Starbucks Corporation *and* Workers United Labor Union International, affiliated with Service Employees International Union. Case 21–CA–304228

September 6, 2024

DECISION AND ORDER

BY MEMBERS KAPLAN, PROUTY, AND WILCOX

On November 2, 2023, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed limited cross-exceptions with a supporting a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified below.[4]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3:

"3. Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

Issuing subpoenas duces tecum to employees requiring them to produce information and/or documents (including audio and video recordings) about their union and/or protected concerted activities or the union and/or protected concerted activities of other employees, including information about their participation in Board processes."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Starbucks Corp., La Quinta, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following language for paragraph 1(a).

"1. Cease and desist from:

(a) Issuing subpoenas duces tecum to employees requiring them to produce information (including audio and video recordings) and/or documents about their union and/or protected concerted activities or the union and/or protected concerted activities of other employees, including information about their participation in Board processes; and"

2. Substitute the following language for paragraph 2(a).

[1] The Respondent asserts that Members Prouty and Wilcox should recuse themselves, claiming that their "past, present, and perceived relationships with the Service Employees International Union" create a conflict of interest. Members Prouty and Wilcox have determined, in consultation with the NLRB Designated Agency Ethics Official, that there is no basis to recuse themselves from the adjudication of this case.

[2] There are no exceptions to the judge's dismissal of the complaint allegation that, by its issuance of the subpoenas, the Respondent has been discriminating against employees for giving testimony under the Act in violation of Sec. 8(a)(4) and (1) of the Act.

[3] Member Kaplan concurs with his colleagues that the Respondent violated Sec. 8(a)(1) by issuing overly broad subpoenas. Specifically, paragraph 5's request for "[a]ll statements, declarations, or affidavits, in any form, and any drafts thereof that you have prepared or that have been taken from you by Board personnel, a representative of the Union, or any other person relating in any way concerning the allegations contained in the complaint" was coercive in that it asked for affidavits in contravention of the Board's well-established policy of protecting confidential witness affidavits from prehearing disclosure. See *Santa Barbara News-Press*, 358 NLRB 1539, 1541–1542 (2012), incorporated by reference in 361 NLRB 903 (2014), enfd. 2017 WL 1314946 (D.C. Cir. 2017). Additionally, paragraph 9's request for "[a]ll documents, including electronically stored information such as emails, voicemails, and text messages, sent by you or received by you from any Board official, employee, or personnel from Region 21" was coercive because it requested documents and communications between employees and the Region. See *Tracy Auto, L.P., d/b/a Tracy Toyota*, 372 NLRB No. 101, slip op. at 6–7 (2023) (finding that the respondent unlawfully subpoenaed employees' communications with the General Counsel). Because Member Kaplan concludes that pars. 5 and 9 of the subpoena requests were unlawful, he finds it unnecessary to pass on the other paragraphs of the requests, as any additional violations would not affect the remedy.

[4] We shall modify the judge's recommended Conclusions of Law and recommended Order to conform to the violations found, the Board's standard remedial language, and in accordance with our decision in *Paragon Systems, Inc*., 371 NLRB No. 104 (2022). Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

Member Prouty would order the notice-reading remedy requested by the General Counsel in the complaint; he would also order that the notice be distributed to employees at the notice-reading meeting. See *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 9–15 (2022) (Member Prouty, concurring) (urging the Board to adopt a reading of the notice aloud and distribution to employees at a group meeting as a standard remedy for unfair labor practices because "[h]aving the notice to employees read aloud to them in a group meeting, with a copy in hand to follow along if they choose, is a superior means of disseminating and amplifying the Board's message to maximize the extent to which employees hear and comprehend it."), enfd. 98 F.4th 314 (D.C. Cir. 2024).

Member Prouty would also be open to, in a future appropriate case, addressing the General Counsel's suggestion that the Board reconsider and possibly broaden the standard for electronic distribution of notices currently set forth in *J. Picini Flooring*, 356 NLRB 11 (2010).

"2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its La Quinta store in La Quinta, California, copies of the attached notice marked 'Appendix.'[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its La Quinta, California store, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 14, 2022."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 6, 2024

Marvin E. Kaplan, Member

David M. Prouty, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue subpoena duces tecum requiring you to produce information (including audio and video recordings) and/or documents about your union and/or protected concerted activities or the union and/or protected concerted activities of other employees including information about your and/or other employees' participation in Board processes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

STARBUCKS CORPORATION LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-304228 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[5] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before the physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lisa McNeill, Esq., for the General Counsel.
Michael L. Kibbe, Esq., David R. Comfort, Esq., Michael G. Pedhirney, Esq., and *Rana Haimout, Esq. (Littler Mendelson, PC),* for the Respondent.
Robert S. Giolito, Esq. (Law Office of Robert S. Giolito, PC), for the Charging Party.

