UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

SNØHETTA ARCHITECTURE, LANDSCAPE ARCHITECTURE, P.C.

and **Cases 02-CA-324827**
02-CA-329042

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 15

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

This case was tried before the Honorable Benjamin W. Green on June 9, 10, 11, and 25, and July 20, 21, 22, and 23, 2026, pursuant to an Amended Consolidated Complaint and Notice of Hearing ("Amended Complaint") issued on May 20, 2026. GC001(J).[1] The Amended Complaint is based on unfair labor practice charges filed by the International Association of Machinists and Aerospace Workers, District Lodge 15 ("Charging Party") on August 29 and October 31, 2023, and served on August 31 and November 1, 2023, respectively. GC001(A); GC001(C).[2]

The Amended Complaint alleges that Snøhetta Architecture, Landscape Architecture, P.C. ("Respondent") violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act"): by threatening employees with loss of business if they selected the Charging Party as their bargaining representative and with discharge if they engaged in protected activities; by laying off eight employees[3] because of their concerted activities and their support for Charging Party—or because Respondent believed them to have engaged in concerted activities and to have supported Charging Party—and to discourage employees from similarly supporting Charging Party and engaging in concerted activities; and by offering employees severance agreements containing unlawful provisions.[4]

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[1] References to the hearing transcript are indicated as "Tr. [page number]" or "[Witness Name] Tr. [page number]" and references to the hearing exhibits are indicated as "GC[exhibit number]" for General Counsel exhibits, "R[exhibit number]" for Respondent exhibits, or "J[exhibit number]" for Joint exhibits.

[2] Respondent admits that it received these charges on or about August 31 and November 6, 2023. GC001(L) at 2-3.

[3] These employees—Andrew Anderson, Joshua Dannenberg, Daniel Katebini, Araceli Lopez, Arie Salomon, Leo Shaw, Amy Shell, and Jordana Starkman—are named in Paragraph 12 of the Amended Complaint and are referred to herein as the "discriminatees."

[4] On July 20, 2026, Judge Green granted General Counsel's oral motion to withdraw Paragraph 6 of the Amended Complaint, which alleged that Respondent, by Marc-Andre Plasse, unlawfully interrogated employees about their union sympathies or activities. Tr. 294.

ISSUES PRESENTED

1. Whether Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge if they engaged in protected activities on or about June 7 or 12, 2023.

2. Whether Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of business if they selected the Charging Party as their bargaining representative on or about the week of June 5, 2023.

3. Whether Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of business if they selected the Charging Party as their bargaining representative on or about June 7 or 12, 2023.

4. Whether Respondent violated Section 8(a)(3) of the Act by laying off Andrew Anderson, Joshua Dannenberg, Daniel Katebini, Araceli Lopez, Arie Salomon, Leo Shaw, Amy Shell, and Jordana Starkman on or about July 31, 2023.

5. Whether Respondent violated Section 8(a)(1) of the Act by offering employees severance agreements containing unlawful provisions.

STATEMENT OF FACTS

I. Respondent's Organization and Operations

Snøhetta Architecture, Landscape Architecture, P.C. ("Respondent") is an architectural design firm founded by architect Craig Dykers, along with another architect. Gordon Tr. 97, 101, 104-05, 613; Perez Tr. 388. Respondent provides architecture, interior architecture, and landscape architecture design services. Gordon Tr. 97; Perez Tr. 387. While Respondent shares branding with a Norway-based company also called Snøhetta, that company operates independently, under the leadership of CEO Isabella Alveberg. Gordon Tr. 101, 104; Perez Tr. 388-89.

Respondent's larger-scale projects include an addition to the San Francisco MoMA, the reconstruction of Times Square, and a pavilion at the World Trade Center. Gordon Tr. 97-98. At the time of the hearing, Respondent was continuing work on the Theodore Roosevelt Presidential Library ("TRPL"). Gordon Tr. 98. In 2023, Respondent's largest projects included TRPL, as well as projects for the Ford Foundation and the University of California San Francisco ("UCSF"). Gordon Tr. 98. To complete projects, Respondent sometimes collaborates with other architectural firms, with Respondent serving as the "design architect" and the other firm as the "architect of record." Gordon Tr. 98-99; Anderson Tr. 167-68; Perez Tr. 404-05.

Architecture projects are broken into at least four phases: Schematic Design ("SD"), Design Development ("DD"), Construction Documentation ("CD"), and Construction Administration ("CA"). Gordon Tr. 100. During SD, Respondent develops the chosen concept and schematically designs the building. Gordon Tr. 101; Perez Tr. 403-04. Next, during DD, Respondent further develops the design. Gordon Tr. 101. Respondent then spells out the details that facilitate bidding by a contractor or construction manager during the CD phase. Gordon Tr. 100; Perez Tr. 403-04. Finally, construction begins and Respondent shifts into the CA phase.

Gordon Tr. 100; Perz Tr 403-04. Respondent's involvement with and work on its various projects continues throughout all four of these phases. Gordon Tr. 101; Perez Tr. 404. It is common for projects to have overlapping phases. Dannenberg Tr. 155. A "fast track" project, for example, may have construction begin on some components while others are still being designed. Dannenberg Tr. 155-56.

Respondent earns fees based on its relative involvement in each phase of a project, earning more when it has more employees staffed on the project and less, for example, when the architect of record is performing a greater share of the work. Perez Tr. 405, 424-25. Specifically, clients pay Respondent on either an hourly or a lump sum basis. Dannenberg Tr. 143-44. Developing the fee for a lump sum contract requires first making an educated estimate regarding the number of people at various levels of expertise necessary for the work and the amount of time needed from each person in order to meet the project's milestone deliverables. Dannenberg Tr. 143-44. This estimated time commitment is then multiplied by the hourly rate for each team member's position. Dannenberg Tr. 143-44. The hourly rate, which is provided by the Finance Team in the form of a rate card, includes: the cost of an employee's salary, a factor for operational overhead, and a margin for profit. Dannenberg Tr. 145. The resulting figure, the overall lump sum fee, is included in the contract with the client and does not change—regardless of whether Respondent expends more or less personnel time than estimated on the project. Dannenberg Tr. 144. For that reason, if Respondent exceeds the estimated time needed for the project, Respondent stands to lose profit. Dannenberg Tr. 144. An hourly fee contract, by contrast, involves invoicing the client for the actual personnel time spent on the project each month. Dannenberg Tr. 144. Under this model, less personnel time means less revenue; Respondent only earns a fee based on the hours expended by each person working on the project. Dannenberg Tr. 144. Hourly fee contracts may also include a

"not-to-exceed" number that represents the upper limit of what Respondent can charge the client, regardless of hours worked. Dannenberg Tr. 144. Calculating the not-to-exceed figure, like calculating the lump-sum fee, involves assessing the personnel and time needed for a given project and then multiplying the hours needed from each individual by their hourly rates. Dannenberg Tr. 144-45. As of July 2023, the contract for work on the Ford Building called for the client to pay Respondent on an hourly timecard basis. Dannenberg Tr. 145-46. Correspondence between Directors on August 3 suggests that the contract for UCSF, too, called for Respondent to be paid on an hourly fee basis. *See* GC105 (McMahon to Cotton noting, amidst conversations about staffing changes in light of the layoffs, that "Sentry is like UCSF in that if I don[']t spend staff hours we don[']t paid our full fee). Although Chief Financial Officer ("CFO") Oscar Perez testified extensively, Respondent did not ask him about fee structures. Perez offered only generalized assertions that Respondent earns more during "the early stages of a project." Perez Tr. 515. Nor did Respondent question Gordon—who testified that his responsibilities as Partner included handling contracts—about the different types of fee provisions in Respondent's contracts. *See* Gordon Tr. 108, 610.

Respondent's leadership did not change between 2023 and the hearing in this matter. Gordon Tr. 104; Perez Tr. 316-17. Respondent was, and still is, led by a five-member Executive Team, composed of Dykers and Managing Partner Elaine Molinar, who are married, as well as Partners Michelle Delk and Alan Gordon, and CFO Perez. GC049; Gordon 104-05; Molinar Tr. 694. The Executive Team typically meets four days every week. Gordon Tr. 620; Molinar Tr. 712. Molinar and Dykers oversee most of the design work at the firm. Gordon Tr. 613. Molinar has been Managing Partner for over a decade and her responsibilities include ensuring that design teams have the resources necessary to do their work. Molinar Tr. 694. Gordon, who has held the

role of Partner for approximately 14 years, described his role as "technical," involving architectural applications, materials, and other details, but not design work. Gordon Tr. 96-97, 612. Moreover, Gordon's responsibilities include ensuring that contracts are put together correctly. Gordon Tr. 108, 610. Delk first joined the firm as the Director of Landscape Architecture around 2013, then became a partner two years later. Delk Tr. 660-61. Delk is the technical partner with respect to the Landscape Architecture discipline. Gordon Tr. 104, 613. Oscar Perez, who has served as CFO for approximately 14 years, is responsible for the financial components of the firm and oversees operations, human resources, office operations, and knowledge management. Perez Tr. 295, 386. Unlike the other members of the Executive Team, Perez is not an equity partner in the firm. Perez Tr. 508, 608.

Human Resources ("HR") is led by Tina Bonacci and Jay Coyne. Gordon Tr. 104; Perez Tr. 414, 565. In 2023, Bonacci's title was HR Manager and her responsibilities involved administering employee reviews and handling the entirety of the recruiting process, including interviewing candidates. Perez Tr. 565-66. Bonacci's responsibilities at that time also included, when necessary, putting employees on performance improvement plans and, in discussion with the relevant Project Leader, deciding when the plan could be ended. Perez Tr. 587-88. Bonacci has since been promoted to HR Director. Perez Tr. 414. At the beginning of 2023, Coyne's title was HR Coordinator; he was promoted around the end of the year to HR Generalist, after Bonacci recommended him for the position. Perez Tr. 566, 588-89; GC094; R12(c) at 9.

Respondent also has an Advisory Board that meets on a quarterly basis to review finances and workload and to strategize for upcoming quarters. Perez Tr. 317-18, 399. As of 2023, the Advisory Board was comprised of the Executive Team, Chair Paul Nakazawa, External Advisor Michael Benedikt, and Directors Anne-Rachel Schiffmann (expert member in Interiors) and John

Newman (expert member in Operations). GC049; R06; Perez Tr. 608-09. Others, including HR, were invited to join on an "as needed" basis. GC049; R06. Employee representatives were invited to every meeting, so that they could provide their point of view "from an employee standpoint." Perez Tr. 398, 427; GC049. The Executive Team regularly solicits advice from the Advisory Board and consulted the Advisory Board about the decision to carry out the 2023 layoffs at issue in this case. Perez Tr. 400.[5]

Next in Respondent's leadership hierarchy were the Directors, of whom there were 15 as of July 2023. Shaw Tr. 27; Gordon Tr. 102; R12(c) at 14-15. Directors, who are statutory supervisors and/or agents of Respondent, held a variety of titles and responsibilities. *See* J1 at 1, ¶1 (stipulating that the eight listed Directors are Respondent's supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act). Directors in the Architecture discipline reported to Gordon, Directors in the Landscape Architecture discipline reported to Delk, and Director of Knowledge Management Kate Grimes and Director of Operations John Newman reported to Perez. Perez Tr. 397. Newman was paid significantly more than any other Director and was by far the highest-paid employee outside the Executive Team. R12(c) at 7-10 (showing Newman's salary of $260,760 was over $43,000 higher than the next highest-paid Director and less than $40,000 below the Executive Team salaries). Newman was responsible for providing support to the project teams and Directors, including by reviewing contracts. Perez Tr. 609. Directors met on a weekly basis to assess the capacity and needs for staffing on various projects and facilitate any changes needed. Perez Tr. 467-69. During these

[5] Q. Did Mr. Nakazawa have – what role, if any, did Mr. Nakazawa have in deciding whether or not to have a RIF in July 2023?
A. Well, within the advisory board, obviously we review our financials and we do solicit advice from our advisors. So we take that to advisement and we – the exec team makes decisions on how to work.

meetings, Newman—who Perez credited with having "the ability to understand people's strengths"—had the role of helping other Directors decide which employees were equipped to which particular tasks. Perez Tr. 590-91, 604-05.

Respondent operates an "employee group" for all staff except for the Executive Team. Perez Tr. 605-06. Under this system, Directors and employees elect one or two "employee representatives," who serve two-year terms, meet monthly with Perez and Molinar to discuss various issues, and participate in Advisory Board meetings. Perez Tr. 392, 398, 427, 605-06. In 2022 or 2023, the employee representatives were Mari Hansael and Joyce Hanlon. Perez Tr. 392. Employee representatives can also bring issues to the attention of HR, but there is no formal process for challenging discipline and, in general, no formalized grievance or arbitration procedure of any kind. Perez Tr. 606-07. Respondent is not obligated to bargain with the employee representatives over terms and conditions of employment. Perez Tr. 607; *see* GC070 (discussing post-layoff meeting with employee representatives with an agenda item to "[e]xplain to them why they are not part of the process this time").

As of July 2023, Respondent employed approximately 90 employees across two offices—one in Manhattan and another in San Francisco.[6] J1 at 7; R12(c) at 11-16; Perez Tr. 545. The office in Manhattan was open plan, with a kitchen and large open space with table in front, and rows of open desks behind and small "booths" for private conversations. Shaw Tr. 22; Gordon Tr. 100; Molinar Tr. 742. CFO Oscar Perez cited this open design as an example of Respondent's culture of openness, meaning "everyone can work and collaborate freely." Perez Tr. 391.

[6] These offices were located at 80 Pine Street, 10th Floor, New York, New York 10005, and at 632 Commercial Street, 4th Floor, San Francisco, California 94111, respectively. J1 at 7. Respondent has since closed its San Francisco office and moved its New York office to Brooklyn. Perez Tr. at 546.

Respondent provides laptops to all employees and provides cell phones to Partners. Gordon Tr. 103. Employees communicate about work matters by email, Slack, and text message. Gordon Tr. 103-104; Dannenberg Tr. 148-49; Katebini Tr. 207. Gordon testified unequivocally that Partners use text message to communicate about work matters. Gordon Tr. 104. Perez, on the other hand, testified that he does "not necessarily" communicate about work matters via phone call. Perez Tr. 296.[7] Later, in response to a question from Respondent, Perez acknowledged communicating by phone call for work. Perez Tr. 314-15.[8] Directors, to whom Respondent does not provide phones, use their personal phones to discuss work matters. Gordon Tr. 104; Dannenberg Tr. 149; Starkman Tr. 222, 234.

II. Timeline of Events

A. January 2023: Employees Request Voluntary Recognition

Employees began discussing unionization in 2021. Shaw Tr. 38. Gradually, the group discussing this possibility, including Leo Shaw, evolved into an organizing committee. Shaw Tr. 38. In the spring of 2022, the organizing committee reached out to Charging Party and began holding meetings and having more conversations with coworkers. Shaw Tr. 38. Josh Dannenberg and Daniel Katebini both learned of the organizing efforts in the summer of 2022 and subsequently became involved. Dannenberg Tr. 150; Katebini Tr. 183.

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[7] Q. And what other modes of communication do you use?
A. That's all, Slack or email. Or verbally, having meetings.
. . .
Q. What about phone calls?
A. No, not necessarily.

[8] Q. Earlier you testified that you don't use your phone work, correct?
A. Yes.
Q. You're not saying you don't get phone calls while at work, are you?
A. No. I mean, yes, occasionally we would call each other for any relevant issue. Yes.

On January 23, 2023,[9] the organizing committee emailed a letter to the Executive Team, announcing that a "strong majority" of Snøhetta employees had signed authorization cards with Charging Party and requesting that Respondent voluntarily recognize the union. GC005; Shaw Tr. 38-39; Gordon Tr. 105-06; Perez Tr. 418; Molinar Tr. 697. Seven employees signed their name to the letter: Alexander Cornelius, Daniel Katebini, Joseph Kim, Joyce Hanlon, Leo Shaw, Mercedes Armillas, and Steven Kocher. GC005.[10]

Although not listed on this letter, Joshua Dannenberg was also a member of the organizing committee at this time. Shaw Tr. 39; Dannenberg 150-52. Dannenberg chose not to include his name in the email because he was the most senior member of the organizing committee in terms of his work role and was worried about jeopardizing his position. Dannenberg Tr. 151; *see* R12(c). However, Dannenberg was open about his union support in one-on-one conversations. For example, around this time, Dannenberg and Armillas discussed the union organizing effort with Director John Oliver over lunch at South Street Seaport. Dannenberg Tr. 151. As part of the organizing committee's efforts to understand the level of interest in and sympathy with the complaints motivating the union drive, and as the senior-most member of the committee, Dannenberg was asked to speak with several Directors, including Oliver. Dannenberg Tr. 152.

Shortly before the voluntary recognition letter went out, Katebini also met and discussed the union effort with several Directors. Katebini Tr. 184. Specifically, Katebini spoke with Directors Michael Cotton, John Newman, and Matt McMahon. Katebini Tr. 184, 208-09.

[9] All dates refer to calendar year 2023 unless otherwise noted.

[10] Perez testified that after the union campaign and the July 2023 layoffs, Cornelius was promoted from Senior Project Architect to Project Leader. Perez Tr. 460. Presented on cross-examination with a letter promoting Cornelius to Project Leader on May 19, 2021, Perez then asserted he had "no recollection of when he was promoted. I don't know the specifics at this time." Perez Tr. 580; GC089.

Following their receipt of this email, the Executive Team agreed to a meeting with the organizing committee. GC006; Shaw Tr. 40. The Executive Team and employees corresponded by email about the details for this meeting, including the Executive Team's request that Directors John Newman and Anne-Rachel Schiffmann be included. GC006 at 3, 8. Per the Executive Team's directive, the meeting—which took place during the work day on Friday, March 31—was held in person in the open area in front of the Manhattan office. GC006 at 3; Shaw Tr. 41; Molinar Tr. 698. Shaw attended this meeting and took the lead in describing the voluntary recognition and election processes and conveying the organizing committee's preference for voluntary recognition. Shaw Tr. 41-42.

On April 5, Molinar sent an all-staff email on behalf of the Executive Team about the March 31 meeting, identifying the six employees who attended—Shaw, Cornelius, Kim, Hanlon, Armillas, and Kocher—and providing a list of "key takeaways." GC007; Shaw Tr. 42; *see* Molinar Tr. 704 (confirming everyone on staff, including the Executive Team, receives email sent to "All Snohetta in the U.S.").

In early April, during Passover, the organizing committee held a meeting at Patsy's Pizzaria in Brooklyn. Starkman Tr. 225. At least two tables of people attended; Starkman recalled Arie Salomon and Anna Fotheringham were there. Starkman Tr. 225. During this meeting, Starkman spoke publicly for the first time about her support of the union. Starkman Tr. 225. Specifically, in response to someone asking if anyone wanted to speak about the significance of Passover, Starkman spoke about the significance of Passover as a celebration of workers' rights and labor and said it felt appropriate to be having the meeting during the holiday. Starkman Tr. 225.

Around the same time, on April 11, Katebini sent an email on behalf of the organizing committee to the Directors, inviting them to a Q&A session regarding the union campaign on April

13, and providing updates about the process, including that over 70 percent of eligible employees had signed authorization cards with Charging Party. R02 at 1; Shaw Tr. 89-90.

The following day, April 14, the organizing committee sent an email via personal email addresses, providing an update on the union campaign and highlighting a group breakfast scheduled for April 20. GC031. This email was signed "Your Snohetta Union Organizing Committee" and listed the same committee members as had signed the request for recogition, with the addition of Anna Fotheringham. GC031; *see* GC005. Director John Oliver received this email on his personal email and forwarded it to his Snøhetta address. GC031.

The union's bagel breakfast event took place on or about April 20 in the kitchen and open area at the front of the Manhattan office. Katebini Tr. 185. It was observed by multiple supervisors. During the event, Partner Craig Dykers approached Katebini in the kitchen area and asked him what the event was for. Katebini Tr. 185-86. Katebini replied that it was a show of solidarity for the union. Katebini Tr. 186. In response, Dykers told Katebini that he was all for public parties but felt that they were excluding people who might not support the union efforts. Katebini Tr. 186. Respondent did not call Dykers to testify about this interaction or any other subject. Around the same time, Director Michael Cotton sent a Slack message to Director Montgomery that day, stating "it feels weird to me that a group of employees is having a convivial breakfast during business hours, in the office, as a forum for directly challenging the interests of the people that pay them." GC061. Director John Oliver later commented via Slack message to Director Nathan McRae that he had observed Andrew Anderson at the event and "he seemed very supportive." GC072.

A few days later, on April 24, Shaw sent an all-staff email on behalf of the organizing committee. GC009; Shaw Tr. 44-45. The following day, April 25, the organizing committee and the Executive Team met again. Shaw and Katebini both attended, along with other members of the

organizing committee. Shaw Tr. 44; Katebini Tr. 187; GC008. After this meeting, the organizing committee and the Executive Team collaborated on a joint email to all staff. GC008; R26; Molinar Tr. 700-01.

B. May 2023: Charging Party Seeks Election & Respondent Implements "Project Worth"

On Friday, May 5, organizing committee members met with Dykers and informed him they would be filing for an election the following Monday. GC096. That Monday, May 8, Charging Party filed a petition with the Board seeking a representation election amongst Respondent's employees in both New York and California. J1 at 2 ¶4, 4-5. The petitioned-for bargaining unit included Designers, Architects, Project Leaders, and Operations staff and excluded Partners, Directors, financial officers, human resources personnel, and others. J1 at 4-5. The same day, Cornelius sent the Executive Team an email about the petition, signing off with the same names as were listed on the initial request for voluntary recognition. R28; *see* GC005.

The next day, May 9, Curbed published an article about the petition and union campaign. GC010; Shaw Tr. 45-46; Anderson Tr. 173. The article included quotes from three employees supporting the union effort: Shaw, as well as Andrew Anderson and Araceli Lopez, who had not previously appeared on the list of organizing committee members. GC010. That morning, Dykers sent an all-staff email sharing the comment Respondent had provided to Curbed and instructing employees to forward all press requests to Dykers, Molinar, or Director Alan Brake. GC011; Shaw Tr. 46-47. The article quickly made the rounds amongst Respondent's supervisors and managers. Molinar forwarded the article to Snøhetta Norway CEO Isabella Alveberg and Elin Nilsen, copying Dykers and Director Alan Brake. GC052. Directors Nathan McRae and John Oliver also discussed the article on the day of publication, with McRae commenting by Slack that he was "a bit surprised that Andrew was not more skeptical." GC072. Oliver responded that "the greatest champions on

this are all relatively short-timers." GC072. Curbed's reporting was also picked up by other architecture-industry publications like Archinect, which reprinted Anderson's quote. GC053. Molinar, Perez, and Brake traded emails that day about seeking various changes to the articles, looping in Claire Holmes from Risa Heller Communications and asking her to conduct some of the outreach. GC053.

Not long after, on May 15, Molinar sent an email instructing Directors and Executive Team members to track all time spent "on the union issue" under the heading "Project Worth." GC093; Perez Tr. 586. When initially asked about Project Worth, Perez testified simply that it was one of Respondent's projects. Perez Tr. 585. In response to General Counsel's follow-up question, Perez added only that Project Worth was intended to track time spent "within overhead efforts." Perez Tr. 585. Only after General Counsel asked a third question did Perez finally concede that Project Worth was specifically related to tracking time spent on the union. Perez Tr. 585.[11]

Several days later, on May 18, Molinar sent an all-staff email attaching a letter expressing Respondent's view on the union campaign. R29; Molinar Tr. 704-05. The following day, Katebini sent an all-staff email, with a letter attached, on behalf of the organizing committee. GC012. Both the email and the letter were signed "Your Snøhetta Union Organizing Committee" and listed a different group than previous communications had: Andrew Anderson and Araceli Lopez had joined Katebini, Shaw, Cornelius, Kim, Armillas, and Kocher on the committee, while Hanlon had left it. GC012. Anderson was made aware of the union campaign relatively late in the process, when Katebini broached the conversation with him around lunchtime one day. Anderson Tr. 170;

[11] Q. What is Project Worth?
A. It's one of our project naming – one of the project names.
Q. And what does it refer to?
A. We were trying to track the time that we were spending within overhead efforts.
Q. With regard to what topic specifically?
A. Learning about the Union activities or learning about meetings.

Katebini Tr. 191-92. Upon learning about the campaign, Anderson became involved organizing efforts. Anderson Tr. 170.

The following week, on May 23, employees Donesh Ferdowsi and Sam Rosen, along with Director Michael Cotton, organized an after-hours meeting about the union campaign at the Seahorse, a bar near the office. Shaw Tr. 49; Katebini Tr. 187; GC032. This meeting was attended by 20 to 30 bargaining-unit employees, as well as Tina Bonacci, and Directors John Newman, Michael Cotton, Aaron Dorf, and Marc-Andre Plasse. Shaw Tr. 49-50; Katebini Tr. 188 (recalling Bonacci and Directors Cotton, Plasse, and Newman being present).[12] Plasse, Newman, and Bonacci all spoke. Shaw Tr. 50-51. Katebini recalled Bonacci stating "that her family had been involved in union stuff growing up, and but she felt that our efforts were not being done in the right way, that – and that unionization didn't feel right for our office and that if we didn't like the conditions at Snohetta, that we could just leave the office."[13] Katebini Tr. 188, 200-01.

Later that week, on May 26, Katebini sent another all-staff email, attaching a second letter from the organizing committee. GC013; Shaw Tr. 47-48. This letter and email listed the same eight members as had the May 19 email. GC012; GC013. Less than an hour later, Newman sent an annotated version of the email to the Executive Team, saying "[i]n exasperation, I've marked up Danny's last email." GC045. Perez testified that the Executive Team did not respond at all to Newman's email. Perez Tr. 548.[14] But the evidence shows that Molinar did respond, first to thank

[12] A transcript error appears on page 50, line 18—instead of John Newman, the transcript reads "Tom Newman." Newman's name appears correctly on line 25.

[13] Katebini testified that on May 6, 2026, he provided to the Region an affidavit, which did not include this statement by Bonacci. Katebini Tr. 201-02. Katebini provided information by phone to a board agent, who then provided Katebini with a written document to sign. Katebini Tr. 209-10. Katebini testified that he had discussed the other events in his testimony with the Region "broadly at different points." Katebini Tr. 211.

[14] Q. How, if at all, did you respond to this email from John Newman?
A. We didn't.
Q. Did you do anything with John Newman's markups?

Newman for his comments and ask him to hold off on distributing them "until we have a holistic and vetted response" and then to confirm that his comments could be useful for Respondent's communications. GC088 at 1. Perez conceded he would have received these emails from Molinar but he did not remember them. Perez Tr. 577-78.

C. June 2023: Continued Campaigning in Lead up to NLRB Election

On May 30, Respondent and Charging Party stipulated to a mixed mail/manual representation election, with voting to take place in person in New York and California on June 14 for most employees and by mail from June 14 through July 6 for three fully remote employees. J1 at 2 ¶5, 7-11. The agreement provided for a ballot count to take place between July 7 and 14. J1 at 8.

The organizing committee, whose composition had changed, continued distributing information to staff during this time. On June 2, Shaw sent an all-staff email to "correct factual inaccuracies" in a letter Respondent sent to employees the previous day. GC033. This email was signed "Snøhetta Union Organizing Committee" and followed by the same eight names that appeared on the May 19 and 26 emails. GC012; GC013; GC033.

That same day, Molinar sent two all-staff emails of her own. In the earlier email, signed "The Executive Team," Molinar provided a list of "myth[s]" and "facts." GC055. The first entry in this list characterized as "myth" the statement that "[u]nionizing will not hurt Snøhetta's business" and provided the following accompanying "facts":

> • Clients have suggested to us that our being union would affect their selection.
>
> • It's not political or intended to be a statement of anything other than practicality – business delays due a strike could cost them millions of dollars.

A. No.

> • Given the choice of two otherwise similar designers, one whose employees could strike and the other whose employees will not, they are going to choose the latter.

GC055. In Molinar's second all-staff email on June 2, she announced that Alveberg would host a "briefing" on June 5. GC014; Molinar Tr. 710.

The day after the Alveberg briefing, on June 6, Ferdowsi, Rosen, and Cotton hosted another after-hours meeting about the union, this one taking place in the open area in the front of the New York office, with a Zoom link for the California office. GC015; Shaw Tr. 52-53. Starkman attended this meeting and voiced her support for the union, sharing that when she started the job she was a recent breast cancer survivor and had watched people lose their jobs and healthcare after receiving their diagnosis. Starkman Tr. 226. Starkman explained that her support for a union was inextricably tied to her belief that people should be protected from losing their jobs, especially in the case of a health emergency like that. Starkman Tr. 226. In the office kitchen afterwards, Director Nick Anderson, who had attended the meeting, responded to Starkman's statement by sharing a family event in his own life. Starkman Tr. 227, 236-37.

The following day, June 7, Respondent hosted the first of two all-staff "town hall" meetings "to have an open discussion about the subject of unionization." GC016 at 2; Shaw Tr. 53-54. Ahead of this first town hall, Respondent asked Directors to attend a two-hour "prepping session" at the Risa Heller office in Manhattan. GC090; Perez Tr. 580-81. This was not the first time Respondent provided Directors with instructions about how to communicate with employees about the union. On June 1, Director Matt McMahon messaged Director Nick Anderson that one of the "themes that are the most sharp when engaging with people on the Union" was "we were left out, and that unity is being sacrificed." GC064. Anderson replied "yeah, if we[']re trying to be personal about it rather than repeating what the lawyer tells us, I think that feels real." GC064.

The first town hall was held in person and by Zoom. Participants in the office were asked to wait for a microphone to speak, to ensure that participants attending by Zoom could hear. GC016. In addition to the Directors, the Partners attended this meeting. Dannenberg Tr. 153; Molinar Tr. 733-34. Shaw attended this town hall and the one that followed a few days later and recalled a number of Directors advocating against the formation of a union, including Matthew McMahon, Kate Larson, Marc-Andre Plasse, Aaron Dorf, and Darlene Montgomery. Shaw Tr. 55-56. Shaw also recalled a comment by Director Michael Cotton, either at the first or the second town hall. Cotton "brought up a specific project opportunity that we were pursuing and that had not been awarded. And he mentioned that the union may have been a factor in the decision." Shaw Tr. 57. Katebini recalled Director Nick Anderson, at either this town hall or the second one, commenting that he was scared of the unionization efforts, because it represented a change and he was scared to lose everything that he had built in his career. Katebini Tr. 189.

Both Shaw and Katebini testified about comments by Director Darlene Montgomery. Shaw recalled Montgomery saying, "if you're more interested in compensation than design mission, you could work somewhere else like Starbucks." Shaw Tr. 56, 85-86. In Katebini's account, Montgomery made a comment to the effect of "if the conditions or the pay at Snohetta is so bad, you can always leave and take a job like that. Specifically, she referenced a design position at Starbucks that pays like twice as much."[15] Katebini Tr. 189, 204-05. Dykers's own internal communication also dovetails with this testimony. Two days after the town hall, Dykers summarized the meeting in an email to Alveberg, noting that "[a]nother person said if you want more money then go somewhere else." GC060. Molinar then responded on the thread, agreeing

[15] Katebini also testified on cross-examination that his May 6, 2026, affidavit, did not include this statement by Montgomery, though he recalled providing the information to the Region "at some point." Katebini Tr. 205. *See supra* n.15.

that Dykers' "account is pretty thorough." GC060. Molinar also added that employee Donesh Ferdowsi had delivered "a powerful, personal, blunt, and insightful presentation about the effect this effort has had on our community and how it will only get worse if the union passes" and characterized him as "a born storyteller." GC060.

Shaw also spoke in support of the union, either at this town hall or the second one that followed. Shaw Tr. 57-58. In his remarks, Shaw addressed the exclusion of Directors from the bargaining unit, noting that Directors were members of Respondent's leadership. Shaw Tr. 57-58. Andrew Anderson spoke in support of the union at this town hall and the second one that followed it. Anderson Tr. 173; Shaw Tr. 58. Specifically, Anderson shared why he believed employees should vote yes for the union in the coming election and responded to questions that arose during the discussion. Anderson Tr. 173.

Dannenberg spoke towards the end of the first town-hall meeting. Dannenberg Tr. 153. He began his comments by acknowledging that several of the Directors who spoke were crying. Dannenberg Tr. 153. He then said that he wanted to share a note of optimism, that he "felt that the act of organizing and exploring the opportunity of a union was a momentous thing" and "it was an important thing for the discipline." Dannenberg Tr. 153. On June 15, Bonacci emailed Dannenberg and copied Molinar, informing Dannenberg that they had received "a formal complaint about your remarks during Thursday's town hall." GC116 at 2-3. Bonacci and Molinar corresponded by Slack about Dannenberg before this email, and Molinar instructed Bonacci not to discipline him "since . . . he's engaged in a protected activity at present." GC114. After Dannenberg responded to Bonacci's email asking for more information, Molinar sent Bonacci another Slack message, saying "I don't think you should give Josh more info. I smell a rat." GC115; GC116 at 1-2.

While she did not recall which of the two town halls, Starkman testified that she spoke at one of these two meetings, and Shaw recalled the same.[16] Starkman Tr. 228; Shaw Tr. 58. Specifically, Starkman expressed fear about the possibility of being discharged at any time as an at-will employee and highlighted the job-security benefits offered by a union. Starkman Tr. 228; Shaw Tr. 58. Later that day, Dykers approached Starkman at her desk to comment on what she said during the town hall. Starkman 228-29; Shaw Tr. 60. Specifically, Dykers told Starkman that Snøhetta was not in the business of freely letting people go and if she wanted to speak more privately about her concerns, he would be happy to speak with her. Starkman Tr. 228-29, 238. Starkman testified that she felt caught off guard and intimidated to be singled out by Dykers in this manner. Starkman Tr. 229, 238-39. Shaw also witnessed this interaction from his desk. Shaw Tr. 60.

