for evaluating facially neutral work rules. *The Boeing Co.*, 365 NLRB 1494 (2017). The Board did not, however, alter the premise that work rules explicitly restricting Section 7 activity remain unlawful. Id. Under *Boeing*, when evaluating a facially neutral work rule, the Board conducted a balancing test that considered (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. Id. at 1496. The Board then applied that framework to categorize types of rules as always, sometimes, or never lawful. Id at 1496-97. Rules in the third category did not require a balancing test because they were always unlawful. *Lowes Home Centers, LLC*, 368 NLRB No. 133 (2019) (Board affirmed ALJ's finding that confidentiality agreement containing a prohibition on wage discussions was per se unlawful under *Boeing*). The Boeing Board explicitly stated that "[a]n example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another." *Boeing*, at 1497.

The Board applied this standard to a confidentiality rule in *Lowe's*, 368 NLRB No. 133. The rule in that case prohibited unauthorized disclosure of confidential information. It defined confidential information as "all non-public information that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and salary information." Id. It simultaneously

maintained a rule defining confidential information as "[m]aterial, non-public information; and [] Proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy." Id. The ALJ held, and Board affirmed, that both versions of this rule were unlawful under the *Boeing* analysis. In so holding, the ALJ stated that no balancing test was necessary because "[b]y specifically prohibiting employees from disclosing of salary information, Respondent's confidentiality of information provision is unlawful and violates Section 8(a)(1) of the Act." The ALJ went on to say that even when conducting the balancing test, the respondent employer had failed to "present more than bare assertions for its alleged business justifications."

Regardless of which test the Board sees fit to apply, prohibitions on salary discussions are unlawful. As the ALJ summarized in *Lowes*:

> "[e]mployee discussions regarding wages, the core of Section 7 rights, are 'the grist on which concerted activity feeds.' *Parexel International, LLC,* 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996). As such, the Board has consistently held that rules or provisions which prohibit employees from discussing wages are unlawful. See *Waco, Inc.*, 273 NLRB 746, 748 (1984) (absent a legitimate and substantial business justification, rule prohibiting employees from discussing their wages with one another is unlawful); *Jeannette Corporation*, 217 NLRB 653, 656 (1975) (unqualified rule prohibiting employees from discussing wages with other employees is unlawful regardless of whether the rule is deemed a company policy or not); cf. *Asheville School, Inc.*, 347 NLRB 877, 881 (2006) (employee discharged for divulging confidential wage information she learned as a result of her job function not protected activity); *Super K-Mart*, 330 NLRB 263 (1999) (employer rule barring disclosure of its confidential company business and documents lawful as the rule did not bar employees from discussing wages)."

Lowes, 368 NLRB No. 133.

Respondent's Non-Disclosure Agreement (NDA) "prohibits employees from disclosing confidential information 'to anyone outside the Company without Company's prior written consent.' (Jt. Exh. 4, Section 2). The prohibition goes on to bar 'the use of any Confidential Information for Employee's own purposes or the benefit of anyone other than Company.'" (ALJD

6:40-46; Id.). The NDA then broadly defines "confidential Information" as "information or material that is commercially valuable to Company and not generally known or readily ascertainable in the industry." (J. Ex. 4). It then lists specific examples of Confidential Information, including Section 1(b), "information concerning Company's employees, including salaries, strengths, weaknesses, and skills." Id.

Discussing salaries is inherently concerted activity, which Section 1(b) explicitly prohibits. To prohibit salary discussions "for the employee's own purposes" specifically prohibits such conduct as discussing terms of employment with union organizers, or with coworkers for the purposes of organizing to improve working conditions and benefits. Information concerning employees "strengths, weaknesses, and skills," also prohibits a broad range of discussions related to working conditions. For example, as exemplified by the case at hand, it prohibits employees from discussing grievances about their supervisor's conduct.

Under even the narrowest interpretation, the NDA is facially unlawful because it explicitly prohibits employees from discussing wages, and other terms and conditions of employment.

3. Respondent does not have a business justification for the NDA.

Like the rule in *Lowe*'s, the NDA here is not entitled to a weighing of interests because it is explicitly unlawful as written. However, if the Board were to conduct a balancing test similar to the one applied under *Boeing*, this level of interference with core Section 7 Rights would not be outweighed by Respondent's proffered business justification, even without applying *Stericycle*'s "narrowly tailored" standard. Respondent asserts that the NDA serves to protect it from competitors. But, like in *Lowes*, Respondent presents only the bare assertion that the NDA serves this purpose, with minimal explanation and no supporting evidence. *Lowes*, 368 NLRB No. 133.

Respondent once again repeats its factually erroneous argument from its post-hearing brief that "the record establishes that prior to implementation of the NDA, employees disclosed confidential business information to customers who subsequently used that information to open a competing video game store." (R. Br. 20). This misrepresents Cadell's brief and unsubstantiated testimony on the matter. In response to Respondent's Counsel's leading questioning on the subject, Cadell testified that "we had some customers that used to come in [. . .] their names were Bill and Monica. [Lofink] did release information about how we would get our pricing, as well as how we would clean and take care of, like, our consoles and games before we would put them out, which is a company secret and should not be traded." (Tr. 85:12-25). He went on to testify that Bill and Monica now own a video game store in the area. (Tr. 85-86). This testimony was given without foundation and is not corroborated by any other witnesses.

Cadell did not allege that Bill and Monica "used that information to open a competing video game store" as Respondent now argues. (R. Br. 20). Cadell did not testify as to when those employee disclosures happened, or when that store was opened. Because he didn't testify as to when either of those events took place, the record does not establish if the disclosures predated the competing store opening, let alone that they used that information to open it. The record also does not indicate if that store opened before or after the implementation of the NDA, making it impossible to say that it could have been a factor in its implementation.