STATEMENT OF THE CASE

AMITA BAMAN TRACY, ADMINISTRATIVE LAW JUDGE. A hearing was held in this matter in Los Angeles, California on May 9 and August 1, 2023. Workers United Labor Union International, affiliated with Service Employees International Union (Union or Charging Party) filed the charge on September 27, 2022.[1] The General Counsel, through the Regional Director for Region 21 of the National Labor Relations Board (the Board), issued a consolidated complaint and notice of hearing on January 9, 2023.[2] Starbucks Corporation LLC (Respondent or Starbucks) filed a timely answer to the complaint.

The complaint alleges that Respondent violated Sections 8(a)(1) and (4) of the National Labor Relations Act (the Act) by issuing subpoenas duces tecum on about September 14 to employees[3] Jazmine Cardenas (Cardenas) and Andrea Hernandez (Hernandez) because the employees gave testimony in the form of written affidavits in a prior unfair labor practice complaint (Case 21–CA–296716) or otherwise cooperated in the Board's investigation in Case 21–CA–296716. The alleged unlawful portions of the subpoena duces tecum, which were identical for Cardenas and Hernadez, are:

1. All audio and/or video recordings of any Starbucks' current or former managers, supervisors, leaders or agents at the La Quinta store relating to union organizing at Starbucks' La Quinta stores, and/or the allegations contained in the complaint. In addition, if a written transcript of such a recording has been prepared, also provide copies of the same.

2. Communications with the media concerning your employment with Starbucks, the Union, and/or the allegations contained in the complaint.

3. Documents provided by you to the Union and/or Region 21 concerning the allegations contained in the complaint, including but not limited to documents concerning the conduct of managers, supervisors, leaders or agents of Starbucks.

4. Communications between you and the Union and/or Region 21 concerning the allegations contained in the complaint, including but not limited to communications concerning conduct of current or former managers, supervisors, leaders or agents of Starbucks.

5. All statements, declarations, or affidavits, in any form, and any drafts thereof that you have prepared or that have been taken from you by Board personnel, a representative of the Union, or any other person relating in any way concerning the allegations contained in the complaint.

6. Communications with current and/or former employees of Starbucks concerning any communication between Store Manager Matt Burton and other partners at the La Quinta store or other Starbucks' locations.

7. Communications with current and/or former employees of Starbucks concerning any violations by employees of Starbucks' policies at Starbucks' La Quinta store or other Starbucks' locations.[4]

8. Documents, communications, and recordings that contain any information concerning any act or failure to act alleged in the complaint or the credibility of any witness or potential witness in this proceeding.

9. All documents, including electronically stored information such as emails, voicemails, and text messages, sent by you or received by you from any Board official, employee, or personnel from Region 21.

10. All documents, including electronically stored information such as emails, voicemails, and text messages, related to, discussing, or referencing your employment with Starbucks.

11. All documents, including electronically stored information such as emails, voicemails, and text messages, related to, discussing, or referencing your presence in the La Quinta store on May 12.

12. All documents, including electronically stored information such as emails, voicemails, and text messages, related to, discussing, or referencing your presence in the La Quinta store on May 18.

13. All journals or notebooks you kept related to your employment at the Starbucks' La Quinta store.[5]

On the entire record, including my observation of the demeanor of witnesses,[6] and after considering the briefs filed by the General Counsel, Charging Party, and Respondent,[7] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Washington corporation with a facility located at 79845 CA–111, La Quinta, California (La Quinta store), has

[1] All dates hereinafter are in 2022 unless otherwise noted.

[2] Although originally consolidated in this matter, on March 24, 2023, the General Counsel withdrew charge 21–CA–304375 and severed certain allegations from the consolidated complaint.

[3] Starbucks' employees are referred to as partners (Transcript (Tr.) 29).

[4] The complaint includes this request twice as an alleged violation of the Act. I will disregard this error.

[5] Only one request in the identical subpoena duces tecum was not alleged to violate the Act: Documents received from Starbucks during your employment with Starbucks.

[6] Although I have included several citations to the evidentiary record in this decision to highlight testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those citations, but rather are based on my review of the entire record for this case. Furthermore, in evaluating witness' testimonies, both the General Counsel and Respondent called one witness each. I found both witnesses to be credible, and there were no matters in dispute.