The day after this first town-hall meeting, June 8, the union organizing committee hosted another meeting at Patsy's Pizzaria. Shaw Tr. 60-61; Dannenberg Tr. 153-54. More than 20 people attended, including organizers employed by Charging Party and employees of a unionized architecture firm called Bernheimer Architecture. Shaw Tr. 61; Dannenberg Tr. 154; Starkman Tr. 235. Ferdowsi also attended. Shaw Tr. 62; Dannenberg Tr. 154. Shaw recalled observing Ferdowsi taking extensive notes throughout the meeting. Shaw Tr. 62. At the meeting, Dannenberg spoke in support of the union. Shaw Tr. 62; Dannenberg Tr. 153. Specifically, Dannenberg provided an introduction to the meeting by giving a history of the organizing effort at Snøhetta and offering his perspective on what the effort meant for discipline of architecture. Dannenberg Tr. 154. Within a day of this meeting, Ferdowsi reported it to Director John Oliver. GC074 at 46, 50.

[16] Documentary evidence supports this testimony. The day after the first town hall, Coyne commented by Slack message Bonacci, "I did not think Jordana had a good take yesterday"; Bonacci replied "don't even get me going." GC046.

During the final week before the election, CFO Perez reached out to Katebini to ask if he wanted to get a coffee. Katebini Tr. 192-93. The two walked to Joe and the Juice and walked around the Seaport waterfront. Katebini Tr. 193. Their conversation centered on the union. Katebini Tr. 193. Perez repeated themes Katebini had heard before, about firms not wanting to work with Respondent or "potential clients not wanting to work with us if we were unionized." Katebini Tr. 193. Perez also told Katebini that "potential clients would be afraid that we might go on strike, or we might lose competitions as a result of this."[17] Katebini Tr. 193-94. Additionally, Katebini remembered the conversation turning to the difficulties of working conditions and Perez mentioning that his wife worked in health care, where conditions were also difficult. Katebini Tr. 194. Finally, Katebini recalled commenting that it was hard to make a living and Perez countering "but you just bought a house, didn't you?" Katebini Tr. 194.

Perez, who was present for the entirety of Katebini's testimony, gave a different account of the interaction. Perez Tr. 550. Perez did not recall reaching out to Katebini to invite him to get a coffee. Perez Tr. 551.[18] Instead, Perez testified that that he ran into Katebini near the elevator and they walked out together "towards wherever we were going to get lunch." Perez Tr. 551. Perez remembered "buying something to drink" and offering "to buy for him something to drink." Perez Tr. 551. But Perez did not identify a location for the drinks or the conversation that followed and explicitly conceded "I don't recall the specifics of our conversation." Perez Tr. 551. Perez testified that he did not "recall" or "remember" making the statements Katebini attributed to him and generally denied making any similar comments to employees during the union campaign. Perez

[17] Competitions involve a small, select group of architecture firms providing design ideas. Katebini Tr. 181.

[18] Q. Did you reach out to Daniel prior to running into him around the elevator to ask if you could go get a coffee and chat with him?
A. Not to my recollection, no.

Tr. 552-53. Perez did recall telling Katebini that "it was unclear on how [the union campaign] would affect us pursuing work"–but otherwise provided no other details about the content of his discussion with Katebini. Perez Tr. 552. Perez acknowledged discussing Katebini's purchase of a house, but said "I don't think it was on that day." Perez Tr. 554.

Three days before the election was set to begin, the union organizing committee sent their final all-staff email, attaching a letter of support from New York state congressional members. GC034; Katebini Tr. 191. Mercedes Armillas sent the email and signed off "Your Snøhetta Union Organizing Committee," followed by the same eight names that had been appearing on union communications since mid-May: Alexander Cornelius, Andrew Anderson, Araceli Lopez, Daniel Katebini, Joseph Kim, Leo Shaw, Mercedes Armillas, and Steven Kocher. GC034.

The next day, June 11, with two days remaining before the election, Respondent hosted the second town-hall meeting. GC017; Shaw Tr. 54-55. Like the first town-hall meeting, this one was held during lunchtime in the same hybrid in-person/Zoom format. GC016; GC017. During this meeting, Ferdowsi referenced the June 8 union meeting and expressed anger that Charging Party's representatives had, in his view, accused Respondent's leadership of manipulating employees' emotions. Shaw Tr. 62-63.

Later that same day, Respondent hosted an additional meeting for Dykers and Molinar to "share their perspective" on the upcoming election. GC019. The meeting invitation was titled "Craig & Elaine's Perspective." GC019. One day before, Dykers received an email noting that a "Guest Contributor" had left a comment on a document titled "Points for Perspective Talk CD." GC103. The quoted portion of the document read, in part, "I want you to know that for me and Elaine, a "No" vote to unionize means a "Yes" vote to the evolution of our Employee Group." GC103.

The manual portion of the election took place as scheduled on June 14. Shaw Tr. 63-64; J1 at1 ¶¶5, 7. At the polling site located in Respondent's New York office, Katebini served as the election observer for Charging Party and Coyne served as the election observer for Respondent. Katebini Tr. 194; GC075 at 67 (June 14 text from Kate Larsen to Director group thread: "Jay was the monitor. Danny was theirs."); GC067.

During the voting period, Bonacci sent a Slack message to Rodriguez instructing him to "[l]et me know if you Razvan or Amy. They[']re in vacation but I[']m curious if they[']ll show up." GC066. Later that day, Bonacci sent a separate Slack message to Delk sharing that "Jay was the 'observer' for the vote and said that only 4 eligible people didn't show up b/c they were out of the country. He said that Amy and Razvan did show up and vote." GC067. Rodriguez, too, confirmed to Bonacci that Shell had come to the office to vote. GC068. News of Shell appearance at the office to vote was also shared in a group text thread of 14 Directors: Oliver texted "Amy and Razvan showed up to vote," to which McRae responded "So Leo was lying all along. No surprise there," followed by a vomiting emoji. GC075 at 48. When Cotton asked "Did Leo tell someone they weren't coming?" Dorf responded "He did. Can't trust a word from any of them in recent days." GC075 at 49. Weeks later, on July 6, Cotton updated the thread that Shell had flown back to New York the day before the vote by coincidence, and had not changed her schedule in order to vote, so she "shouldn't be singled out." GC075 at 84-85. Brake then responded "Michael, I would share that with the execs if you haven't already." GC075 at 85.

D. May & June 2023: Respondent Monitors Union Activities

i. Partners Track & Discuss Union Support

The meeting notes for the June 29 Advisory Board meeting indicate that Managing Director Elaine Molinar's focus since the March 30 meeting was "almost exclusively on potential

unionization." R08 at 1. During that timeframe, Molinar corresponded with Directors about employees' union sentiments and plans for voting. For example, she commented in a June 8 email to Director Nick Anderson that it was "very unfortunate" that one employee, who Anderson had shared "would be a 'no' vote," would be on vacation and unlikely to vote. GC058. In that same thread, Molinar mentioned that she and Dykers had discussed Shell's vacation schedule, then explained that Shell would be unable to vote if she were not in town. GC058.

By the time Perez prepared slides for the June 29 Advisory Board meeting, Molinar had already spent over 200 hours on the union effort. Perez Tr. 584-85; GC092 at 16; GC093; Molinar Tr. 735-36. Perez had billed the next-highest number of hours—around 105. GC092 at 16. Of the Executive Team members, Dykers had spent the third-most time, followed by Gordon, then lastly Delk. GC092 at 16. That day, Molinar emailed the Executive Team, the Directors, and Bonacci, to share a portion of portion of her report to the Advisory Board, including the following: "Since May 8th, our Directors and other staff opposed to unionization have demonstrated exceptional character, dedication, and support. They have worked hard and taken action to stave off unionization. Nevertheless, many are feeling drained and betrayed by their colleagues." GC076.

The record indicates that Gordon, too, spent significant time responding to the union campaign, in particular seeking information on employees' union activities. Anderson, who did not join the organizing committee until later in the campaign, described being approached by Gordon at some point soon after Anderson found out about the campaign but before he showed his support publicly. Anderson Tr. 170-73. Gordon, with whom Anderson had spoken only two or three times in his entire tenure at Snøhetta, approached Anderson in the restroom at the office. Anderson Tr. 171-72. Gordon started the conversation and asked if Anderson "was aware that there was an attempt to union drive." Anderson Tr. 171. It was clear to Anderson that Gordon's question was

driving at a broader conversation. Anderson Tr. 172. Anderson responded that he was aware of the campaign and supported it. Anderson Tr. 171. Gordon then made the argument that the union was unnecessary, because there was no need to introduce a third party between management and staff. Anderson Tr. 171-72. Anderson responded that the primary proponents of the campaign were good workers. Anderson Tr. 171-72. That ended the conversation and was the last time Gordon and Anderson spoke. Anderson Tr. 172. Notably, Respondent never asked Gordon about this interaction with Anderson, despite calling him as a witness.

While testifying, Gordon blanketly denied any knowledge of partners communicating directly with employees about whether that employee or any other employees supported the union. Gordon Tr. 112-13.[19] Later, Gordon testified that he could only "assume" that there were conversations amongst Executive Team members and Directors about how employees might vote in the union election. Gordon Tr. 111. However, he denied that Directors were ever asked to report their knowledge of employees' likely votes in the union election. Gordon Tr. 112.[20] Similarly, Gordon flatly denied that any Directors had ever told him that they had communicated directly

[19] Q. Did any partners communicate directly with employees about that employee or any other employees' Union support?
A. Not with partners, no.
Q. I just want to make sure I understand. Your testimony, just to make sure I understand, is that partners did not communicate directly with employees about whether that employee or any other employees supported the Union?
A. Not to my knowledge.

[20] Q. And were these or any other directors asked to report their knowledge of the likely votes of employees?
A. They were not asked.
Q. I'm sorry?
A. They were not asked.
Q. Were any directors asked to provide updates on employees' likely votes?
A. There was a – they created a list and I saw the list.
Q. Were they asked – were these directors asked to provide updates?
A. Not asked. There could have been versions of it.

with employees about how they or other employees were likely to vote in the election. Gordon Tr. 112.[21]

Despite this testimony, the documentary evidence shows that Gordon, in fact, engaged in extensive discussion of employees' union sentiments. The record includes a June 9 email to Gordon from Director John Oliver, attaching a four-tab Excel spreadsheet. GC039. The first tab, title "Target Ingredients" contained a list classifying employees as "Yes Votes," "No Votes," "Undecided/On the Fence," "Absent," and "Ineligible"—all referring to the impending union election. GC039; *see* Gordon Tr. 117 (confirming "votes" refers to votes in the election). Beside the names in the "Undecided/On the Fence" category are names of various Directors and employee Donesh Ferdowsi. GC039; R12(c). Two of the names in this category, Arie Salomon and Sam Rosen, have note next to them that "Donesh is working on him." GC039. Respondent did not ask Gordon to testify about this email, despite eliciting subtantial testimony about other email exchanges with Oliver.

The record also contains an email from Oliver to Gordon and Newman at 11:19 AM on June 13, one day before the union election. GC051. The subject of this email is "Extell," the name of an architectural project that had nothing to do with the union. Gordon Tr. 652; Perez Tr. 568. In the initial email that begins the thread is what appears to be a 10:46 AM email from Alan Gordon noting "Kristy and Sean have been moved over to the NO column" and asking for thoughts on eight listed employees "or any others that may be undecided." GC051. Text at the bottom of the email suggests an Excel document was attached: "<June 2923Chart0613.xlsb.xlsx>." GC051. While Gordon acknowledged finding Oliver's 11:19 AM email in his inbox, he denied sending the

[21] Q. Did any directors communicate to you that they had communicated directly with employees about how they or other employees were likely to vote?
A. Not to me.

10:46 AM email. Gordon Tr. 617-18. He later said he had "doubt" that he wrote the email. Gordon Tr. 653-54. But Gordon offered no other explanation of how else the document, which bears close resemblance to an email he admits sending, wound up in this form in Respondent's email system. Gordon Tr. 654. *Compare* GC051 *with* GC038. There is no dispute that Respondent produced neither the apparent 10:46 AM email from Gordon on this thread, nor the apparent attachment. Tr. 370, 654-55, 742.

Gordon did confirm exchanging emails with Directors John Newman and John Oliver less than an hour later the same morning. Gordon Tr. 120-121; GC038. The subject line of the email thread was "ACQ," which Gordon testified stood for "acquisitions," and had nothing to do with the content of the email thread.[22] Gordon Tr. 126-27, 652. The initial email in this thread is from Gordon at 11:53 AM, asking Oliver and Newman to "check Version2" and concluding "[a]lso Wen LI and Anna Morrison??"[23] GC038 at 2.

At certain points, Gordon asserted that "Version2" referred to the one and only version of the "affinity list" that he had seen. Gordon Tr. 614, 646-48. But at 12:07 PM, Oliver responded to Gordon's email and attached another version of the affinity list, a document with the name "Directors – Affinity List 3." Gordon Tr. 116-117; GC038 at 2-3. Gordon testified that this version—Directors – Affinity List 3—was the only version of the affinity list he found after repeated searches of his email account and the only one he received.[24] Gordon Tr. 616-18, 649.

[22] Asked if he knew why the subject line was ACQ when the email related to employees' union sentiments, Gordon stated "No" and speculated that the subject "could be left over from another email called ACQ." Gordon Tr. 127.

[23] Gordon testified that he only asked this question because both employees "were on maternity leave." Gordon Tr. 129. But Respondent's own documents indicate that Morrison returned from leave in December 2022, six months prior to this email exchange. R04 at 11.

[24] Notably, GC039, the June 9 email from Oliver to Gordon attaching an Excel version of this list, was already admitted into evidence at the time Gordon gave this testimony, but Respondent's counsel did not ask him about it. Tr. 241 (receiving GC039(a) and 039(b)).

Gordon testified repeatedly that he looked at Directors – Affinity List 3 before responding to Oliver. Gordon Tr. 123, 129, 615, 658. Later, though, Gordon denied ever opening it, claiming he "wasn't interested" and stating that Version2 was the only version of the affinity list he looked at. Gordon Tr. 648. On Directors – Affinity List 3, the eight discriminatees are listed among 28 "yes votes," alongside 37 "no votes," two "undecided/on the fence," and four "absent." GC038

The record also contains emails from Oliver to himself on June 11, 13, and 14, with attachments labeled "Directors – Affinity List 2.jpg," "Directors – Affinity List 3.jpg," and Directors – Affinity List 4.jpg," respectively. GC040; GC041; GC042. The eight discriminatees are listed as "yes votes" on all three of these lists. GC040; GC041; GC042.

Oliver's email response to Gordon also contained specific notes about particular employees. First, Oliver noted Wen Li and Anna Morrison, the employees Gordon had asked about, were "a No" and "in the UNKNOWN category," respectively. GC038. Oliver then noted that employee Sean Sweeney had been "moved to NO" after a conversation with "Matt." GC038. At the time, Respondent employed two Directors named Matt: Matt McMahon and Matt Ostrow. Gordon Tr. 122; R12(c) at 14-15 (showing no other employees named Matt or Matthew in the company). Gordon testified that he "didn't see that portion" of Oliver's email and didn't "remember sort of reading the end of the sentence." Gordon Tr. 122-23. Yet Gordon did respond to the question at the bottom of that email from Oliver: "Are we missing anyone?" GC038 at 1. Gordon responded to that question with "Dan Marty?", referring to an employee whose name was one of three highlighted on Directors – Affinity List 3.[25] GC038 at 3; Gordon Tr. 123. In response, Oliver updated Gordon that "[l]ast I heard from Donesh, Dan was supportive of the union but conflicted." GC038 (color copy of GC023); Gordon Tr. 120-123.

[25] A note at the bottom of that email reads "Get Outlook for iOS." GC038. Asked to confirm that meant he had sent the email from a phone, Gordon responded only "[i]t's possible." Gordon Tr. 123.

Text messages exchanged by the Directors offer further evidence of Gordon's interest in and efforts to track employees' union sentiments. On June 9, Oliver sent a text thread of eight other Directors a picture of a document with employees divided into columns labeled "supporter" and "non-supporter." GC074 at 44-45. Beside each of these columns is an additional column labeled "reviewer." GC074 at 45. When McMahon texted back "[w]hat does reviewer mean?" Oliver responded "[t]hat's Alan's notes." GC074 at 46. Later, Larsen asked about "Zao Zhu," whose name appears on the document, and Oliver responded "[t]hat's from Alan's sheet. Our new L-A designer? He muffed the name." GC074 at 57.

The record indicates that other Directors, too, were in touch with Gordon about employees' voting intentions. Later on June 9, Montgomery texted a group of nine Directors: "Just talked to Alan G. We are wondering if Amy [Shell] and Razvan will return in time to vote. Leo's comments to AG seemed to indicate that." GC074 at 60. That evening, Montgomery texted the group again: "It was interesting to talk to Alan G, who revealed how betrayed he felt by all of the time he has put in with Leo and Amy and Danny. It was an interesting perspective: that they had not included him even after he had reached out." GC074 at 69.

ii. Directors Track & Discuss Union Support

The record also indicates that Directors were involved in tracking employee union support. The earliest version of the affinity list spreadsheet in the record appears in an email Plasse sent to himself via his personal email address on May 17. GC081. Soon thereafter, Plasse shared the spreadsheet with other Directors via their personal email addresses. GC074 at 2; GC082; *see also* GC083 (sharing talking points document with Schiffmann, Dorf, and Cotton).

Respondent's supervisors also repeatedly contacted Ferdowsi seeking information on the union sentiments of other employees. On May 1 for example, Director Matt McMahon exchanged

Slack messages with Ferdowsi. In the midst of their conversation about the union campaign, Ferdowsi stated "just talked with juan . . . thinking of some kind of 'people in the middle' convo." GC062. McMahon responded "I[']ve spoken with Jaun already as well. He[']s of our mindset. Maybe try Isabelle and Mario? Also curious about Jeff and Sam B." GC062. The document pictured in Oliver's June 9 photo to the group thread also included handwritten notes—Oliver explained "it's a print with my markups after reviewing with Donesh yesterday." GC074 at 45-46.

Later, in a different thread including every Director but Ostrow, various Directors heaped praise on Ferdowsi for his actions over the course of the campaign. On June 14, Grimes—who had earlier referred to the union as "those goddam fuckers" in a Slack message to Larsen—texted the group "i have definitely decided i can't read anybody after all this. i certainly don't really know anybody (present company, execs, tina, jay, veronica, and alicia excepted." GC065; GC075 at 73-74. She then added "well, and mario. and chad. in the end," and Aaron Dorf responded "Don't forget Donesh. That dude is my hero," to which Kate Grimes responded "it's true. and donesh," and Nathan McRae replied "Donesh needs to be sent on a European riverboat cruise all summer." GC075 at 74-75. Soon after, John Oliver wrote that he had asked Ferdowsi and employee Mario Mohan to respond to an email from Armillas. GC075 at 75. At the time of the hearing, Ferdowsi was still employed by Respondent. Gordon Tr. 123.

Testimony from Amy Shell sheds additional light on the role Ferdowsi played. In the midst of the union campaign in the spring, Ferdowsi asked Shell if she would join him in one of the booths in the office and asked her how she was feeling with everything. Shell Tr. 213. She responded that she was going to vote in support of the union based on her own experience in the industry. Shell Tr. 213. Before the conversation ended, Shell asked Ferdowsi to keep the information in confidence—because she worked closely with the Partners, she was concerned

about breaking their trust. Shell Tr. 213. By June, Shell's union support was well known and she appeared as a union supporter in every version of the affinity list, including those sent to Gordon. GC038 at 3; GC039B at 2; GC040 at 2; GC041 at 2; GC042 at 2; GC074 at 45. Later that month, McMahon told Montgomery by Slack that he was "having a little run-in with Amy this morning, she's trying to direct my time," to which Montgomery responded one minute later "I am on a need to know basis with all of the unionists." GC054.

Directors' discussions of the union activities of Shell, as well as Shaw, continued after the vote. On evening of June 14, in a thread with all Directors except Ostrow, Director Alan Barke texted "It's just crazy the people at project leader level wouldn't immediately see how risky this is." GC075 at 70-71; *see* GC075 at 67 (showing date and time). McRae responded "I know. And also those in acquisitions! they know. They know that all the qualifications that we submit are in order to reduce risk for the client." GC075 at 71. Brake then replied "For Leo, it's ideology/religion. For Amy, happy-go-lucky optimism? Disappointing for both." GC075 at 71. Not long after, Dorf noted "For ALL of them, it's just an experiment that they think can walk away from if it doesn't work out," prompting Plasse to chime in "Good luck finding their next job," then added "They have limited their future options quite dramatically." GC075 at 71-72.

Record evidence also shows other instances of Directors speaking with employees about the union sentiments of their coworkers. For example, on June 9, Darlene Montgomery texted "Leslie is a no. So is Bless."; when Marc Andre Plasse responded asking how she "extract[ed] a response from Bless?", Montgomery said "Isabelle D talked to her."[26] GC074 at 44, 56. Later, on June 14, Director Kate Larsen texted the thread that was actively discussing the ongoing union vote: "Btw, [Senior Project Architect] Jake [Levine] said that he felt Zeynep was on the fence all

[26] Project Designer Isabelle Desfoux and Project Architect Bless Yee were the only two employees matching those names. *See* R12(c) at 7-10.

last week."[27] GC075 at 69; R12(c) at 7 (providing name and title). Levine and Larsen also exchanged Slack messages the day of the ballot count, with Larsen writing "dying to know who else is organizing :wink:" and Levine responding "[j]ust ask Leo, I[']m sure he[']ll tell you." GC108.

The record shows Levine also corresponded with other supervisors about the union. On June 5, Director Nick Anderson texted a group of eight other Directors that "Jake mentioned the group hasn't heard much from directors and he's trying to galvanize the undecided/skeptical so at least they know they aren't alone." GC074 at 33. After the ballots were counted, Levine emailed Molinar and thanked her for her all-staff email about the results. GC097.

E. July 2023: Ballots Are Counted & Respondent Implements Layoffs

i. Layoffs Discussions Prior to July 2023

Perez testified about presentations he prepared for Advisory Board meetings in September and December of 2022; he was "trying to convey" that Respondent would "need to consider where to have potential cuts or reduction in expenses." Perez Tr. 408. Specifically, he discussed a slide he created projecting that revenues would fall below Respondent's expenses starting in December 2022. Perez Tr. 409; R03 at 20. Perez also testified that Bonacci prepared, and Perez reviewed, a presentation for the December 2022 Advisory Board meeting that noted that "[s]everal employees across all levels are expected to be unstaffed in Q1 2023." R04 at 14; Perez Tr. 414-15. Perez stated he recalled that section of the presentation being discussed during the Advisory Board meeting, but provided no other details. Perez Tr. 415.

Perez also testified about slides he created for Advisory Board meetings in 2023 that a profit loss for the year. Perez Tr. 423. The first Advisory Board meeting of the year took place on

[27] As of July 2023, Respondent employed no one else with the name Jake or Jacob aside from Senior Project Architect Jacob Levine. *See* R12(c) at 7-10; Shaw Tr. 55 (identifying "Jake" as Jake Levine).

March 30, and by this time Respondent had already retained counsel in response to the union campaign. R05 at 2; Perez Tr. 434. Perez's slides for the meeting indicate that, as of that date, the projects producing just 20 percent of Respondent's revenue were consuming a disproportionate 39 percent of its labor costs. R05 at 10. Ford, UCSF, and TRPL, on the other hand, were not in this group. R05 at 10 (showing the four projects not contributing to disproportionate labor costs were "202109 USCFRB," "201809FRDHUB," "202006TRPL," and "202001DHC"). The notes from this same meeting indicate that the Executive Team would "[o]utline markers for when staff needs to be let go." R06 at 7; Perez Tr. 433.

According to Perez, the Executive Team decided before the March 30 meeting to lay off up to 14 employees.[28] Perez Tr. 433-34, 458. Before this March 30 meeting, per Perez, Respondent sought the advice of counsel about conducting layoffs during the union campaign, but decided against it after weighing the risks of "a potential claim of retaliation." Perez Tr. 434, 452-53.

At the June 29 Advisory Board meeting, the minutes reflect the sentiment that the shortage of new projects "requires immediate attention," but Respondent had been unable to act "due to unionizing efforts in the studio." R08 at 2. The notes also blame the union campaign for "[m]uch of the dip in productivity." R08 at 2. Molinar similarly testified that, by July 2023, "we had been putting this off since early in the year" but provided no other detail. Molinar Tr. 713. The interiors work, however, was in a different position: the minutes from the June 29 meeting noted "a need for two additional designers dedicated to interior work" and listed as an action item "[r]ecruit two interior designers, who could potentially support architectural needs when not fully staffed on interior work." R08 at 2.

[28] The only document that references this number is the Business Justification Analysis that was finalized days before the layoffs. R13.

Gordon, for his part, claims that discussions about letting staff go began "in 2022," because "[w]e were seeing things dovetail down and some fees for projects were becoming less." Gordon Tr. 621. These discussions, Gordon testified, continued into 2023, including at the advisory board meeting for the first quarter of that year. Gordon Tr. 620-21.

ii. Respondent Continues Hires & Promotions

Throughout this time period, Respondent continued hiring and promoting other employees. For example, Respondent hired: Matthew Ostrow as Director on March 1, Taylor Rogers as Communications Coordinator on March 30, Yonma Darwish as Accounting Assistant on April 10, and Xiaoji Zhou as Designer I in Landscape Architecture on April 10. R12(c) at 9; GC086; Perez Tr. 572-73, 602. Between June and September, Respondent also hired Temi Osanyintolu as a Designer I in Architecture and Chao Li as a Designer I in Landscape Architecture. R19 at 11. When Bonacci asked Molinar on July 21 about the status of Respondent's offer to Osanyintolu in light of the "conversations about restructuring," Molinar confirmed that Respondent would proceed with hiring Osanyintolu. GC091; Perez Tr. 583.

Effective September 1, Respondent promoted Wilson Rodriguez from Senior Staff Accountant to Accounting Manager and raised his salary by more than $15,000. Perez Tr. 567; GC084; R12(c) at 9. Coyne, too, received a promotion, effective at some point between July and the end of the year. R12(c); GC094; Perez Tr. 566, 588-89.

iii. Ballot Count & Implementation of Layoffs

On Friday, July 7, the manual and mail-in ballots were counted. J1 at 2 ¶6. Out of 64 valid votes, 29 were cast for Charging Party; the union had lost the election. J1 at 13. Later that afternoon, Director Nick Anderson asked Dykers by Slack whether anyone was going to announce the results of the count. GC071. Dykers responded affirmatively, then added: "If you would like

to promote transparency, The union organizers have already organized a 'secret' party for the yes folks this evening. The transparency problem remains with this faction. I'm guessing yhe AWU is hosting the gathering. Do you know about this?" GC071. Also that day, McRae texted the group thread of every Director except Ostrow: "I think we need to start focusing on the future. I've already had one conversation that would indicate that they will likely plan to be at this again next year." GC075 at 119.

Delk and Perez both testified that it was only after the ballot count that the Executive Team "resumed" discussions about implementing a layoff and decided to move forward. Perez Tr. 461; Delk Tr. 660-61. The Executive Team decided to exclude Directors from consideration for layoff, according to Perez, because they were going to take on more responsibility for business development. Perez Tr. 466.

The next business day after the ballot count, Monday, July 10, Perez informed Directors that Respondent would be implementing layoffs and requesting their input. Perez Tr. 463-64; GC024; *see* Molinar Tr. 712. The following morning, Newman sent an email to an external contact, explaining that the union had lost the election and noting "[n]ow its up to me to design some prophylaxis against any future such efforts." GC044.

On July 13, Perez emailed the Directors, asking for each to provide a list of three to five individuals who should be considered for layoff. Perez Tr. 462; GC024. Perez's emails included a list of employees at all levels below Director and indicated who had already resigned or given notice of their intent to resign. Perez Tr. 465-66; GC 024. The emails instructed each Director to ensure they selected based on "direct knowledge" of the employees' abilities. GC024. Perez sent three separate emails—one each for the Architecture, Landscape Architecture, and Operations groups—and copied Newman, Delk, and Gordon on each one. GC024. Aside from Newman, no

other Director was copied on all three emails. GC024. According to Perez, he was soliciting feedback at this stage from every single Director except Newman, "but [Newman] was going to be part of the discussions." Perez Tr. 467, 610. Nonetheless, Newman did respond to Perez's email with his feedback. For the Architecture group, Newman nominated for layoff Salomon, Kocher, Lopez, Katebini, and Timothy Kunkel. R11 at 23-24. For the Operations group, Newman nominated Shaw, Starkman, and Respondent's sole IT employee, Emmett De Muzio. R11 at 85-86; Perez Tr. 573. Newman explained that De Muzio's position "is a very important one, I have trouble with a unionist in the IT position. To my mind, trust in this role is essential." R11 at 85. Perez testified he did not "do anything" with Newman's comment about De Muzio and he did not remember whether or not he told the Executive Team about it. Perez Tr. 471-72. Molinar also testified she did not remember whether or not Perez conveyed Newman's email about De Muzio to her at the time. Molinar Tr. 731.

After receiving these layoff nominations from most Directors, on July 14 and 17, Perez held four group meetings with the Directors to discuss the nominated employees. Perez Tr. 472-73; R11. The meetings were divided up by discipline—there were two Architecture meetings, one Landscape Architecture meeting, and one Operations meeting. Perez Tr. 477-78. In general, the Directors each attended one of these meetings—but Newman attended multiple or perhaps all of them. Perez Tr. 474 (confirming Newman attended multiple meetings, not recalling whether he attended all); R12(c) at 2-6 (attributing comments during these meetings to Newman). Gordon and Delk also attended and contributed to these meetings. Perez Tr. 472-73; R12(c) at 2-6. Perez denied that these meetings included any discussion of employees' union support. Perez Tr. 473, 475.

Perez collated the initial nominations from each of the Directors into a spreadsheet. Perez Tr. 476; R12(c) at 1. Tabs 1 and 5 of the spreadsheet reflect the initial Director nominations; Perez

testified that employees who were nominated by more than one Director were marked as a Director selection, indicated with an 'x' in Tab 5 Columb P. Perez Tr. 477, 504; R12(c) at 1, 7.[29]

The Director selections included Designer I Julianna Cano, Designer I Leslie Finnie, and Senior Project Leader Nicolaus Wright, none of whom were selected by the Executive Team. R12(c) at 1,7. Cano, Finnie, and Wright were all marked as "no votes" on the affinity list Gordon received from Oliver on June 13. GC038. Record evidence also makes clear that Cano's opposition to the union had been brought to the attention of Molinar, who received and responded to an email Cano sent in May expressing a position against the union. GC100. The two continued corresponding into July, with Molinar thanking Cano for making a statement at one of the town halls. GC101. No witness explained why the Executive Team did not consider or select these three employees for layoff, despite multiple nominations by Directors.

After the feedback meetings with Directors, Perez then added notes from the subsequent Director meetings, attributing some of the feedback to individual Directors by their initials. Perez Tr. 590; R12(c) at 2-6. While looking at this spreadsheet, Perez and Delk asserted that the Executive Team had made an initial ranking of employees before July 14—but did not offer any further detail regarding when the Executive Team assigned those rankings. Perez Tr. 485-87; Delk Tr. 664; R12(c) at 7, column M. Molinar testified only that these initial rankings were assigned separately from the Directors' feedback. Molinar Tr. 716.

[29] De Muzio was nominated only once, by Newman, but Perez asserted that the reason De Muzio did not have an 'x' by his name in Column P of Tab 5 was because "[h]e was selected by John Newman, which wasn't considered in the selection process." Perez Tr. 504; R12(c) at 8. Newman's nomination of De Muzio was included on Tab 1. R12(c) at 1. Many other employees who, like De Muzio, were nominated only once similarly do not have an 'x' in Column P of Tab 5. *Compare* R12(c) at 1 *with id.* at 7-9 (showing no 'x' in Column P for Kristy Haag, Daniel Ibba, Roman Falcon, Russell Low, Anegliki Mavroleon, Claire Laurence, and others).

After the Director meetings, Perez presented the spreadsheet to the Executive Team over the course of multiple meetings. Perez Tr. 489. One part of the Executive Team's evaluations of each employee was "how well they integrate within our culture." Perez Tr. 509. For example, Perez explained that Kocher had initially been "well integrated" into the office culture when he started working for Respondent, but by the time of the July 2023 layoffs he had "lost sort of his steam in the office in terms of [] collaborating with the rest of his teammates." Perez Tr. 509-10. Over the course of these meetings, the executive team selected 11 employees for layoff. Perez Tr. 504-05; R12(c) at 7, column O. In addition to the eight discriminatees, the 11 finalists for layoff included Steven Kocher, Joseph Kim, and Nicholas Mercado. R12(c) at 7. After making these initial selections, the Executive Team continued to receive and consider feedback from Directors. Delk Tr. 671.

On Monday, July 24, Molinar sent a Slack message to the Executive Team dictating a schedule for the week. GC070. Under Monday, she wrote "John N is delegating keeper convos for directors to hold." GC070. These "keeper convos" were meant to put certain staff "at ease" ahead of Respondent's announcement of layoffs. Molinar Tr. 737-38, 745; GC070; GC099. Molinar testified that these were one-on-one conversations intended to convey to "top performers" that "they were very valuable members of the studio." Molinar Tr. 737-38. There is record evidence of 17 employees selected for these conversations. GC095; GC099. Out of these 17 employees, 14 are listed as "no votes" and only one, Dan Marty, is listed as a "yes vote[]" on the last affinity list Gordon admitted receiving on June 13. *See* GC038.

Later in her July 24 Slack message, Molinar laid out an including an agenda for meeting informing staff of the impending layoffs. She included a number of talking points for that meeting, including: "We[']re finding it necessary to reorganize for efficiency and we will finalize our

decisions with a week and get back to you. (yes, staff reductions will need to be considered)." GC070 at 1. In a separate Slack message on the same thread, Molinar added "I know Kate wants to slow this down, but according to JN, Everyone is just waiting for the hammer to drop." GC070 at 2.