Moreover, there is nothing in the record to indicate that these alleged disclosures to Bill and Monica were the reason the NDA was implemented. Potts, who made the decision to implement the NDA, made no mention of Bill and Monica, or previous employee disclosures, in his own testimony. Pott's testified only that the purpose of the NDA is ". . . to protect the store . .

. we do have a lot of competitors. You know, we try to keep things close to the vest, so we're not giving away how we do things, where we get product, our pricing structures. . ." (Tr. 96).

Even if Respondent had demonstrated a causal connection between this alleged disclosure and the NDA, it has still not established, or even argued, a connection between the disclosure of information about pricing and cleaning, and the need to prohibit disclosures of salaries. There is nothing in the record to indicate how Respondent's business concerns are being served by preventing employee disclosures of "information concerning Company's employees, including salaries, strengths, weaknesses, and skills." (J. Ex. 4).

Employee's rights to engage in such core Section 7 conduct as wage discussions, cannot be outweighed by the mere existence of a competing business in the area, regardless of which balancing test the Board applies.

4. Respondent's NDA is unlawful under Stericycle.

If the Board declines to overrule *Stericycle*, it should affirm the ALJ's holding that Respondent's NDA is unlawful under that standard. Under *Stericycle*, a rule is presumptively unlawful if the General Counsel can prove that it "has a reasonable tendency to chill employees from exercising their Section 7 rights." *Stericycle*, 372 NLRB at 3. In evaluating the prima facie case, the Board interprets the rule from the perspective of an employee who is economically dependent on their employer and contemplates engaging in Section 7 activity. Id. at 14. The employer's intent behind the rule is irrelevant to this evaluation. Id. at 13. Thus, if there is ambiguity in how a rule could be interpreted, the Board will construe it against the employer. Id. at 14. As the Board acknowledges, such an employee "is readily inclined to avoid violating a rule, and so readily inclined to interpret it more broadly to restrict or prohibit Section 7 activity than a disinterested observer might," "and would interpret the rule as a layperson, not as a lawyer." Id. at 14-15.

In *Claremont Resort, Inc.*, the Board upheld the ALJ's finding that a rule prohibiting "negative conversations" about associates or managers could reasonably be interpreted by employees as prohibiting them from discussing complaints about managers that affect working conditions. 344 NLRB 832, 832 (2005) (applying *Lutheran Heritage*).

As discussed above, the NDA explicitly prohibits Section 7 conduct including salary discussions and as such should be found presumptively unlawful under even the narrowest interpretation. *Stericycle* calls for arguably the broadest possible interpretation, and the NDA is unlawful under that framework. A rule that broadly prohibits any use of employees "salaries, strengths, weaknesses, and skills" has more than a "reasonable tendency" to chill employees from engaging in discussions with their coworkers about salaries; grievances about supervisors; and other terms and conditions of employment.

i. The NDA is not narrowly tailored to the proffered business justification.

Having established that the NDA is presumptively unlawful, the burden is on Respondent to establish a legitimate and substantial business justification for such a rule and show that it cannot be advanced by a more narrowly tailored rule. *Stericycle*, 372 NLRB at 3. The ALJ did not explicitly hold as to whether Respondent had established a legitimate business interest but held that "Even assuming [] that Respondent has a legitimate and substantial interest in keeping certain information private from competitors or others, those interests were not narrowly tailored here." (ALJD 7:19-32).

As discussed above, in Section IV(B)(3) of this Brief, Respondent has failed to establish a legitimate and substantial business interest. However, as the ALJ correctly stated, "[e]ven assuming [] that Respondent has a legitimate and substantial interest in keeping certain information

private from competitors or others, those interests were not narrowly tailored here." (ALJD 7:19-32).

Respondent excepts to the ALJ's implicit finding that its proffered business justification is insufficient as well as his explicit holding that it was not narrowly tailored (R. Exc. 20, 22). Respondent argues that "the Board has not required employers to prove a negative—that no conceivable alternative exists—but rather to demonstrate that the rule as written is reasonably necessary to protect the identified interest." (R. Br. 20).

Stericycle puts the burden on Respondent to explain "why a more narrowly tailored rule would fail to advance that interest." *Stericycle*, 372 NLRB at 17. So, while it may be true that Respondent need not show that "no conceivable alternative exists" it does need to show why a less intrusive rule would be ineffective at advancing the specific business justification it has put forward.

Even assuming that Respondent's characterization of the law is correct, they have not "[demonstrated] that the rule as written is necessary to protect the identified interests." In Cadell's unreliable testimony about the alleged disclosure that led to the NDA, he mentions information about how the company gets its pricing, and how it cleans its consoles. Potts, who implemented the NDA, testified that its purpose was to protect information from competitors such as "how we do things, where we get product, our pricing structures." (Tr. 96). None of Respondent's witnesses testified as to why it is necessary to prohibit discussions of employees' "salaries, strengths, weaknesses, and skills." The NDA's definition of confidential information goes far beyond the purposes established on the record of protecting pricing structures, cleaning procedures, and product sources.

The Board should affirm the ALJ's holding that the NDA is not narrowly tailored to the proffered business justification.

5. *Section 2(a)-(c) of the NDA is not an effective savings clause.*

Respondent argues that Section 2(a)-(c) of the NDA "contains explicit exclusions that preserve Section 7 rights." (R. Br. 16). Section 2(a)-(c) states that the NDA does not apply to information that "(a) was in Employee's possession or known to Employee, without an obligation to keep it confidential, before such information was disclosed to Employee by Company; (b) is or becomes public knowledge through a source other than Employee and through no fault of Employee, or (c) is or becomes lawfully available to Employee from a source other than Company." (J. Ex. 4).