[7] The transcript and exhibits in this case generally are accurate. Additional abbreviations used in this decision are as follows: "L." for line; "Jt. Exh." for joint exhibit; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's Brief; "R. Br." for Respondent's Brief; and "CP Br." for Charging Party's Brief.

been engaged in the retail sale of food and beverages. Respondent, in conducting its operations annually, derived gross revenues in excess of $500,000, and purchased and received at the La Quinta store goods valued in excess of $5000 directly from points outside the State of California. Accordingly, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find that the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Previous Unfair Labor Practice Complaint Concerning the La Quinta Store

On May 27, the Union filed a charge against Respondent in Case 21–CA–296716 alleging that Respondent instructed unnamed employees that there should be "no talking" about the union while working. During the investigation of the charge in June, Respondent's employees Jazmine Cardenas (Cardenas)[8] and Andrea Hernandez (Hernandez), who worked at the La Quinta store, provided testimony to the Board in the investigation of Case 21–CA–296716 (Tr. 31). Specifically, Hernandez signed her affidavit on June 14 (Tr. 41). Hernandez testified that she did not request any time off work to participate in the investigation (Tr. 33–34). Hernandez also only told Cardenas that she provided an affidavit to the Board; Hernandez did not disclose her participation in the Board process to La Quinta Store Manager Matt Burton (Burton)[9] or any employee/partner, other than Cardenas (Tr. 34, 42–43). Burton also confirmed that neither Hernandez nor Cardenas told him that they provided information or an affidavit to the Board or participated in the Board investigation (Tr. 56). Thereafter, on July 14, Region 21 of the Board issued a complaint and notice of hearing against Respondent in Case 21–CA–296716 (GC Exh. 9). Neither Cardenas nor Hernandez were named in the unfair labor practice complaint and had not been named in the underlying unfair labor practice charge (GC Exh. 8(a) and (b)) (Tr. 32).

On September 14, in connection with the October 11 scheduled hearing in Case 21–CA–296716, Respondent, by its unnamed legal representative, issued subpoenas duces tecum to Cardenas and Hernandez (Tr. 36). Prior to the hearing, Starbucks' attorneys interviewed some La Quinta store partners to prepare for litigation but did not interview Hernandez or Cardenas (Tr. 38–39). Store Manager Burton ensured the partners being sought for interviews by Starbucks' attorneys were available during work time (Tr. 74–75). But Burton did not know who was being interviewed, did not maintain a list of partners who went to the interviews, and did not ask about the interviews (Tr. 75–76).

The subpoenas duces tecum, issued on September 14 and which were identical, requested certain documents from Cardenas and Hernandez including documents they provided to the Union and to the General Counsel, as well as communications with other employees (Jt. Exh. 1(a) and (b)). However, the definitions and instructions section of the subpoenas instructed Hernandez and Cardenas that they were not being asked to provide witness questionnaires, affidavits, and statements provided to the Board (Jt. Exh. 1(a) and (b)).

In response to the subpoenas to Hernandez and Cardenas, the General Counsel and the Union filed petitions to revoke. On October 7, Administrative Law Judge Jeffrey D. Wedekind granted the petitions to revoke. Judge Wedekind wrote that the subpoenas were "grossly overbroad and [sought] information that is not reasonably relevant" to the complaint allegations or Respondent's defenses. Furthermore, Judge Wedekind wrote that although some of the subpoena requests encompassed some relevant information, Respondent was not entitled to subpoena that information from the General Counsel's investigative file or because the information would reveal "protected conduct or communications by the two employees and other employees" (GC Exh. 4).

However, Judge Wedekind stated that Respondent could renew its request for any notes or journal entries after the employees testified. The hearing in Case 21–CA–296716 was held on October 11 and 12. After Hernandez testified about writing in a notebook, Respondent renewed its request for the notes, and these documents were then provided to Respondent (GC Exh. 4; Tr. 46–47).

On December 6, Judge Wedekind issued his decision in Case 21–CA–296716 whereby he dismissed the complaint allegations. In so finding, Judge Wedekind discredited the testimonies of Cardenas and Hernandez. Specifically for Hernandez, Judge Wedekind discredited her testimony, in part, because her notes, which were produced per the subpoena, did not reflect the alleged statements Burton made during a meeting she attended. Judge Wedekind's decision has been appealed, and his decision is not yet final.

B. Relevant Facts

Hernandez has worked at the La Quinta store for the past 9 years, most of which has been as a shift supervisor (Tr. 25–26, 47). Burton has been the store manager (SM) of the La Quinta store since April (Tr. 26, 52–53). Hernandez became actively involved in the Starbucks Workers United organizing campaign in December 2021 (along with 5 other partners) and considered herself to be a lead organizer (Tr. 29–30, 43). Ultimately, the partners voted to be represented by the Union (Tr. 31).

Hernandez testified that she did not take any time off work to participate in the Board processes including when she provided her affidavit, prepared for the hearing, and attended the hearing. Hernadez only informed Cardenas of her involvement in the Board process (Tr. 35–37, 42–43). Burton testified that Cardenas requested time off between May and October, but he did not know the reasons for her requested time off, did not ask her why she needed the time off, and did not ask her for a reason (Tr. 56).