On Wednesday, July 26, Perez gave a presentation to all staff to convey that Respondent was struggling financially. Perez Tr. 456-57; Shaw Tr. 64; R14. The same day, Respondent distributed a memo to all staff stating that Respondent would be laying off "up to 11" employees. Perez Tr. 518-19; R15

Later that afternoon, employee Anna Fotheringham gave two weeks' notice of her intent to resign. Perez Tr. 521; GC059. By Perez's account, Fotheringham's resignation led the Executive Team to remove three employees—Steven Kocher, Joseph Kim, and Nicholas Mercado—from the layoff list. Perez Tr. 521-22. Per Delk, the Executive Team chose to remove Kocher from the list at this time based on feedback from Directors. Delk 671-72. Perez, Delk, and Molinar testified that the Executive Team chose to remove Kim and Mercado from the layoff list at this time because the Landscape Architecture team had enough work for the two of them. Perez Tr. 523; Delk Tr. 671; Molinar 722. Internal communications, however, indicate that Mercado was removed the layoff list first and separately from Kim or Kocher. *See* GC070 at 2 (July 24 message designating exit convos for 10 employees); GC095 (July 26 message listing same 10 employees); Delk Tr. 682. Respondent did not ask any witness to address the Slack conversation, which was already in evidence when Respondent began presenting its case, showing that Mercado's name was removed from the layoff list on or before July 24. *See* GC070.

Perez denied that the Executive Team's meetings about the layoffs included any discussion of employee union support. Perez Tr. 517, 528. Initially, Delk echoed Perez's denial and added

"[w]e didn't know who supported the Union." Delk Tr. 672, 675. On cross-examination, though, Delk acknowledged that she had raised a question about whether the Executive Team had "inadvertently" selected only employees who were members of the organizing committee. Delk Tr. 676. Delk testified that this communication took place after the Executive Team had already finalized its selection of the eight discriminatees for layoff and denied knowing about the union support of anyone not named as an organizing committee member.[30] Delk Tr. 675-76. But around 7 PM on July 26, Delk sent a Slack message to the other members of the Executive Team, listing 10 employees—the same list initially selected for layoff with the exception of Mercado—and noting "(I believe) everyone now included for exit are union supporters." Delk Tr. 677-78; GC095. When shown this document during cross examination, Delk stated that she didn't "know" who supported the union but acknowledged that she believed all 10 listed employees supported the union. Delk Tr. 678-79. Delk Tr. 680, 683-84. Delk denied seeing any version of the affinity list before the layoffs. Delk Tr. 680. Instead, Delk testified that her belief that those 10 individuals supported the union was based on membership in the organizing committee and information "through conversations – we had a number of people. The executive group would hear from people in the studio, both directly or indirectly sharing their thoughts," because "there were plenty of conversations happening in the studio around that time." Delk Tr. 683-84.

Less than 20 minutes later, Molinar responded to Delk's question: "6/10 are organizers. the others are theoretically unknowns, but they are also low performers or toxic. But yes, we can discuss more. I'm sure there's trouble brewing. even though we have solid reasons that don't include that factor." GC095; Molinar Tr. 725. Molinar testified that by "theoretically unknowns,"

[30] Q. But you didn't know about the Union support of anyone not named as an organizing committee member?
A. Correct.

she meant "[w]e don't know what their position was." Molinar Tr. 728. When asked the same question by the ALJ later, she answered "what people may say publicly doesn't necessarily reflect what they're thinking." Molinar Tr. 740. Molinar testified multiple times that in order to figure out that six of the 10 employees slotted for layoff were organizers, she had to look back at the names on the "original petition." Molinar Tr. 727-28, 740; *but see* GC005 (showing that only four of the 10 employees listed in relevant part in GC095 signed the original request for voluntary recognition). Molinar similarly denied seeing or hearing about the affinity list before the layoffs. Molinar Tr. 729. When asked whether employees made public statements as to their preference regarding the union, Molinar was equivocal: "Some did, I think." Molinar Tr. 741. But she did not deny that the Executive Team had discussions about how employees were going to vote in the election. Molinar Tr. 740-41.[31]

Later, after the layoff list was ultimately reduced to eight, Perez and Bonacci prepared a "Business Justification Analysis" in order to "document the process of selection," according to Perez. Perez Tr. 523-24; R13. Per Perez, the Business Justification Analysis reflected the reasons that the Executive Team selected each of the eight discriminatees for layoff. Perez Tr. 524. Perez testified repeatedly that he and Bonacci prepared the Business Justification Analysis on July 27 and never revised or modified thereafter. Perez Tr. 524-25, 574. But an email from Bonacci to Perez, Molinar, and Newman indicates that she had spent "most of" July 28 working on the document, before somehow losing the file. Perez Tr. 574; GC087. When shown this email, Perez confirmed the document referenced in Bonacci's email was the Business Justification Analysis but offered no explanation. Perez Tr. 575.

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[31] Judge Green: Okay. So by that, you mean there was some discussion among the executive team as to how people were going to vote?
The Witness: We were generally curious.

Respondent instructed employees to work from home on July 31 and stated those who were selected for layoff would receive Zoom calls. Dannenberg Tr. 158; Katebini Tr. 196; Perez Tr. 527. The Zoom calls were conducted by Perez, Molinar, and Newman. Perez Tr. 529-30. Either Bonacci or Coyne were also present on each of these Zoom calls as an HR representative. Perez Tr. 530. Bonacci developed a script for the layoff conversations. Perez Tr. 528-29; R33.

After Perez, Molinar, and Newman completed the layoff conversations on July 31, Molinar sent a letter informing the remaining staff that no further layoffs were contemplated. Perez Tr. 530-31; R16. Molinar's letter stated that the layoffs were conducted based on "the need to align costs with income" and noted that Bonacci, Molinar, Perez, and Newman were available to speak in office hours with anyone interested in talking. R16. The following day, August 1, Molinar sent another all-staff communication, stating that Respondent had "made the difficult decision to reorganize the studio solely for financial reasons." Perez Tr. 533-34; Molinar Tr. 728-29; R22.

By the September 19 Advisory Board meeting over a month after the layoffs, in Perez's own account, Respondent "ha[d]n't improved our position" financially. Perez Tr. 458.

III. Discriminatees' Work and Layoffs

A. Andrew Anderson

Andrew Anderson began working for Respondent in February 2021 as a Technical Specialist. Anderson Tr. 165; R12(c) at 14. Several months later, in May 2021, Respondent promoted Anderson to the position of Senior Project Leader. GC028; Anderson Tr. 166. Bonacci's email confirming this promotion informed Anderson that the title change "distinguishes you as someone who is performing at the upper tier of your job category." GC028. Anderson's responsibilities included serving as a resource across various projects and giving advice on matters of construction administration and, occasionally, contracts. Anderson Tr. 166. In the early stages

of a project, Anderson's work involved providing advice about the feasibility, cost ramifications, or potential pitfalls of various design ideas. Anderson Tr. 167. As a project developed, Anderson would redline architectural drawings. Anderson Tr. 167. Later, in the construction process, Anderson's role involved defending the design intent, for example, through involvement with material approvals or proposals to change the design. Anderson Tr. 167. Carrying out these responsibilities included collaborating with architects of record to ensure that the final stamped drawings reflected the design intent. Anderson Tr. 167-68.

While employed by Respondent, Anderson worked on a variety of smaller projects as needed, but spent most of his time on a series of larger projects. Anderson Tr. 168. The larger projects included the Ford Central Campus Building ("Ford Building"), the UCSF research facility, and TRPL. Anderson Tr. 168; Dannenberg 150. For the Ford Building, Anderson worked on highly complex technical components of the project. Dannenberg Tr. 150. For instance, Anderson provided advice and direction on technical matters to every team working on the external parts of the building—including the brickwork, metal pan, terracotta, and façade teams. Anderson Tr. 168. Anderson filled a similar role on the USCF and TRPL projects. Anderson Tr. 169.

By the end of July 2023, Anderson was primarily working on TRPL and was continuing some work on the UCSF project, as well. Anderson Tr. 174. At this point, he was no longer heavily involved in the Ford Building and was doing only "low-level" work on that project like "giving support to the project architect." Anderson Tr. 175. For TRPL, Anderson was developing a number of outdoor wooden structures and working with the façade team. Anderson Tr. 174. He was also working on the interior of the theater, providing advice and redlining drawings, as well as doing CAD drawing work himself. Anderson Tr. 174. At the time, construction had not yet begun and

Anderson was not aware of any imminent end to this work. Anderson Tr. 174 Additionally, Anderson was continuing his role as a resource for other projects. Anderson Tr. 174-75.

Testifying about the Executive Team's discussions regarding layoff selections, Gordon said of Anderson, "we didn't have anything to put him on" because "Ford was done." Gordon Tr. 643. Perez testified that at the time of the layoffs, Anderson "wasn't really tied specifically to a project" and stood out for this reason. Perez Tr. 514. Specifically, Perez characterized Anderson's work as "very specific in niche" and noted that Anderson's experience was useful on the early stages of the Ford project but was not needed going forward. Perez Tr. 514. After Respondent asked several pointed questions about whether the Executive Team considered employees' workload, Molinar testified that the Executive Team's discussions about Anderson were that "he didn't have a lot to do."[32] Molinar Tr. 719-20. Molinar clarified that she did not make any comments about Anderson and added "[t]hat would've been Alan." Molinar Tr. 720. The Business Justification Analysis states that Anderson was assigned to Ford and Respondent had concluded that there was "no longer business justification to employ a Technical Specialist, Senior Project Leader on the Ford project." R13 at 3.

[32] Q. Okay. Was there any discussion during these executive group meetings about what I'll call the employees' staffing? In other words, whether or not they were fully deployed or being used more or less than others in their discipline?
MR. KELLEY: Objection, leading.
JUDGE GREEN: Overruled.
THE WITNESS: What do you mean? Exactly do you mean?
BY MR. PINS: Q. Did you guys talk about – was it discussed in this group about whether or not someone was working a lot – whether or not you had something for people to do or not?
A. Sure. Yes.
Q. Okay. If you remember that relative to anyone, please bring that up. But I certainly don't want to lead you, and I'm not going to lead you. I'm just asking.
A. Mm-hmm.
Q. Okay. What about Andrew Anderson? Do you remember any discussion about Andrew Anderson?
A. Yes. I recall that he didn't have a lot to do. He did not have a full workload.

On July 31, John Newman informed Anderson by Zoom that he was being laid off. Anderson Tr. 175. Newman did not provide a reason for his selection. Anderson Tr. 175.

B. Joshua Dannenberg

Joshua Dannenberg began working for Respondent in May 2018 as a Project Leader. Dannenberg Tr. 138; R12(c) at 14. Approximately three years later, in May 2021, Respondent raised Dannenberg's salary and promoted him to the position of Senior Project Leader. Dannenberg Tr. 138-39; GC025. In the email that informed Dannenberg of his promotion, Bonacci explained that he was receiving it because he was "someone who is performing at the upper tier of your job category." GC025. As a Senior Project Leader, Dannenberg reported to Director Nathan McRae. Dannenberg Tr. 140. Dannenberg's responsibilities included leading teams through the various project stages, which involved ensuring that the team members were on track for delivering the specific goals of the project. Dannenberg Tr. 139-40. Dannenberg was also tasked with communicating with client representatives, sometimes on a daily basis, traveling to the job site to observe construction, and working with technical consultants to facilitate their collaboration with Respondent's design team in developing the technical aspects of the project. Dannenberg Tr. 142. Additionally, Dannenberg was responsible for drafting contracts between Respondent and clients—including developing the fees that went along with those contracts—and for performing financial audits. Dannenberg Tr. 139-140, 143. Performing financial audits involved evaluating whether labor costs on a particular project were in line with financial projections, with an eye towards maintaining target profits. Dannenberg Tr. 141.

While employed by Respondent, Dannenberg primarily worked on three projects: the Ford Campus Plan ("Ford Plan"), the Ford Central Campus Building ("Ford Building"), and the Rutledge Hill Development Project ("Rutledge Hill"). Dannenberg Tr. 140. The Ford Plan was a

master plan—meaning no structures were actually built at the time—for Ford's Research and Engineering Campus and World Headquarters Campus. Dannenberg Tr. 141. Respondent's work on the Ford Plan included defining phases in which everything could eventually be built. Dannenberg Tr. 141-42. Dannenberg Tr. 145. The first phase was the Ford Building. Dannenberg Tr. 141.

For the Ford Building, Dannenberg was responsible for developing the fees and drafting multiple contracts throughout the course of Respondent's work on the project. Dannenberg Tr. 143. The initial contract for the Ford Building, which Dannenberg drafted, provided for a lump sum payment by the client. Dannenberg Tr. 143, 145-46. This payment structure changed in later contracts and, by July 2023, the contract, again drafted by Dannenberg, for work on the Ford Building called for the client to pay Respondent on an hourly timecard basis. Dannenberg Tr. 145-46.

At the end of July 2023, Dannenberg was predominantly working on the Ford Building. Dannenberg Tr. 155. Dannenberg explained that the project was in multiple phases at this point—while much of the design work for the project had been completed, other components were still being designed. Dannenberg Tr. 155-56. For example, the team was actively designing a series of working spaces that were to be incorporated into the landscape design. Dannenberg Tr. 156. Perez, by contrast, asserted simply that the project was "in construction" and did not elaborate. Perez Tr. 515-16. Dannenberg's work on the project was expected to continue well into 2024 and to include significant travel to the project site in Dearborn to observe construction, conduct field reports, and work with the contractor on technical issues that arose in the field. Dannenberg Tr. 142, 149, 156. When drafting the contract in place at that time, and the not-to-exceed figure included in it, Dannenberg had projected that he would be spending 100 percent of his working time on the Ford

Building through the end of calendar year 2023, then continuing with only a slight reduction in 2024. Dannenberg Tr. 156-57. Although Gordon testified multiple times that his responsibilities as Partner included handling contracts, Respondent did not question him about this contract. *See* Gordon Tr. 108, 610.

At this time, Dannenberg was also in the midst of developing a contract for the Rutledge Hill project. Dannenberg Tr. 155, 157. Rutledge Hill was a large-scale project that, as of March 30, Respondent forecasted as a "large earner." R06; Perez Tr. 568-69. By the June 29 Advisory Board meeting, Respondent's records were continuing to project Rutledge Hill as one of the firm's largest projects. R5 at 20; Perez Tr. 568-69. Rutledge Hill had been paused for a short time while the client recruited funding for the project, but restarted shortly before the layoffs, after the client notified Dannenberg that he was ready to move ahead and asked for a contract. Dannenberg Tr. 155, 157. Dannenberg began developing the contract and, by the end of July 2023, it was nearly complete. Dannenberg Tr. 155, 157. Presentation slides that Perez prepared around this time show that Respondent was projecting no reduction in billing on Rutledge Hill by the end of the year. GC085 at 7; Perez Tr. 570-71.

Perez testified that the Ford project was going into construction at this time and there was "redundancy with the management piece that was needed up to that point." Perez Tr. 515. Regarding Rutledge Hill, Perez claimed the Executive Team "had no reason to believe that it was going to move on to the next stages" at that time. Perez Tr. 515. Molinar did not recall anything about the Executive Team's discussion of Dannenberg. Molinar Tr. 720. Delk stated she "may have" contributed her observations from working with Dannenberg but did not recall what those were. Delk Tr. 669. Gordon testified only that he "didn't comment on Josh." Gordon Tr. 643.

The Business Justification Analysis stated Dannenberg was selected for layoff simply because "there is no longer business justification to employ a Senior Project Leader on the Ford project." R13 at 3.

On July 31, Dannenberg received a Zoom call from Newman and Coyne. Dannenberg Tr. 158. Newman told Dannenberg that he had been selected for the layoff. Dannenberg Tr. 158. Newman added that he wished Rutledge Hill had come back sooner. Dannenberg Tr. 158-59.

Approximately a week later, Danneberg saw multiple press releases announcing that Respondent's Rutledge Hill project would be proceeding. Dannenberg Tr. 160; GC027. At least one of the press releases he saw included a quote from Nathan McRae. Dannenberg Tr. 160; GC027 at 4. Rutledge Hill was never completed; the project died after the client failed to obtain funding. Perez Tr. 445-46.

C. Daniel Katebini & Arie Salomon

i. Katebini's Work on TRPL & Conversation with Molinar

Daniel Katebini began working for Respondent in April 2019 as a Project Architect. Katebini Tr. 178-79; R12(c) at 13. Approximately two years later, Respondent awarded Katebini a raise and a promotion to the title of Senior Project Architect. Katebini Tr. 179; GC030. Bonacci's email to Katebini confirming this salary and title change stated that it "distinguishes you as someone who is performing at the upper tier of your job category." GC030. As a Project Architect working on the Charlotte Mecklenburg Public Library project when he first started, Katebini oversaw the work of three designers and managed consultants, including mechanical engineers and structural engineers. Katebini Tr. 180-81. After his promotion to Senior Project Architect, Katebini's responsibilities expanded to include more client-facing and design-directing work. Katebini Tr. 180. Amont the Directors, Katebini worked most closely with Michael Cotton, Aaron

Dorf, and Matt McMahon. Katebini Tr. 181. Katebini worked directly with Director John Newman only once, briefly for a competition that took place 2021 or 2022. Katebini Tr. 181-82. That competition arose when a property owner reached out to three architecture firms, include Respondent, to solicit ideas for renovating a property on Park Avenue. Katebini Tr. 181. Respondent provided proposals to add glazing to the façade and renovate the building's lobby; this work spanned approximately two months. Katebini Tr. 181-82. Katebini worked directly Director Nick Anderson for one or two months at the beginning of Katebini's tenure. Katebini Tr. 182. Katebini never worked directly with Director John Oliver. Katebini Tr. 182-83.

While employed by Respondent, Katebini primarily worked on the Charlotte-Mecklenberg Public Lirbary, the Quarra Stone Master Plan, and the TRPL. Katebini Tr. 180-81. By the end of July 2023, Katebini was focused entirely on the TRPL. Katebini Tr. 194. His role was leading the design of all of the landscape structures of the project, which featured both a main building and a large landscape component including shade structures, bridges, and photovoltaic systems. Katebini Tr. 194-95. Project Designer Timothy Kunkel had a similar leadership role, with respect to the main building portion of the project. Katebini Tr. 195; R12(c) at 12 (providing Kunkel's title). Both Katebini and Kunkel were managing small teams and coordinating with engineers on the structures assigned to them. Katebini Tr. 195. Meanwhile, Project Designer Steven Kocher was also working on the building side of the project. Katebini Tr. 196; R12(c) at 7 (providing Kocher's title). At the time, TRPL was halfway through the particularly intensive CD phase and was ramping up. Katebini Tr. 196. The project was so busy that Katebini had elected to forgo vacation time that summer in order to focus on it. Katebini Tr. 196.

On July 20, less than two weeks before the layoffs, Molinar sent a Slack message to the Executive Team, noting that "Danny came to 'clear the air' about his role during the past months,

offering to 'help rebuild'. basically, he was begging for his job. but I refrained from suggesting how I thought he could best help. . .." GC070. Molinar testified that this conversation took place in a booth in the office and that she did not know what Katebini meant by "rebuilding the studio." Molinar Tr. 742. Asked what she meant by "I refrained from suggesting how I thought he could best help. . . ," Molinar answered that she "didn't have any ideas." Molinar Tr. 743.

On July 31, Katebini received a Zoom call from Bonacci and Molinar informing him that he was being laid off. Katebini Tr. 196-97.

ii. Salomon's Work on TRPL

Salomon was employed as a Designer II and began working for Respondent in February 2020. R12(c) at 8. By the time of the layoffs, Salmon, like Katebini, was working on TRPL.

iii. Respondent's Justifications & Discussions of TRPL

Gordon testified that TRPL project was "tailing down" by the time the Executive Team met to make layoff selections. Gordon Tr. 642. Regarding Katebini, Gordon testified that the discussion at these meetings was that "[w]e didn't have work for him . . . [s]o there was nothing to put him on." Gordon Tr. 642-43. Perez, too, claimed that Katebini was a "redundancy" on the project. Perez Tr. 511. Molinar did not contribute to the discussion of Katebini, but recalled "some talk about him having difficulty doing his job," which she explained was a reference to "[n]ot being able to facilitate or execute effective solutions." Molinar Tr. 719.

Both Gordon and Perez compared Katebini's work on TRPL with that of other employees also staffed on TRPL. Perez testified that the Executive Team felt Katebini's work could be done by Kocher, who was also among the 11 employees initially selected for layoff. Perez Tr. 511; R12(c) at 7. For her part, Molinar testified that Kocher "did good work, but he did it at an exceptionally slow pace" but he was needed for "an important task" on TRPL. Molinar Tr. 719,

722, 725-26. According to Gordon, Kocher was needed on TRPL to work on the fireplace in the building. Gordon Tr. 644. Per Perez's testimony, by contrast, Kocher was working on a canopy overhanging the building's entrance. Perez Tr. 510. Delk offered another yet account, testifying that Kocher was working "on a component of the project signage and wayfinding." Delk Tr. 667. Perez also addressed Kunkel's role on TRPL—testifying initially that Kunkel was a Project Architect who was more senior and had more experience than Katebini, a Project Designer. Perez Tr. 512. Respondent's counsel then pointed out that Respondent's documents directly contradict this characterization, showing that Katebini was in fact a Senior Project Architect, while Kunkel was a Project Designer. Perez Tr. 512-13; R12(c) at 7; R11 at 2. At that point, Perez conceded that Katebini had a higher title than Kunkel, but asserted that Kunkel had more scope and responsibility on TRPL. Perez Tr. 513. Perez did not provide any additional detail about Kunkel's role on TRPL.

While there was less testimony about the Executive Team's consideration of Salomon, Respondent similarly characterized his layoff as the result of "redundancy." Perez, who could not recall which project Salomon was working on at the time, testified that the Executive Team selected Salomon for layoff after looking at the recommendations from Directors and agreeing that "he stood out as a redundancy" and "wasn't needed." Perez Tr. 505. Molinar testified that the Executive Team "would have" discussed Salomon's "low level of engagement in his work," meaning he "was not that collaborative or productive." Molinar Tr. 717. Molinar provided no other details about Salomon's work. She had relatively little involvement with Salomon's work and testified that she probably did not make any comments about Salomon during the discussions. Molinar Tr. 718. Gordon testified that Salomon "was considered a low performer and there were teams that didn't want him." Gordon Tr. 627-28. Gordon testified that during the Executive Team meeting to discuss selections for layoff, he commented about Salomon that Salomon "didn't have

any energy" and "was a low performer." Gordon Tr. 641-42. He added that Salomon was doing a little work on TRPL, "but we were tailing down in that job." Gordon Tr. 642. Gordon offered no other details about Salomon's work. The Business Justification Analysis noted that Salomon was selected for layoff because his role was identified as "an operational redundancy" and there was no justification to transfer him from TRPL to another project. R13 at 2. The memo explained that TRPL, as of August 1, would not require any Designer I roles. R13 at 2.

Regarding Katebini, the Business Justification Analysis similarly stated his role—noted there as Senior Project Designer—was identified as an "operational redundancy." R13 at 3. TRPL, the memo explained, would "not require sustained workload for the current number of Senior Project Designer roles we have staffed on the Project" and there was no justification for moving him to a different project. R13 at 3. This characterization conflicts with other record evidence, which shows (1) Katebini was a Senior Project Architect and (2) both Kunkel and Kocher were Project Designers, not Senior Project Designers. *See* R12(c) at 7; Perez Tr. 512 (explaining that employees with 'architect' titles are licensed architects and employees with 'designer' titles are not licensed).

On July 31, the day of the layoffs, Matt McMahon sent a Slack message to a group including Larsen and Perez, stating "[a]lso it's probably worth stating that TRPL projections are in contradiction with layoff messaging." GC047 at 1. On August 3, three days after the layoffs, Michael Cotton started a Slack thread with Directors Dorf, Oliver, McMahon, and McRae, stating, "TRPL needs help picking up Danny scope," and proposing that "either Anna [Morrison] or Jake [Levine] to help with TRPL." GC106; *see* R12(c) at 8 (showing last names); Shaw Tr. 55 (explaining reference to "Jake" was Jake Levine). Cotton then asked Dorf and McMahon to "weigh in on TRPL needs." GC106. In response, Dorf wrote "Priority 1 is a Danny replacement (1 PA) -

complete design, coordination and documentation of the PV's // Priority 2 is a Catherine/Arie replacement (1 Des2 or above) - assist the team with Revit, pick up redlines etc."[33] GC106. McRae replied, "I think we can get you most of Jake or Anna starting Thursday this week to fill that Danny hole." GC106.

D. Araceli Lopez

Lopez, who was hired in July 2022, was employed as a Designer II. R12(c) at 7. By July 2023, her responsibilities included working on Ford Building and on the interiors team for UCSF. GC110; GC111. As of March 17, Schiffmann, the Director in charge of Interiors, had a positive view of her work. In response to a question from Cotton about Lopez's availability, Schiffmann responded "my understanding is she would not be unhappy to eventually work on something different then the UCSF interiors – but she is doing a good job.:thinking_face:" UCSF. GC110 (Schiffmann describing to Cornelius her conversation with Director Michael Cotton); *see* R12(c) at 7-10 (showing no other employee named Michael). Cornelius responded that Lopez should stay on the UCSF project "at least through DD." GC110. Lopez's skillset was desired on the Ford Building project. On June 5, Senior Project Designer Kristy Haag wrote to Bonacci, who had indicated she would be speaking with Perez and Molinar about Lopez's work on the Ford Building, that there was no end date for Lopez's work on the project. GC111; R12(c) at 8 (showing title). A week later, on June 13, Haag followed up with Bonacci, stating "I could really use more of Araceli's time on Ford." GC112. Bonacci responded, "I just had my HR catch up and discusses her being on Ford. Overall the thought is she should work on UCSF full-time. Especially if that is what the project needs. Her time on Ford is okay but needs to be capped at 8 hrs." GC112.

[33] Catherine Shih was a Designer II who had resigned. R12(c) at 9; R11 at 2.

Gordon, while looking at notes for the June 29 Advisory Board meeting that referenced "low performers," testified that Lopez "was tough to work with" and "was sort of non-collaborative." Gordon 627-28. Gordon testified that there was a complaint about Lopez from Alex Cornelius, but offered no other details. Gordon Tr. 628. Discussing the Executive Team meetings where layoffs were discussed, Gordon said he commented that Lopez was a "[n]on-collaborator." Gordon Tr. 642. Gordon could not recall what project Lopez was working on at the time of the layoffs. Gordon Tr. 642. Molinar did not "remember specifically" the Executive Team's discussion about Lopez, "except that there had been issues regarding her performance and she was also very difficult to work with." Molinar Tr. 717. Molinar did not make any comments about Lopez. Molinar Tr. 718. Perez, for his part, testified that the Executive Team considered complaints that Lopez was "unproductive" and "not collaborative." Perez Tr. 506. In particular, Perez referenced conflicts between Lopez and Project Designer Ana Sotelo, who was supervising Lopez's work on UCSF. Perez Tr. 507[34]; R12(c) at 8 (showing Sotelo's name and title). Perez testified that he learned of these complaints from Bonacci and, in the lay-off process, relied on a document she prepared on July 19. Perez Tr. 507-08, 561; R40[35]. The document references several meetings that purportedly took place beginning June 15 related to Lopez's work on Ford and the Interiors team for UCSF. R40. Perez was not present for any of the meetings referenced in the document and Respondent did not call Bonacci to testify. Perez Tr. 560. The document attributes to Cornelius comments that Lopez "could use improvement" in communication and to Designer II Rusell Low

[34] A transcript error appears on page 507, lines 16—instead of Ana Sotelo, the transcript reads "Anna Siltello (phonetic)."

[35] Respondent Exhibit 40 was admitted over General Counsel's hearsay objection and should not be relied upon for the truth of the matter asserted. Tr. 561. Perez's testimony established that Bonacci, who Respondent did not call to testify, prepared the document on July 19, based on information she received from employee Alex Cornelius. Perez Tr. 560. Perez was not party to any of the underlying communications. Perez Tr. 560.

and an unnamed employee comments that Lopez "can be challenging to work with." R40; R12(c) at 7 (showing Low's title). The document also notes an observation by Project Designer Nicole Passarella that Sotelo "can be overbearing." R12(c) at 8 (showing Passarella's title).

Perez's notes from the Director meetings reflect just two comments about Lopez—the first, attributed to Newman, references "issues with teammates." R12(c) at 3. The second is attributed to Schiffmann, noting that Lopez "is doing her work – with good output" but characterizing her as "from an interpersonal level not a good fit." R12(c) at 3.

The notes indicate that collaboration came up in discussions of other candidates, too. The notes for Julianna Cano, for example, reflect Plasse's view that she "can be argumentative" and is "[n]ot an easy collaborator." R12(c) at 3. According to these notes, Dorf, too, shared this view, stating Cano "can rub people the wrong way." R12(c) at 3. Discussion of Leslie Finnie, too, referenced her "challenges w/ fit on projects." R12(c) at 3. McMahon, per the same document, had similar critiques of Nicky Mercado, casting him as "[d]ifficult to share information – difficault to collaborate with." R12(c) at 4.

The Business Justification Analysis explained that Lopez was selected for layoff because her role was identified as "an operational redundancy." R13 at 2. UCSF would no longer need as many Designer IIs, the memo explained, and there was no justification for transferring her to another project. R13 at 2-3.

Lopez was laid off on July 31. GC001(L) at 7. The following day, Cotton told Oliver by Slack "we need to put Leslie [Finnie] on CD or CA work. I refuse to believe that she can't fill in for Arie or Araceli." GC117. Oliver responded "ok. I asked Kristy in the Ford meeting if she needed help since Araceli is gone. She is thinking about it but I see Alex has already suggested the same for UCSF interiors." GC117.

E. Leo Shaw & Amy Shell

Leo Shaw began working for Respondent in July 2019 as a Proposal Coordinator. Shaw Tr. 21; R12(c) at 14. His duties in that role are documented in a job listing. GC002. Nearly two years later, in May 2021, Shaw received a raise and a promotion to the position of Senior Proposal Coordinator. Shaw Tr. 23-24; GC003. At the time, he was notified that he was "performing at the upper tier of [his] job category." GC003. As a Senior Proposal Coordinator, Shaw's responsibilities included conducting research to identify and evaluate new business opportunities, making recommendations to the Executive Team about which opportunities to pursue, and managing the process of creating and submitting proposals, also referred to as request for proposals or RFPs, for those opportunities. Shaw Tr. 24-25. During the proposal process, Shaw was responsible for communicating with the prospective client, coordinating with any consultants, and supporting other members of Respondent's staff to develop a workplan. Shaw Tr. 25. Typically, clients select finalists from among the firms that provide proposals for a given project and then interview those finalists; while he assisted with preparations for such interviews, Shaw did not participate in them directly. Shaw Tr. 26.

Amy Shell was also employed by Respondent as a Senior Proposal Coordinator, beginning approximately in February-March 2022. Shaw Tr. 27; Shell Tr. 212; R12(c) at 15. Though Shell and Shaw usually worked on distinct proposals, they performed similar functions. Shaw Tr. 27. Shaw and Shell's role was sometimes referred to as the "ACQ team." Gordon Tr. 623. Their roles required working particularly closely with the Partners. Shell Tr. 213. Both attended weekly "new business" meetings with the full Executive Team, along with several Directors, to discuss new business opportunities and to discuss the status of proposals. Shaw Tr. 28-29, 34, 75, 92-93. In preparation for these meetings, Shaw and Shell were expected to conduct research in order to make

recommendations to the Executive Team about various opportunities, based on factors including: the project's fee and size, relationships with the client that might make it more or less likely that the firm would be successful in pursuing the project, and any partnerships with other architectural firms that might be necessary. Shaw Tr. 30. In addition, Shaw attended a weekly "forecasting" meeting with Gordon, Delk, and Bonacci, and various Directors that aimed to understand on a week-by-week basis. Shaw Tr. 30-31. Shaw attended these meetings from January through June 2023 and did not recall any discussions of layoffs during these meetings. In practice, Shaw and Shell coordinated most directly with Delk and Gordon, though on paper they reported to Director of Communications and Business Development Alan Brake. Shaw Tr. 26-27, 74. Shaw and Shell both utilized a shared email inbox for internal communications, Snus-NewBusiness. Shaw Tr. 34; GC004.

i. Gordon criticizes Shaw's Performance Beginning in May 2023

In May 2023, Shaw had a Zoom call with a Joe Chisholm, a representative from the University of California San Diego ("UCSD"), about a potential project for a large dormitory. Shaw Tr. 32, 75. Shaw testified that during this call, he provided a general overview of the firm and mentioned that "while Snøhetta did not have extensive experience completing residential projects of that high-rise type, it was very typical for us to partner with architects of record who had local experience and experience in the building project type." Shaw Tr. 32. Shaw spoke about architects of record with other prospective clients because it was an important relationship that would be evident in a proposal, which would include Respondent's qualifications along with those of any partner architect of record. Shaw Tr. 32-34. Following the call with Chisholm, Shaw sent a summary of the call to Molinar, Gordon, and Delk and noted that Chisholm was "not too worried

about a lack of housing experience" and was "comfortable with a design arch with other experience." GC004; Shaw Tr. 34.

Gordon testified that he soon thereafter received a call from Chisholm who "was a little confused" because Chisholm felt Shaw had suggested Respondent did not have the experience necessary to do the project. Gordon Tr. 632. Gordon emailed the Executive Team and Bonacci about the conversation on May 22, stating "we may have lost the chance of being considered." Gordon Tr. 632; R17 at 1. On June 16, Gordon emailed the group again to note that Chisholm had not returned Gordon's subsequent outreach. R17 at 1. In the next new business meeting approximately a week later, Dykers and Gordon told Shaw that Chisholm had reached out to them about the conversation, reporting that Shaw gave the impression that Respondent did not have extensive experience in that type of project. Shaw Tr. 35, 75-76, 92-93. Shaw apologized for creating any miscommunication by possibly conveying that Respondent was unprepared to do the UCSD project. Shaw Tr. 35-36, 93. Shaw was not disciplined. Shaw Tr. 35-36; Gordon Tr. 633. Gordon claimed that Shaw was not disciplined because "we already knew that we were going to change our ways and eliminate this proposal team." Gordon Tr. 633. Afterwards, Shaw continued working with Gordon on this UCSD opportunity, specifically by researching and establishing communications with potential architects of record who could partner on the project. Shaw Tr. 36. Respondent remained in consideration for the project and subsequently advanced to and participated in the interview stage of consideration. Gordon Tr. 652-53.