Section 2(a)-(c) attempts to exclude from the definition of confidential information any information the employee obtains from a source outside the Company itself. However, information that an employee learned through their employer is not automatically excluded from use for Section 7 purposes. See e.g. *Verizon Wireless & Commc'ns Workers of Am.*, 369 NLRB No. 108, at 19 (2020) (applying *Boeing*, the Board found the respondent employer's prohibition on disclosing "non-public information" unlawful). In *Verizon*, the employer maintained a broad prohibition on disclosing "non-public company information" including "financial information." The Board stated that "employees would reasonably interpret this to mean that they are restricted from disclosing information or communications with third parties, such as unions, about wages, hours and other terms and conditions of employment." Id. Employees regularly obtain all sorts of information related to protected topics from their employer such as handbooks filled with the details of their terms and conditions of employment. Employees are generally entitled to use

information that comes to them in the "normal course of work activity." *Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1973).

Like the rule in *Verizon*, a reasonable employee would read the NDA and assume they are not allowed to disclose to the public many terms and conditions of employment simply because they learned that information from their employer and it is not publicly available. This is even truer in the case at hand because in *Verizon*, the rule did not contain language explicitly prohibiting salary discussions, while Respondent's NDA does. Section 2 contains no language that exempts salary discussions from the definition of confidential, despite Respondent's insistence that it does. An employee whose coworker told them their salary, would reasonably be unsure if that is considered information they obtained "from the company." An employee's own wage is information that was obtained from the company and thus could reasonably be considered confidential under this NDA.

Section 2(a)-(c) of the NDA does not rehabilitate the unlawful terms in Respondent's NDA. The ALJ correctly found that the NDA prohibits protected concerted activities, in violation of Section 8(a)(1) of the Act.

C. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) of the Act When it Discharged Lofink Pursuant to its Unlawful Non-Disclosure Agreement (Response to Respondent's Exceptions 8, 23, 24, 37).

The Board has long held that discipline imposed pursuant to an unlawfully overbroad rule may be unlawful, even if the rule was enforced against unprotected activity. *Double Eagle Hotel & Casino*, 341 NLRB 112, 112, fn. 3 (2004), enfd., 414 F.3d 1249 (10th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). In *Continental Group, Inc.*, 357 NLRB 409 (2011), the Board clarified the *Double Eagle* rule by holding that discipline imposed pursuant to an unlawfully overbroad rule violates the Act when an employee violates the rule by "(1) engaging in protected conduct or (2)

engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." *Continental*, 357 NLRB at 412.

Respondent's Exceptions 23, 24, and 37, together, except to the ALJ's holding that Respondent violated Section 8(a)(1) of the Act by discharging Lofink pursuant to the unlawful NDA. (ALJD 8:16). Respondent's brief does not specifically argue these exceptions. As discussed in Sections IV(B) and (D)(1) of this brief, Respondent argues that the NDA is lawful, and that Lofink was not engaged in protected concerted conduct. However, Respondent's brief does not argue that Respondent did not rely on the NDA when it discharged Lofink. Nor does Respondent argue that Lofink was not involved in conduct that "touches and concerns Section 7."

1. Respondent discharged Lofink pursuant to the NDA.

The record evidence establishes that Respondent discharged Lofink pursuant to Section 1(b) of the NDA. The record shows that Potts was the person responsible for the discharge decision. (Tr. 98:8-10). Potts stated, on at least five occasions—verbally; in writing; on recording; and twice under oath—that he discharged Lofink for violating the NDA.

The discharge notice states that "We are terminating our agreement effective immediately due to your breach of the NDA dated 1/3/2024. You disclosed confidential information in violation of section 1 – b. You are required to cease all further disclosures. Failure to comply may result in legal action." (J. Ex. 5).

Shoptough testified that shortly after Respondent discharged Lofink, it held an employee meeting attended by all Respondent's remaining employees. (Tr. 59). Potts, backed up by Case, explained to the employees that Lofink had been discharged for breaking his NDA by speaking about Case's wages. (Id.; ALJD at 4:40-41) Respondent excepts to this factual conclusion but does

not specifically argue this exception in its brief.[6] (R. Exc. 8). None of Respondent's witnesses contradicted this testimony,[7] nor did Respondent argue in its post-hearing brief to the ALJ that it was false. Since the testimony was uncontradicted, the ALJ correctly credited it.

Potts testified under oath at the unemployment hearing that he discharged Lofink for violating his NDA. (J. Ex. 3, P. 18). He elaborated that not only did Lofink violate the NDA by discussing Case's salary, but his complaints about Case's performance also violated Section 1(b) by disclosing his "strengths and weaknesses." (J. Ex. 3, P. 22; ALJD 4:46-5:2). When given the opportunity at the unemployment hearing to state any other reasons that contributed to his decision to discharge the CP, Potts confirmed that "what I had discussed there, is the reason he was let go. Like I said, after the fact, I found out other things that support why he was fired, but he was not fired for those reasons, I found those out after the fact." (J. Ex. 3, P. 27).

In Respondent's position statement[8] during the investigation of this case, when asked to "state in detail all the reasons why Respondent discharged Romulus Lofink," Potts wrote in response, "for telling employees and customers what Paul Case made in salary and making disparaging remarks about Paul Case to employees and customers." (J. Ex. 6, 7).

And again, at trial, Potts confirmed in his testimony that he discharged Lofink for violating Section 1(b) of his NDA. (Tr. 98).

The Board should affirm the ALJ's finding that that Respondent relied on the NDA, and specifically Section 1(b), when it discharged Lofink.

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[6] Respondent's brief does argue that the ALJ erroneously relied on Shoptough's testimony as to certain other factual findings, discussed more below, but it does not discuss this one.