[8] Cardenas no longer works for Respondent (Tr. 54).

[9] Respondent admitted, and I find that Burton has been a supervisor and agent of Respondent within the meaning of Sec. 2(11) and 2(13) of the Act.

Hernandez testified that she kept a small booklet in her apron where she took notes of her conversations with Burton (Tr. 44). Hernandez explained that the Union advised her to keep notes during the election period, and she encouraged other partners to keep notes in a journal as well (Tr. 44–45). Although Hernandez did not tell other partners that she kept her notes in a booklet, she also was not secretive about this fact (Tr. 45). Hernandez confirmed that her benefits have remained the same or improved due to a pay increase required by the State of California throughout this time period (Tr. 47).

C. Procedural Matters

During this unfair labor practice complaint proceeding, on April 13, 2023, the General Counsel issued a subpoena duces tecum (B–1–11KBEZR) to Respondent. The subpoena B–1–11KBEZR contains two requests which are identical except for specifying the names of Cardenas and Hernandez in each request. The General Counsel requested:

> All documents, including electronically stored information, which describes, discusses, and/or involves the basis and/or reasons for issuing subpoena duces tecum to Cardenas and Hernandez on about September 14, in connection with the hearing in Case 21–CA–296716.

Respondent filed a petition to revoke, refusing to provide any documents, claiming that the documents are protected by attorney–client and attorney work product privileges. In support, Respondent explained why the subpoenas duces tecum were issued to Cardenas and Hernandez in preparation for the hearing in Case 21–CA–296716. Respondent's counsel wrote:

> In order to defend itself at the hearing, Respondent's counsel interviewed witnesses at the La Quinta store that might have knowledge of the facts and circumstances surrounding the allegations in the 21–CA–296716 Complaint. During this extensive preparation process, Respondent's counsel determined that Andrea Hernandez ("Hernandez") and Jazmine Cardenas ("Cardenas"), two partners at the La Quinta store, might have relevant information as it pertained to Starbucks' defense at the hearing. Specifically, Respondent's counsel learned that it was widely known that Hernandez maintained a journal in which she documented events, interactions, and occurrences she had with SM Burton, to possibly include the details surrounding the charges at the hearing. Respondent's counsel further learned that Hernandez claimed to have illegally recorded her conversations with SM Burton, and openly discussed it with Cardenas within earshot of other partners while working on the floor of Respondent's La Quinta store.

Respondent also refused to provide a privilege log claiming that the requests would infringe on their due process rights. Respondent argued that they are not required to provide a privilege log based on the Ninth Circuit's decision in *United States v. Horn*, 976 F.2d 1314 (9th Cir. 1992). There, the Ninth Circuit held that the overbroad subpoena request by the Federal Government to the client's attorney obviated the need for an *in camera* inspection of the documents and permitted the blanket assertion of privilege.

In opposition, the General Counsel argued that Respondent should provide a privilege log for any responsive documents claimed to be attorney–client privileged or provide the documents for *in camera* inspection. As for Respondent's argument that the documents are protected as attorney work product, the General Counsel argued that an exception to the privilege applies because Respondent's attorneys issued the subpoenas unlawfully. The Charging Party argued that attorney–client privilege does not apply as Respondent's attorneys acted alone and did not communicate with their client about the issuance of the subpoenas. But if there are responsive documents, Respondent must create a privilege log and submit the documents for *in camera* inspection. The Charging Party also argued that attorney work product privilege does not apply as Respondent's attorneys' "impressions and conclusions" are at issue.

Because Respondent filed a motion to dismiss the complaint with the Board, I placed the ruling on the petition to revoke in abeyance pending the Board's decision on Respondent's motion to dismiss. The hearing in this matter opened on May 9, 2023. Both parties presented their cases, but no party rested their case–in–chief and the record remained open due to the then pending Board decision as well as my ruling on the petition to revoke. The Board on May 19, 2023, denied Respondent's motion to dismiss (GC Exh. 11(a)).

Thereafter, on May 30, 2023, I denied Respondent's petition to revoke as the documents requested are reasonably relevant to this proceeding, are sufficiently specific, and are not burdensome as the documents requested relate to a specific time and incident (GC Exh. 11(i)). As explained in my order, I determined that the facts in *United States v. Horn* are distinguishable. The subpoenas issued by the General Counsel were to the custodian of records for Starbucks and the requested information did not specifically seek obviously privileged documents. Furthermore, the Ninth Circuit noted that the normal assertion of privilege necessitates a privilege log for *in camera* inspection, and that blanket assertions of privilege are strongly disfavored. Thus, I ordered Respondent to search for any responsive documents and provide any non–privileged documents no later than June 30, 2023. To the extent Respondent claimed that any documents are privileged, I ordered Respondent to produce a particularized privilege log consistent with FRCP 26(b)(5)(A) and 45(e)(2)(A) to be provided to General Counsel no later than June 30, 2023.