On June 16, two days after the union election, Shaw and Gordon exchanged emails about an RFP for a "mind exploratorium." GC021. In his initial email, Shaw noted his belief that Respondent did not "have any business pursuing this, but if you'd like to forward on to HGA, that could make sense." GC021. HGA referred to a large national architecture practice who was serving

as Respondent's architect of record for a laboratory project Respondent was working at the time at the University of California San Francisco, so Shaw believed HGA would have the requisite experience to be a partner on the Exploratorium project. Shaw Tr. 78, 95. When Gordon responded asking what Shaw meant about not having business pursuing the project, Shaw wrote back within hours, stating "I only meant pursuing without a partner / prime with lab expertise," like HGA, and suggesting research "on other potential partners besides HGA as well." GC021. The next day, June 17, Gordon forwarded Shaw's initial email to Bonacci and noted: "Please review. This is a project that we should definitely look at as a pursuit. In no way should Leo have dismissed this." R01. Gordon's forwarded email omitted Shaw's response that clarified his proposal to partner with HGA or another partner. R01; GC021. When asked by the ALJ, Gordon claimed Shaw's follow-up email did not alleviate his concerns about Shaw's initial email because Respondent definitely needed a partner because "[w]e're not lab specialists." Gordon Tr. 656-57. Shaw was not disciplined over these communications—Gordon claimed that was because the decision to eliminate the proposal team had already been made. Gordon Tr. 636. He added that neither these communications nor those around the UCSD project were the reason Shaw was included in the layoffs, because "we were already going to get rid of that team." Gordon Tr. 636.

ii. Respondent Decides to Eliminate the Proposal Coordinator Role

According to Gordon, by December 2022 he already believed "it was directors who needed to take over the RFP process and the new business process." Gordon Tr. 623-24, 628. Gordon gave this testimony while looking at two specific lines in the Business Development Update for the December 2022 Advisory Board meeting. Gordon Tr. 623-24.[36] At this point, Directors were

[36] These lines read: "2. Develop a system for onboarding Directors to help track Long Lead ACQ opportunities earlier in the process to help gather due diligence on teaming, identify stakeholders, and keep in contact with partners. 3. Prepare key director-level staff to become RFP competition managers, who will better track budget, resources, and schedule." R39.

already involved in supporting business development efforts. Perez Tr. 591. There is no reference in this document to Directors taking over the work performed by Shell and Shaw, nor to eliminating the proposal coordinator positions. *See* R39.

Gordon also testified, again while looking at meeting notes, that there was discussion at the March 30 Advisory Board meeting "[a]bout coming up with the right way or a new way to do business development." Gordon Tr. 622; R06. Perez, also testifying in reference to these notes, left the meeting with a task to speak with the Norway-based Snøhetta about their ACQ process—the notes mention that "they do a lot of design competitions, as well as RFPs"—but he did not recall any outcome of that conversation. Perez Tr. 432-33; R06 at 5, 7. The meeting minutes also reflect Newman's role in business development and the ACQ process, including "asking who is right for each proposal's team" at the "beginning of any new" business development. R06 at 2-3.

The first document to reference an expanded role for Directors in the acquisitions process is the meeting notes that were distributed up to a week after the June 29 Advisory Board meeting. [37] R08; Perez Tr. 448-50. The document lists, as an action item, "[r]econfigure Director scope to include New Business pursuits." R08 at 1. While looking at this language, Gordon testified it meant "that the directors need to take on new business and everything associated with it." Gordon Tr. 625; R08 at 1. The minutes also reference a "suggest[ion] that a Director be assigned to lead each new business effort," which Perez testified referred to "starting to begin that shift or that reorganization . . . where directors were going to take a direct role in the production of proposals." R08 at 2; Perez Tr. 454. The individuals assigned to this line in the minutes, and to the task of having a meeting "to refine ACQ process," are Michelle Delk, Alan Gordon, and John Newman. R08 at 2; *see* R06 at 1 (listing Advisory Board members and their initials). Perez, who did not

[37] Perez did not know when these particular notes were distributed, but he asserted that they are "usually" distributed within a week of the meeting. Perez Tr. 449-50.

address these repeated references to Newman, asserted that Directors were not involved at all in the discussions on deciding to change Directors' role in the business development work. Perez Tr. 455.

While Gordon testified that the Executive Team decided to discharge Shaw and Shell "well before" June 2023, he offered no specificity about the timing of that decision, apart from noting "[w]e were talking in 2022." Gordon Tr. 628-29. Perez, for his part, claimed that the Executive Team decided "that directors could take on more of the responsibility" for acquisitions and thus decided to lay off Shell and Shaw sometime before March 30. Perez Tr. 436, 458-59, 517. Delk, by comparison, in the context of the process of selecting employees for lay off in late July, that the Executive Team had "decided previously that we needed to approach our new business team and our efforts for getting new business a little differently." Delk Tr. 669. Thus, Delk asserted, the conversation about Shaw and Shell at the layoff selection meeting was about "not needing those roles or filling those roles with different people." Delk Tr. 669-70. Delk testified about discussions "quite a while before" the July layoff selection about "wanting to make a change" to business development efforts and "to focus more on the work our directors could be doing"—but she did not provide any detail about when these discussions took place, or when the Executive Team decided, as part of the intended changes, to lay off Shell and Starkman. Delk Tr. 670. Molinar, testified that discussions about restructuring the process for pursuing new projects started "[e]arly in the year." Molinar Tr. 722.

The first document to reference Respondent's plan to lay off both Shell and Shaw is a letter by Gordon dated July 26, less than a week before the layoffs. This July 26 letter discusses Shaw's communications regarding the UCSD and mind exploratorium projects, lays out recent project losses, and concludes that a group of Directors should take over the business development work.

R17. While Gordon reported writing the letter because Bonacci asked him to do it "as a record," he initially sent it only to Molinar. Gordon Tr. 637; R17 at 6-7. The letter concludes by laying out a proposed structure for business development work. In addition to Directors, employees Donesh [Ferdowsi], Chad [Carpenter], and Jake [Levine] would also assume roles in the newly reorganized department. R17 at 10; *see* R12(c) at 11-13 (providing employee names). The letter does not reference any previous decision by the Executive Team to lay off Shell and Shaw. *See* R17 at 6-10.

The Business Justification Analysis similarly did not reference any earlier decision to lay off Shell and Shaw. *See* R13 at 4. Instead, the memo noted simply that Respondent had "identified that there is no longer business justification to maintain a New Business Department" and would be distributing tasks to Directors and other employees as needed. R13 at 4.

Molinar's July 31 letter to remaining staff said the following about the Business Development department: "We're at a point where we need to redefine our approach to New Business. While we develop a new approach, we will be dispersing the tasks associated with pursuing new business amongst some of the design staff who have availability and interest. Led by the Executive team with Directors." R16 at 1. The same day, Molinar sent a Slack message to the Executive Team, noting "I can't remember where we left this: meeting with the Directors to assess the current new business needs and as well as a way forward re a new approach." GC095.

iii. Layoffs & Later Developments

On July 31, Bonacci and Gordon informed Shaw by Zoom that he was being laid off, because his position "was no longer needed" and the department was being eliminated; neither one mentioned Shaw's performance. Shaw Tr. 64-65. Shell, too, was laid off on this date. GC001(L) at 7.

A week after the layoffs, a group of Directors and Delk exchanged emails about a forthcoming RFP. GC102 at 3. In response, Cotton wrote: "Have we appointed anyone to track these opportunities? In the past when someone reached out, I would immediately forward to Amy and Leo. Who fills that role now?" GC102 at 1. Delk replied to Cotton: "We've not yet formalized who will help track and follow-up on opportunities." GC102 at 1. Later in the month, on August 28, Director Matt Ostrow wrote to Cotton that he was "trying to get this resort proposal out by thursday as well – but without leo or amy it is not ideal." GC109.

Around that same time, between August 25 and 29, Shaw saw a job posting on Respondent's website for a Communications Coordinator. Shaw Tr. 66-68, 79; GC020. The posting encompassed multiple duties that Shaw had performed as a Senior Proposal Coordinator, including generation of graphics and other content for RFPs and RFQs and information gathering and reporting on market conditions and clients. Shaw Tr. 69; GC020; GC002 (listing Shaw's duties as Proposal Coordinator). Respondent had hired Taylor Rogers to the position of Communications Coordinator on March 20. Perez Tr. 567; R12(c) at 9. Before Shaw's layoff, Rogers did not perform any duties related to generation of content to support marketing and business development efforts, including RFPs. Shaw Tr. 80; Perez Tr. 594. Perez testified, while looking at a list of job postings with notes, that Respondent posted the Communications Coordinator job because Rogers resigned. Perez Tr. 542; R20. According to Perez, Respondent then removed the posting because Rogers rescinded her resignation. Perez Tr. 542. Apart from notes Bonacci completed at an unknown time after the charges in this case had been filed, there is no documentary evidence of these purported communications between Respondent and Rogers. *See* Perez Tr. 544 (addressing creation of R20); R20 (including entry on October, 2). By its own admission, Respondent closed the job posting on

August 29, the same day that Charging Party filed the first charge in this matter. R20; GC001(A). Respondent has not hired any "proposal coordinators" since July 2023. Perez Tr. 545.

F. Jordana Starkman

Jordana Starkman began working for Respondent in September 2022 as a Knowledge Management Project Coordinator. Starkman Tr. 222; R12(c) at 15. She was the first person at the firm to have that title and no one else held it at the same time as her. Starkman Tr. 222. Perez, whose responsibilities include Knowledge Management, defined it as a way to create a learning environment in the office with respect to design and new technologies. Perez Tr. 297. Starkman's responsibilities included managing the materials and book libraries, handling intranet maintenance, and coordinating learning programs, including events like lunch-and-learn programs by accredited vendors and "knowledge cafes." Starkman Tr. 222, 233-34. During knowledge cafes, employees gather for a presentation by another employee, followed by a group discussion or exercise. Starkman Tr. 222-23. Starkman's work facilitated information-sharing within the firm, reducing the time employees would need for research. Starkman Tr. 223. In this role, Starkman reported to Director Kate Grimes; she never worked directly with Newman. Starkman Tr. 224.

At the end of July 2023, Starkman was working on onboarding a new intranet system, including testing a system called Knowledge Architecture. Starkman Tr. 229. Additionally, Starkman was working on a phase closeout process for the firm. Starkman Tr. 229-30. The purpose of this process was to capture specific knowledge about the aspects of a given phase as it was ending, to ensure that emails, papers, and materials were not lost. Starkman Tr. 230-31.

Perez asserted that the Executive Team decided at some point prior to March 30 to lay off Starkman, because her position was "not necessary" for Respondent's "core business." Perez Tr. 436, 458-59. Around the same time, Perez explained, the Executive Team had decided to lay off

the business development team (Shaw and Shell). Perez Tr. 458-59. The first documentation of the Executive Team's decision to eliminate Starkman's position is the Business Justification Analysis completed in late July. *See* R13.

In response to Perez's request that Directors provide their recommendations for layoff, Grimes initially nominated Shaw, Shell, and Starkman, but later followed up to detail Starkman's ongoing work, which she described as "incredibly important to continue," and to state her preference for retaining Starkman if possible. R11 at 74.

Asked about the Executive Team meetings to select employees for layoff, Perez testified again that Starkman's role "wasn't necessary" for Respondent's "core business." Perez Tr. 516. Asked about the same meetings, Gordon thought he made a comment that lunch and learns could be coordinated by the vendor companies who provide those trainings. Gordon Tr. 643. Delk recalled the Executive Team discussing Starkman's role as not critical to the office. Delk Tr. 669. Molinar recalled discussions at these meetings about Starkman's role being "non-essential." Molinar Tr. 720-21. Neither Gordon nor Delk nor Molinar mentioned the Executive Team making any decision before July to lay off Starkman or eliminate her position. The Business Justification Analysis noted that Respondent had identified there was "no longer business justification to employ a Knowledge Management Project Coordinator" and would be reallocating Starkman's tasks to other employees. R13 at 4.

On July 31, Starkman received a computer call from Oscar Perez and Jay Coyne who informed her that she was being let go. Starkman Tr. 231. They did not mention her performance. Starkman Tr. 231. Molinar's July 31 letter to remaining staff stated that "Knowledge Management efforts will be restructured so that staff throughout the firm will support ongoing KM projects. More information will be forthcoming." R16 at 1.

IV. Severance Agreements

Respondent offered severance agreements to all eight discriminatees. These severance agreements conditioned the payment of severance benefits on the waiver of certain rights. The agreements included the following provisions:

> 7. General Release of All Claims. You knowingly and voluntarily release and forever discharge the Company of and from any and all claims, known and unknown, which you, your heirs, executors, administrators, successors, and assigns have or may have as of the date of execution of this Agreement against the Company. You understand that you release and forever discharge the Company from any and all claims including but not limited to any alleged violation of:
>
> . . .
>
> J. the National Labor Relations Act, as amended
>
> . . . .
>
> 9. No Lawsuits Exist and No Lawsuits Will Be Filed. You understand you are waiving all claims, whether known or unknown to you, and whether or not you suspect that those claims exist or might exist as of the date of execution of this Agreement, except as such waiver is prohibited by law. You confirm that no lawsuit, demand, action or charge against the Company exists or has been filed in any forum or form on your behalf. You promise not to file any lawsuit, demand, action, charge or otherwise assert any claims that are released in Paragraph 7 of this Agreement. Nothing in this Agreement precludes you from filing and/or participating in an administrative complaint or charge brought before any federal, state, or local governmental or administrative agency. Should any such charge or complaint be filed, you agree you will not accept any relief or money from it.
>
> 10. Remedy for Breach of Promises. In the event you breach any of your obligations under this Agreement or commence, join, or otherwise assert an action based on events related to your employment with, or separation from, the Company which is precluded by this Agreement, you will forego the right to further payment under this Agreement and will repay any money paid under this Agreement, including amounts paid for insurance coverage, together with the maximum interest allowed by law, and pay all of the Company's costs, including, without limitation, reasonable attorneys' fees, for prosecution or defense of the claim. The Company will be entitled to

any further relief as deemed appropriate by any court or other relevant tribunal.

. . . .

11. Confidential Information. You acknowledge that, in the course of your work for the Company, you had access to Confidential Information (as defined below) concerning the Company, its products, customers, and methods of doing business. You acknowledge that the Company has developed, compiled, and otherwise obtained, often at great expense, this information which has great value to the Company's business. You agree to hold in strict confidence and not disclose any Confidential Information, directly or indirectly, to anyone outside of the Company, or use, copy, publish, summarize or remove from Company premises such information. For purposes of this Agreement, the reference to "Confidential Information" means all information and any idea in any form, tangible or intangible, whether disclosed to or learned or developed by you, pertaining to or affecting the business of the Company or other affiliated companies, their clients, consultants, or business associates unless: (i) the information is or becomes publicly known through lawful means not requiring the permission or license of the Company; (ii) the information was rightfully in your possession or part of your general knowledge prior to her association with the Company or by virtue of your activity not related to your association with the Company; or (iii) the information is disclosed to you without confidential or proprietary restriction by a third party who rightfully possesses the information (without confidential or proprietary restriction for the benefit of the Company) and did not learn it, directly or indirectly, from the Company on a confidential basis. The parties further agree that the following information is included, without limitation, in the definition of Confidential Information: (i) processes, trade secrets, electronic codes, designs, computer software, source codes, proprietary techniques, inventions, improvements and research projects; (ii) information about costs, budgets, profits, markets, employees, sales, clients, customers, or vendors; (iii) plans for future development and new concepts and marketing; and (iv) all documents, books, papers, drawings, models, sketches, studies, consultants' reports and other data of any kind and description, including electronic data recorded or retrieved by any means, that have been given to you by the Company or other affiliated companies which is not of a public nature, as well as written or oral instructions or comments regarding any of the same. You further acknowledge that this provision is of the essence of this Agreement, and that the Company would suffer irreparable harm in the event of any breach of this provision. If you disclose Confidential Information to a government official or attorney for the sole purpose of reporting or investigating a suspected violation of law, you may not be held liable under federal or state trade secret law for such disclosure and may be granted immunity by a court of proper jurisdiction.

> 12. Non-Disparagement; References. The parties shall not make any statement to any third party, orally or in writing, that is reasonably calculated to discredit, ridicule, discount, disparage, adversely affect the business reputation of, or reduce the income of the Company. For example, you may not make any, disloyal, unlawful, or other improper statements or conduct; discredit, ridicule, discount, or disparage your coworkers; sharp, public, disparaging attacks on the quality of the Company's products or services, or its business policies; or malicious, or reckless, false statements disparaging the Company's products or services. Nothing in this Agreement is intended to, or has the effect of, restricting your right to engage in concerted activity or other legally protected activities (which includes discussing the terms and conditions of employment for mutual aid and protection) or otherwise engaging in activity protected under the NLRA. The Company acknowledges that it has not made and will not make disparaging statements or take any disparaging actions, from the date of this Agreement forward, and agrees to only verify the position you held with the Company and your salary in response to any requests the Company receives for a reference.
>
> 16. Entire Agreement. This Agreement contains the entire agreement between the parties and supersedes and terminates any and all previous agreements between the parties, whether written or oral, except for the Company's Protective Agreement, which you previously signed, which is attached to this Agreement (where applicable), and which shall remain in force and effect in accordance with its terms. With that exception, all prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. No waiver by either party of any provision or condition of this Agreement at any time shall be deemed a waiver of such provision or condition at any prior or subsequent time or of any other provision or condition at the same or any prior or subsequent time.[38]

Additionally, the agreements proffered to Anderson and Dannenberg contained the following provisions:

> 25. Time Limit for Execution. You have a period of up to forty-five (45) calendar days to review and consider this Agreement before signing it. The signed agreement should be submitted to Tina Bonacci (tina@snohetta.com, 80 Pine Street, 10th Floor, New York, NY 10005). You may use as much of this forty-five (45)-calendar day period as you wish prior to signing.

[38] GC018; GC026; GC029; GC035; GC036; R18.

> 26. Revocation. This Agreement contains a release of certain legal rights which you may have, including rights under the Age Discrimination in Employment Act ("ADEA"). You are advised to consult with an attorney regarding such release and other aspects of this Agreement before signing this Agreement. You are entitled to change your mind an revoke this Agreement within seven (7) calendar days of signing it (the "Revocation Period"). Any revocation within this Revocation Period must be submitted, in writing, to Tina Bonacci and state, "I hereby revoke my acceptance of our Separation Agreement and General Release." The revocation letter either must be mailed to 80 Pine Street, 10th Floor, New York, New York 10005and be postmarked within the Revocation Period or must be received by email to Tina Bonacci, tina@snohetta.com, within the Revocation Period. If the last day of the Revocation Period is a Saturday, Sunday or legal holiday, then the Revocation Period shall not expire until the next day which is not a Saturday, Sunday or legal holiday. If you revoke this Agreement during the Revocation Period, it will not be effective or enforceable and you will not receive the payment or benefits described in Paragraph 2 of this Agreement. If you do not revoke this Agreement within the Revocation Period, the Agreement shall become effective on the eighth (8th) calendar day after the Company's receipt of your signed copy of this Agreement. To become effective, this Agreement must be countersigned by the Company.[39]

The agreements proffered to Katebini, Lopez, Salomon, Shaw, Shell, and Starkman, by contrast, contained the following provision and no equivalent provision for revocation:

> 24. Time Limit for Execution. You have a period of up to three (3) calendar days (August 10, 2023) from receipt of this Agreement to review and consider this Agreement before signing it. The signed agreement should be submitted to Tina Bonacci (tina@snohetta.com, 80 Pine Street, 10th Floor, New York, NY 10005). You may use as much of this three (3) calendar day period as you wish prior to signing. To become effective, this Agreement must be countersigned by the Company.[40]

The agreements containing the above language replaced agreements that Respondent had initially offered to the discriminatees that included confidentiality language requiring employees to keep the financial terms of the severance agreements confidential. Perez Tr. 536-37; R34. In an August 7 email sending the revised agreement to Starkman, Bonacci stated “our intention is not to limit

[39] GC026; GC029.
[40] GC018; GC035; GC036; R18.

your ability to discuss the terms of your employment with us or your separation from employment." R34. There is no evidence that similar language was sent to any of the other discriminatees.

Seven of the eight discriminatees signed agreements. GC026; GC029; GC035; GC036; R18. They were not eligible for severance pay if they did not sign an agreement. *See* R33 (indicating employees laid off on July 31 would receive pay through August 1). Shaw did not sign an agreement and did not receive any severance pay. Shaw Tr. 64; GC018.

V. Compliance with Preservation-of-Evidence and Production Obligations

During the investigation into the underlying unfair labor practice charges, the Region sent Respondent three reminders of the obligation to preserve evidence. Charging Party filed the initial charge in this case on August 29. GC001(A). Respondent admits receiving this charge on or about August 31. GC001(L) at 2. The docketing letter accompanying the charge contained the following paragraph:

> Preservation of all Potential Evidence: Please be mindful of your obligation to preserve all relevant documents and electronically stored information (ESI) in this case, and to take all steps necessary to avoid the inadvertent loss of information in your possession, custody or control. Relevant information includes, but is not limited to, paper documents and all ESI (e.g. SMS text messages, electronic documents, emails, and any data created by proprietary software tools) related to the above-captioned case.

GC077 at 2; *see id.* (attaching copy of charge). Charging Party filed the second charge in this case on October 31. GC001(C). Respondent admits receiving this charge on or about November 6. GC001(L) at 2-3. The docketing letter accompanying the charge contained the same preservation-of-evidence language quoted above. GC079. On October 31, Senior Field Examiner Paula Gomez emailed Respondent's counsel a letter requesting evidence related to the layoffs; this letter, too,

contained the preservation of evidence letter. GC078 at 3 n.1. Among the letter's requests were requests for three different email exchanges involving John Newman. GC078 at 3, ¶ 3.

Respondent produced CFO Oscar Perez as their custodian of records. *See* Tr. 294. Perez served as Respondent's party representative and was present for the testimony of all witnesses that preceded him. Perez Tr. 387. Perez testified that he and Director Kate Grimes were the two Snøhetta employees responsible for collecting documents pursuant to General Counsel's subpoena. Perez Tr. 296-97. Grimes conducted the Slack searches. Perez Tr. 296. Respondent reported searching the Slack accounts of sixteen people: the five Executive Team members, nine Directors, and HR staff Tina Bonacci and Jason Coyne. *See* R35; R36; R37; R38.[41] These same individuals were asked to conduct searches on their own email accounts. Perez Tr. 301. CFO Perez testified he "assume[s]" that individuals are able to delete emails from their accounts, and, if they do so, any deleted emails would not be found by such searches. Perez Tr. 302. Perez similarly indicated he believes that individuals can delete Slack messages from their accounts. Perez Tr. 302.
CFP

Perez was not aware of Respondent having any policy regarding employees deleting messages from their email or Slack accounts. Perez Tr. 303. Neither Respondent's counsel, nor Perez was not aware of any litigation hold policy at Snøhetta. Tr. 247-48; Perez Tr. 303. Perez asserted that Respondent's counsel, who Respondent retained before March 30, instructed Respondent to ensure they had all relevant information. Perez Tr. 304, 434. But Perez also testified that he had no recollection of whether or not Respondent's counsel instructed Respondent to preserve information. Perez Tr. 304-05. Perez had no knowledge of whether Respondent instructed anyone on staff to preserve information related to the charges. Perez Tr. 305.

[41] Respondent Exhibits 35 through 38 were admitted over General Counsel's hearsay objection. Given the lack of explanatory testimony, these documents deserve little weight.

It is undisputed that email and Slack accounts of supervisors or agents who Respondent no longer employed at the time of the hearing could not be searched for materials responsive to General Counsel's subpoenas. Respondent's documents confirm that, of the 15 Directors employed as of July 2023, only nine Slack accounts were searched. *Compare* R12(c) at 14-15 (listing Directors employed in July 2023), *with* R35 (listing Slack accounts searched). The remaining six Slack accounts are those that belonged to the following Directors whose employment ended on the following dates: Nicholas Anderson, June 20, 2025; Alan Brake, July 11, 2025; Jonathan McNeal, December 24, 2024; John Newman, August 31, 2025; Darlene Montgomery, June 11, 2025; and Matthew Ostrow, November 30, 2023. Tr. 352-53. Director John Newman's employment ended because Respondent terminated him. Perez Tr. 306. The email accounts of these six Directors, like their Slack accounts, could not be searched. Tr. 247.

Perez testified that Slack and email accounts of discharged employees are deleted "[i]mmediately after they get terminated" and the policy is no different for employees who voluntarily resign. Perez Tr. 306-07. Contrary to Perez's representations, however, internal communications indicate that Respondent retains accounts for up to a year following an employee's departure. In December 2023, Grimes sent a Slack message explaining that email accounts of departing employees are Respondent's email retention policy: "Emmett and I will have to treat your email account as we would any employee terminating employment at Snohetta U.S. We will put it in holding for up to 12 months and then it will be deleted." GC080. The deletion of email accounts is carried out by Snøhetta in Oslo, upon notification from Respondent of the person's departure, and Slack accounts are deleted by in-house by Director Kate Grimes. Perez Tr. 307-08.

Perez claimed that Respondent shares an email platform with the Norway-based Snøhetta company and is thus compelled by "an EU law" to delete employee emails, but he could neither identify the law nor provide additional details about its requirements. Perez Tr. 389-90, 564-55. Perez did not provide any testimony regarding why Respondent deletes Slack accounts.

Respondent produced several images from Slack that look different than the remainder of the Slack messages produced. *Compare* GC047; GC048, *with* GC080. Perez explained that these images show Slack as it appears to Respondent's staff when using it in the course of their work. Perez Tr. 311. Many of these messages cannot be read in their entirety. *See* GC047; GC048. Notably, these incomplete messages include a message from Matt McMahon to a group including Kate Larsen and Oscar Perez on July 31, stating "Also it's probably worth stating that TRPL projections are in contradiction with layoff messaging. … As I mentioned landscape is seeing -.5% profit on the project, yet architecture is targeting ... " GC047 at 1. A June 9 message from Elaine Molinar to "execteam" reads: "Now that we know a bit more about Sam B, wouldn't he be a better election observer than JJ?" GC048 at 1. Another message from Molinar, this one on June 30, reads: "I just learned some news that will help us with our restructuring timeline. It can occur during the 7 day period after election, if yes vote, there is no certification until after the 14th, so no reason to involve outside parties in ... " GC048 at 1. There is no dispute that Respondent did not produce these messages in their entirety to General Counsel, despite General Counsel's requests. Tr. 370, 372-73. Respondent provided no explanation for why it was unable to produce these messages. Tr. 374.

ARGUMENT

I. Respondent, by Director Darlene Montgomery, Violated Section 8(a)(1) of the Act By Threatening Employees with Discharge if They Engaged in Protected Activities

A. Legal Standard

An employer violates the Act by stating that employees seeking improved working conditions should quit rather than unionize. *See e.g.*, *Starbucks Corp.*, 373 NLRB No. 123, slip op. at *1 (Oct. 2, 2024) (collecting cases and emphasizing that "the Board has long held unlawful employers' statements that employees dissatisfied with working conditions should quit rather than try to improve them through union activities"); *Roma Baking Co.*, 263 NLRB 24, 24-25, 27 (1982) (adopting ALJ's finding that employer violated the Act by the statement that if employees "did not like their jobs they could quit"). In the Board's longstanding view, these statements are coercive because—by implying that union support is at odds with continued employment—they convey an implicit threat of discharge. *See, e.g.*, *Starbucks Corp.*, 373 NLRB No. 123, at *1 (collecting cases); *Jupiter Med. Ctr. Pavillion*, 346 NLRB 650, 651 (2006) (noting that such statements suggest "that support for the union is incompatible with continued employment" and "coercively imply that employees who engage in such activity risk being discharged"); *Paper Mart*, 319 NLRB 9, 9 (1995) (finding an employer's statement, during a discussion about union solicitation, that an employee should seek employment elsewhere if he was unhappy constituted an implicit threat of discharge); *Padre Dodge*, 205 NLRB 252, 252 (1973) (finding violation where employer rhetorically asked a known union organizer "why, if he was not happy on the job, did he continue his employment," because "[s]uch remarks clearly convey to an employee the threat that management considers engaging in union activities and continued employment essentially incompatible").

For the same reasons, it is also unlawful for employers to invite employees to quit in response to their protected activities. *See, e.g.*, *Medco Health Sols. of Las Vegas, Inc.*, 364 NLRB 1687, 1688 n.4 (2016) (finding that the employer's statement—made in response to an employee's protected act of wearing a shirt protesting an employment condition—that if the employee could not support the employer's policies, then perhaps "this wasn't the place for him" violated Section 8(a)(1) of the Act); *Starbucks Corp.*, 374 NLRB No. 9, slip op. at *2 (Dec. 16, 2024) (agreeing with ALJ that employer violated the Act when a manager, in response to an employee's comment that she wanted better wages and working conditions, told the employee there were jobs at other companies that offered better pay), *enf'd in rel. part*, 179 F.4th 321, 326 (5th Cir. 2026).

Importantly, the Board has made clear that employer statements of this nature are unlawful even when they do not explicitly reference a union or protected activity. For example, in *Jupiter Medical Center Pavillion*, the Board reversed the ALJ and concluded that the employer had violated the Act when an administrator suggested to a vocal union supporter, in response to her disclosure that she was a relatively new employee, "[m]aybe this isn't the place for you … there are a lot of jobs out there." 346 NLRB at 651. Rejecting the dissent's argument that this comment and the union supporter's disclosure that directly preceded it were unrelated to union activity, the Board pointed out that administrator made the statement at a meeting the employer had called to campaign against the union and that the union supporter had previously referenced working conditions that she believed motivated the union campaign. *Id.*

B. Application

Here, credible testimony, record evidence, and the lack of any contrary testimony all clearly establish that Director Darlene Montgomery, Respondent's admitted supervisor or agent, invited employees to quit in response to their union activities. Both Shaw and Katebini recalled

Montgomery telling employees who had gathered for Respondent's union town hall that if they were unsatisfied working for Respondent they could leave for a job at Starbucks. Their accounts are notably similar, with Shaw recalling Montgomery saying, "if you're more interested in compensation than design mission, you could work somewhere else like Starbucks" and Katebini remembering a comment to the effect of "if the conditions or the pay at Snohetta is so bad, you can always leave and take . . . a design position at Starbucks that pays like twice as much." Shaw Tr. 56; Katebini Tr. 189.

The omission of Montgomery's statement from Katebini's affidavit is not a reason to discredit his testimony on this point. The Board has repeatedly affirmed ALJs who recognized that a witness should not be discredited solely because their affidavit omits some facts about which they testified. *See, e.g.*, *Nat'l Grid USA Serv. Co., Inc.*, 348 NLRB 1235, 1247 (2006) (affirming ALJ who credited a witness's testimony regarding facts that were omitted from his affidavit and noted that this omission may merely reflect which questions the witness was or was not asked "when he gave the affidavit to the Board agent"); *Am. Wire Prods., Inc.*, 313 NLRB 989, 989, 993 (1994) (affirming ALJ who credited an employee's testimony regarding a meeting with a manager, finding the omission of this meeting from the employee's affidavit "immaterial"); *Gold Circle Dep't Stores*, 207 NLRB 1005, 1010 n.5 (1973) ("The fact that certain facts remained unmentioned in an affidavit may give one pause but it hardly amounts to impeachment of a witness for the simple reason that the perfect affidavit has yet to be written. The omission may be that of the interrogator or it may be that of the witness."). Here, there is ample reason to credit Katebini's testimony. Katebini did not recall when he had discussed various topics with the Region and he did not type the affidavit himself. Critically, he provided detailed and consistent testimony that is consonant with that given by Shaw on this point. *See Tracy Toyota*, 372 NLRB No. 101, slip op.

at *2 n.8, *3-4 (July 6, 2023) (concluding ALJ appropriately credited witness who demonstrated "a sharp memory for the details"); *Fiskardo Estiatorio*, 356 NLRB 1000, 1000, 1015 (2011) (affirming finding of ALJ who credited witnesses' "detailed and credible testimony" over another witness's general denials on that issue, even while crediting the latter witness's "specific" and "detailed" testimony on other issues).

The lack of contrary testimony, further supports the accounts of Shaw and Katebini. Critically, Respondent did not ask any of its witnesses about Montgomery's comment, despite the fact that Partners, including Molinar, attended the town hall meeting where it occurred. A party's failure to ask a favorable witness about a factual issue of which that witness would likely have knowledge, gives rise to the "strongest possible adverse inference" against that party. *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 183 (2001) (quoting *Flexsteel Indus.*, 316 NLRB 745, 757-58 (1995)); *see also Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n.1 (1992) (citing *Int'l Automated Machs.*, 285 NLRB 1122, 1123 (1987)). Because Respondent failed to question any witness—particularly Molinar, who explicitly testified that she attended both town halls—about this allegation, an adverse inference is appropriate that their testimony would have been unfavorable to Respondent by showing that Montgomery did make this statement General Counsel's witnesses attributed to her.

Respondent's own internal communications further bolster the unrebutted testimony of General Counsel's Witnesses. Dykers himself, summarizing the town hall by email, wrote that someone had made the statement "if you want more money then go somewhere else." Molinar, who received this email from Dykers, testified after its admission but was not asked about it.

The fact that Montgomery may not have explicitly referenced the union does not exculpate Respondent. Like the statement in *Jupiter Medical Center*, Montgomery's comment came in the

midst of a meeting the employer called for the express purpose of discussing the union. In this context, Montgomery's words, by implying that union support was incompatible with continued employment, amounted to an unlawful threat.

II. Respondent Violated Section 8(a)(1) of the Act by Threatening Employees with Loss of Business if They Selected Charging Party as Their Bargaining Representative

A. Legal Standard

An employer may lawfully communicate its views on unions to its employees only insofar as those communications do not contain any "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Accordingly, an employer may "make a prediction as to the precise effect [it] believes unionization will have on [the] company" *only* if such prediction is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." *Id.* Without such an objective factual basis, an employer's prediction of the impact of unionization may violate the Act, even if it is phrased conditionally. In *Gissel*, for example, the Court found unlawfully threatening the employer's statement that "the Union's 'only weapon is to strike,' and that a strike '*could* lead to the closing of the plant.'" *Id.* at 588, 618-19 (emphasis added).