[8] The parties stipulated to enter the Position Statement submitted to the Region during the investigation of this case as Joint Exhibit 7, as well as the letter it was responding to as Joint Exhibit 6. Potts testified at trial that he is the one who wrote that position statement. (Tr. 100:12-101:11).

2. *Lofink engaged in conduct that Touches the Concerns of Section 7 when he discussed Case's work performance and compensation.*

As discussed below in Section IV(D)(1) of this brief, Counsel for the General Counsel requests the Board to affirm the ALJ's holding that Lofink was engaged in protected concerted activity when he discussed Case's performance and salary. Therefore, as the ALJ correctly held, Respondent violated Section 8(a)(1) by discharging Lofink pursuant to the first prong of *Continental*. However, should the Board find that Lofink was not engaged in protected concerted activity, the discharge was still unlawful pursuant to the second *Continental* prong because Lofink's conduct "implicates the concerns underlying Section 7 of the Act." *Continental Group,* 357 NLRB at 412. Respondent did not argue in its post-hearing brief, its exceptions, or its brief supporting exceptions, that Lofink's conduct did not touch the concerns of Section 7 under the *Continental* framework. Therefore, such an argument should be deemed waived, and the Board should find that he was so engaged.

The second prong of the *Continental* framework applies to "situations in which an employer disciplines an employee pursuant to an overbroad rule for conduct that touches the concerns animating Section 7 (e.g., conduct that seeks higher wages) but is not protected by the Act because it is not concerted." *Continental Group,* 357 NLRB at 412. In contrast, an employer may lawfully discipline an employee pursuant to an otherwise overly broad rule only for conduct that is "wholly distinct from activity that falls within the ambit of Section 7." For example, in *Continental*, the employee was sleeping at the respondent employer's facility, which is conduct wholly distinct from Section 7. Such conduct has nothing to do with the employee's employment relationship, or any complaints he had about that relationship.

In contrast, Lofink's conduct was inextricably intwined with his employment relationship. Lofink's complaints about Case are specifically about his performance as Lofink's supervisor, and

how that performance impacts Lofink and other employees in their jobs. The salary discussions are intertwined with the complaints about Case's conduct and thus intertwined with complaints about working conditions. Additionally, discussions about Case's salary touch a subject that is consistently held to be protected: wages. Any discussions of wages cannot be said to be "wholly distinct" from Section 7.

As the Board in *Continental* explained, one justification for the *Double Eagle* rule is that unlawful policies which have a chilling effect on Section 7 activity when maintained, have an even greater chilling effect when enforced, "even if it is enforced against activity that could have been proscribed by a properly drawn rule." *Continental*, 357 NLRB at 411. Here, the NDA, which by its mere maintenance would tend to have a chilling effect on potential Section 7 activity, surely had an even greater chilling effect when enforced to discharge an employee for complaining about wages and working conditions. This is especially true given that Respondent held a meeting to tell all its employees that it discharged Lofink for discussing wages in violation of his NDA. (Tr. 57-58).

The Board should affirm the ALJ's holding that Respondent violated Section 8(a)(1) when it discharged Lofink, pursuant to an unlawful NDA, for discussing his manager's performance and salary because that conduct was protected concerted activity and touches the concerns implicating Section 7.

D. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) of the Act when it Discharged Lofink Because of his Protected Concerted Activity (Response to Respondent's Exceptions 30, 38).

It is a violation of Section 8(a)(1) of the Act for an employer to discharge an employee in retaliation for activity protected under Section 7. Under the *Wright Line* framework, the General Counsel can establish a prima facie case by showing that (1) the employee engaged in protected

concerted activity; (2) the employer had knowledge of that activity; and (3) the adverse action was motivated by animus towards that activity. *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *Fremont-Rideout Health Group*, 357 NLRB 1899, 1902 (2011); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2005), enfd., 577 F.3d 67 (2d Cir. 2009). If the General Counsel makes such a showing, the burden then shifts to the employer to demonstrate that "the same action would have taken place even in the absence of the protected conduct." *Wright Line,* 251 NLRB at 1089.

1. *Lofink engaged in Protected Concerted Activity when he discussed Case's work performance and compensation (Response to Respondent's Exceptions 5, 6, 7, 9, 13, 27).*

Section 7 of the Act gives employees the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Thus, the statutory concept of protected concerted activity has two elements: the employee's activity must be "concerted," and it must be "for mutual aid or protection." See, e.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 152-153 (2014). Concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Indus.*, 281 NLRB 882, 887 (1986) (*Meyers II*), aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). Employees are engaged in concerted activity for mutual aid and protection when they discuss shared concerns about terms and conditions of employment even in the absence of a discussion of specific planned action. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007) (employee discussions about the effect of a new performance evaluation policy on wages held concerted, despite lack of evidence that employees contemplated group action; "it is obvious that discussions of this kind usually precede group action"), enfd., 519 F.3d 373 (7th Cir. 2008).

ii. Case's Work Performance and Compensation affected Working Conditions.

Respondent argues that Lofink's discussions about Case were not protected because they did not relate to his working conditions and choice of supervisors is a management prerogative. (R. Br. 23). This argument is not supported by Board law or the facts of this case.

Respondent claims that "choice of supervisors is a management prerogative that employees have no Section 7 right to challenge." (R. Br. 23). This is an inaccurate statement of law. Respondent cites three appellate court cases to support this assertion;[9] none of them stand for the proposition that employee discussions about supervisors cannot be protected concerted activity. It is true that employees have no right to *bargain* over the employer's choice of supervisor. However, when related to working conditions and stemming from legitimate group concerns, conduct which protests supervisor conduct, as well as choice of supervisors, is protected concerted activity. *Hoytuck Corp.*, 285 NLRB 904, Fn. 3 (1987) (citing *Dobbs Houses, Inc.*, 135 NLRB 885, 888-889 (1962), enf. denied on other grounds 325 F.2d 531 (5th Cir. 1963); *Guernsey-Muskingum Electric Cooperative,* 124 NLRB 618 fn. 1 (1959), enfd., 285 F.2d 8 (6th Cir. 1960).