In the denial of Respondent's petition to revoke, I disagreed with the General Counsel's argument that an exception to the privileges applies. The Board in *Patrick Cudahy, Inc.*, 288 NLRB 968, 974 (1988), held that the crime–fraud exception to privilege does not extend to unfair labor practices "generally" (emphasis in original). Thus, I declined to find that the crime–fraud exception applies. Moreover, contrary to the Charging Party's argument, mental impressions, conclusions, opinions, and legal theories of an attorney concerning litigation are protected under the work product doctrine. *Central Telephone Co. of Texas*, 343 NLRB 987, 988–989 (2004). Thereafter, I ordered that the hearing would resume on August 1, 2023.

Prior to the hearing's resumption on August 1, 2023, on July 25, 2023, the General Counsel filed a motion for evidentiary sanctions pursuant to *Bannon Mills*, 146 NLRB 611 (1964), for Respondent's failure to comply with my May 30, 2023, order denying Respondent's petition to revoke. Specifically, the

General Counsel requested that an adverse inference be drawn because Respondent refused to produce documents for *in camera* inspection or provide a privilege log. The General Counsel requested that Respondent be barred from introducing any unproduced documents and records that would have been responsive to the subpoena and barred from eliciting witness testimony relating to the information learned from the employee interviews. Finally, the General Counsel cites to FRCP 37(c)(1)(C) to impose other appropriate sanctions, including prohibiting Respondent from supporting or opposing designated claims or defenses or from introducing designated matters into evidence (GC Exh. 11(e)).

On July 31, 2023, Respondent filed an opposition to the General Counsel's motion for evidentiary sanctions. Respondent agreed that they had not provided any documents. Respondent conveyed that they did not provide a privilege log as "there is no legal obligation for Starbucks to do so in a Board proceeding, absent an order from a District Court." Respondent argued that *in camera* inspection of alleged privileged documents exclusively lies with the Federal Courts, and granting sanctions would violate the Fifth Amendment (GC Exh. 11(g)).[10]

When the hearing resumed on August 1, 2023, no party including Respondent presented any further evidence. Counsel for the General Counsel stated that at that time there were no plans to seek subpoena enforcement in the Federal Courts (Tr. 91–93).

Legal Analysis

Section 7 of the Act provides that, "employees shall have the right to self–organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 of the Act also protects the right of employees to utilize the Board's processes by filing unfair labor practice charges free from coercion. See 29 U.S.C. §157; see also *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983).

The General Counsel alleges that the September 14 subpoenas duces tecum Respondent issued to Hernandez and Cardenas violated both Sections 8(a)(1) and (4) of the Act. Respondent argues that they have a right to use the Board processes to subpoena information to prepare for litigation brought against them by the General Counsel. Furthermore, Respondent argues that their right to the information outweighs the employees' right to keep their Section 7 activity confidential.

As discussed, hereafter, I find that the General Counsel has proven that specific requests of Respondent's September 14 subpoenas duces tecum issued to Hernandez and Cardenas violated Section 8(a)(1) of the Act, but I decline to find a Section 8(a)(4) violation. I will rule on the motion for sanctions when discussing the Section 8(a)(4) allegation as the General Counsel's April 13, 2023, subpoenaed documents concern the reasons why Respondent issued the September 14 subpoenas to Hernandez and Cardenas. The Section 8(a)(1) allegations are proven by objective evidence and are not impacted by Respondent's refusal to comply with the General Counsel's April 13, 2023, subpoena issued in this proceeding.

A. 8(a)(1) Allegation

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7. The Board has set forth an objective test to determine if the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act. *Santa Barbara News–Press*, 358 NLRB 1539 (2012), incorporated by reference in 361 NLRB 903 (2014) (impermissible for employer to subpoena employees in order to obtain their confidential Board affidavits); *Multi–Ad Services*, 331 NLRB 1226, 1227–1228 (2000). The test "does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001), citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Included within those Section 7 rights is the right for employees to assist the General Counsel's investigation and litigation of an unfair labor practice charge. See, e.g., *Interstate Management Co. LLC*, 369 NLRB No. 84, slip op. at 2 (2020) ("[E]mployees have a Sec[.] 7 right to provide evidence to the Board and to cooperate in Board . . . investigations without inference."); *Hoover, Inc.*, 240 NLRB 593, 605 (1979) (finding that employer violated Sec. 8(a)(1) by threatening reprisal against employees who communicated with the Board); accord *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) ("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."). The Board has consistently found that employers act with illegal objective when serving subpoenas to current and former employees to obtain their confidential Board affidavits. *Ampersand Publishing, LLC*, 361 NLRB 903 (2014); *Inter–Disciplinary Advantage*, 349 NLRB 480, 505 (2007). The Board considers such demands to be inherently coercive and unlawful as the Board protects confidential witness affidavits from prehearing disclosure. See *Inter–Disciplinary Advantage*, supra.