Assessing predictions like these requires weighing employees' economic dependence on their employer and their related tendency "to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." *Hogan Transp., Inc.*, 363 NLRB 1980, 1981 (2016) (quoting *Gissel*, 395 U.S. at 617). In other words, the Board analyzes employer statements from the point of view of employees. *Purple Commc'ns*, 361 NLRB 575, 577 (2014) (citing *Gissel*, 395 U.S. at 617). Doing so requires considering the "overall picture presented to the employees" over the course of an organizing campaign. *See Mohawk Bedding Co.*, 204 NLRB 277, 279 n.2 (1973) (weighing employer's statements "in the context of the entire campaign").

Subsequent cases have made clear that this standard applies alike to employers' predictions of negative reactions to unionization by an employer's customers, clients, and other stakeholders. For example, in *Hertzka & Knowles v. NLRB*, the Ninth Circuit discussed and affirmed the conclusion that the employer, an architectural firm, violated Section 8(a)(1) by informing employees that clients would be reluctant to deal with a unionized architect and thus it would be more difficult to find clients if employees unionized. 503 F.2d 625, 629 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975). Similarly, in *McDonald Land & Mining Co.*, the Board affirmed the Administrative Law Judge's finding that the employer violated Section 8(a)(1) by telling employees that if creditors learned of employees' union campaign, they "might get nervous and decide to throw us [into] Chapter 11." 301 NLRB 463, 463, 466 (1991); *see also Hogan Transp., Inc.*, 363 NLRB at 1981-83 (concluding that the employer violated Section 8(a)(1) by conveying its prediction that there was "a strong possibility" that the company's only customer would cancel its contract if employees unionized).

To avoid liability for such predictions of negative client reactions, an employer must establish an objective factual basis for the prediction. *Hogan Trans., Inc.*, 363 NLRB at 1981 ("The burden of proof is on the employer to demonstrate that its prediction is based on objective fact.") (citing *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995)); *see also Hertzka & Knowles*, 503 F.2d at 629 (noting that the architectural firm produced no evidence that unionization would lead to a business slowdown, as it had predicted to employees); *McDonald Land & Mining Co.*, 301 NLRB 463, 463, 466 (1991) (pointing out that the employer failed to provide "any facts that would have permitted the employees to make their own evaluation of the likelihood of such action by the creditors"); *TNT Logistics N. Am., Inc.*, 345 NLRB 290, 291, 291 n.8 (2005) (finding no violation in a supervisor's statement that "if the Union comes in we wouldn't have a job with Home Depot,"

because the supervisor first noted the "uncontroverted fact[]" that Home Depot does not do business with unionized clients and employer thus met the "critical" test of providing objective facts).

Meeting this burden requires that an employer provide an objective factual basis for the *specific* prediction at issue—not simply evidence that its customers dislike or generally avoid unions. In *Hogan Transports, Inc.*, for example, the employer provided evidence that its only customer in the area did not like unions, had taken steps to avoid unions in other locations, and had expressed concern directly to the employer about the possibility of future work stoppages. 363 NLRB at 1981-82. Nevertheless, the Board affirmed the ALJ and concluded that such facts still failed to provide a sufficient objective basis for the employer's statements to its employees that unionization had a high likelihood of prompting that customer to cancel its contract with the employer, causing employees to lose their jobs; the statements thus violated Section 8(a)(1). *Id.* In *Curwood, Inc.*, by contrast, the Board concluded that the employer, having offered multiple letters from large customers expressing concerns about work stoppages, had provided sufficient objective material to substantiate its remarks to employees that customers viewed unionization negatively and were concerned about work stoppages. 339 NLRB 1137, 1137-38 (2003) (citing *Gissel*, 395 U.S. at 618).

Importantly, the employer must provide the objective factual basis to employees when making the prediction in the first place. In *DTR Industries, Inc.*, for example, the Board concluded that the employer had unlawfully threatened employees by stating that the company would lose business as a result of unionization without providing context and factual basis for this prediction simultaneously. 350 NLRB 1132, 1132-33 (2007) (distinguishing *DTR Industries v. NLRB*, 39 F.3d 106, 114 (6th Cir. 1994)—which found no violation where the employer provided context and

basis for its prediction of plant closure as part of the same remarks—and explaining that "[i]n this case, by contrast, the statements provided no objectively-based rationale"); *see also Yoshi's Japanese Rest.*, 330 NLRB 1339, 1339, 1342 (2000) (affirming the ALJ's conclusion that the employer, who pointed to "later-produced evidence" to support its prediction that unionization might lead to the plant closing, could not rely on such evidence because "*Gissel* requires that a prediction of plant closing be based upon simultaneously stated objective facts"); *cf. Curwood, Inc.*, 339 NLRB at 1138 n.5 (declining to reach the argument—due to the parties' failure to raise it—that the letters from customers could not be relied upon as an objective factual basis for the employer's predictions because neither the letters nor their contents were shared with employees simultaneously with those predictions).

B. CFO Oscar Perez Threatened Employees with Loss of Business if They Selected Charging Party as their Bargaining Representative

CFO Perez, an admitted statutory supervisor or agent, initiated a one-on-one conversation with employee Daniel Katebini the week before the union election. Perez told Katebini that firms and potential clients would not want to work with Respondent if it unionized, and that "potential clients would be afraid that we might go on strike, or we might lose competitions as a result of this." Katebini Tr. 193-94. Perez provided no objective basis for these remarks—no lost contracts or competitions, no ultimatums or even communications from clients, to establish that his comments referred to demonstrably probable consequences beyond Respondent's control. His statement instead conveyed, from his perspective as the firm's CFO, that unionizing would cost Respondent its business and, by extension, its employees their livelihoods.

Perez's own testimony confirms both the subject and the coercive tenor of the conversation. He admitted telling Katebini that "it was unclear on how [the union campaign] would affect us pursuing work," thus acknowledging that he raised the union's impact on Respondent's business

in a private conversation with a bargaining-unit employee. *See* Perez Tr. 552. Perez stated he did not "recall" or "remember" making the specific statements Katebini attributed to him—but did not deny making them. *See* Perez Tr. 553. He testified more ambiguously and in less detail about this interaction than did Katebini, whose testimony Perez had the opportunity to hear in full before taking the stand himself. In this context, and in light of Katebini's detailed testimony about the encounter and consistency on direct and cross-examination, Katebini's testimony should be credited over Perez's testimony.

Respondent's other communications offer additional support for Katebini's account of the conversation with Perez. Less than two weeks beforehand, Molinar sent an all-staff email similarly asserting that the union would hurt Respondent's business because clients would be unlikely to work with Respondent if employees unionized: "[g]iven the choice of two otherwise similar designers, one whose employees could strike and the other whose employees will not, [clients] are going to choose the latter." GC055. Even this email stopped short of claiming clients had actually voiced such sentiments to Respondent, instead noting only that "[c]lients have suggested to us that our being union would affect their selection." GC055. The close resemblance between Respondent's messaging in this email and the comments Katebini recalled Perez making to him further bolster the credibility of Katebini's testimony. Evidence that an employer made other statements similar to allegedly unlawful threats may be relied upon to show that such threats were part of the approach that employer adopted to oppose a union campaign. *Ford Paint & Varnish Co.*, 264 NLRB 1189, 1198, 1191 n.5 (1982) (affirming ALJ who found that a supervisor's threat of plant closure, although not alleged as a separate complaint violation, constituted "further evidence that the threat of plant closure was part of the approach the [employer] determined to pursue in opposing the Union's drive"). Here, Molinar's email suggests that Respondent's

approach to the union campaign included forecasting business consequences that would arise from negative reactions of clients.

Respondent failed to suggest any objective factual basis for such predictions even at trial. While prevailing caselaw indicates that an employer must provide its objective factual basis at the time it makes its prediction to employees, it is telling that Respondent did not even attempt to establish such a basis during the multi-week hearing in this matter. This omission is especially notable in light of the extensive testimony Respondent elicited from its witnesses about the process of soliciting work from and communicating with clients. This record makes the analysis particularly clear—unlike the employers in *Hogan Transports, Inc., Yoshi's Japanese Restaurant*, or *Curwood, Inc.*, there is no dispute that Respondent did not provide a factual basis for its statements predicting negative business impacts from the union.

With the above in mind, the evidence supports finding that Perez told Katebini that, if employees unionized, potential clients would be worried about strikes and would not want to work with Respondent. Because Perez offered no objective factual basis for his prediction at the time, and because Respondent offered no evidence or testimony to establish such a factual basis at trial, this prediction amounts to an unlawful threat. An economically dependent employee would tend to pick up the implication that unionizing would cost Respondent its business and, in turn, employees their jobs.

C. Director Michael Cotton Threatened Employees with Loss of Business if They Selected Charging Party as their Bargaining Representative

Director Michael Cotton, an admitted statutory supervisor or agent, threatened employees with loss of business and, by extension, their livelihoods, if they elected union representation. Specifically, during a town hall meeting a week or less from the union election, Cotton "brought up a specific project opportunity that we were pursuing and that had not been awarded. And he

mentioned that the union may have been a factor in the decision." Shaw Tr. 57. While Shaw did not identify at which of the two town halls Cotton made this statement, this omission is reasonable given that the two meetings were held less than a week apart at the same time of day and in the same location and that both followed the same format.

Moreover, Shaw's testimony about Cotton's statement is unrebutted. First, Respondent chose not to cross-examine Shaw about this statement. Second, there is no dispute that Cotton remained employed by Respondent at the time of the hearing in this matter. *See* Tr. 347, 352-53; R35. Yet Respondent did not call Cotton as a witness. Nor did Respondent question any Partner—including Molinar, who admittedly attended both town halls—about whether or not Cotton made such a statement. Together, the failure to call Cotton and the failure to question favorable witnesses who attended the town halls provide grounds for an adverse inference that testimony from these witnesses would have been unfavorable to Respondent by supporting Shaw's account of Cotton's statements.

As it did with Perez's comment and Molinar's email discussed above, Respondent failed to offer any basis for Cotton's statement that the union campaign had cost Respondent work. While Cotton, unlike Perez, referenced a specific project opportunity that Respondent had not won, this specificity still provides no factual basis for Cotton's suggestion that the union may have been a factor in the potential client's decision. There was no suggestion in Cotton's remarks that the potential client had communicated to Respondent in any way that its decision was related to employees' union campaign. Nor did Respondent offer any testimonial or documentary evidence of such communication at trial.

Without such a factual basis, Cotton's comment amounts to an unlawful threat. He told a group of employees—who Respondent had assembled specifically to discuss the union in the week

leading up to the election—that Respondent had possibly lost work because of the union. Understood from the perspective of economically dependent employees who had previously been exposed to Respondent's other communication about the economic fall-out that would follow unionization, this statement clearly intimates that selecting the union in the fast-approaching union election would lead to continued loss of business and, accordingly, employees' jobs. Because it lacks any apparent objective factual basis, this prediction constitutes an unlawful threat in violation of Section 8(a)(1) of the Act.

III. Respondent Exhibited Animus Through Unalleged Unlawful Conduct

Respondent's animus against employees' union activities is also readily apparent from other acts that would have constituted independent violations of the Act had they been alleged in the Amended Complaint. The Board will rely, as background evidence of animus, on unalleged conduct that, if alleged, would have constituted a violation of the Act. *See Mid-Atlantic Rest. Grp. v. NLRB*, 722 F. App'x 284, 288 (3d Cir. 2018) (concluding that the ALJ "did not abuse his discretion by considering evidence not specifically pled in the complaint"); *Jack & the Box Distrib. Ctr. Sys.*, 339 NLRB 40, 40 n.3 (2003) (noting that General Counsel relied upon threat of plant closure not pled in the complaint as background evidence of animus). Here, evidence showing additional threats, as well as interrogations, by Respondent's supervisors and agents sheds additional light on Respondent's animus against the union.

A. HR Manager Tina Bonacci Threatened Employees with Discharge if they Engaged in Protected Activities

The record establishes that HR Manager Tina Bonacci threatened employees with discharge for engaging in protected activities. While the Amended Complaint did not allege this statement as an independent violation of the Act, it nevertheless provides additional evidence of Respondent's animus against the union. Katebini testified that he—along with Directors Michael

Cotton and Marc-Andre Plasse, among others—attended an informal meeting about the union campaign on May 23 and at this meeting Bonacci stated "that her family had been involved in union stuff growing up, and but she felt that our efforts were not being done in the right way, that – and that unionization didn't feel right for our office and that if we didn't like the conditions at Snohetta, that we could just leave the office." Katebini Tr. 188.

Bonacci's statement, like Montgomery's Starbucks comment discussed above, amounts to an unlawful threat of discharge. Board law is clear that inviting employees to quit in response to their union activities violates the Act. *See e.g.*, *Starbucks Corp.*, 373 NLRB No. 123. Here, Bonacci explicitly linked employees' union activities with an invitation to quit.

Katebini's testimony about this comment is unrebutted and credible. While his affidavit did not reference Bonacci's comment, that omission is not dispositive. The Board has time and again affirmed ALJ decisions recognizing that witnesses' affidavits may omit information for a variety of reasons and thus declining to discredit witnesses on this basis. *See Nat'l Grid USA Serv. Co., Inc.*, 348 NLRB 1235; *Am. Wire Prods., Inc.*, 313 NLRB 989; *Gold Circle Dep't Stores*, 207 NLRB 1005. In *Ford Paint & Varnish Co.*, for instance, the Board affirmed an ALJ who credited an employee's testimony about a plant manager's threat of plant closure—even though the employee's affidavit did not mention that threat and the complaint did not allege it as a separate violation of the Act. 264 NLRB at 1189, 1191 n.5 (1982) ("I found [the employee] to be a credible and convincing witness and credit this testimony notwithstanding the fact that it is not in his affidavit."). The ALJ found it unnecessary to find an independent violation based on this testimony only because he had already concluded that the employer had made other unlawful threats of plant closure. *Id.* Here, as in *Ford Paint & Varnish Co.*, an employee testified about an unalleged threat of the same type evident in other parts of the record. There is no more reason to discredit Katebini

than there was to discredit the employee in that case. Moreover, the testimony and documents showing that Montgomery made a similar threat further support Katebini's testimony on this point. *See id.* at 1191 n.5.

Bonacci is clearly a supervisor or agent of Respondent. While Bonacci was not alleged in the Amended Complaint as a statutory supervisor or agent of Respondent, the record contains sufficient evidence to establish that she is Respondent's supervisor with the meaning of Section 2(11) of the Act or agent with the meaning of Section 2(13) of the Act. It is uncontested that at the time that she made the statement, Bonacci was led the HR team as the HR Manager and was tasked with administering employee reviews, handling the entirety of the recruiting process, putting employees on performance improvement plans and deciding, in consultation with statutory employees, when those plans should end. Around this same time, Bonacci effectively recommended at least one employee, Jay Coyne, for promotion. There is no conflicting evidence on this point. For these reasons, the record establishes that Bonacci was a supervisor or agent of Respondent when she made the statement Katebini attributed to her.

It is telling that Respondent declined to call Bonacci as a witness in this matter. Bonacci is still employed by Respondent and has since been promoted to the position of HR Director. Respondent's decision not to call Bonacci—or Directors Cotton and Plasse who were also present at this group meeting—to testify about this statement gives rise to an adverse inference such testimony would have been unfavorable to Respondent, supporting Katebini's account of the statement. *See Douglas Aircraft Co.*, 308 NLRB at 1217 n.1 (citing *Int'l Automated Machines*, 285 NLRB at 1123).

In this context, Bonacci's statement, while unalleged, constituted an unlawful threat, conveying to employees that union activity was incompatible with continued employment. This conduct underscores Respondent's animus towards the union.

B. Partner Alan Gordon Interrogated Employees About their Union Activities

Partner Alan Gordon interrogated alleged discriminatee Andrew Anderson about his union sentiments. Anderson's testimony of this interaction is unrebutted. Gordon, with whom Anderson had spoken only two or three times in two years working for Respondent, approached Anderson in the restroom at the office and asked him if he was aware of the union campaign. Although this conduct was not alleged in the Amended Complaint, it would constitute an independent violation of the Act and serves as additional evidence of Respondent's animus towards the union.

An interrogation is unlawful when, viewed under the totality of the circumstances, it reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1178 (1984); *Bozzutos, Inc.*, 365 NLRB 1444, 1445 (2017) ("In determining whether the questioning of an employee constitutes an unlawful interrogation, the Board considers the totality of the circumstances."). When deciding whether an employer engaged in unlawful interrogation, the Board considers myriad factors, including: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. *Rossmore House*, 269 NLRB at 1178 n.20 (listing above factors). Notably, this test does not hinge on the subjective reaction of the employee subjected to the interrogation—an interrogation may be unlawful regardless of whether the employee who was subjected to it actually felt intimidated. *See, e.g.*, *SFTC, LLC*, 360 NLRB 1139, 1140 n.9 (2014) (finding interrogation unlawful, in spite of evidence that the employee was not intimidated, because "the Board's test for unlawful interrogations is an objective one"); *Oklahoma City Collection Dist. of Browning Ferris,*

Inc., 263 NLRB 79, 81 (1982) (affirming ALJ's finding that employer unlawfully interrogated employee who testified that he did not feel coerced). Regarding background, the Board looks at whether the employer committed other unfair labor practices around the same time—including in the months following the interrogation. *Bozzutos, Inc.*, 365 NLRB at 1445 (citing *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 237 (1998), which found an interrogation unlawful based in part on an unlawful discharge that took place several months later); *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1140 n.8 (2014) ("The Board has recognized that a subsequent unfair labor practice can increase the coerciveness of a preceding interrogation."). Regarding the nature of the information sought, the Board weighs the employee's reasonable interpretation of the employer's communication. *Med. Ctr. of Ocean Cnty.*, 315 NLRB 1150, 1154 (1994) (affirming ALJ who concluded that supervisor's question "what's going on; what's happening?" constituted an unlawful interrogation, because the employee, who was not an open union supporter, reasonably interpreted it as a question about union issues); *cf. Starbucks Corp.*, 374 NLRB No. 128, slip op. at * (June 5, 2026) (finding it unnecessary to pass on the ALJ's finding that the employer unlawfully interrogated employees through a supervisor's text that read: "[W]e received notice that the store will be on strike until Monday. If you would like hours, feel free to reach out to me."). Regarding place, the Board has repeatedly found unlawful interrogations that took occurred in or near office restrooms. *See, e.g.*, *Bozzutos, Inc.*, 365 NLRB at 1444-45 (finding unlawful interrogation where high-ranking employer official stopped an employee who was existing the restroom to ask him "what was going on with 'this union stuff'"); *Publishers Printing Co.*, 233 NLRB 1070, 1073 (1977) (affirming ALJ's finding that supervisor interrogated employee by asking him in the restroom "how the Union meeting went the past Sunday"); *Ohio New & Rebuilt*

Parts, Inc., 267 NLRB 420, 427 (1983) (affirming ALJ's conclusion that a supervisor unlawfully interrogated an employee in the restroom of the employer's facility).

Applying these factors here leads to the conclusion that Gordon's questioning of Anderson was unlawful. First, Respondent violated Sections 8(a)(1) and 8(a)(3) in the months following this conversation. Second, Anderson reasonably understood Gordon to be seeking information about his union sentiments. While Gordon, like the supervisor in *Medical Center of Ocean County*, did not explicitly ask Anderson to disclose his union sentiments, the import of his question was clear to Anderson nonetheless. Anderson later joined the organizing committee, but at this point he had not yet publicly disclosed his support for the union. Third, Gordon's identity as a long-time Partner, one of the highest-ranking leaders in the company, also increases the coerciveness of the conversation—particularly in light of the context that Gordon and Anderson had interacted very little in the years preceding this conversation and never again after it. Lastly, the location of the interaction further demonstrates the unlawful nature of Gordon's inquiry. Rather than speak to Anderson in any of the public areas of the open-plan office, Gordon chose to approach Anderson in the restroom. All of these factors support the conclusion that Gordon unlawfully interrogated Anderson.

Gordon testimony was direct and credible. It is also unrebutted. Respondent chose not to question Gordon, who testified at length during this proceeding, about this interaction. This supports an inference against Respondent. *See Ishikawa Gasket Am., Inc.*, 337 NLRB at 183 (quoting *Flexsteel Indus.*, 316 NLRB at 757-58).

C. Director Matthew McMahon Solicited Employees to Report on the Union Activities of Other Employees

Director Matthew McMahon, Respondent's admitted supervisor or agent, asked bargaining-unit employee Donesh Ferdowsi to report on the union activities of other employees.

By Slack message on May 1, McMahon explained that he had spoken with one employee, who was "of our mindset" and said to Ferdowsi "Maybe try Isabelle and Mario? Also curious about Jeff and Sam B." GC062. This conduct, which would constitute a violation of the Act were it alleged in the complaint, provides additional evidence of Respondent's animus towards the union.

It is unlawful for an employer to ask an employee about the union activities of his coworkers. *See, e.g.*, *T-West Sales & Serv., Inc.*, 346 NLRB 118, 118, 125 (2005) (affirming ALJ's conclusion that employer unlawfully solicited employees to report on the activities others when a supervisor asked employees to let him know if they heard anything about the union); *Nat'l Garment Co.*, 241 NLRB 703, 703, 707 (1979) (affirming conclusions of ALJ who found that the employer violated the Act when a supervisor advised an employee to report details of what occurred at union meetings). Such communications may violate the Act as unlawful interrogations or as unlawful solicitations to report on the union activities of other employees, or because they create the impression of unlawful surveillance—or all three simultaneously. *See, e.g.*, *MPC Plating, Inc.*, 295 NLRB 583, 583, 592 (1989) (adopting ALJ's conclusion that employer unlawfully interrogated an employee by asking if he knew who was leading a union effort and unlawfully requested surveillance of employees' union activities by asking that same employee to find out who was behind the union effort); *MTR Sheet Metal, Inc.*, 337 NLRB 713, 713, 715 (2002) (adopting, in absence of exceptions, ALJ decision, which noted that "[s]oliciting employees to report on the union activity of others necessarily creates the impression of unlawful surveillance").

Here, McMahon's requested Ferdowsi to gather information on the union sentiments of his coworkers. It is immaterial whether or not Ferdowsi initiated the conversation about the union with McMahon. Even where an employee voluntarily reports information about a union campaign to an employer, it remains unlawful for that employer to respond by requesting additional information

about other employees' union activities. *Purple Commc'ns, Inc.*, 370 NLRB No. 26, at *1, *49 (adopting, in the absence of exceptions, ALJ's conclusion that the employer—whose supervisor, in response to a known anti-union employee starting a conversation by reporting a union statement, asked the employee to share the contents of that statement—had unlawfully interrogated the employee, unlawfully solicited the employee to report on the union activities of coworkers, and created the impression of unlawful surveillance). Accordingly, McMahon's response, asking Ferdowsi to "try Isabelle and Mario?", was an unlawful solicitation for Ferdowsi to report on the union activities of his coworkers—regardless of Ferdowsi's reaction to such solicitation.

No testimony is needed to support this finding. ALJs can and do find that employers violated Section 8(a)(1) on the basis of written conversations introduced into evidence as exhibits, rather than testimony. *RHCG Safety Corp.*, 365 NLRB 852, 852-53 (2017) (affirming ALJ's finding that employer engaged in unlawful interrogation based on supervisor's text to employee "U working for Redhook or u working in the union?"—notwithstanding the employer's argument that other text messages were exchanged but omitted from the screenshot that was received into evidence); *see also Purple Commc'ns, Inc.*, 370 NLRB No. 26, at *49 (finding violations based on photographs of messages exchanged via Facebook). Respondent produced the record of this conversation between McMahon and Ferdowsi and there is no dispute of its authenticity.

Moreover, other evidence on the record further supports this interpretation of McMahon's communication. The record is replete with references to Ferdowsi's ongoing communication with Respondent's supervisors about the union activities of his coworkers. While Respondent does not violate the Act merely by its supervisors *receiving* this information, it is unlawful for those supervisors to *request* it from Ferdowsi. While this communication from McMahon is the clearest record of such a request for information about employees' union activities, it is likely that Ferdowsi

was asked at other points, as well. For example, Director John Oliver told other Directors on June 9 that he had marked up a list of bargaining-unit employees categorized by union support after reviewing it with Ferdowsi. A spreadsheet of union support that Oliver sent to Partner Alan Gordon later that day noted, in reference to Arie Salomon "Donesh [Ferdowsi] is working on him." GC039. This evidence supports the conclusion that McMahon's Slack message to Ferdowsi was a request for information on the union activities of others.

Given this context, McMahon's statement, while unalleged, constituted an unlawful solicitation to report on the union activities of other employees. This conduct sheds further light on Respondent's animus towards the union.

IV. All Allegations in the Amended Complaint Are Timely

A. Legal Standard

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." However, the Supreme Court—recognizing the Board's broad investigatory authority and its duty to vindicate public rights—long ago made clear that this provision does not bar the General Counsel from litigating allegations that were not raised in a timely charge. *See Carney Hosp.*, 350 NLRB 627, 628 (2007) (citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-09 (1959)). Accordingly, a complaint is not restricted to the particular language of the charges upon which it is based, as long as each complaint allegation is "closely related" to an allegation in a timely filed charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988).

To assess whether allegations are "closely related," the Board considers whether they: (1) involve the same legal theory and (2) arise from the same factual situation or sequence of events. *Carney Hosp.*, 350 NLRB at 628 (citing *Redd-I, Inc.*, 290 NLRB at 1118). In other words, the

Board looks at whether the allegations are (1) legally related and (2) factually related. *Charter Comm's, LLC*, 366 NLRB No. 46, slip op. at *4-5 (Mar. 27, 2018). While the second of these two factors is not fulfilled merely because allegations relate to events during the same union campaign, the Board has made clear that it is satisfied where the timely and untimely allegations "are part of an overall plan to undermine union activity." *Carney Hosp.*, 350 NLRB at 630; *see also Recycle Am.*, 308 NLRB 50, 50 (1992) ("[A] sufficient nexus between charge and complaint is established when all the allegations involve 'part of an overall plan to resist organization.'") (quoting *Well-Bred Loaf*, 303 NLRB 1016, 1016 n.1 (1991)); *cf. Truck Drivers & Helpers Union v. NLRB*, 993 F.2d 990, 1001 (1st Cir. 1993) (explaining that to satisfy the legally related factor of the *Redd-I* test, "[i]t is sufficient that both charges are part of the same effort or crusade against the union."). As the Board explained in *Recycle America*: "allegations of coercive acts aimed at thwarting a union campaign may be deemed closely related to . . . allegations of coercive acts in resistance to that campaign," regardless of whether the coercive acts are of the same kind and regardless of whether the timely charge explicitly alleges the existence of an overall plan on the part of the employer. 308 NLRB at 50 n.2. Finally, the Board may also consider a third factor: whether the allegations call for the same or similar defenses by the charged party. *Carney Hosp.*, 350 NLRB at 628 n.8 (noting that this third factor is not mandatory).

Notably, allegations may be closely related even if they invoke different sections of the Act and even if they took place months apart. *See Nickles Bakery*, 296 NLRB 927, 928 n.5 (1989); *Vista Del Sol Healthcare*, 363 NLRB 1193 (2016). For example, in *Fiber Products*, the Board concluded that Section 10(b) did not bar the General Counsel from amending the complaint at hearing to allege that the employer had violated Section 8(a)(1) of the Act throughout May and June 1992. 314 NLRB 1169, 1169 (1994), *enfd. FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 940-41

(4th Cir. 1995). The original timely charges, by contrast, had alleged only that the employer violated Section 8(a)(3) in October 1992 by discharging two employees because of their union activities. *Fiber Prods.*, 314 NLRB at 1169. Nonetheless, the Board reasoned with respect to the first *Redd-I* factor that "[a]ll allegations relate[d] to the same alleged animus and pattern of reprisals" against employees' union and concerted activity. *Id.* Regarding the second factor, the Board concluded that the Section 8(a)(1) allegations "involve[d] earlier events in the same factual sequence as the 8(a)(3) termination allegations." *Id.* Accordingly, the allegations were not barred by Section 10(b). *Id.*

Additionally, the Board will allow litigation of otherwise untimely allegations that are relevant to proving a timely allegation. In *Charter Communications, LLC*, for instance, the Board decided that several otherwise untimely allegations that the employer violated Section 8(a)(1) in July and August 2014 were closely related to timely allegations that the employer violated Sections 8(a)(1) and 8(a)(3) in September and October 2014. 366 NLRB No. 46, at *4-5. Regarding the second *Redd-I* factor, the Board concluded the allegations represented a progression of events in the employer's response to employees' union campaign, ultimately culminating in the discharge that was the subject of the timely Section 8(a)(3) allegation. [42] *Id.* at *4. Turning to the third factor, the Board concluded that it, too, supported finding the allegations closely related, because the General Counsel's relied on the otherwise untimely Section 8(a)(1) allegations to show that the discharge was motivated by union animus, and consequently the employer would have to defend against that conduct whether or not it was properly alleged as a separate violation of the Act. *Id.* at *4.

[42] The Board distinguished one Section 8(a)(1) allegation, finding that it failed to fulfill the second *Redd-I* factor because, unlike the other allegations, it concerned conduct that General Counsel did not allege the employer had undertaken in response or connected to employees' union activity. *Charter Commc'ns, LLC*, 366 NLRB No. 46, at *5.

In accordance with all of the above, the Board has specifically made clear that the General Counsel may litigate otherwise untimely allegations of threats preceding a timely alleged Section 8(a)(3) violation. For example, in *The Earthgrains Co.*, the original timely charge alleged only that the employer unlawfully transferred an employee to a different work location because of his union activities. 351 NLRB 733, 733 (2007). The Board, however, found that Section 10(b) did not bar otherwise untimely allegations that the employer had also threatened that employee with unspecified reprisals and, on another occasion, with transfer or discharge, if he engaged in union activities. *Id.* at 734. Concluding that these allegations were all closely related, the Board reasoned that they were legally related under the first *Redd-I* factor because the General Counsel would have to show that the employee's union activity was a motivating factor in his transfer and the alleged threats were relevant to that inquiry in that they could show an unlawful motive. *Id.* With respect to the second *Redd-I* factor, the Board concluded that the allegations were factually related both because all alleged conduct occurred within a few days *and* because "the transfer made good on [the] preceding threat to transfer or discharge" the employee. *Id.*

B. Application

Paragraphs 7-9 of the Amended Complaint---alleging that Respondent, through Michael Cotton and Oscar Perez, threatened employees with loss of business, and, through Darlene Montgomery, invited employees to quit, in violation of Section 8(a)(1) of the Act---are closely related to the timely charge in Case 02-CA-324827. The charge in Case 02-CA-324827 (filed August 29, 2023) reads: "Within the past six months, the Employer has unlawfully discriminated against several employees for having exercised their right to engage in concerted activities" in violation of Sections 8(a)(3) and (1). GC001(A). The conduct at issue in Paragraphs 7-9 is alleged to have occurred in June 2023. GC001(J). Respondent nonetheless asserts as an affirmative

defense that Paragraphs 6–11 of the Amended Complaint are time-barred by Section 10(b) of the Act. GC001(G).

As a threshold matter, the conduct alleged in Paragraphs 7-9 occurred within six months of the August 29, 2023, charge, satisfying the requirement that the otherwise untimely conduct have occurred within 6 months of a timely-filed charge. Further, the charge places at issue Respondent's discrimination against employees for their protected activity in violation of Sections 8(a)(3) and (1)1). Under the *Redd-I* test described above, Paragraphs 7-9 are closely related to the charge.

First, the discharges and threat allegations involve the same legal theory. To prove the 8(a)(3) allegations, the General Counsel has shown that Anderson, Dannenberg, Katebini, Lopez, Salomon, Shaw, Shell, and Starkman's union activity was a motivating factor in their discharges. The Section 8(a)(1) statements alleged in Paragraphs 7 through 9---Perez's warning to Katebini that clients would not work with a unionized firm (Katebini Tr. 193), Cotton's statement to employees assembled for a town hall that the Union may have cost the firm a project opportunity (Shaw Tr. 57), and Montgomery's invitation to employees at a town hall to quit and "go to Starbucks" if they were dissatisfied (Katebini Tr. 189) --- further establish that unlawful motive. *The Earthgrains Co.*, 351 NLRB at 734. See also *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 941 (1995) (terminating employees in retaliation for their attempts to organize a union violates both Sections 8(a)(3) and 8(a)(1)).

Second, the timely and allegedly untimely allegations arise from the same factual situation or sequence of events. The threats and the discharges are parts of Respondent's single, coordinated campaign to defeat the organizing effort and remove its supporters. Specifically, Respondent's coercive statements were part of a firm-wide response to the Union that Respondent itself documented. Respondent created "Project Worth" for the specific purpose of tracking the time

management spent responding to the Union, directed its Directors and Executive Team (but not bargaining-unit employees) to bill their hours to that project, and by June 29, 2023, had logged hundreds of hours of management time to that effort. Respondent, through Perez, Cotton, and Montgomery, also took affirmative steps to determine, document, and track union sentiment and support before the election. GC039. Against this documentary record, there can be no doubt that Perez, Cotton, and Montgomery were "part of an overall plan to undermine union activity." *Carney Hosp.*, 350 NLRB at 630. This is not a case in which the only factual connection between the charge allegations and the complaint allegations is that they occurred during the same time period. *Cf. Drug Plastics & Glass Co. v. NLRB,* 44 F.3d 1017, 1021 (D.C. Cir. 1995) (Denying enforcement on basis that record showed chronological relationship but did not otherwise support Board's finding that the allegations arose out of an overall plan to resist the union).

Third, Respondent would raise similar defenses to both the threats and discharge allegations. In defending the layoffs, Respondent disputes any unlawful motive for the discharges. Because Respondent has to defend its conduct during the campaign, the third *Redd-I* factor is satisfied. Finally, there are no due process concerns, as the matters have been fully litigated.