Respondent first cites *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F.2d 749 (4th Cir. 1949). In that case, a supervisor approached an employee at work to correct his misconduct. During the exchange, the employee "became very angry, used harsh and insulting language and assumed an insubordinate attitude." Id. at 751. The employee then circulated a petition asking for the supervisor to be removed. Id. The employee was discharged for originating that petition. The Board found that the circulation of that petition was protected concerted activity, but the 4th Circuit

[9] The Board generally instructs Administrative Law Judges to follow its "nonacquiescence policy" and follow Board precedent over court of appeals precedent, unless overruled by the United States Supreme Court. See e.g. *D.L. Baker, Inc.* 351 NLRB 515, 529, fn. 42 (2007). Therefore, the Board is not bound by the cases cited by Respondent. However, even if the Board considers the Courts' rulings in these cases, they do not support the argument they are cited for.

overruled that finding. In so doing, they agreed with dissenting Board members that the employee's petition "grew out of personal resentment." They said that although he convinced a few employees to sign his petition, thereby transforming his personal resentment into activity which was, in the literal sense, 'concerted,' upon inspection of the context, the other employees did not legitimately share his concerns. Id. Respondent misrepresents the Court's reasoning in that case by citing it for the proposition that "conduct aimed at humiliating or removing supervisory personnel" is not protected. That is nowhere to be found in the decision. The Court's reasoning focused on the fact that the petition arose out of an individual complaint, not a group one. Its reasoning was not that the goal of the petition—removal of a supervisor—was an unprotected subject matter. Id. at 753-54.

Respondent then cites *Trompler, Inc. v. N.L.R.B.*, 338 F.3d 747, 749 (7th Cir. 2003) to support the proposition that "choice of supervisors is a management prerogative that employees have no Section 7 right to challenge." (R. Br. 23). However, the Court in that case explicitly stated the opposite. The Court upheld the Board's finding that a group of employees engaged in protected concerted activity when they walked off the job to protest a supervisor's conduct. In so finding, they clarified that although choice of supervisor is a management prerogative that employees have no right to *bargain*, "[a] complaint that a supervisor's conduct is impairing the terms or conditions of the employment of the workers whom he supervises is, however, a legitimate subject for concerted activity." Id. at 749.

Lastly Respondent cites *Cleaver-Brooks Mfg. Corp. v. N.L.R.B.*, 264 F.2d 637 (7th Cir. 1959). In that case, four employees engaged in a work stoppage in protest of the respondent employer's choice of foreman. Id. at 640. Following that stoppage, they continued to insist they were unwilling to work for that foreman. The Board held that the employees had been engaged in

protected concerted activity. The Court overturned that ruling because work stoppages are generally not protected activity. Its reasoning was not that the employees do not have a right to protest the choice of their supervisor, but rather that their method of protest constituted misconduct which removed them from the Act's protection. Id. at 640-41.

In contrast to *Cleaver-Brooks*, Lofink and his coworkers did not engage in a work stoppage or any other misconduct that removed them from the protection of the Act. (See *Infra*, Section E-F). In contrast to *Joanna Cotton Mills*, Lofink did not convince a few coworkers to passively sign onto his personal vendetta. His coworker Shoptaugh confirmed that she shared his concerns about Case's performance and its impact on the other employees' workloads. (Tr. 52). Furthermore, unlike in *Joanna Cotton Mills*, there is no evidence in the record that Lofink had any reason to have a personal vendetta against Case. Rather, like in *Trompler*, Lofink and his coworkers were engaging in concerted discussions about how their manager's conduct was impairing their terms and conditions of employment. As both Lofink and Shoptough testified, Case had duties that overlapped with their own. So, when he failed to complete a task, or completed it incorrectly, it created more work for them. (Tr. 27, 52). Workload is a working condition.

There is also no evidence in the record to indicate that Lofink was attempting to have Case removed from his position. But it doesn't matter if he was; such conduct would still be protected. The question is whether the discussions he was having related to working conditions, which they did, and whether those concerns were shared with his coworkers, which they were.

iii. Case's Work Performance and Compensation were a Shared Concern.

The ALJ found that Lofink "frequently engaged in protected activity, regularly speaking with his coworkers about Case's performance and its impact on their own work." (ALJD 8:44-46). Respondent argues that this finding improperly relied on Tiffany Shoptaugh's testimony. (R. Br. 13-15).

Credibility findings need not be all or nothing and ALJ's routinely credit some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB at 623.

The ALJ found that Shoptaugh's testimony was not as reliable on the details of the discussions. However, he also found that "she had a firm recollection of having had conversations with Lofink about Case, and of once having had a belief as to Case's performance and as to what Case was earning." (ALJD 5:20-25). The ALJ's factual conclusions are consistent with this finding; they rely on her general assertion that she had conversations with Lofink about Case's performance, but do not rely on her testimony as to the details of those conversations.

For example, the ALJ found that "Lofink and Shoptaugh continued having conversations about Case's performance regularly, sometimes including Kayla Bridwell, and Caddell was typically present as well. These conversations took place about once every week or two during the period February through May 2024." (ALJD 3:44-47). Respondent argues this finding is not supported by "Shoptough's acknowledged vague and inconsistent testimony." But that finding does not rely only or primarily on Shoptough's testimony. That conclusion directly credits Lofink's testimony as to the details of when and how frequently these discussions happened, as well as who was involved. (Tr. 30:5-7). The ALJ did not need to credit all the details of Shoptough's testimony to reach this conclusion. Rather, he properly credited her general assertion she held similar concerns to Lofink about how Case's neglect of his duties created more work for her. (Tr. 52). Her testimony adds credibility and weight to Lofink's more detailed recollections, by confirming that the conversations happened, and the general topic. It is the subject of the complaints, not the details of when and where, that demonstrate their concerted nature.