In each of these subpoena requests, Respondent sought Section 7 protected information. In a number of these requests, Respondent sought any communications and documents the employees provided to the General Counsel along with their affidavits.[11] Although Respondent included within the subpoena instructions that Starbucks was not requesting witness affidavits, Respondent's document requests directly contradict this instruction. At least one request explicitly requests affidavits prepared or taken by the Board, and other requests ask for documents provided by the employees to the Board concerning allegations which could encompass declarations or statements. Objectively, this conflict is confusing, and thus, Respondent's instruction does not make an inherently unlawful request lawful. As the Board recently reiterated in *Tracy Auto, L.P.*, 372 NLRB No. 101, supra at 6–7 (2023), "the harm is in the very request itself, which would have a chilling effect on employees' willingness

[10] In contrast, Respondent, when opposing the General Counsel's petition to revoke the September 14 subpoenas duces tecum issued to Hernandez and Cardenas, offered that the ALJ could "conduct an *in camera* review of Hernandez' journal and her illegally recorded conversations with SM Burton to determine what Starbucks is entitled to" (GC Exh. 3).

[11] Identified herein as pars. 3, 4, 5, and 9.

to" assist in the General Counsel's investigation and litigation of unfair labor practice allegations. *Chino Valley Medical Center*, 362 NLRB 283, 283 fn. 1 (2015) (employer violated Section 8(a)(1) by issuing subpoena duces tecum to employees seeking communications between employees and the union and documents relating to the distribution and/or solicitation of union authorization cards), enfd. in relevant part sub nom. *United Nurses Associations of California v. NLRB*, 871 F.3d 767 (9th Cir. 2017). Section 102.118(a) of the Board's rules and regulations requires Respondent to obtain written consent from the General Counsel to obtain any files, documents, reports, memoranda, or records in control of the General Counsel. Furthermore, any subpoena duces tecum which requires production of those items described shall be invalidated on the grounds that the requested items are privileged against disclosure. Respondent did not seek and obtain permission for these items, and Respondent cannot subpoena items in the General Counsel's possession from the union or an individual.

In other requests, Respondent sought information about employees' Section 7 conduct, including their recordings of meetings about their union organizing, communications amongst employees, and documents related to such communications.[12] "The confidentiality interests of employees have long been an overriding concern to the Board. Generally, an employer who seeks to obtain the identities of employees who sign authorization cards and attend union meetings violates the Act." *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995). The Board has sought to protect such information "because of 'the potential chilling effect on union activity that could result from employer knowledge of the information.'" *Veritas Health Services v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012). The foreseeable "chill" on employees' free exercise of Section 7 rights has led courts to bar employers from seeking such information through otherwise permissible means. See, e.g., *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977). Indeed, an employer may not surveil its employees to obtain such information and may not give its employees the impression that it has surveilled—or will surveil—them to obtain such information. *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991); *Beretta U.S.A. Corp.*, 298 NLRB 232 (1991), enfd. mem. 943 F.2d 49 (4th Cir. 1991); *Adco Metals*, 281 NLRB 1300 (1986). Further, an employer violates the Act if it questions its employees about this information. *Hanover Concrete Co.*, 241 NLRB 936 (1979); *Dependable Lists, Inc.*, 239 NLRB 1304, 1305 (1979); *Campbell Soup Co.*, 225 NLRB 222 (1976). Similarly, Respondent sought to question employees about their confidential communications with the Union and other employees. Respondent sought the employees' recordings, communications, documents, and journals which could reveal their confidential communications. In the context of this matter, Hernandez and Cardenas participated in the Board processes without informing any managers, supervisors, or attorneys at Starbucks. They attempted to keep their activity hidden other than the knowledge that they were union supporters. Furthermore, their communications with employees and the Union were kept hidden. Thus, on the eve of trial, when they received such expansive and overbroad subpoenas, objectively, reasonable employees' participation in Section 7 activity would be chilled. This chilling effect is precisely why the Supreme Court and the Board have consistently sought to protect employees' confidential Section 7 activity from disclosure. Thus, each specified request, as set forth within, of Respondent's subpoenas duces tecum to Hernandez and Cardenas violated Section 8(a)(1) the Act.