Accordingly, *Redd-I* supports Paragraphs 7-9 of the Amended Complaint. In any event, even if untimely, all allegations are undoubtedly relevant to animus. *See, e.g.*, *CSC Holdings*, LLC, 365 NLRB 665, 668 (2017); *Charter Commc'ns, LLC*, 366 NLRB No. 46, at *5; *The Earthgrains Co.*, 351 NLRB at 734.

V. Respondent Unlawfully Laid Off Eight Employees Because of Their Support for Charging Party

In July 2023, after closely tracking employees' union support throughout the campaign, Respondent laid off eight employees—every single one of whom it believed to have supported Charging Party. Respondent initiated these layoffs one business day after the ballot count revealed

that the union had lost the election. Within the month, Respondent had rid itself of half of the organizing committee and up to a third of all union supporters. Respondent's justifications for selecting the eight discriminatees are vague, internally contradictory, and unsupported by the evidence. Taken together, these proffered justifications fail to overcome the substantial evidence that anti-union animus was a motivating factor in Respondent's decision to lay off Andrew Anderson, Joshua Dannenberg, Daniel Katebini, Araceli Lopez, Arie Salomon, Leo Shaw, Amy Shell, and Jordana Starkman..

A. Legal Standard

An employer that lays off employees because of those employees' actual or believed union support or to discourage other employees from union support violates Section 8(a)(3) of the Act. When weighing allegations that an employer has violated the Act in this manner, the Board applies the burden-shifting framework laid out in *Wright Line*. 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under this framework, General Counsel must show that "antiunion animus was a substantial or motivating factor in the employment action." *Baptistas Bakery, Inc.*, 352 NLRB 547, 549 n.6 (2008) (citing *Wright Line*, 251 NLRB 1083).

General Counsel may meet this initial burden by establishing: (1) union activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus as a motivating factor for the employment action. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at *13 (Aug. 25, 2023). It is not necessary that the employer acted against a given employee based on a desire to punish or discourage the activity of that employee in particular; an employer that lays off employees "with the intent of discouraging or punishing union activity in its workforce generally" equally violates the Act. *Intertape Polymer Corp.*, 372 NLRB No. 133, at *13.

If the General Counsel successfully makes its initial showing under *Wright Line*, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB at 1089. At this stage, a legitimate justification for the employment action is insufficient; an employer may overcome General Counsel's prima facie case only by persuading the factfinder by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. *Intertape Polymer Corp*., 372 NLRB No. 133, at *8; *Consol. Bus Transit*, 350 NLRB 1064, 1064 (2007) (citing *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993)).

B. Respondent Knew or Believed All Eight Discriminatees Engaged in Protected Activities

A litany of documents establish beyond a doubt that, at the time of the layoffs, Respondent considered every one of the discriminatees to be a union supporter. On July 26, Partner Michelle Delk explicitly flagged to the entire Executive Team that each one 10 employees then slated for layoff were union supporters. This Slack message only underscores what is abundantly clear from tracking lists sent to Partner Alan Gordon, company-wide emails from the organizing committee, public demonstrations of union support, and internal communications between supervisors: Respondent knew who supported Charging Party. Five days after Delk's message, the Executive Team laid off all but two of the 10 employees.

To meet its initial *Wright Line* burden, General Counsel often begins by showing employees' union activity, accompanied with an employer's knowledge of that activity, followed by evidence that animus towards that activity motivated the Employer's action against the employees. *See Intertape Polymer Corp.*, 372 NLRB No. 133. However, General Counsel may alternatively make out its prima facie case by showing that the employer acted out of a *belief* that the employee was involved in union activity; it is not necessary that the employee actually did engage in such activity.

See, e.g., *Capstone Logistics*, 372 NLRB No. 124, slip op. at *9 (Aug. 22, 2023) ("[I]t is well settled that even if an employee has not actually engaged in protected concerted activity, an employer violates the Act if it discharges the employee because it believes that the employee engaged in protected concerted activity."); *Salisbury Hotel*, 283 NLRB 685, 686 (1987) ("An employer clearly violates the Act by discharging an employee whom the employer mistakenly believes has engaged in union activity."); *Daniel Constr. Co.*, 277 NLRB 795, 795 n.4 (1985) (agreeing with the ALJ's finding that the employer's belief that an employee engaged in protected concerted activity sufficed to bring that employee under the protection of the Act); *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 342 (8th Cir. 1986) (noting that "it is not necessary that the general counsel prove the employer's knowledge of a specific employee's opinion as to the union, when there is a mass layoff for the unlawful purpose of discouraging union membership.").

Here, even the uncontested evidence leaves no doubt that Respondent believed each one of the discriminatees to have supported the union. Delk noted the union support of these individuals on July 26, but the record makes clear that the Executive Team was aware of employees' union sentiments much earlier than that. Even Gordon conceded that he saw at least one version of the affinity list on June 13, which categorized all eight of the discriminatees as "yes votes." *See* GC038.[43] It is also undisputed that the Executive Team received multiple all-staff emails identifying the members of the organizing committee. The composition of this group changed over time, and that was obvious to Respondent; beginning in mid-May, the organizing committee sent at least four company-wide emails identifying Anderson, Lopez, Katebini, and Shaw as four of the

[43] While Respondent did not ask him to testify about it, Gordon received at least one more version of the affinity list on June 9. *See* GC039B. This June 9 version of the list included only 21 employees as "yes votes"—seven of whom were discriminatees. The only discriminatee not categorized as a union supporter on this earlier version of the list is Arie Salomon, who is marked "undecided/on the fence," with the note "Donesh is working on him." *See id.*

group's eight public members. *See* GC012; GC013; GC033; GC034. The Executive Committee also corresponded about the online news article that quoted only three employees—Anderson, Lopez, and Shaw—all making statements in support of the union. *See* GC010; GC011; GC052; GC053.

Moreover, members of the Executive Team attended the town hall meetings where Anderson, Shaw, Starkman, and Dannenberg all voiced their support for Charging Party. Starkman's testimony—about her comments at the town hall and subsequent related conversation with Partner Craig Dykers—was corroborated by Shaw's testimony, unrebutted because Respondent declined to question or call its own witnesses about it, and further supported by Bonacci's exchange with Coyne the following day. *See* GC046. Respondent also declined to question its witnesses regarding Dannenberg's testimony about speaking at the town hall. Moreover, documentary evidence shows that Bonacci later contacted Dannenberg about a complaint related to his remarks at the town hall and Molinar instructed her not to discipline Dannenberg because "he's engaged in a protected activity at present." *See* GC114; GC115; GC116.

The Executive Team also admittedly received information about employees' union sentiments indirectly. Delk explicitly conceded that the Executive Team "would hear from people in the studio, both directly or indirectly sharing their thoughts" about who supported the union. Delk Tr. 683-84. By Delk's own account, these communications yielded information about the union sentiments of individual employees. The record suggests that at least some of this information that ultimately filtered up to the Executive Team flowed through Respondent's Directors from employee Donesh Ferdowsi. For example, Director John Oliver revealed to other Directors that Ferdowsi had described to him a union meeting on June 8. Shaw and Dannenberg both testified that Dannenberg had spoken in support of the union at this meeting and that Ferdowsi

indeed attended. Shell, for her part testified that she shared her support of the union with directly with Ferdowsi. The record also suggests that Ferdowsi spoke directly with Salomon about his union sentiments prior to Salomon's categorization as a "yes vote." *See* GC039B at 2; GC038.

There is also no dispute that the Executive Team discussed employees' union sentiments—upon questioning by the ALJ, Molinar did not deny that the Executive Team had internal conversations about how employees were going to vote in the election. Molinar, for her part, spent over 200 hours of her time on activities related to the union. Her claim that she had to check the "original petition" to know who was a member of the organizing committee is not credible. *See* Molinar Tr. 727-28, 740. Nor is Gordon's testimony that he was uninterested in the affinity list. Throughout his testimony, Gordon repeatedly contradicted both himself and the record evidence, including multiple emails he inexplicably denied reading or sending. The Directors' communications show that Gordon was, in fact, deeply invested in employees' union activities—following up repeatedly with Directors about updates to the affinity list and expressing pointed "betrayal" at Shaw, Shell, and Katebini's union activites in particular. *See* GC074 at 69. In light of the extensive evidence on the record, it is clear that Respondent knew or believed that all of the eight discriminatees were in support of Charging Party.

C. Respondent's Anti-Union Animus Was a Motivating Factor in the Layoffs

Taken as a whole, the record powerfully demonstrates that anti-union animus was a motivating factor in Respondent's decision to lay off the eight discriminatees. In the months leading up to the layoffs, Respondent not only closely tracked employees' union support, but also violated the Act through a variety of unlawful threats and interrogations detailed above. Critically, while the Executive Team had information that the majority of its employees did *not* support Charging Party, Respondent laid off *only* employees it considered to be union supporters. Notably,

four of the eight known members of the union organizing committee were among those laid off. In fact, before reducing the layoffs from 10 to eight employees, Respondent planned to lay off two more of the eight known members of the organizing committee. Record evidence establishes that the intended impact of this action was to discourage remaining employees from engaging in union activities. As layoffs were getting underway in the wake of Charging Party's election loss, Respondent's highest-paid Director, John Newman, told a contact, "[n]ow it's up to me to design some prophylaxis against any future such efforts." GC044. While Respondent's witnesses denied instructing him, in those specific terms, to do so, the evidence shows that Newman's feedback was incorporated throughout the layoff process and that he was later tasked with delegating assurances to selected remaining employees—nearly all of whom Respondent knew to be opponents of the union.

To show that antiunion animus was a motivating factor for an employment action, General Counsel may rely on circumstantial evidence gleaned from the record as a whole. *Intertape Polymer Corp.*, 372 NLRB No. 133 at *14. Direct evidence of an employer's discriminatory motive is exceedingly rare, and accordingly the Board routinely infers unlawful motive from, "among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; . . . disparate treatment of the employee; and reliance on pretextual reasons for the action." *Id.*

Here the circumstantial evidence persuasively demonstrates that anti-union animus was a motivating factor in Respondent's decision. First, Respondent's purported core decision-makers engaged in coercive conduct and made statements evincing animus: for example, Perez made an unlawful threat to discriminatee Katebini; Gordon coercively interrogated discriminatee Anderson;

and Molinar sent an Slack message to the rest of the Executive Team, less than two weeks before the layoffs, implying that Katebini should resign following his role in the organizing over the past months. *See* GC070. Next, Respondent repeatedly engaged in unlawful conduct in the months leading up to the layoffs. These preceding unlawful acts are particularly relevant because they presaged Respondent's mass layoff of union supporters. In particular, Montgomery's and Cotton's threats to employees at the town hall, Perez's threat to Katebini, and Bonacci's threat to employees at the informal meeting all suggested that union activity would lead employees to lose their jobs. In this sense, the layoffs made good on those threats. The way Respondent announced the layoffs appeared designed to heighten this effect: only select employees were provided assurances "to put them at ease" ahead of the layoffs, which were publicly announced to all staff on July 26 but not implemented until July 31. *See* Molinar Tr. 737; GC070. Of the 17 employees who the record shows Respondent designated to receive such assurances, only one was believed to be an (albeit "conflicted") union supporter per the last affinity list Gordon received. *See* GC038 at 1, 3; GC095; GC099. Respondent's own internal communications establish that Newman—who just two weeks prior had claimed it was up to him "to design a prophylaxis against" any future union efforts—was responsible for delegating these "keeper" conversations.

Next, the disproportionate impact of Respondent's layoffs cannot be ignored. Under the umbrella of disparate treatment, longstanding Board law makes clear that a statistically disproportionate impact on union supporters is itself significant evidence that an employer acted from a discriminatory motive. *Huck Store Fixture Co.*, 334 NLRB 119, 122 (2001) (collecting cases concluding that disproportion in number of union supporters laid off or discharged is itself indicative of unlawful motivation); *Glenn's Trucking Co., Inc.*, 332 NLRB 880 (2000) ("In these circumstances, the statistical evidence can be used as an element of animus."); *Am. Wire Prods.,*

Inc., 313 NLRB at 994 (affirming decision of ALJ who noted that "the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination"); *see also NLRB v. Chicago Steel Founder Co.* 142 F.2d 306, 308 (7th Cir. 1944) ("[D]isproportionate treatment of union and nonunion workers may create an inference of discrimination leaving it to an employer to give an adequate explanation of the discharge or lay-off"). Here, per the last affinity list Gordon received, 28 employees were believed to be "yes votes" and 37 were considered "no votes," with an additional two categorized as "undecided/on the fence" and four more listed as "absent." GC038 at 3. By the time Respondent began selecting employees for layoff, three employees designated "yes votes" and one designated as a "no vote" had resigned. *See* R11 at 1-2; GC038. With 25 believed union supporters and 36 believed union opponents remaining, Respondent proceeded to lay off nearly one-third of the remaining union supporters, while not laying off a single union opponent.[44] The odds of such an outcome resulting coincidentally are exceedingly slim. Notably, the eight laid-off employees represented half of the known organizing committee, including all three of those who had spoken to the press. *See* GC010. Moreover, as of July 24, Respondent's plan was to lay off 10 employees: the eight discriminatees plus two *more* union supporters—Joseph Kim and Steven Kocher, both of whom were known members of the organizing committee. *See* GC070. Respondent reduced the layoffs from 10 to eight and removed Kocher and Kim from the list just days before implementing the layoffs.[45]

[44] The latest "affinity list" in evidence, sent on June 14 from Director John Oliver to himself and titled "Directors – Affinity List 4," reflects a slightly higher number of believed union supporters (31) and slightly lower number of believed union opponents (35). *See* GC042. However, there is no evidence that any member of the Executive Team ever saw this version of the list; Gordon, the only Executive Team member who admitted to seeing any version of the list, testified that he only ever looked at Version 2 or Version 3 of this list.

[45] Another finalist for layoff, a known union opponent named Nicky Mercado, was removed from the layoff list before either Kim or Kocher, notwithstanding representations by Respondent's witnesses that he was removed for the same reason as Kim.

The initial inclusion of Kocher and Kim on the layoff list offers additional evidence of Respondent's targeting of union supporters; had Respondent determined to lay off 10 employees rather than eight, the group would *still* have consisted uniformly of "yes votes." Respondent's later removal of Kocher and Kim from the layoff list does not, however, exculpate Respondent. It is well established that an employer's decision not to take action against *all* union supporters does not disprove discriminatory motive for that employer's action against other union supporters. *Master Sec. Servs.*, 270 NLRB 543, 552 (1984); *Volair Contractors, Inc*., 341 NLRB 673, 676 n.17 (2004); *NLRB v. W.C. Nabors Co.*, 196 F.2d 272 (5th Cir. 1952), *cert. denied* 344 U.S.865 (1952); *CNN Am., Inc.,* 361 NLRB 439, 500 (2014); 362 NLRB 293 (2015), *aff'd in rel. part NLRB v. CNN Am.*, 865 F.3d 740 (D.C. Cir. 2017). The same holds true with regard to the fact that Respondent did not take any action against the other 4 signatories to the August 6, 2020 email

Furthermore, the link between anti-union animus and the layoffs was made explicit by Director John Newman. Four days after the ballot count and one day after the Executive Team admittedly began discussing layoffs with Directors, Newman sent his email about designing a prophylaxis against future union efforts. What this meant became apparent later that week, when Newman emailed Perez to nominate De Muzio, Respondent's only IT professional for layoff, explaining "I have trouble with a unionist in the IT position," because "trust in this role is essential." *See* R11 at 85. In total, Newman nominated eight employees for lay off: De Muzio, Lopez, Katebini, Kocher, Kunkel, Shaw, Starkman, and Salomon. *See* R11 at 23. All but De Muzio, Kocher, and Kunkel were ultimately laid off. At trial, Respondent's witnesses variously sought to insulate their decision-making from this clear animus by minimizing Newman's role in the layoff decisions and in the firm in general. But their testimony was self-contradictory and is not credible in light of the totality of the evidence. Newman was the highest-paid person outside the Executive

Team by a margin of over $40,000. He and Schiffmann were the only Directors on the Advisory Board. With regards to the layoffs, Newman was the only Director to be included on all three of Perez's emails seeking nominations for layoff and the only Director to attend multiple of the Director group meetings that Perez facilitated. Perez included Newman's email nominations and contributions during the group meetings on the spreadsheet he created and used throughout the lay-off selection process. *See* R12(c) at 1-5. The evidence also suggests Molinar consulted with Newman about the timing of the layoffs, as she informed the Executive Team "according to JN, Everyone is just waiting for the hammer to drop." *See* GC070. Finally, Newman was also given the responsibility of delegating "keeper" conversations to put select staff at ease before the layoff announcement. In the immediate aftermath of the layoffs, Respondent directed employees to contact Molinar, Perez, Bonacci, or Newman if they wanted "to talk." *See* R16. Taken together, evidence establishes that Newman was, in fact, more actively involved in the layoff decisions than any other Director.

While Respondent's witnesses claimed on the one hand that the Executive Team made the final decisions on the layoffs, they also admitted that those decisions were guided by input from the Directors and from Bonacci. Perez, Gordon, and Delk, all attended the Director group feedback meetings. And Director input continued past this stage; Delk, for example, testified that, Steven Kocher—who was one of 10 finalists for layoff—was removed from the final lay-off list towards the very end of the process after "feedback from directors." *See* Delk Tr. 671. Additionally, Perez's testimony made clear that information from Bonacci informed the Executive Team's selection at least of Lopez. While not all expressed it as blatantly as Newman, Bonacci and the Directors exhibited animus towards employees' union activities before and after the election. Bonacci, Montgomery, and Cotton made unlawful threats as discussed above. Plasse, too, expressed a view

that union activity was incompatible with continued employment when he texted the Directors, referring to the union supporters, "Good luck finding their next job" and "They have limited their future options quite dramatically." *See* GC075 at 71-72. In the same thread, Directors enthusiastically praised the efforts of known anti-union employee Donesh Ferdowsi. In another text message, Dorf, reacting to a reported statement by Shaw about other employees' voting plans, said "He did. Can't trust a word from any of them in recent days." GC075 at 49. It was clear to all that negative feelings towards the union were widespread; Molinar herself took time to acknowledge to the Advisory Board and the Directors themselves that many "Directors and other staff opposed to unionization" were feeling "betrayed" by employees' union activities. *See* GC076.

Finally, Slack messages between the Executive Team shed additional light on the role of animus in the layoff decision. On July 26, Delk flagged that all 10 remaining finalists for the layoff were union supporters. It is not clear what prompted Delk to send this message, but the record indicates that Nicky Mercado, a known "no vote," had very recently been removed from final layoff list. Delk may have been less attuned to the union campaign than her colleagues; there is comparatively little evidence of her involvement and she billed the least time to "Project Worth" of any member of the group. By contrast, the record shows that the other four members of the Executive Team were deeply invested in responding to the union campaign. *See* GC092 at 16. Both Perez and Dykers engaged in unlawful conduct as discussed above; Gordon participated in in-depth discussion of the affinity list; and Molinar spent more time—over 200 working hours—on the union campaign than anyone else. In any case, Delk's message did not appear to elicit surprise from any other member of the Executive Team. Instead, Molinar's response confirmed "6/10 are organizers," but "the others are theoretically unknowns" and argued "we have solid reasons that don't include that factor." *See* GC095. Molinar's characterization of union support as a "factor"

here is notable. So, too, is the evasive nature of Molinar's testimony regarding this response—from her claim that she had to check the "original petition" to know that "6/10" were organizers (even though only *four* of employees listed had signed the voluntary recognition petition), to her explanation upon questioning by the ALJ that by "theoretically unknowns" she meant "what people may say publicly doesn't necessarily reflect what they're thinking." *See* Molinar Tr. 740; GC095.

Respondent's witnesses of course denied that their decisions were motivated by anti-union animus, but there is substantial basis for discrediting their testimony. First, much of their testimony regarding the lay-off process was vague and relied on hearsay statements about what others had purportedly said during the meetings. Respondent's witnesses also repeatedly contradicted themselves and offered unconvincing explanations of documentary evidence. Molinar, for example, gave evasive and implausible answers to the ALJ's questions about what she had meant when she said "I refrained from suggesting how I thought [Katebini] could best help . . . " *See* GC070; Molinar Tr. 741-42. Gordon contradicted himself over and over while testifying about which versions of the affinity list he had seen or received and implausibly claimed he did not author an email that by all appearances was sent from his own email address. Delk, for her part, claimed first that the Executive Team did not know who supported the union. On cross-examination, she conceded that the Executive Team did know who was on organizing committee but did not know about the union support of any other employee. Only when confronted with her own Slack message, which stated her belief that the 10 finalists for layoff were all union supporters, did she admit that the Executive Group had gleaned information about the union sentiments of employees from ongoing conversations with people in the office.

Cumulatively, this evidence makes clear that anti-union animus was a motivating factor in Respondent's decision to lay off the eight discriminatees.

D. Respondent Failed to Meet its *Wright Line* Burden

Because General Counsel made its initial showing under *Wright Line*, Respondent bears the burden of proving, by a preponderance of the evidence that it would have laid off the eight discriminatees even in the absence of union activity. *See Intertape Polymer Corp*., 372 NLRB No. 133, at *8. Respondent has failed to do so. In fact, the role of anti-union animus in Respondent's decision-making is even clearer by the insufficient and pretextual justifications Respondent offered for its decisions. Neither the testimony nor the documents Respondent presented to justify its decision to lay off the eight employees are reliable. As noted previously, the testimony of Respondent's witnesses about their reasoning for selecting the eight discriminatees was vague and riddled with hearsay. The documentary evidence is similarly vague, incomplete, and inconsistent with the remainder of the record.

The most comprehensive document regarding Respondent's justifications is the "Business Justification Analysis." *See* R13. This document asserts that all discriminatees were laid off as part of Respondent's "restructuring plan to streamline efficiency and cost savings in its operations" and purports to offer an employee-by-employee justification for the layoffs—but its reliability is suspect for multiple reasons. First, Perez testified repeatedly that this document was never modified after July 27, but had no explanation when presented on cross-examination with emails its author, Bonacci, sent the evening of July 28 stating she had spent the majority of that day on it but had lost the file and would need would need to continue working. *See* GC087. Second, by July 27, Respondent had long-before retained labor counsel, was aware it was laying off a group composed exclusively of union supporters, and may have anticipated a legal challenge. Specifically, Molinar responded to Delk's July 26 message highlighting that every lay-off finalist was a union supporter and noted "I'm sure there's trouble brewing. even though we have solid

reasons that don't include that factor." GC095. Nonetheless, even taken at face value, this document fails to sustain Respondent's case.

According to the Business Justification Analysis, Respondent laid off Anderson because "there is no longer business justification to employ a Technical Specialist, Senior Project Leader on the Ford project." *See* R13 at 3. Gordon similarly testified that the Executive Team concluded that there were no projects for Anderson because "Ford was done." *See* Gordon Tr. 643. Molinar concurred that Gordon would have been the one to comment on Anderson's role in the Executive Team's discussions. By the time Gordon presented this testimony, Anderson had already testified that, at the time of the layoffs, he was no longer working on the Ford Building. Instead, Anderson explained that he was primarily working on TRPL and was continuing work on UCSF, as well. Anderson gave specific examples of his ongoing TRPL work, which including developing outdoor wooden structures and working on the interior of the theater. Respondent's failure to examine its witnesses about Anderson's work on TRPL highlights the cursory nature of the testimony it offered to support the decision to lay him off.

Joshua Dannenberg, per the Business Justification Analysis, was similarly laid off because "there is no longer business justification to employ a Senior Project Leader on the Ford project." R13 at 3. On the same note, Perez testified that the Ford Building was "in construction" and there was "redundancy with the management piece" of the Ford Building. *See* Perez Tr. 525-16. Perez added that the Executive Team "had no reason to believe" Rutledge Hill was going forward. *See* Perez Tr. 515. Neither Molinar, nor Gordon, nor Delk added anything else. In contrast to these sparse and generalized assertions, Dannenberg provided lengthy, in-depth testimony about his work at Snøhetta. He noted that, as of July 2023, aspects of the Ford Building were still in the design phase—pointing specifically to a series of working spaces in the landscape design. He also

explained that his role on the project was expected to continue well into the following year, including significant travel to the project site in Dearborn to observe construction, conduct field reports, and work with the contractor on technical issues that arose in the field. Danneberg also provided extensive testimony regarding the basis for his expectation that his work on the project would continue. His responsibilities as a Senior Project Leader included developing contracts between Respondent and their clients and that he had, in fact, drafted the contract covering Respondent's work on the Ford Building at that time. Under this contract, Respondent was to be paid only for the time its employees actually expended working on the project. When calculating the "not-to-exceed" amount that represented the maximum Respondent could charge the client, Dannenberg had estimated that he would be spending 100 percent of his time working on the project through the end of 2023, followed by continued work at a slightly lower rate in 2024. By removing Dannenberg from the project prematurely, Respondent stood to lose the fee his hours of work would have demanded. Yet Respondent failed to question its witnesses about this fee structure, despite calling both Gordon, who testified he was in charge of contracts, and Perez, the CFO. Finally, Dannenberg was in the midst of developing a contract for Rutledge Hill and expected that project to absorb the portion of his time that opened after the end of the calendar year. Perez's brief, generalized testimony that the Executive Team did not expect that project to go forward is simply not believable in light of Dannenberg's credible testimony to the contrary, the detailed press release publicly announcing the project one week after the layoffs, and Perez's own forecasts projecting that Rutledge Hill would be billing fully through December. *See* GC085 at 7.

Respondent claims, per the Business Justification Analysis, that it laid off Katebini because his role was identified as an "operational redundancy" on TRPL, which "will not require sustained workload for the current number of Senior Project Designer roles we have staffed on the Project."

See R13 at 3. Notably, there is no evidence that other Senior Project Designers were assigned to TRPL at that time. Kunkel, who Katebini testified held an analogous role on the project, was a Project Designer. The Business Justification Analysis also cited the lack of any justification for transferring Katebini to another project. In testimony, Perez, too, used the word "redundancy" to describe Katebini's role on the project. Along the same lines, Gordon testified that TRPL was tailing down and Respondent did not have work for Katebini. Molinar did not make any comments about Katebini during the Executive Team's discussion but recalled in vague terms a comment about him having difficulty doing his job. While Respondent's witnesses testified in more detail about Katebini's peers on TRPL, their accounts diverge substantially. Delk, Gordon, and Molinar each testified that Steven Kocher work was focused on a different part of TRPL. Perez, for his part, testified initially that Katebini was a Project Designer who was more junior than his colleague on TRPL, Kunkel, a Project Architect. Only after Respondent's counsel showed him documents did Perez correct himself and concede that Katebini, a Senior Project Architect, held a more senior title than did Kunkel. In contrast to the abstract testimony offered by Perez (who had the benefit of sitting through all of Katebini's testimony), Katebini provided a detailed and specific description of his and his colleagues' work on the various landscape and main-building components of TRPL. Katebini also explained that TRPL was in such an intensive phase of work at that time that he had decided to forgo vacation in order to focus on it. Directors' internal communications support Katebini's testimony, because they show that Respondent immediately moved to replace him on TRPL with either Architect Anna Morrison or Project Leader Jake Levine, a known union opponent. Moreover, Respondent's own supervisors raised concerns about Respondent's characterizations of TRPL relative to the layoffs: on July 31, Director McMahon sent a Slack message to Larsen and Perez reading, in part, "it's probably worth stating that TRPL projections

are in contradiction with layoff messaging." *See* GC047 at 1. The remainder of this message is not available because it was not produced.

The Business Justification Analysis similarly casts Salomon's layoff as arising from the "operational redundancy" of his role on TRPL and the lack of justification for moving him to a different project. *See* R13 at 2. Perez again echoed this language, testifying that Salomon's role "stood out as a redundancy" and he "wasn't needed." *See* Perez Tr. 505. Gordon characterized Salomon as a "low performer" who "didn't have energy," but offered no examples. *See* Gordon Tr. 641. As with Katebini, the record shows that Respondent immediately sought to replace Salomon with another employee on TRPL—three days after Salomon's layoff Cotton proposed that Designer I Leslie Finnie, who Respondent considered a "no vote," fill in either for Salomon or Lopez.

Lopez, too, was laid off because her role on UCSF was identified as an "operational redundancy," according to the Business Justification Analysis. *See* R11 at 2. Lopez's work at the time of the layoffs was primarily on the interiors team for UCSF. As of March 17, Schiffmann, the Director in charge of interiors, had such positive view of Lopez's work that she appeared reluctant for Lopez to move to a different project. *See* GC110. In the Director group meetings, Schiffmann continued to express this sentiment, noting per Perez's notes, that "she is doing her work – with good output." *See* R12(c) at 3. At this time, Lopez was also working one day a week on the Ford Building with Senior Project Designer Kristy Haag, who told Bonacci on June 14 that she "could really use more of Araceli's time on Ford." *See* GC112. On June 29, the Advisory Board had discussed its need for more designers who could do interiors work. Additionally, both projects on which Lopez was staffed were billing on an hourly basis, meaning if Respondent simply reduced time on these projects, its revenue would fall. All of these factors indicate that Lopez's work was

valuable, yet none were addressed by Respondent. Instead, Molinar and Perez testified, again in noticeably vague terms, that the Executive Team considered conflicts between Lopez and other employees. Information about these conflicts came from a document Bonacci created on July 19, when the lay-off process was already well underway. There is no testimony about why Bonacci created this document and the timing raises questions. But even taking the document by its own terms, alleged issues with Lopez's work first arose mid-June. Additionally, Perez's own notes indicate Directors raised comparable collaboration and "fit" issues with respect to Finnie and Cano, whose omission from the Executive Team's selection went unaddressed. In apparent acknowledgment of the importance of Lopez's work on Ford and UCSF, Directors immediately began discussing who could replace her on both of these teams, with Cotton proposing Finnie be the one to do so.

Respondent claims to have laid off Shell and Shaw because it had decided to restructure its approach to business development. Both Gordon and Perez claimed the Executive Team decided to eliminate their positions in March—but the earliest document to reference this plan is one Gordon drafted on July 26 reportedly at Bonacci's request. Notably, although it was admittedly written *after* the Executive Team selected 10 finalists (including Shell and Shaw) for layoff, the document does not indicate definitively that there was any previous decision to eliminate the Proposal Coordinator role. Nor does the Business Justification Analysis make any suggestion that Respondent had decided to eliminate these roles at an earlier stage than it decided the other layoffs. The credibility of Respondent's witnesses' testimony that the decision to lay off Shell and Shaw long predated July 2023 is further undercut by Perez's efforts to solicit input from Directors regarding layoffs in the Operations group through email *and* a meeting. *See* R12(c) at 6 (documenting meeting about layoffs from the Operations group). By Perez's account, the

Executive Team had already decided by March 30 to lay off Shaw, Shell, *and* Starkman. Although he testified at length, Perez offered no explanation for why, if this outcome was indeed pre-determined, he expended his own and others' time discussing Directors' recommendations for which three employees from the Operations group should be laid off. *See* GC024 at 7-8; R12(c) at 6. Similarly, Gordon provided no credible explanation for why he went to such lengths to document—including in his July 26 letter—Shaw's perceived performance issues in May and June if Respondent had already decided in March that his position would be eliminated. Moreover, internal communications suggest that Respondent had failed to plan in advance for how to handle basic, essential elements of Shell and Shaw's work, like tracking opportunities—another indication that the decision was not as long-planned as Respondent's witnesses claimed. *See* GC102. It is also telling that after the layoffs, per Gordon's July 26 letter and internal communications between Directors, known union opponents Ferdowsi, Jake Levine, and Chad Carpenter were slated to assume roles in business development. Finally, Respondent's explanation for publishing a job posting weeks after the layoffs for "Communications Coordinator" to perform a number of tasks previously assigned to Shell and Shaw then removing the day after the first charge was filed in this matter is suspect. While Perez claimed that this opening was posted in response to Communications Coordinator Taylor Rogers' subsequently rescinded resignation, Respondent provided neither documentation of such communication with Rogers nor evidence that she was performing the tasks listed in the posting.

Respondent claims to have laid off Starkman because her role was not necessary" for Respondent's "core business." Perez Tr. 436, 458-59. Although Perez testified that the Executive Team decided to eliminate Starkman's position before March 30, none of Respondent's witnesses corroborated this assertion. Instead, Respondent's witnesses—Perez included—testified in general

terms about discussing Starkman's role as "non-essential" during their selection meetings in July. *See* Molinar Tr. 720-21. Perez offered no explanation for why such discussion would be necessary if the Executive Team had already made this decision months previously. Nor did Respondent ask any of its witnesses to address its own document, showing that Starkman's direct supervisor, Grimes, had advocated explicitly for Respondent to retain Starkman if possible.

Respondent's failure to explain why did *not* lay off other employees and why it continued hiring during the layoff process further illustrates the pretextual nature of Respondent's defense. For example, Respondent did not explain why Mercado, the single "no vote" employee the Executive Team put on the layoff list, was removed from that list before organizing-committee member Kim, even though both worked in the Landscape Architecture group. Moreover, Perez's testimony directly contradicts the record evidence. The Executive Team's internal communications establish that they had removed Mercado from the layoff list by July 24, yet Perez testified that both Mercado and Kim were removed from the list following the resignation of employee Anna Fotheringham on July 26. *See* GC070; Perez Tr. 521-23. Respondent also did not ask any of its witnesses to justify why they did not at any point select for layoff Wright, Cano, or Finnie—despite the fact that all three were nominated for layoff by multiple Directors. Notably, all three of these employees were considered "no votes" for the union and Cano, in particular, had corresponded directly with Molinar about her opposition to the union campaign. Additionally, while asserting that the layoffs were financially necessary, Respondent failed to address evidence that continued hiring and promoting employees throughout this time. Respondent claims to have made the decision to lay off up to 14 employees before the March 30, yet it hired six employees between March and September and promoted at least two others. In fact, internal correspondence from July 21 shows Respondent affirmatively chose to continue the hiring process for Temi Osanyintolu, a

Designer I in Architecture, while in the midst of the layoff process that culminated in the layoff of Salomon, a Designer I in Architecture. Perez was shown the document confirming Osanyintolu's hire but offered no explanation. By neglecting to address this evidence, Respondent highlighted the cursory nature of its witnesses' testimony and its defense as a whole.