Furthermore, Lofink and Shoptough's testimony on this subject is uncontradicted by any evidence in the record. Cadell testified that he heard Lofink discussing Case and his salary

frequently at work. (Tr. 80). Respondent focuses on Cadell's testimony that Lofink was discussing it with customers, but that testimony failed to contradict the fact that he was discussing it with coworkers. When asked who else was "privy" to the conversations, Cadell said "probably anyone who was on duty, as well as, of course, customers." (Tr. 80-81). This testimony, as vague as it is, affirms that Lofink had these conversations frequently, and at best, fails to contradict that they involved other employees.

iv. Lofink's Discussions about Case's Work Performance and Compensation were Directed Towards Group Action.

Respondent argues that Lofink's conduct was not concerted because it was not directed towards initiating group action. The ALJ correctly found that Lofink approached both Case and Potts about the employees' concerns about Case properly marking inventory. (ALJD 3:39-42). Respondent excepts to this conclusion, claiming that "all of Lofink's supervisors testified that Lofink never brought Case's performance to them…" (R. Br. 23). This is a misrepresentation of the testimony. Assistant Manager Cadell testified at trial that he was aware of Lofink's discussions about Case and frequently overheard them. (Tr. 80). At the unemployment hearing, Cadell testified under oath that whenever he and Lofink worked together "it was a consistent mainstay that [] there was a lot of criticism of the general manager." (J. Exh. 3 34:15-22). He went on to specify that those criticisms were about Case's "work ethic as well as his position." General Manager Case's testimony is silent as to whether Lofink, or any other employee, ever confronted him about performance issues. Only Potts denies on the record anyone ever approaching him about these issues. (Tr. 97). As discussed above, the ALJ correctly found Lofink to be a more credible witness than Potts. On this point, Lofink testified that he brought the employees' complaints to Case himself on a few occasions and also brought their complaints to Potts once. (Tr. 35-36; ALJD 3:39-

42). The ALJ's holding as to the witness' relative credibility and the factual conclusion that Lofink raised his complaints to management was correct and should be affirmed.

Furthermore, *Meyers II* doesn't require employees to have reached the point of taking action for their discussions to be concerted. Lofink credibly testified that on two occasions his coworkers brought concerns about Case to him and he told them that he agreed and planned to discuss it with Potts at some point. (Tr. 29:4-7, 24). Even if those plans never came to fruition (which they did), this contemplation of group action is the type of discussion contemplated by *Meyers II*. See 281 NLRB at 887. Even if Lofink had never explicitly made plans to approach management (which he did), the discussions are still concerted. These are the types of discussions about shared complaints about working conditions that necessarily precede group action. See *St. Margaret Mercy*, 350 NLRB at 204.

The ALJ's holding that Lofink's discussions about Case constituted protected concerted activity was sound, supported by the record, and the Board should affirm this holding.

2. *Respondent knew about Lofink's Protected Concerted Activity and had animus towards it (Response to Respondent's Exceptions 28, 29).*

The ALJ correctly noted that "there can be no question that Respondent had knowledge" of Lofink's protected concerted activity. Respondent excepts to that finding, stating that Potts testified that "he had no knowledge of that activity until informed by a customer." (R. Exc. 28). Respondent does not argue in its brief that the knowledge element cannot be met so that exception should be deemed waived. *Holsum de Puerto Rico*, 344 NLRB at fn. 1. In any event, Lofink was discharged because Potts was informed by a customer, so Respondent implicitly admits that it had knowledge at the time it discharged Lofink.

Respondent also excepts to the ALJ's finding that Respondent had "animus towards the activity that was a substantial or motivating reason for" Lofink's discharge. (ALJD 9:13-18; R.

Exc. 29). Respondent argues that this holding fails to consider that the discharge was also motivated by Lofink "fabricating an inflated salary." However, Respondent has failed to meet its burden to show that Lofink was making knowingly false statements. Respondent has also failed to show that this was a motivating factor in the discharge. As discussed in Section IV(D)(1) of this brief, the record shows that Potts repeatedly stated that Lofink was discharged for discussing Case's salary, insulting him, and thereby violating his NDA. In none of those opportunities to explain the discharge, prior to trial, did Potts state that Lofink was discharged for fabricating Case's salary. The first time Potts mentions this claim that Lofink's statement was made up was at the unemployment hearing. Potts testifies there that Lofink had said Case was "not worth the money he is being paid - - which, by the way, isn't even what he gets paid. That was made up." (J. Ex. 3 22:5-9). This statement is made offhandedly, as an afterthought, not in response to direct questioning about the reasons for the discharge. Earlier in that testimony, Potts had testified at length about how Lofink's comments had violated the NDA without initially mentioning that they were false. Id. at 21-22.

Potts response in his position statement to the Region is also informative as to his primary motive. It states that he discharged Lofink "for telling employees and customers what Paul Case made in salary …" (J. Ex. 6, 7). This indicates that Respondent was upset that Lofink had disclosed real information, not fabricated.

The ALJ's finding that Respondent had knowledge of Lofink's protected concerted activity, and that activity was a motivating factor in his discharge, was sound, supported by the overwhelming evidence in this case, and should be affirmed.