I disagree with the General Counsel's reliance on *Guess?, Inc.*, 339 NLRB 432, 434 (2003), to support its argument that Respondent's issuance of the subpoenas to the employees violated the Act (GC Br. at 9). In *Guess?*, the Board set forth a three–part test to be used in determining whether an employer's discovery requests in a separate proceeding[13] were lawful. The Respondent's subpoenas to Hernandez and Cardenas were issued in the underlying unfair labor practice proceeding itself, not in a separate proceeding. The subpoenas likewise did not contain discovery requests, which the Board prohibits, but rather were issued pursuant to Section 102.31 of the Board's rules and regulations. Thus, the *Guess?* framework does not apply under these circumstances. The proper standard to apply is that contained in *National Telephone Directory*, supra, where the Board held that an employer in an unfair labor practice proceeding was not entitled to obtain the names of employees who attended union meetings and signed authorization cards. To reach this holding, the Board utilized a balancing test and found the employees' rights under Section 7 to keep their protected activities confidential outweighed the employer's need for the information to present its defense.[14] That balancing of interests yields the same result in this case.

As for Respondent's defense, Respondent has every right to issue subpoena duces tecum under the Board's rules and regulations. *However*, while Respondent has the right to defend itself in an unfair labor practice proceeding and has the right to use the Board's rules and regulations to issue subpoenas to employees, Respondent must carefully balance their rights when crafting these subpoenas so as not to outweigh employees' Section 7 rights. In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court balanced the confidentiality interests of employee affiants who had not testified in a hearing, with an employer's interest in obtaining their affidavits for the purpose of preparing its defense of unfair labor practice allegations. The Court, in holding that the investigatory affidavits are protected from disclosure under the Freedom of Information Act, recognized that such disclosure would create a risk that recipients of the affidavits would intimidate employees "to make them change their testimony or not testify at all." Id. at 239. The Court further suggested that potential witnesses might "be reluctant to give statements to NLRB investigators at all" without assurances of

[12] Identified herein as pars. 1, 2, 6, 7, 8, 10, 11, 12, and 13.

[13] In *Pain Relief Centers*, 371 NLRB No. 143, slip op. at 2 (2022), the Board stated that *Guess?* set forth a three–part test for "assessing whether discovery requests in a separate proceeding" violated the Act.

[14] Even in *Tracy Auto*, the Board did not state that the *Guess?* framework would apply in unfair labor practice litigation. Instead, the Board stated that applying the *Guess?* framework would yield the same result: a violation of the Act when seeking all documents between the employee and the General Counsel. Id. at 5.

confidentiality because of the "all too familiar unwillingness [of employees] to 'get too involved' [in formal proceedings] unless absolutely necessary." Id. at 240–241.

Respondent cites to several decisions to support its position that Starbucks may use Board processes and issue subpoena duces tecum to employees. Again, the controversy here is not the issuance of the subpoenas to Hernandez and Cardenas. The controversy is the depth and scope of these requests to employees which infringed on their right to engage in confidential protected activity, including participating in Board processes. In *Maritz Communications Co.*, 274 NLRB 200 (1985), the Board did not find a violation of Section 8(a)(1) when the pretrial questions were relevant to a civil suit alleging age discrimination. Here, in contrast, it is not relevant to the unfair labor practice proceeding what Hernandez and Cardenas communicated to the media, what they spoke about to their coworkers regarding violations of Starbucks' policy, what recordings they may possess concerning union organizing, or what documents they may possess regarding the credibility of witnesses. Such broad subpoenas duces tecum only seeks to coerce and intimidate employees from participating in Board processes. Contrary to Respondent's statement in their brief (R. Br. at 12), the subpoenas issued to Hernandez and Cardenas were overly broad and the requested documents were not reasonably relevant to the proceeding as determined by Judge Wedekind. Only after the employees testified did Judge Wedekind permit Respondent to obtain specific pages of Hernandez's notebook as related to the allegations in the complaint. These documents were ordered to be provided to Respondent as they were relevant to the proceeding. Thus, Respondent's due process rights were preserved.

In *Ozark Automotive Distributors, Inc.*, 779 F.3d 576 (D.C. Cir. 2015), the Court determined that, in that context, the documents sought were relevant to the proceeding, and the hearing officer should have reviewed the documents *in camera* to reconcile the employees' confidentiality interests with the employer's need for the documents. In contrast, Judge Wedekind made the decision to revoke these subpoenas, albeit one request as explained previously. Respondent claims that Judge Wedekind approved their subpoenas issued to Hernandez and Cardenas. This statement is not true. Judge Wedekind granted the petitions to revoke due to relevance and being overbroad, except for the notebooks, specific pages of which were given to Respondent after Hernandez testified. Thus, the decision in *Ozark Automotive Distributors* is not comparable to the circumstances here.