Accordingly, in light of the record evidence, Respondent failed to meet its burden to prove by a preponderance of the evidence that it would have taken the same action even in the absence of union activities.

E. Adverse Inferences of Additional Animus Are Warranted

While the record contains sufficient evidence to establish that Respondent unlawfully laid off the discriminatees because of their known or believed union activities—adverse inferences are also warranted against Respondent. These inferences are appropriate due both to Respondent's admitted failure to preserve relevant evidence in the email and Slack accounts of its supervisors and to its demonstrable failure to preserve and produce relevant email and Slack messages. Specifically, the ALJ should infer that the deleted email and Slack accounts and the deleted email and Slack messages, would have contained both statements of animus against employees' union activities and statements contradicting Respondent's proffered justifications for the layoffs.

i. Legal Standard

A legal duty to preserve evidence arises when a party knew or should have known "that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 435 (2d Cir. 2001)); *see also Nat'l Ass'n of Broad. Emps. & Technicians*, 371 NLRB No. 15, slip op. at *5 (Aug. 25,

2021) (citing *Zubulake*, 220 F.R.D. 212).[46] In NLRB proceedings, parties are informed of their obligation to preserve evidence as a matter of standard practice by language included in the initial letters that accompany each docketed charge. *Nat'l Ass'n of Broad. Emps. & Technicians*, 371 NLRB No. 15, at *1-2, 6 (quoting standard preservation-of-evidence language that is included in form letters); *see also id.* at *2 n.9 (citing Office of the General Counsel, Division of Operations-Management, Memorandum OM 18-02 (Oct. 30, 2017) (hereinafter "Memorandum OM 18-02")). The Board has made explicitly clear that this language is sufficient to trigger a party's obligation to preserve evidence *and* that a party that subsequently ignores this obligation is subject to sanctions. *Nat'l Ass'n of Broad. Emps. & Technicians*, 371 NLRB No. 15, at *6 (deciding that—in light of the language included in form letters from the Board—a union's own letters instructing a charging party to preserve a broad range of evidence were "unnecessary either to place [the charging party] on notice of his obligations or to ensure the availability of sanctions if he were to have disregarded them").

Once the duty to preserve evidence arises, a party is obligated to implement a litigation hold—including by suspending routine document destruction policies. *Zubulake*, 220 F.R.D. at 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."). The particular obligation to suspend routine document deletion policies is

[46] When analyzing subpoena issues that involve electronically stored information ("ESI"), the Board applies both the Federal Rules of Civil Procedure ("FRCP") and *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Second Edition (The Sedona Conference Working Group Series, 2007), *available at* https://thesedonaconference.org/publications ("Sedona Principles"). *CNN Am., Inc.*, 352 NLRB 675, 676 (2008); *see also* National Labor Relations Board Division of Judges Bench Book (July 2026), § 8–730 Failure to Preserve Evidence (Litigation Holds and Spoliation); Office of the General Counsel, Division of Operations-Management, Memorandum OM 18-02, at *1-2 (Oct. 30, 2017) (discussing the duty to preserve ESI and other relevant information).

not new; it is well settled that a company "cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988). In fact, it was such routine document destruction policies, and the need to protect against related spoliation of relevant evidence, that prompted the Board to incorporate the now-standard preservation-of-evidence language in docketing letters in the first place, nearly a decade ago. Memorandum OM 18-02 at *2-3 (announcing changes to charge/docket letters because "[a]lerting the producing party of their duty to preserve at the onset of litigation reminds the party to immediately suspend the deletion all ESI (including e-mail) related to the charge/docket letter").

When a party fails to abide this obligation to preserve evidence, a judge may impose a range of evidentiary sanctions, including adverse inferences. *See* National Labor Relations Board Division of Judges Bench Book (July 2026), § 8–730 Failure to Preserve Evidence (Litigation Holds and Spoliation) (hereinafter "Bench Book"). Adverse inferences, in particular, are appropriate where:

> (1) the party had an obligation to preserve the evidence at the time it was destroyed,
> (2) the evidence was destroyed "with a culpable state of mind," and
> (3) the evidence was "relevant" to the party's claim or defense.

Nat'l Ass'n of Broad. Emps. & Technicians, 371 NLRB No. 15, at *6 (citing *Zubulake*, 220 F.R.D. at 220). The Federal Rules of Civil Procedure ("FRCP") frame this test slightly differently, stating that a court may apply an adverse inference "upon finding that the party acted with intent to deprive another party of the information's use." Fed. R. Civ. P. 37(e).[47] In either case, a party's state of mind or intent will rarely, if ever, be proved by direct evidence, so courts have "substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives

[47] The Second Circuit has ruled that this 2015 amendment to the FRCP "abrogated the lesser 'culpable state of mind' standard in the context of lost ESI." *Hoffer v. Tellone*, 128 F.4th 433, 438 (2d Cir. 2025).

of the witnesses in a particular case, and other factors." *Petters Co., Inc.*, 606 B.R. 803, 827 (Bankr. D. Minn. 2019) (quoting *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004)), *aff'd sub nom. Kelley v. BMO Harris Bank N.A.*, 657 B.R. 475 (D. Minn. 2022)); *see also* Bench Book, § 8–730 ("Intent may be established by circumstantial evidence, including the timing, method, and selectivity of the destruction.") (citing *In re Petters Co., Inc.*, 606 B.R. 803)); *Bistrian v. Levi*, 448 F. Supp. 3d 454, 475 (E.D. Pa. 2020) ("Because courts are unable to 'examine [a party's] head' to 'confirm [whether they] acted in bad faith,' courts look to circumstantial evidence to determine intent.") (quoting *DVComm, LLC v. Hotwire Comm., LLC*, No. 14-5543, 2016 WL 6246824, at *8 (E.D. Pa. Feb. 3, 2016)).

In cases where an adverse inference is inappropriate, on the other hand, a court may instead impose lesser evidentiary sanctions. In *Bistrian v. Levy*, for example, the court declined to find that the government acted intentionally when its agents, who may have been unaware that litigation was likely, allowed surveillance video to be automatically overwritten under a one-month retention policy. 448 F. Supp. 3d at 476. While accordingly denying the request for an adverse inference, the court sanctioned the government by ruling that the video's destruction would be considered as a factor in reaching factual conclusions about the event that would have been shown in the video. *Id.* at 478.

V. Deleted Slack & Email Accounts

Respondent's obligation to preserve evidence attached no later than the docketing of the first charge. The preservation-of-evidence language included in the docketing letter reinforced this duty. Thereafter, Respondent had a duty to suspend its routine document deletion practices and implement a litigation hold. *See Zubulake*, 220 F.R.D. at 218. The record establishes that it did

neither. Perez was unable to identify any litigation-hold policies and did not know whether anyone was ever instructed to preserve information related to the charges. *See* Perez Tr. 303, 305.

In fact, rather than taking steps to preserve evidence, Respondent did the opposite by manually deleting the Slack and email accounts of the Directors who resigned or were discharged throughout 2023, 2024, and 2025. It is undisputed that the email and Slack accounts of six Directors—including John Newman and Darlene Montgomery, both of whom were named in the Amended Complaint—could not be searched because Respondent deleted them at some point them after each Director's departure. That these were the accounts of two of the alleged discriminating officials, particularly Newman, who authored the "prophylaxis against any such future efforts" email, makes the destroyed evidence not merely relevant but central. The Region's request for evidence, sent to Respondent in October 2023, requested this email exchange and two others involving Newman, making absolutely clear the relevance of Newman's communications. *See* GC078 at 3, ¶ 3. Nevertheless, Respondent proceeded to delete Newman's Slack and email accounts after discharging him in August 2025.

By this conduct, Respondent effectively shielded from production an unknown quantity of responsive material in the Slack and email accounts of not six Directors, representing more than a third of the 15 who were working for Respondent at the time of the alleged unlawful conduct. Communications from these individuals remained accessible for production to General Counsel only to the extent that they involved a current Director, Partner, or HR official; deletion of the accounts made correspondence with employees or Directors who subsequently left employment or with third parties unavailable.[48]

[48] Correspondence these six Directors may have exchanged with the 20 employees who were employed by Respondent during the relevant period and were still employed by the date of the hearing in this matter may be accessible on Respondent's systems but were not searched in full. Tr. 350-51.

When a party, like Respondent here, destroys relevant evidence it had a duty to preserve, judges may impose adverse inferences upon finding that the party acted "with a culpable state of mind" or with "intent to deprive another party of the information's use." *Compare Nat'l Ass'n of Broad. Emps. & Technicians*, 371 NLRB No. 15, at *6, *with Hoffer v. Tellone*, 128 F.4th 433, 438 (2d Cir. 2025). It is clear that courts can infer intent in circumstances where evidence is destroyed pursuant to routine document retention practices. *See, e.g.*, *Ottoson v. SMBC Leasing & Fin., Inc.*, 268 F. Supp. 3d 570, 582 (S.D.N.Y. 2017) (collecting cases). For example, in *Blazer v. Gall*, audio and video recordings stored on the defendant's hard drives were overwritten as part of a 30-day retention policy. No. 1:16-CV-01046-KES, 2019 WL 3494785, at *4 (D.S.D. Aug. 1, 2019). The court noted that the defendants took no action to preserve the recordings, despite an obligation to do so, and found that the totality of the circumstances indicated the defendants acted with intent, warranting an adverse inference. *Id.* at *5. Similarly, in *Moody v. CSX Transportation, Inc.*, evidence was lost when defendants allowed data they had a duty to preserve from a locomotive's "black box" to be overwritten, then subsequently destroyed a laptop that may have contained a copy of the data. 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017). While the defendants alleged to have done so based on a mistaken belief that the data had already been preserved in another repository, the court nonetheless concluded that they had acted with an intent to deprive the plaintiff of the evidence and granted an adverse inference. *Id.*

Here, as in the cases above, Respondent's past practice of deleting the accounts of departing staff is no defense. Indeed, Respondent's acts were *more* intentional than that of the parties in *Blazer* or *Moody*, both of whom allowed deletion of evidence through automatic overwriting. Perez's testimony made clear that Respondent took affirmative steps to delete the accounts of the former Directors—in the case of email, by notifying the Norway Snøhetta of each employee's

departure and, in the case of Slack, by manually deleting the account. *See Bistrian*, 448 F. Supp. 3d at 475 ("Under Rule 37(e) . . . . automatic overwriting is generally less culpable than affirmative deletion").Additionally, the evidence suggests Respondent may not have followed its own procedures, as internal communications suggest Respondent typically retains the email accounts of departing staff for up to a year after their departure. *See* GC080. Respondent's employment of both Newman and Montgomery ended less than a year before the hearing in this matter opened. Yet Respondent had already deleted their accounts by that time. Respondent's intentionality is also especially evident in the case of Newman's accounts because it was Respondent who chose to discharge him.

Courts may also infer intent in these cases from a party's failure to provide a credible explanation for its failure to preserve evidence. For instance, in *Shim-Larkin v. City of New York*, the court considered a request for spoliation sanctions regarding work-related text messages on an employee's personal cell phone that were deleted and permanently lost after the defendant employer took no steps to preserve them for nearly a year after being put on notice of impending litigation. No. 16CV6099AJNKNF, 2019 WL 5198792, at *10 (S.D.N.Y. Sept. 16, 2019). Because the defendant offered no evidence that its failure to preserve these messages was the result of an accident or mistake, the court found that the defendant had acted intentionally and concluded that an adverse inference was warranted. *Id.* at *12. Likewise, in *Alabama Aircraft Indus., Inc. v. Boeing Co.*, the defendant implemented a protocol for the collection of ESI, but its agents departed from that protocol by deleting ESI from one particular computer. 319 F.R.D. 730, 746 (N.D. Ala. 2017), *aff'd*, No. 20-11141, 2022 WL 433457 (11th Cir. Feb. 14, 2022). Although the defendant argued that this deletion was an inadvertent mistake, the court found that the defendant had failed to credibly explain its agents' actions, concluding that it had acted with intent and an adverse

inference instruction to the jury was appropriate. *Id.*; *see also First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, No. 15-CV-1893-HRL, 2016 WL 5870218, at *3 (N.D. Cal. Oct. 7, 2016) (granting adverse inference jury instruction over defendant's objection that deletion of text messages was an innocent mistake by agents who had a habit of routinely deleting text messages).

Like the parties in the above cases, Respondent has failed to meaningfully explain its deletion of these accounts without taking any steps to ensure preservation of relevant information. While Respondent may contend the deletion was a result of application of European data-privacy laws governing the Norway Snøhetta, this defense is unavailing. This is a case between non-European Union parties and no allegations have been made that either party is currently a European Union citizen. Therefore, the European Union General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) does not apply. As set out above, once litigation became reasonably foreseeable, Respondent was obligated to suspend any routine deletion practice and impose a litigation hold over material within its control. Additionally, this asserted justification applies only to the email accounts, yet Respondent also deleted Slack accounts, which it maintained in-house.

When making these determinations, courts also consider a party's conduct in other evidentiary matters. *Petters Co., Inc.*, 606 B.R. at 827. For this reason, evidentiary irregularities that are not the basis for independent sanctions can support an adverse inference on other issues. For example, in *Blazer*, the court discussed a document that the defendants had lost and was available only because the defendants had faxed it to another institution that retained it. 2019 WL 3494785, at *5. The defendants could not explain why the document was missing from their own records. *Id.* at *1. While no adverse inference was necessary regarding the document's contents because it was available from the other institution, the court nevertheless weighed the defendant's

failure to preserve that document in favor of its conclusion that an adverse inference was warranted as to the contents of deleted audio and video recordings. *Id.* at *5.

The record here reflects multiple irregularities in Respondent's handling of the evidence that strengthen the case for finding intent and making an adverse inference. Like the party in *Blazer*, Respondent was unable to explain why certain emails and messages, discussed in the following section, were missing from their records. While Respondent produced a considerable number of documents in response to General Counsel's subpoenas, the mere volume of responsive information is immaterial to the question of whether Respondent intentionally destroyed some evidence. Respondent's failure to explain its inability to produce the individual communications discussed below shed weighs in favor of concluding that an adverse inference is warranted for Respondent's deletion of Slack and email accounts.

Accordingly, General Counsel requests an adverse inference that the deleted Slack and email accounts would have contained additional statements of animus against employees' union activities and statements contradicting Respondent's proffered justifications for the layoffs.

VI. Missing Email & Slack Messages

The record also indicates that Respondent mishandled and likely deleted specific email and Slack messages. Adverse inferences are also appropriate regarding these communications. Where there is dispute over whether or not evidence was deleted, courts may rely upon circumstantial evidence to find that the evidence was deleted and thus grant adverse inferences. *See Ottoson v. SMBC Leasing & Fin., Inc.*, 268 F. Supp. 3d at 582 (S.D.N.Y. 2017) (collecting cases).

Here, Respondent does not contest that it produced neither the apparent June 13, 10:46 AM email from Alan Gordon to John Oliver that appears on the bottom GC051, nor the apparent attachment, "<June 2923Chart0613.xlsb.xlsx>." Gordon's denial that he wrote the email strains

credulity, particularly in light of its close resemblance to an email he does admit writing. *Compare* GC051 *with* GC038. Gordon's testimony about these emails was contradictory and simply not credible. Moreover, that both these emails bear subject lines having admittedly nothing to do with their contents suggests the senders or recipients may have been trying to disguise their correspondence for some reason. The logical conclusion is that Gordon deleted his June 13, 10:46 AM email to Oliver. Neither Gordon nor Respondent offered any plausible alternative.

Similarly, there is no dispute that Respondent did not produce full versions of the Slack messages that appear on GC047 and GC048. These messages, unlike the other Slack messages Respondent produced during this matter, are only partially visible, omitting replies as well as portions of the messages themselves. They are also undeniably relevant. One of these Slack messages, in fact, bears directly on Respondent's proffered justification for the layoffs: "Also it's probably worth stating that TRPL projections are in contradiction with layoff messaging. … As I mentioned landscape is seeing -.5% profit on the project, yet architecture is targeting ... " Respondent failed to offer any explanation for its failure to produce this material—whose relevance it does not dispute—in its full form.

An adverse inference is warranted for Respondent's failure to preserve and produce this information. In particular, General Counsel requests an adverse inference that the attachment to Gordon's deleted email would have contained additional statements of animus against employees' union activities. With respect to the deleted Slack messages, General Counsel requests an adverse inference that the messages would have contained: additional statements of animus, statements contradicting Respondent's proffered justifications for the layoffs, especially with respect to TRPL.

Lastly, if the ALJ determines that adverse inferences are inappropriate, General Counsel requests that the ALJ apply lesser evidentiary sanctions by considering the deletion of evidence and failure to produce as a factor in reaching factual conclusions. *See Bistrian v. Levy*, 448 F. Supp. 3d at 476.

VI. Respondent's Severance Agreements Are Unlawful Under Current Board Law

Under extant law, a severance agreement is unlawful "if its terms have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act." *McLaren Macomb*, 372 NLRB No. 58, slip op. at *5 (Feb. 21, 2023). Under this precedent, the Board will examine the language of the agreement, looking in particular at whether any relinquishment of Section 7 rights is narrowly tailored. *Id.* at *4.

Applying *McLaren Macomb,* the severance agreements' confidentiality provision, on its face, substantially interferes with employees' Section 7 rights. This provision, which contains no time limit and thus appears to apply indefinitely, broadly defines confidential information as "all information and any idea in any form, tangible or intangible, . . . pertaining to or affecting [Respondent]'s business"—including "information about . . . employees"—and prohibits disclosure of any of the foregoing to anyone outside the company. This language restricts employees from engaging in a wide swath of protected concerted or union activity related to providing information about employees to assist an employee, union or other third party.[49] The provision here concludes by noting that a signatory who discloses such information to a government official "for the sole purpose of reporting or investigating a suspected violation of law may not be held liable under federal or state trade secret law . . . and may be granted immunity by

[49] This wide-reaching definition of confidential information arguably also includes the terms and existence of the severance agreements themselves. *See McLaren Macomb*, 372 NLRB No. 58, at *10 (finding unlawful a severance agreement provision that explicitly barred signatories from disclosing the terms of the agreement).

a court of proper jurisdiction"; far from ensuring employees that they may share "confidential" information as needed to cooperate in an NLRB investigation, for example, this language implies that, outside the limited context of trade-secret law, employees could possibly face liability for doing so. Moreover, the plain terms of this provision prohibit employees from consulting with a union regarding employment conditions or even the terms of the agreement itself. Accordingly, the confidentiality provision unlawfully restrains and coerces employees from engaging in statutorily protected activity and its proffer thus violates Section 8(a)(1) under *McLaren Macomb*.

The agreements' non-disparagement provision similarly interferes with Section 7 rights. The non-disparagement provision in *McLaren* prohibited employees from making statements "to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives." 372 NLRB No. 58, at *2. The Board found that the non-disparagement provision substantially interfered with employees' Section 7 rights on its face, as "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." *Id.* at *8. The provision here bars "any statement to any third party, orally or in writing, that is reasonably calculated to discredit, ridicule, discount, disparage, adversely affect the business reputation of, or reduce the income of" Respondent—including by making "disloyal, unlawful, or other improper statements." By these terms, the provision expressly prohibits employees from making critical comments about terms and conditions of employment to any person.

The purported savings clause in the non-disparagement provision is insufficient to render the agreements lawful. While the non-disparagement provision includes a sentence asserting that the agreement does not restrict the "right to engage in concerted activity or other legally protected activities (which includes discussing the terms and conditions of employment for mutual aid and

protection) or otherwise engaging in activity protected under the NLRA," this language fails to mitigate the impact of the provision as a whole.[50] An employer cannot specifically prohibit protected activity and then avoid liability for that prohibition by making a general reference to legal protections. *Allied Mech.*, 349 NLRB 1077, 1077 n.1, 1084 (2007). While the sentence here offers "discussing the terms and conditions of employment for mutual aid and protection" as an example of statutorily protected activity, the provision as a whole still requires an employee to independently understand "the broad panoply" of their rights under the Act and how those rights might protect conduct that is otherwise expressly proscribed by the terms of the agreement. For that reason, the language fails to effectively clarify that the agreement does not limit employees' Section 7 rights. *See First Transit, Inc.*, 360 NLRB 619, 621 (2014) ("An effective . . . 'savings clause[]' should adequately address the broad panoply of rights protected by Section 7."). Similarly, while Bonacci sent Jordana Starkman an email ostensibly explaining that "our intention is not to limit your ability to discuss the terms of your employment with us or your separation from employment," this language is external to the agreement—which itself specifies "all prior and contemporaneous discussions and negotiations . . . are superseded by, this Agreement"—and thus insufficient. *See* R34; GC036 at 4 ¶16. Moreover, there is no evidence that any other alleged discriminatee received this explanation. Accordingly, under extant law the non-disparagement and confidentiality provisions violate Section 8(a)(1) of the Act.

Notwithstanding the above, Respondent's affirmative defense asserts that the Separation Agreements were "tailored and drafted consistent with the Act, as interpreted by the National Labor Relations Board and related General Counsel Guidance including, but not limited to, GC

[50] Notably, although this sentence purports to modify the agreement as a whole, it is nested specifically in the non-disparagement paragraph and makes no reference to the confidentiality paragraph that precedes it.

25-05 (rescinding, in relevant part, GC 23-05)." *See* GC001(L) at 12, ¶ 11. Counsel for General Counsel does not dispute the administrative premise of that defense. Moreover, General Counsel is contemporaneously presenting to the Board argument that *McLaren Macomb* be overruled and that the Board instead (1) implement a new standard, finding severance agreements, or their proffer, to be unlawful only if they contain an explicit waiver of Section 7 rights that is not narrowly tailored or (2) in the alternative, reaffirm *Baylor University Medical Center*, 369 NLRB No. 43, slip op. (Mar. 16, 2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50, slip op. (Nov. 24, 2020), as the standard for assessing whether the proffer of a severance agreement violates Section 8(a)(1). See Counsel for the General Counsel's Answering Brief to the Respondent's Exceptions at 15-27, *Valley Radiology*, No. 10-CA-324512 (N.L.R.B. May 5, 2026), *available at* https://apps.nlrb.gov/link/document.aspx/09031d4584274894.

To square the above, while the severance agreements are unlawful under *McLaren Maco*mb, Counsel for General Counsel submits that *McLaren Macomb* should be overruled and replaced with the above standard. General Counsel further submits that the severance agreements would be unlawful under either of the two proposed standards. Counsel for General Counsel recognizes that the ALJ is bound to follow extant Board Law.

X. General Counsel's Proposed Standard for Severance Agreements

The Board should overrule *McLaren Macomb*[51] and analyze severance agreements in a way that protects employees' Section 7 rights while honoring the Board's longstanding policy favoring private resolution of workplace disputes. To accommodate these goals, the Board should only find severance agreements, or their proffer, to be unlawful if they contain an *explicit* waiver

[51] Chairman Murphy and Member Mayer have indicated that they would be open to overruling *McLaren Macomb* once they have a three-member majority. *Prime Comm'ns, LP*, 374 NLRB No. 88, slip op. at 1 n.1 (2026).

of Section 7 rights that is not narrowly tailored. Respecting parties' private agreements, including the severance agreements at issue here, unless they actually contain an explicit overly broad forfeiture of statutory rights furthers the Board's bedrock policy favoring private resolution of potential workplace disputes through settlements, enables parties to agree to commonplace clauses, and promotes agreements that benefit employees while protecting employers' legitimate business interests. *Cf. H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (although not "absolute," freedom of contract is one of the "fundamental policies" under the Act).

A. Severance Agreements Serve the Public Interest by Fostering Private Resolution of Disputes.

As a critical starting point, the Board should evaluate severance agreements through the lens of its longstanding policy "favor[ing] 'private, amicable resolution of labor disputes, whenever possible.'" *S. Freedman*, 364 NLRB at 1204 (quoting *Hotel Holiday Inn De Isla Verde*, 278 NLRB 1027, 1028 (1986)), *overruled by McLaren Macomb*, 372 NLRB No. 58; *see Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944) ("[T]he Board has from the very beginning encouraged compromises and settlements"). Severance agreements commonly contain a broad release of claims against the employer as a quid pro quo for the severance payment because such agreements are a means of avoiding potential litigation. *See Baylor*, 369 NLRB No. 43, slip op. at 3 (severance agreement included release of claims); *IGT*, 370 NLRB No. 50, slip op. at 1 (same); *Regal Cinemas*, 334 NLRB 304, 305 (2001) (same), *enforced*, 317 F.3d 300 (D.C. Cir. 2003); *Hughes Christensen Co.*, 317 NLRB 633, 633-34 (1995) (same), *enf. denied on other grounds*, 101 F.3d 28 (5th Cir. 1996); *Phillips Pipe Line Co.*, 302 NLRB 732, 732 (1991) (same); LHH, *Why Do Companies Offer Severance Packages?*, Feb. 13, 2025, https://www.lhh.com/en-us/insights/why-companies-offer-severance-pay (survey of human resources leaders shows that "reducing litigation risk remains an important factor in severance policies" and "[c]ompanies

typically tie severance benefits to the signing of release agreements, helping protect the organization from potential legal challenges while ensuring departing employees receive meaningful support"). Thus, in the case of both potential and pending claims, the Board's policy favoring private agreements helps parties achieve labor peace, the fundamental goal of the NLRA. *Cf. Independent Stave Co.*, 287 NLRB 740, 743 (1987) (settlements allow parties to side-step "the very risks that [the private parties] have decided to avoid," allowing them to "reach an early restoration of industrial peace, which . . . is a fundamental aim of the Act"). Moreover, because they are designed for similar aims, the Board is often called upon to adjudicate the lawfulness of the same central provisions in settlement and severance agreement cases—such as a release of claims, confidentiality, and non-disparagement clauses—provisions that are included as standard practice in many settlement and severance agreements.[52] Accordingly, it is unsurprising that the Board has applied its severance agreement caselaw when analyzing settlement agreements, and vice versa. *See, e.g., S. Freedman*, 364 NLRB at 1204 (in settlement context, relying on principles from severance cases, *Clark*, 336 NLRB 747, and *Metro Networks*, 336 NLRB 63); *Shamrock*, 366 NLRB No. 117, slip op. at 3 n.12 (applying *S. Freedman* in severance context).

Moreover, as a practical matter, the Board's role in this area should be circumscribed. The Board should not view itself as the arbiter of every private agreement in the workplace that *could* be read to encompass Section 7 rights under the broadest possible interpretation. *See Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) ("[a]s an administrative agency the Board should not . . . seek

[52] *See, e.g., Drafting a Settlement and General Release Agreement: Single Plaintiff Employment Dispute Checklist*, Practical Law Checklist 9-522-0993 (available on Westlaw) (listing common employment settlement agreement terms as including release of claims, confidentiality, and non-disparagement); *Breach of a Non-Disparagement Clause*, 13 Bus. & Com. Litig. Fed. Cts. § 144:42 (5th ed.) ("employment severance agreements . . . and contracts to settle pending litigation often include non-disparagement clauses").

to rule on every dispute that may fall within the letter of the Act"), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). By inserting itself into private negotiations between parties, including the severance agreements at issue here, and finding common provisions to be universally unlawful, the Board does a disservice to the public. Scrutinizing severance clauses to such an extreme degree hurts employer interests, especially their ability to amicably resolve potential litigation, and employee interests by preventing them from entering into agreements they otherwise would have absent an overreading by a completely uninvolved party. Such agreements, which are negotiated as an employee exits a company, have common (often standard) industry provisions meant to avoid potential disputes unrelated to the NLRA. For example, employers understandably desire some post-employment protections from their former employees given that they no longer owe a duty of loyalty and may harbor ill will toward the company depending on the circumstances of their departure. *See Hawaii Tribune Herald*, 356 NLRB 661, 661-63 (2011) (*Jefferson Standard* concerns a "duty [of loyalty] possessed by current employees"), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976) ("wholly natural for an employee to react with some vehemence to an unlawful discharge"), *enforced*, 548 F.2d 391 (1st Cir. 1977); *see also Why Do Companies Offer Severance Packages?*, *supra* p. 12 ("In an era where company reputations can be made or broken on social media and employer review sites, how organizations treat departing employees significantly impacts their ability to attract future talent.").

The Board's hyper-scrutiny of severance agreements can also hurt employee interests, especially given that employees do not "view every employer document . . . through the prism of Sec[tion] 7." *IGT*, 370 NLRB No. 50, slip op. at 2 n.8. Departing employees often rely on severance payments to make ends meet during a potential gap in employment. *See Why Do*

Companies Offer Severance Packages?, *supra* p. 12. An employer's demonstrated willingness to offer severance agreements further provides current and prospective employees with peace of mind in uncertain economic times that they too would have a cushion if they experience job loss. *Id.* The Board's hyper-regulation of severance agreements thus becomes an obstacle for parties trying to get the benefit of a deal that is not generally designed (and is not understood) to constitute a waiver of Section 7 rights.

B. The Board Should Overrule *McLaren Macomb* and Only Find Severance Agreements, or their Proffer, to be Unlawful if they Contain an Explicit Waiver of Section 7 Rights that is Not Narrowly Tailored.

i. Explicit employee waivers of the right to assist other employees with their claims before the Board or file their own future claims are not narrowly tailored.

In light of these policies and practical concerns, the Board should overrule McLaren Macomb and only find severance agreements, or their proffer, to be unlawful if they contain an explicit waiver of Section 7 rights that is not narrowly tailored. Under this approach, many common severance provisions would be lawful. For example, a departing employee's waiver of their own present NLRA rights would be narrowly tailored, and thus lawful. In contrast, a severance agreement that explicitly waives the departing employee's Section 7 rights to assist other employees before the Board or file their own future claims would be overbroad and thus unlawful.

Indeed, the Board has long found its ability to effectively enforce the Act is infringed upon by overbroad employee waivers of the right to assist *other* employees with *their* claims. This Section 7 right—the right to cooperate with the investigation and prosecution of unfair labor practices—continues to be important at the post-employment stage. The Supreme Court has made clear that "'all persons with information about [unfair labor] practices [must] be completely free from coercion against reporting to the Board'" and that such freedom is necessary to protect the Board's "channels of information from being dried up by employer intimidation of prospective

complainants and witnesses." *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967)). Former employees often have valuable information to share with Board agents and are especially important resources when current employees are too afraid of possible retaliation to cooperate with the Board. *See, e.g.*, *Flexsteel Industries,* 316 NLRB 745, 745, 749 (1995) (judge credited former employee witness because he had "no reason to lie" and noted that current employees must testify "adversely to their pecuniary interest") (cited repeatedly for these propositions), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) ("the danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage"). Thus, the Board has found unlawful severance agreements barring employees from lending assistance to others' claims, reasoning that such waivers did not arise from the facts giving rise to the settlements. For example, in *Metro Networks,* 336 NLRB at 64, 67 & n.20, the Board found, with former Chairman Hurtgen agreeing, that a non-assistance provision was unlawful because the promise not to "assist or otherwise participate, except as may be required by law, in any claim . . . [or] investigation . . . of any kind which relates to any matter that involves [the employer]" would have prohibited the employee from voluntarily assisting other employees with matters under the Act. Likewise, in *Clark,* 336 NLRB at 748, an inaptly named "confidentiality" provision in a severance agreement was found unlawful because it contained a ban on employees "voluntarily appear[ing] as a witness, voluntarily provid[ing] documents or

information, or otherwise assist[ing] in the prosecution of any claims . . . against the company," thereby barring them from assisting a Board investigation of a claim filed by another individual.[53]

Similarly, the Board has found that waivers were unlawfully overbroad if they waived the right to engage in *future* Section 7 activity. For example, in *Ishikawa Gasket America*, the employer violated Section 8(a)(1) based on language in a separation agreement prohibiting the employee from engaging in, among other things, "any conduct which is contrary to the [c]ompany's interests in remaining union-free" for one year post-employment. 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). The Board explained that "future rights of employees as well as the rights of the public may not be traded away in this manner." *Id.* at 176 (quoting *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973)). The Board also considered a release of claims lawful where it pertained to existing or pending claims and did not reach future incidents. *See, e.g., Phillips Pipe Line,* 302 NLRB at 732-33 (release lawfully waived right to file Board charge where it was "clear from the language of the release itself that it applies only to claims . . . resulting from circumstances predating the execution of the release"); *Coca-Cola*, 243 NLRB 501, 502 (1979) (lawful settlement of employee suspension where release interpreted not to apply to future claims); *Mandel*, 202 NLRB 117, 119 (1973) (employer unlawfully conditioned reinstatement on forbearance from future charges and concerted activities).

Indeed, the Board narrowly construed a release of claims unless it was clear from the language and surrounding context that the release waived the filing of future claims over future incidents. Thus, in *First National Supermarkets*, the Board construed a release "narrowly" such that it was limited to past employment claims notwithstanding that it was "broadly worded." 302

[53] *Baylor* overruled and limited *Clark* and *Metro Networks* to the extent they held that non-assistance clauses are categorically unlawful, even absent unfair labor practices that reflect hostility to employee rights. 369 NLRB No. 43, slip op. at 2 n.6.

NLRB 727, 727 (1991). By its terms, the release waived "claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with [the employer]." *Id.* The Board observed that "the phrase 'total employment' may appear ambiguous in isolation" but that "its meaning becomes evident when examined in the context of the release itself, as well as the circumstances surrounding [the employee's] discharge," namely that it was proffered after a "lengthy dispute" over his discharge and vacation pay. *Id.* Given this context, the majority rejected the dissent's view that "total employment" could be interpreted to mean claims arising during future reemployment. *Id.* at 727-28. The majority observed that the dissent's interpretation "ignores the context in which releases are generally negotiated with a terminated employee," namely, that an employer is "seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded." *Id.* Thus, it "would not be reasonable to conclude that the parties, by signing the present release, intended to compromise the rights and obligations that would grow out of any future employment relationship." *Id.* at 728. In justifying its narrow reading of the release, the Board relied on the fact that the Board had undertaken a similar approach in *Coca-Cola*, where it "implicitly interpreted a release providing 'that no actions of any kind will ensue' narrowly based on the entire document and the surrounding circumstances." *Id.* at 727 (quoting *Coca-Cola*, 243 NLRB at 501-02).[54]

[54] This is consistent with the approach the Board employs when assessing whether the statutory right to bargain has been waived. *See, e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983); *KOIN-TV*, 369 NLRB No. 61, slip op. at 2 n.5, 7-8 (2020) (applying clear and unmistakable waiver principles in assessing whether post-contract change was unlawful where relevant provisions did not survive expiration of the agreement), *enforced sub nom. NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801 (9th Cir. 2021).