3. *Respondent failed to meet its Wright Line Burden (Response to Respondent's Exceptions 31, 32).*

If the General Counsel establishes a prima facie case that Respondent discharged the Charging Party for protected concerted activity, the burden then shifts to Respondent to demonstrate that "the same action would have taken place even in the absence of the protected conduct." *Wright Line,* 251 NLRB at 1089.

As the ALJ points out, "Respondent did not put forward an argument that something other than Lofink's protected activity was the reason for the discharge." (ALJD 9:26). Respondent excepts to this conclusion as erroneous and not supported by the record. (R. Exc. 31). Respondent argues that it met its *Wright Line* burden by showing that Lofink was discharged for making false and disparaging comments about Case to customers on the sales floor, thereby disparaging the company and violating his NDA. (R. Br. 28). However, this argument is a misapplication of the burden shifting framework. That conduct was in the course of protected concerted activity, and therefore the ALJ correctly analyzed those arguments as a question of (a) whether Lofink's conduct was protected; and (b) whether his conduct lost the protection of the Act. (ALJD 9:26-47).

E. The ALJ Correctly Found that Lofink did not Lose the Protection of the Act by Using Profanity (Response to Respondent's Exception 32).

Respondent excepts to the ALJ's finding that using profanity was commonplace. (R. Exc. 32). Respondent's brief does not specifically argue about that factual conclusion so the exception is waived. *Holsum de Puerto Rico*, 344 NLRB at fn. 1. The only reference even related to this contention in Respondent's brief is that it argues that Respondent had "multiple independent grounds for Lofink's discharge that have nothing to do with protected activity." It divided those reasons into four categories, including, "[t]hird, Lofink used profane and disparaging language about his supervisor in front of customers." (R. Br. 28). As discussed above, this is not an "independent ground" for the discharge because the profanity was used in the course of protected concerted activity.

The correct analysis is whether Lofink lost the protection of the Act through his use of profanity while discussing Case. Respondent did not make this argument in its post-hearing brief and it does not make this argument in its brief in support of exceptions. Therefore, any argument that he lost protection through his use of profanity is waived. *Little John Electrical Solutions*, 368 NLRB at fn. 1; *Holsum de Puerto Rico*, 344 NLRB at fn. 1. In any event, such an argument would be unsupported by the facts in the record and relevant Board Law.

First, the record evidence does not support that Lofink ever made such a statement, or that such a statement motivated Lofink's discharge. Lofink credibly denied it, and Shoptaugh confirmed that Lofink did not speak like that about Case. (Tr. 106-07, 55). The only evidence to indicate that Lofink was using profanity is Pott's testimony that a customer told him that Lofink called Case "a worthless piece of shit." (Tr. 94). The record as a whole indicates that Potts was concerned about the substance of that statement, not his use of the word shit. Potts' testimony does not indicate that he was bothered by the use of the word "shit" when he decided to investigate and then discharge Lofink.

Second, even assuming arguendo that Lofink did use the phrase, that is not enough to forfeit the protection of the Act. As the ALJ correctly stated, "the Board has long held that the use of profanity, including in reference to supervisors, does not by itself lose the protection of the Act. *Pier Sixty, LLC*, 362 NLRB 505 (2015). This is especially true when the profanity is used, as here, in the context of protected concerted activity." (ALJD 9:44). Respondent excepts to that conclusion, without arguing in its brief, as an "erroneous application of the law to the facts" because Lofink's comments "involved not merely using profanity but making false, disparaging statements about his supervisors to customers." (R. Exc. 35). This waived[10] argument attempts to

[10] *Holsum de Puerto Rico*, 344 NLRB at fn. 1.

combine two weak defenses in an attempt to bolster both. The ALJ correctly applied *Pier Sixty* to the question of whether Lofink lost the protection of the Act through his use of profanity. The ALJ also separately analyzed the question of whether Lofink lost the protection of the Act by making false or disparaging comments, as discussed below.

F. The ALJ Correctly Found that Respondent Failed to Prove Lofink's Statements were Knowingly False (Response to Respondent's Exceptions 1, 2, 4, 10, 14, 15, 25, 26, 33, 34, 35).

The majority of Respondent's exceptions and supporting argument can be summarized as an argument that Lofink was either not engaged in protected-concerted activity, or lost the protection of the Act, because he was making false and disparaging comments about Case where customers could hear him. Specifically, that Lofink was telling people Case's salary and the amount was made up.

It is well settled law that false statements lose the Act's protection only if "knowingly false or made with reckless disregard for their truth or falsity." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enforced sub nom. *Nevada SEIU, Local 1107*, 358 F. App'x 783, (9th Cir. 2009).

The ALJ found that "here, Respondent has not even proven that Lofink's statement was false, and no evidence was presented to suggest that Lofink knew it to be false." (ALJD 9:38). The ALJ's sound reasoning is that Respondent failed to enter any evidence as to what Case's actual salary was and thus could not even establish the threshold issue that Lofink's statement was false, let alone "knowingly false."

Respondent argues, and Respondent's witnesses testified, that Lofink was stating that Case made about $100,000 a year. Lofink testified that he always believed that Case made $80,000, and that was what he told people when discussing it. (Tr. 33; J. Ex. 3, P. 33). The ALJ did not resolve

this dispute, and he did not need to, because whichever number Lofink was saying, Respondent cannot prove it was false because they did not establish the truth.

Respondent's brief claims that Case's salary was admitted as an exhibit. (R. Br. 29). This is false; Case's salary information was not entered as an exhibit, nor is there any indication of what it is anywhere on the record. The only Exhibits in the record are the GC's Exhibit 1—the formal papers; and the Joint Exhibits. If there was any indication of Case's salary in the record Respondent would not have dedicated so many pages to arguing that it's not a necessary fact for their defense.

Respondent argues that the ALJ "improperly shifted the burden of proof regarding falsity." (R. Br. 27). This is an incorrect statement of the law which Respondent supported with no caselaw except a single reference to the *Stericycle* dissent[11]. In any case, the ALJ correctly placed the burden of proving that Lofink's statement was false on Respondent. The statements Lofink made constituted protected concerted activity, as held by the ALJ and explained above. So, the burden then shifts to Respondent to show that the statements nonetheless lost the protection of the Act by meeting the *Valley Hospital* standard. This would require Respondent to show both (1) that Lofink's statements about Case's salary were false; and (2) that Lofink either knew the statements were incorrect or made the statements with a "reckless disregard for their truth or falsity."

Respondent further argues that "[t]he ALJ's requirement that Respondent prove the exact amount of Case's salary [. . .] to establish falsity is an incorrect legal standard." (R. Br. 29). Once again, respondent does not cite to any caselaw here. The correct legal standard requires proof that the statement was false. *Valley Hospital*, 351 NLRB at 1252 (2007). The requirement that respondent establish Case's actual salary is not so much an independent legal standard as a logical necessity under *Valley Hospital*. It is logically impossible to show that Lofink's statement that Case

[11] The connection of which is unclear to Counsel for the General Counsel.

made $80,000 (or $100,000 as Respondent claims he said) was false, without any indication of what Case was actually paid.

There is no explanation as to why Respondent did not enter this information in the record. That information is critical to Respondent's primary defense, his actual salary is all that would be needed to establish conclusively either that Lofink was telling the truth or lying. The failure to present this should result in an adverse inference against Respondent that the salary was what Lofink said it was, and therefore he was not making false statements. However, such an inference is not necessary to support the ALJ's holding because the burden is on Respondent to prove its falsity, which they have not done.

Respondent attempts to imply that it must have been false by arguing at length that Case and Cadell never told Lofink how much Case is made. The ALJ correctly credited Lofink's testimony that he did learn this information from his supervisors, and that holding should be affirmed as discussed in the credibility section of this brief, above.

But even if the record didn't establish how he learned the information, which it does, Respondent has failed to prove that he made it up. He could have overheard it or learned it any number of other lawful ways.

The ALJ's holding that Respondent failed to establish that Lofink's comments lost the protection of the Act under *Valley Hospital* is sound, and the Board should affirm this finding.

G. The ALJ Correctly Found that Respondent's Unfair Labor Practices Affect Commerce Within the Meaning of the Act (Response to Respondent's Exception 39).

Respondent excepts to the ALJ's conclusion of law that "[t]he unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act." ALJD (10:20). Respondent admitted jurisdiction in its answer to the complaint and did not raise this argument in front of the ALJ. Having failed to raise a jurisdictional argument in front of the

ALJ, it should be barred from doing so on exception. Respondent does not argue this exception in its brief.

There is no indication in the record that the ALJ's jurisdictional finding was incorrect and the Board should affirm the holding that Respondent has, at all material times, been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, this dispute affects commerce, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

H. The ALJ's Remedial Orders were Correct and Should be Upheld (Response to Respondent's Exceptions 40, 41).

To effectively remedy Respondent's unfair labor practices, the ALJ correctly issued a recommended Order requiring that Respondent comply with the Board's standard remedies, including posting of the Notice to Employees, rescinding the rule requiring employees to sign the unlawful non-disclosure agreement, and making Romulus Lofink whole for any losses suffered as a result of his discharge. (ALJD 10-11).

The Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Section 10(c) of the Act directs the Board to order remedies for unfair labor practices including reinstatement with or without backpay. See 29 U.S.C. § 160(c). The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). To effectuate the policy goals of the Act, the Board's remedial function is "to restore the situation as nearly as possible, to that which would have occurred but for the violation." *NLRB v. Ampersand Publ'g, LLC*, 43 F.4th 1233, 1237 (9th Cir. 2022); see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The Board and courts have "repeatedly underscored the essential

role of make-whole relief in the statutory scheme." *King Soopers, Inc.*, 364 NLRB 1153, 1155 (2016), enfd. in relevant part, 859 F.3d 23 (D.C. Cir. 2017). The Board has held that standard remedies should include "all direct or foreseeable pecuniary harms" resulting from the respondent's unfair labor practices. *Thryv, Inc.*, 372 NLRB No. 22 (2022).

Respondent argues that the remedial orders are inappropriate because Respondent did not commit the ULP's as alleged. If the Board affirms the ALJ's legal conclusions, as it should, the remedies are appropriate.

Respondent makes arguments about Lofink's mitigation efforts as well as the viability of reinstatement. Both are arguments to be made at a compliance hearing and are not appropriate decisions to be made at this stage. See e.g. *Great Chinese Am. Sewing Co. v. N.L.R.B.*, 578 F.2d 251, 255-56 (9th Cir. 1978), enfg. 227 NLRB 1670 (1977); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 411, (1960); *NLRB v. Dazzo Products, Inc.*, 358 F.2d 136, 138 (2d Cir. 1966); *NLRB v. Theatrical Employees Local 776*, 303 F.2d 513, 521 (9th Cir. 1962).

The Board should affirm the ALJ's remedial order, as they are appropriate and reflect the Board's standard remedies for the unfair labor practices committed by Respondent.

V. CONCLUSION

For the foregoing reasons, all of Respondent's exceptions, including those waived and not specifically argued, are without merit. Counsel for the General Counsel respectfully urges the Board to reject Respondent's exceptions and enter an order adopting the ALJ's findings of fact and law, and adopting the remedies as ordered by the ALJ.

Respectfully submitted,

/s/

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Dated this Wednesday, September 9, 2026

CERTIFICATE OF SERVICE

This is to certify that on Wednesday, September 9, 2026, copies of the Brief of Counsel for the General Counsel were served by email on:

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