Under the General Counsel's proposed standard, clauses that prohibit an employee from cooperating with the Board in others' ULP cases—as in *Baylor*,[55] *Clark*,[56] and *Metro Networks*[57] or filing claims over future incidents—as in *Mandel*, 202 NLRB at 119 would be unlawful inasmuch as they constitute explicit waivers of Section 7 rights that are not narrowly tailored.[58]

ii. *McLaren Macomb* and two earlier cases should be overturned because they treat broadly-worded or ambiguous proscriptions as explicit waivers.

The *McLaren Macomb* standard sweepingly emphasizes the "broad scope and the wide protection to employees by Section 7" and that it is "through the lens of this broad grant of rights and the Board's duty to protect them" that severance agreements should be scrutinized. 372 NLRB No. 58, slip op. at 6-7. That "lens," however, effectively turns any severance clause into a waiver of statutory rights whenever it *could possibly* be read to encompass Section 7 activities. This is anathema to the Board's longstanding policy favoring private settlement agreements, is contrary to the approach applied in *First National Supermarkets*, 302 NLRB at 727-28—a case that *McLaren Macomb* purportedly followed—and creates unnecessary obstacles to parties trying to get the benefit of a deal that was not designed or understood to constitute a waiver of Section 7 rights.

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[55] The non-assistance provision in *Baylor* (included under the misleading heading "No Participation in Claims") stated that the signatory "agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any [c]laim brought by any third party against [employer]." 369 NLRB No. 43, slip op. at 1.

[56] The non-assistance provision in *Clark* (tucked inside in a paragraph entitled "Confidentiality") stated: "You further agree that You will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the company." 336 NLRB at 748, 761.

[57] The non-assistance provision in *Metro Networks* provided: "you agree not to sue or file a charge . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves [the employer] . . . and that occurred on or before your execution of this [a]greement." 336 NLRB at 64, 69.

[58] Should the Board adopt the proposed test, it should nevertheless reaffirm in an appropriate case that an otherwise facially lawful severance provision cannot be applied in an unlawful manner—for instance, by using it as a basis to sue a signatory former employee for providing Board testimony.

Specifically, in overturning *Baylor* and *IGT*, *McLaren Macomb* claimed a return to "long-standing precedent," but it actually compounded an analytical error that emerged in earlier cases applying the narrowly-tailored-waiver standard. *Id.*, slip op. at 9. *McLaren Macomb* stated, without limitation, that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights." 372 NLRB No. 58, slip op. at 7. Applying that test, it found any provision that had a "chilling tendency on the exercise of Section 7 rights" to be overbroad and unlawful. *Id*. slip op. at 8. Yet, before *Metro Networks*[59] and *Shamrock*,[60] those decisions never painted in such broad strokes. Rather, as set forth above, they held that an employer could lawfully condition a settlement or severance on an employee's waiver of Section 7 rights where the waiver was narrowly tailored to the facts giving rise to the agreement and the employee received a benefit for the waiver. *See, e.g*., *Coca-Cola*, 243 NLRB at 502. And this earlier precedent expressly cautioned against interpreting "broadly-worded" or "ambiguous" phrases "in isolation" and ignoring the context in which they were offered. *First National Supermarkets*, 302 NLRB at 727-28 (observing that in *Coca-Cola*, 243 NLRB at 501-02, the Board "implicitly interpreted a release providing 'that no actions of any kind will ensue' narrowly based on the entire document and the surrounding circumstances").

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[59] *Metro Networks* found a confidentiality-of-employment-information to be unlawfully proffered, seemingly independent of the fact that the employees had been unlawfully discharged. The nondisclosure clause in that case, 336 NLRB at 64, provided in relevant part that employees will not publicize or communicate to any entity "information concerning your employment" with the employer. Although the provision also contained a confidentiality-of-contract-terms provision, that was not the basis for the Board's finding that the paragraph was unlawful. *Id.* at 67 & n.18 (interpreting paragraph to prohibit employee from "communicating with anyone about his employment").

[60] *Shamrock* also found a common non-disclosure-of-confidential-business-information clause to be unlawfully proffered, as well as a commonplace non-disparagement clause, apparently independent of the other unfair labor practices in the case. The non-disclosure clause provided that the employee may not disclose any confidential or proprietary information, which it defined as including "personnel or corporate information." The non-disparagement provision stated that the employee may not make "disparaging" remarks that could be "detrimental" to the company. *Shamrock*, 366 NLRB No. 117, slip op. at 28-29.

In its misapplication of longstanding precedent, the Board in *McLaren Macomb* effectively employed a work rule-type analysis to severance provisions. Although the Board denied using this framework in response to then-Member Kaplan's partial dissent, its work rule approach is apparent from its exacting scrutiny of each provision at issue in the case, assessing whether it could possibly be interpreted to restrict Section 7. *Id*., slip op. at 10.

Once this longstanding precedent is properly understood, it is clear that *McLaren Macomb* erred in concluding that a non-disparagement provision was unlawful despite it being a commonplace severance agreement provision that contained no explicit reference to Section 7 rights. The Board read its terms broadly—filtering them through the "lens of [the Act's] broad grant of rights"—and finding they could be interpreted to encompass Section 7. *Id.*, slip op. at 6. Thus, the Board reasoned that the prohibition on making statements to employees or the public that "could disparage or harm the image of [the] [e]mployer" was unlawful because it could encompass a statement that the employer had violated the Act, "conduct regarding any labor issue [or] dispute," or cooperation with a Board investigation "at any time in the future" because it lacked a temporal limitation. *Id*., slip op. at 8. Tellingly, the Board reasoned that the provision was overbroad in that it failed to reference the Board's standard in *Jefferson Standard*, 377 U.S. at 477—essentially creating a requirement that employers write the NLRA law into severance provisions that were not intended to reach Section 7 activities. 372 NLRB No. 58, slip op. at 8. In short, *McLaren Macomb*'s finding that a general non-disparagement clause was unlawful —one that did not reference clearly protected activities such as cooperating with an administrative agency or supporting employees in a labor dispute—is ripe for overruling.

McLaren Macomb also deviated from prior precedent in finding a confidentiality-of-contract-terms provision unlawful and should be overruled on this basis as well. Such a

provision had never been held unlawful. Tellingly, *McLaren Macomb* overturned prior precedent (*S. Freedman*, 364 NLRB 1203, and *Shamrock*, 366 NLRB No. 117) to reach this result, undermining its assertion that its decision represented a "return to the approach followed by Board precedent before *Baylor.* " *Id*., slip op. at 7, 9 n.48. Notably, *S. Freedman* construed a confidentiality-of-contract-terms clause to be a "narrowly tailored," "limited waiver" of the right to discuss discipline with coworkers in the context of an employee who was being reinstated and waiving his right to pursue the matter further through a grievance.[61] 364 NLRB at 1203-04. The Board found that clause lawful, specifically invoking the policy favoring the private resolution of labor disputes. *Id.* Following *S. Freedman*, the Board in *Shamrock* found lawful a confidentiality-of-contract-terms provision in a separation agreement since it did not waive the employee's right to discuss his discharge. 366 NLRB No. 117, slip op. at 3 n.12, 29. Indeed, the Board recently observed that confidential settlement agreements may "facilitate the resolution of workplace conflicts and thus 'further the Board's policy of encouraging the peaceful, nonlitigious resolution of disputes.'" *Dish Network, LLC*, 370 NLRB No. 97, slip op. at 4 (2021) (quoting *Independent Stave*, 287 NLRB at 741). Accordingly, the Board should overrule *McLaren Macomb* and restore *S. Freedman* and *Shamrock* on this point.

Finally, by prioritizing departing employees' Section 7 rights above all else, the *McLaren Macomb* Board ignored the basic tenet of appropriately accommodating Section 7 rights and private interests based on the nature and relative strength of the Section 7 right at issue. Pursuant to longstanding Supreme Court precedent, Section 7 rights are "not unlimited." *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 797-98 (1945). Rather, they fall along a spectrum that requires

[61] *S. Freedman* did not construe this broadly worded confidentiality-of-contract-terms clause to preclude the employee from providing information to the Board, distinguishing *Metro Networks* on this basis. 364 NLRB at 1204 & n.4.

balancing of the nature and strength of the respective Section 7 rights against legitimate employer interests. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). In the context of settling claims—including settlements concurrent with the end of employment—the narrowly-tailored-waiver test reflects an appropriate balance between employees' statutory rights and employers' legitimate interests, including "seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded." *First National Supermarkets*, 302 NLRB at 727-28.

Contrary to this case law, *McLaren Macomb* gave no weight to legitimate employer interests in entering into severance agreements, while finding the mere possibility of Section 7 infringement to be of sole, dispositive importance. As explained above, employer interests in maintaining industrial peace, resolving potential claims, protecting its reputation, and safeguarding its confidential and proprietary information are relatively strong. *See supra* pp. 12-14-employassist. To be sure, departing and former employees are statutory employees with Section 7 rights. *See, e.g., Briggs Manufacturing*, 75 NLRB 569, 570-71 (1947) (holding that "employee" as defined in Section 2(3) "covers . . . former employees of a particular employer"); *Eastex v. NLRB*, 437 U.S. 556, 564 (1978) (Section 2(3) "definition [of 'employee'] was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own"). However, their right to engage in protected concerted activities post-employment is comparatively low on the *Hudgens* spectrum because, generally speaking, they are no longer personally invested in improving the terms and conditions of employment at their former employer since any improved terms would not affect them. That said, as explained above at pp. 15-17, one Section 7 right is especially important at the post-employment stage—the right to cooperate with the investigation and prosecution of unfair labor practices.

In effectively outlawing many commonplace severance clauses by failing to adequately balance employee and employer interests, *McLaren Macomb* gives undue weight to the right to engage in concerted activities post-employment while virtually ignoring legitimate employer interests. In contrast, the narrowly-tailored-waiver standard proposed by the General Counsel reflects a better balance. That standard will safeguard access to the Board, ensure that employees are not coerced into trading away future rights, and respect employers' legitimate interest in reaching private settlements that protect their businesses, including facing disparagement and defamation from prior employees as well as protecting business-related confidential information, while benefiting both parties.

For all these reasons, the Board should overturn *McLaren Macomb*—as well as *Metro Networks* and *Shamrock* to the extent they found broadly-worded but commonplace non-disparagement and confidentiality clauses to be unlawful independent of the other unfair labor practices in those cases—and readopt *S. Freedman* and *Shamrock* to the extent they held that confidentiality-of-contract-terms provisions were lawful. *See supra* pp. 16, 21-22.

C. The General Counsel's Proposed Standard is Preferable to *Baylor* and *IGT*

The General Counsel respectfully submits that the proposed approach outlined herein is preferable to the standard set forth in *Baylor* and *IGT*. While both would significantly narrow the circumstances in which the Board interjects itself into severance agreements, the General Counsel's standard has some distinct advantages. It is more consistent with longstanding precedent, namely, *Mandel*, 202 NLRB at 119, 122, which found that conditioning reinstatement on waiving the right to file future charges with the Board was unlawful notwithstanding that *all the other unfair labor practice allegations were dismissed*. Applying *Baylor*'s approach, that condition would have been lawful to proffer because there was "no reason to believe that the

[employer] harbor[ed] animus against Sec. 7 activity." *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6.[62] In addition, the General Counsel's approach is more protective of the right to cooperate with the Board, which is a strong statutory right in this context, as explained above. The General Counsel's proposed approach also recognizes that the proffer of a facially unlawful agreement—when combined with a valuable benefit such as a severance payment at a time when the departing employee could use a financial cushion—tends to encourage employees to accept the terms and nominally forfeit unwaivable rights. In any event, as a practical matter, there is little benefit in permitting employers to propose overbroad waivers to employees if those same waivers would be unlawful if signed and maintained. This is especially so if the overbroad waiver discourages employees from cooperating with the Board because it erects a barrier for the Board to ever learn of the violation.

Admittedly, *Baylor* rejected former General Counsel Peter Robb's argument that settlement agreement precedent should be applicable in the severance agreement context. 369 NLRB No. 43, slip op. at 2 n.7. However, the General Counsel respectfully submits that the Board should revisit this conclusion. As to the argument in *Baylor* that severance agreements are not related to a labor dispute, as explained above, a primary purpose of severance agreements is to resolve potential labor-related claims, some of which may be on the precipice of litigation. Thus, many severance agreements do resolve potential labor disputes. Moreover, settlement and severance agreements contain many of the same standard terms and both have labor peace as their goal. Accordingly, settlement and severance agreement principles and precedents align well. *See*

[62] While it appears that the discriminatee in *Mandel* may have accepted the unlawful condition because he did, in fact, withdraw his charges, it is not entirely clear if he agreed to refrain from filing any future charges and the Board's decision certainly does not rely on his acceptance for finding it coercive within the meaning of Section 8(a)(1). 202 NLRB at 118-19 (supervisor promised that discriminatee would stop petitions, not discriminatee).

Section IV.A. The *Baylor* Board's observation that severance agreement provisions do not impact terms and conditions of employment is equally unpersuasive. *Id.* A severance agreement clause explicitly waiving Section 7 rights in an overbroad manner is no less chilling on a former employee's willingness to participate in Board proceedings or assist the Board in its investigations than it would be in a settlement agreement context. In either case, an employee's exercise of Section 7 rights comes at the potential cost of forfeiting the severance payment or being forced to defend against a costly employer lawsuit—significant disincentives notwithstanding that they do not affect employment terms.

D. If the Board Does Not Adopt the General Counsel's Proposed Standard, It Should Overturn *McLaren Macomb* and Return to *Baylor* and *IGT.*

Although the General Counsel recommends that the Board adopt the proposed standard set forth herein, should the Board disagree, it should return to *Baylor* and *IGT* instead of continuing to apply *McLaren Macomb*. Despite their shortcomings, *Baylor* and *IGT* are more closely aligned with the Board's policy favoring private agreements, they constrain the Board's role in policing such agreements, and they allow employers to proffer severance agreements without undue concern about running afoul of the Act, thereby benefitting employees. Indeed, while *McLaren Macomb* reads severance provisions too broadly, the main strength of *Baylor* and *IGT* is that they respect the Board's policy favoring private resolution of disputes, allowing employees and employers to offer and negotiate severance agreements without concern that a provision that does not reference Section 7 rights could result in an unfair labor practice. Because this represents a better balance of interests, returning to *Baylor* and *IGT* would be an improvement over current law should the Board decide not to adopt the General Counsel's position.

E. Applying the General Counsel's Proposed Standard, the Board Should Find that the Severance Agreement Was Unlawfully Proffered Because the Confidentiality Provision is Unlawful, Even Though the Non-Disparagement Provision Is Lawful

Under the General Counsel's proposed new standard, a severance agreement that waives a departing employee's own present rights under the Act would be narrowly tailored and thus lawful, while a severance agreement that explicitly waives the departing employee's Section 7 right to assist other employees would be overbroad and thus unlawful. This distinction is important because "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board" in order to "prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants." *Scrivener*, 405 U.S. at 122.

Applying this standard here, the confidentiality provision Respondent proffered to the discriminatees constitutes a waiver that is not narrowly tailored and is thus unlawful.[63] This provision bars departing employees from disclosing to any third party "all information and any idea in any form, tangible or intangible, whether disclosed to or learned or developed by you, pertaining to or affecting the business of the Company or other affiliated companies, their clients, consultants, or business associates," including "information about . . . employees." By its own terms, this provision is crucial to the agreement: "this provision is of the essence of this Agreement, and [Respondent] would suffer irreparable harm in the event of any breach of this provision." While the paragraph does not explicitly mention statements about a labor dispute, it concludes by stating that a signatory who discloses confidential information to a "government official or attorney for the sole purpose of reporting or investigating a suspected violation of law . . . may not

[63] Under this standard, the non-disparagement provision does not violate the Act.

be held liable under federal or state trade secret law for such disclosure and may be granted immunity by a court of proper jurisdiction." This explicit reference to investigations by government officials and attorneys makes clear that the provision *does* apply to statements made in the context of administrative proceedings, like investigations and hearings by the Board. Notably, the provision does not *allow* such disclosures to government officials by exempting them from the scope of the agreement—instead it merely clarifies that signatories who make such disclosures may not be held liable *specifically* under the umbrella of federal or state trade secret law. This language indicates that disclosing confidential information, as defined in this paragraph, to government officials would violate the agreement, potentially subjecting a signatory to the remedies, including repayment with interest, that the agreement makes clear are due to the employer in the event of a breach. Because the paragraph defines confidential information so broadly as to clearly encompass information relevant to the investigation of unfair labor practices, this provision amounts to an explicit waiver of a signatory's right to cooperate in Board proceedings. Although a separate paragraph asserts that "[n]othing in this Agreement precludes you from filing and/or participating in an administrative complaint or charge brought before any federal, state, or local governmental or administrative agency," the confidentiality provision functions to impose restrictions on *what* can be shared in those proceedings. Accordingly, this restriction is not narrowly tailored to the facts giving rise to the severance agreement; it extends to participation in claims by others. Accordingly, the severance agreements are facially unlawful and thus unlawful to proffer.

Under *Baylor* and *IGT*, a severance agreement that waives Section 7 rights is lawful only if it: (1) was entered into voluntarily; (2) only applied to post-employment activities and had no impact on employment terms or accrued benefits; and (3) was offered under non-coercive

circumstances. *Baylor U. Med. Ctr.*, 369 NLRB No. 43, at *1-2; *IGT*, 370 NLRB No. 50, at *2. In both *Baylor* and *IGT*, the Board concluded that the agreements were lawful because, among other reasons, the circumstances were non-coercive in that there were no allegations that the respective employers had violated Section 8(a)(3). 369 NLRB No. 43, at *2; 370 NLRB No. 50, at *2. The severance agreements at issue here fail to meet this test. Here, the Amended Complaint alleges that Respondent made unlawful threats in violation of Section 8(a)(1) and violated Section 8(a)(3) by laying off each of the discriminatees due to their actual or believed union activities and to discourage other employees from union support. In light of this context, Respondent did not offer the severance agreements to the discriminatees under non-coercive circumstances. *See Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at *3 n.12 (June 22, 2018) (finding the separation agreement, which waived an employee's Section 7 rights, unlawful because the employer unlawfully discharged that employee for protected activity), *enfd.*, 779 F. App'x 752 (D.C. Cir. 2019) (per curiam). Accordingly, the confidentiality and non-disparagement provisions, which limit Section 7 rights in the manners explained above, are facially unlawful under the standard discussed in *Baylor* and *IGT*.

VIII. The Severance Agreements Do Not Bar a Full Remedy

The ALJ should order the standard make-whole remedy for each unlawfully laid-off employee. Respondent asserts as an affirmative defense that the severance agreements bar the discriminatees from financial recovery. *See* GC001(L) at 13, ¶¶ 14-15. While Respondent has represented that it does not seek to litigate this issue at this stage of the case, the agreements, signed by seven of the eight discriminatees, do not bar any remedy for three independent reasons. The agreements include unlawful terms, were proffered as part of a broader scheme to eliminate union

supporters and are therefore inextricable from Respondent's underlying misconduct, and do not satisfy the *Independent Stave* test.[64]

First, it is well established that an agreement that includes unlawful terms cannot preclude reinstatement or backpay. *Smyrna Ready Mix Concrete*, 371 NLRB no. 73, slip op. at *10 n.22 (Mar. 8, 2022) (finding that "the separation agreement is itself unlawful and to be denied effect on that basis," negating the need to "engage in an analysis under *Independent Stave Co.*"); *A.S.V., Inc.*, 366 NLRB No. 162, slip op. at *3 (Aug. 21, 2018) (concluding that the ALJ properly determined that severance agreements were unenforceable because they contained provisions that "would reasonably chill statutorily protected activity"—even in the absence of allegations that such provisions independently violated the Act). As shown above, the severance agreements here are unlawful not only under extant Board law, but also under each alternative standards the General Counsel has urged the Board to adopt. Accordingly, the agreements cannot bar any remedy in this case.[65]

Moreover, even if the Administrative Law Judge concludes that the severance agreements at issue are not independently unlawful, they cannot bar any remedy because they were proffered at the time of the discriminatory layoffs and are therefore inextricably intertwined with Respondent's underlying unlawful conduct. *See A.S.V., Inc.*, 366 NLRB No. 162, at *2 (denying

[64] Respondent affirmatively states that "all individuals listed above, with the exception of Leo Shaw, executed their respective Agreement and Respondent paid out all consideration contemplated therein prior to the filing of the Charges." *See* GC001(L) at 9, ¶13. Thus, the record shows that Leo Shaw never signed a Separation Agreement and never received any release consideration.

[65] Although Respondent has asserted that the agreements' severability clause should ensure the agreements bar financial recovery even if certain provisions are found unlawful, this argument, too fails. GC001(L) at 13 ¶15. First, the text of the agreement inveighs against such interpretation; the confidentiality provision itself asserts that "this provision of the essence of this Agreement." This language is inconsistent with severing the provision. Second, Respondent's argument is incompatible with the standards under *A.S.V., Inc.*, 366 NLRB No. 162, slip op. at *3 (Aug. 21, 2018) and *Independent Stave Co.*, 287 NLRB, 740, 743 (1987), neither of which rest on the interpretation of particular provisions of a severance agreement, as explained *infra*.

enforcement of severance agreements that "were inextricably intertwined with the [employer's] underlying discrimination"). When severance agreements are incorporated into an employer's scheme to eliminate union supporters, the Board will not give them effect. *Clark Distrib. Sys.*, 336 NLRB 747, 751 (2001). The Board has suggested that where this is the case, full analysis under the *Independent Stave Co.* criteria is unnecessary, because it is clear that accepting the agreements would not effectuate the purposes and policies of the Act. *Compare A.S.V., Inc.*, 366 NLRB No. 162, at *1-2 (finding severance agreements unenforceable for the independent reason that they "were part and parcel of the [employer's] effort, through plantwide threats and a mass layoff" to counter employees' union campaign), *with Clark Distrib. Sys.*, 336 NLRB at 751 (applying *Indep. Stave Co.* and giving no effect to severance agreements that were part of scheme to eliminate union support). Here, as in *A.S.V., Inc.*, the severance agreements were offered as part of Respondent's plan to rid itself of employees who supported the Union in the wake of a union campaign that was marked by the employer's public threats against union supporters. *See A.S.V., Inc.*, 366 NLRB No. 162, at *2. For this reason, the severance agreements should be denied enforcement.

Finally, the severance agreements cannot bar any remedy because they fail to meet the full set of criteria set forth in *Independent Stave Co.*, 287 NLRB, 740, 743 (1987). When assessing the effect of employee waiver and release agreements, the Board considers: (1) whether the charging party, the respondent, and the individual discriminatees have agreed to be bound, and the position taken by General Counsel; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been fraud, coercion, or duress; and (4) whether the respondent has engaged in a history of violations of the Act. *Id.*

For example, in *A.S.V., Inc.*, the Board rejected severance agreements for failing to meet the *Independent Stave Co.* criteria, in light of opposition by the charging party and the General Counsel, as well as "an atmosphere of serious, unremedied unfair labor practices" that were not remedied by the agreements, which provided four to eight weeks of pay but failed to provide reinstatement or notice to other employees. 366 NLRB No. 162, at *1. By contrast, in *BP Amoco Chemical-Chocolate Bayou & Paper*, the Board did give effect to termination agreements that waived relief under the Act because the employees were given (1) 45 days to decide whether to sign and another seven days to cancel thereafter, (2) 60-days' pay regardless of whether they signed plus substantial additional pay if they did sign (many employees received $40,000 to $50,000 or more), and (3) the opportunity to attend off-site informational meetings conducted by the employer regarding the terms of the agreements. 351 NLRB 614, 614-16, 630 (2007) (finding that the agreements met the third *Independent Stave Co.* factor in light of extended time to review and assess the agreements and to revoke them after signing). Critically, the Board found that these agreements were reasonable under the second *Independent Stave Co.* factor because "there was significant risk that a charge alleging discriminatory selection would not be meritorious," given that there was little or no union activity occurring at the workplace and that there was no evidence that a quarter of the discriminatees had engaged in protected activities, let alone that the employer was aware of such activities. *Id.* at 616, 632.

The Board's rationale for rejecting the severance agreements in *A.S.V., Inc.*, is equally applicable to this case. Here, as there, Charging Party was not party to the agreements and General Counsel objects to them because they provided no remedy for the chilling effect of the other unfair labor practices (factor 1). The Board has consistently held that the General Counsel's and Charging Party's opposition is a "powerful reason to disregard [a] settlement[.]" *Beverly Calif. Corp. v.*

NLRB, 253 F.3d 291, 295 (7th Cir. 2001) (citations omitted). The severance agreements also fail under the second *Independent Stave* factor, because they do not adequately remedy the alleged violations. The agreements fail to provide reinstatement or notice to other employees or in any other way address Respondent's unlawful conduct over the months directly preceding their proffer. The circumstances of *BP Amoco*, by contrast, are notably dissimilar to this case. Unlike the employer in *BP Amoco*, Respondent: (1) had just experienced a company-wide union campaign, (2) had notice or belief of protected conduct by every single one of the laid-off employees, all of whom it then offered a disputed severance agreement, (3) denied any severance payment to laid-off employees who declined to sign an agreement, and (4) gave six of the eight discriminatees only three days to decide whether to sign and no opportunity to cancel thereafter.

In light of all of the above, the severance agreements fail to meet the criteria laid out in *Independent Stave Co.* and should not bar the remedy in this case.

IX. Respondent's Constitutional Defenses.

Respondent's Answer, GC001(G), raises a litany of constitutional arguments. If these arguments are not developed in Respondent's post-hearing brief, they have been forfeited and should be summarily rejected on that basis.[66] And even if the arguments are adequately raised and preserved, they lack merit.

[66] A respondent "fail[s] to meet its burden" to establish affirmative defenses—including those "based on alleged violations of its rights under the U.S. Constitution"—if it neglects to "present evidence or argument regarding those defenses" at the hearing or in its post-hearing brief. *Starbucks Corp.*, Case 18-CA-299560, JD-23-23 slip op. at 2 n.2 (Apr. 6, 2023); *accord Trader Joe's East Inc.*, Case 01-CA-296847, JD-70-24 slip op. at 65 n.160 (Nov. 8, 2024); *Starbucks Corp.*, Case 29-CA-309779, JD(NY)-21-24 slip op. at n.3 (Sept. 18, 2024); *Starbucks Corp.*, Case 13-CA-316407, JD-37-24 slip op. at 2 n.2 (June 14, 2024); *Starbucks Corp.*, Case 14-CA-306625, JD-24-24 slip op. at 18 n.7 (Apr. 25, 2024); *Starbucks Corp.*, Case 27-CA-294617, JD(SF)-04-24 slip op. at 2 n.1 (Feb. 6, 2024); *Starbucks Corp.*, Case 19-CA-295708, JD-02-24 slip op. at 26 n.33 (Jan. 4, 2024); *Starbucks Corp.*, Case 19-CA-296765, JD(SF)-37-23 slip op. at 43 (Nov. 27, 2023); *Starbucks Corp.*, Case 20-CA-298282, JD(SF)-18-23 slip

Respondent's twenty-sixth and twenty-seventh affirmative defenses claim that the removal protections Congress granted to Board members and administrative law judges are unconstitutional. This affirmative defense fails because "there is no evidence that the Respondent suffered any harm from the Board members' and administrative law judges' removal protections." *Commonwealth Flats Dev. Corp.*, 373 NLRB No. 142, slip op. at 1 n.1 (2024); *SJT Holdings, Inc.*, 372 NLRB No. 82, slip op. at 1 n.4 (2023) (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021), and *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), *rev'd per curiam on other grounds*, 598 U.S. 623 (2023)); *YAPP USA Auto. Sys., Inc. v. NLRB*, --- F. Supp. 3d ----, No. 24-12173, 2024 WL 4119058, at *9-10 (E.D. Mich. Sept. 9, 2024) (applying causal-harm standard to reject constitutional challenge to removal protections enjoyed by Board members and administrative law judges), *injunction pending appeal denied*, No. 24-1754, 2024 WL 4489598 (6th Cir. Oct. 13, 2024), *emergency application for writ of injunction denied*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024) (Kavanaugh, J., in chambers).

Because Respondent cannot make—and indeed, has not even tried to make—the required showing of harm here, Respondent's removal-restrictions arguments should be rejected solely on lack-of-harm grounds. *Cortes v. NLRB*, No. 1:23-cv-02954, 2024 WL 1555877, at *7 (D.D.C. Apr. 10, 2024) (declining to address the constitutionality of Board members' removal protections because "the Court could 'dispose of the case' on the harm requirement" (quoting *Bond v. United States*, 572 U.S. 844, 855 (2014))), *appeal docketed*, No. 24-5152 (D.C. Cir. June 10, 2024). Although a Board majority addressed the merits of Board members' removal protections in *SJT Holdings*, above, at 1, contested questions concerning the scope of the President's constitutional

op. at 2 n.2 (July 31, 2023); *Starbucks Corp.*, Case 22-CA-305726, JD(NY)-14-23 slip op. at 15 n.6 (July 14, 2023).

powers should be left to the courts to decide, as then-Member Kaplan correctly urged in that case. *Id.* at 2 n.5.

Respondent's twenty-eighth and twenty-ninth affirmative defense claims that any hearing in this matter would violate its rights under the Seventh Amendment. But "the Supreme Court has considered, and rejected, the Respondent's Seventh Amendment claim." *Troutbrook Co.*, 373 NLRB No. 125, slip op. at 2 (2024) (citing *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 48–49 (1937)). Recent decisions by courts and administrative law judges are in accord. *See Operating Engineers Local 39 v. NLRB*, --- F.4th ----, No. 23-124, 2025 WL 251692, at *13 (9th Cir. Jan. 21, 2025) ("We conclude that the Board's invocation of *Thryv*'s make-whole relief here vindicates a public right."); *YAPP USA Auto. Sys.*, 2024 WL 4119058, at *12 (holding that a Seventh Amendment challenge to an unfair-labor-practice proceeding "would likely fail based on the public-rights exception"); *CP Anchorage Hotel 2, LLC*, Cases 19-CA-218585 et al., JD(SF)28-24, slip op. at 19 (2024) ("The Board may resolve any doubts about the Board's make-whole remedy based solely on the public-rights exception to the Seventh Amendment."); Order Denying Respondent's Motion to Dismiss Compliance Specification, *Oak Harbor Freight Lines, Inc.*, Case 19-CA-031797 (Div. of Judges Sept. 16, 2024) ("Another reason why the Seventh Amendment does not apply is because this Board proceeding comes within the 'public rights' exception to the Seventh Amendment."); Order Denying Respondent's Demand and Motion for Jury Trial, *Advanced Marine Concepts LLC*, Case 14-CA-326677 (Div. of Judges July 23, 2024).[67]

[67] Because Congress has "significant latitude to assign adjudication of public rights to entities other than Article III courts," *Oil States Energy Sers., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018), the public-rights doctrine also suffices to defeat Respondents' argument that violations of the NLRA must be adjudicated by an Article III court. As the Supreme Court has repeatedly recognized, "[t]he Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). Its orders "vindicate public, not private rights." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943).

Equally unavailing is Respondent's thirtieth affirmative defense, which alleges that "the NLRB unconstitutionally exercises legislative, executive and judicial powers in the same administrative proceedings." But this argument ignores that by congressional design "[t]he NLRA creates a stark division of labor between the General Counsel and the Board," *Exela Enter. Sols. v. NLRB*, 32 F.4th 436, 444 (5th Cir. 2022), that runs "along a prosecutorial versus adjudicatory line," *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 124 (1987). The General Counsel carries out the functions assigned to that position under Section 3(d) of the Act "independent of the Board's supervision and review," *id.* at 118, so Respondent's structural challenge is inapt. *See NLRB v. FLRA*, 613 F.3d 275, 281 n.* (D.C. Cir. 2010) (observing that "the statutory separation mandated by § 3(d) is unique" among federal agencies). Thus, the Board has rejected the argument that "the agency wields a structurally unconstitutional combination of prosecutorial and adjudicatory functions." *Jones Lang Lasalle Americas, Inc.*, 373 NLRB No. 37, slip op. at 1 n.1 (2024) (citing *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023)), *petition for review filed*, No. 24-1079 (D.C. Cir. Apr. 3, 2024); *accord Amazon.com Services LLC*, Case 29-CA-261755, slip op. at 1 n.2 (2024) (not reported in Board volumes).

Finally, Respondent's thirty-first affirmative defense, which claims that the Amended Complaint is an impermissible attempt to create new law that is not entitled to deference and will not withstand judicial scrutiny, is misplaced. Board remedial determinations are reviewed by the courts under an abuse-of-discretion standard. As the Supreme Court has repeatedly explained, the Board has the authority to exercise its "primary responsibility and broad discretion to devise remedies" for violations of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (collecting cases).

CONCLUSIONS AND REMEDY

For the foregoing reasons, Counsel for the General Counsel respectfully urges that the Administrative Law Judge find that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act as alleged in the Amended Complaint.

Accordingly, General Counsel respectfully requests your Honor issue an order requiring Respondent to reinstate employees Andrew Anderson, Joshua Dannenberg, Daniel Katebini, Araceli Lopez, Arie Salomon, Leo Shaw, Amy Shell, and Jordana Starkman, make those employees whole for the adverse effects they suffered due to any direct or foreseeable results of Respondents' unlawful conduct, post and distribute a Notice to Employees and an Explanation of Rights, and provide any other remedy deemed appropriate.

Dated at New York, New York
This 24th of September, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 24, 2026, the Counsel for the General Counsel's Brief to the Administrative Law Judge in Case No. 02-CA-324827 et al. was e-filed and served by email upon the following:

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