Finally, the Board processes specifically do not have discovery to protect employees' concerted activities from coercion. It is evident here that Respondent's requests not only sought information provided to the Board but also sought other confidential Section 7 activity which were not relevant to the proceeding and infringed on the employees' rights. These rights have been repeated by both the Board and the Supreme Court whereby employees' participation in Board proceedings and when engaging in Section 7 activity must be protected.

In sum, Respondent violated Section 8(a)(1) of the Act when issuing the specified requests, as set forth within, in the subpoenas to Hernandez and Cardenas prior to the unfair labor practice hearing.

B. 8(a)(4) Allegation

Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. The provision, "otherwise" discriminate is broadly construed in order "to prevent 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, 122 (1972), quoting *John Hancock Mutual Life Insurance v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951). See also *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001). This broad interpretation includes rehiring conditioned upon the dropping of charges with the Board, refusing to hire a job applicant, and refusing to rehire an employee even where the original dismissal was nondiscriminatory. In this instance, the General Counsel argues that the issuance of the September 14 subpoenas duces tecum prior to the hearing was the discriminatory action taken against Hernandez and Cardenas for their participation in the Board process.

In cases in which motive is an issue, the Board analyzes 8(a)(4) and (1) violations under the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To do this, the General Counsel had to demonstrate that Hernandez and Cardenas' activity in utilizing Board processes was a motivating factor in the discrimination taken against them. *Newcor Bay City Division*, 351 NLRB 1034, 1034 fn. 4 (2007). Under this framework, it is the General Counsel's burden to establish discriminatory motivation by proving the existence of protected activity, the Respondent's knowledge of that activity, and the Respondent's animus against that activity. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004), citing *Wright Line*, supra at 1089. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding, Inc.*, 330 NLRB 464, 464 (2000). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Allied Mechanical*, 349 NLRB 1327, 1328 (2007).

As an initial matter, the General Counsel has not cited to any Board decisions which find that the issuance of prehearing subpoenas duces tecum to employees is a discriminatory action. While Section 8(a)(4) has been broadly construed, there appear to be no Board decisions on point, or even analogous to this situation. Hernandez admitted that her benefits remained the same, and the General Counsel did not present any evidence of an action taken against the employees, other than the issuance of the subpoenas. Thus, I would dismiss the Section 8(a)(4) allegation on this basis. However, even if the issuance of the subpoenas to Hernandez and Cardenas is determined to be a discriminatory action, the General Counsel did not establish a prima facie case of discrimination thereby violating Section 8(a)(4).

While the record is clear that Hernandez and Cardenas participated in Board processes by providing affidavits, preparing to testify, and testifying at the hearing, the record lacks any

evidence that Respondent knew of their activity prior to issuing the subpoenas. To prove a prima facie case of a Section 8(a)(4) violation, the protected activity must be known by the Respondent. As described previously, when finding a Section 8(a)(1) violation, Respondent's actions of issuing the subpoenas duces tecum to Hernandez and Cardenas would be objectively coercive. Both Hernadez and Cardenas sought to keep private their Board activities; neither employee informed La Quinta Store Manager Burton of their participation, and Hernandez testified that she did not tell anyone other than Cardenas. Burton had no knowledge of their participation. Burton only learned of their participation *after* they testified at the October 11 unfair labor practice hearing, which came *after* the attorneys for Starbucks issued the subpoena duces tecum at issue here (the alleged discriminatory action). Moreover, even though not pled as unnamed agents, Starbucks' attorneys acted on Respondent's behalf when issuing the subpoenas, but there is no evidence, direct or circumstantial, that the attorneys knew about Hernandez and Cardenas participation in Board processes until *after* they issued subpoenas to them. Thus, I do not find that there is any evidence that Respondent knew of Hernandez and Cardenas participation in Board activities.

Even assuming that Respondent was aware of Hernandez and Cardenas' Board activity, the next step which the General Counsel must prove is animus. To do so, the General Counsel relies upon its motion for sanctions seeking a general adverse inference based upon the Respondent's failure to provide any documents or privilege log in response to the General Counsel's April 13 subpoena duces tecum.[15] The General Counsel simply argues, "[A]n adverse inference should be drawn against Respondent. If there were evidence of a legitimate and unlawful basis for issuing the subpoenas, then Respondent would have produced that evidence. Respondent's privilege claim notwithstanding, Respondent did not even attempt to produce any evidentiary defense" (GC Br. at 31).

A party has an obligation to begin a good–faith effort to gather responsive documents upon service of a subpoena and a party who fails to do so does so at its peril. *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). The General Counsel has two options in such instances. The General Counsel may seek enforcement of its subpoena duces tecum in Federal district court pursuant to the Board's rules and regulations at Section 102.37 or the General Counsel may request sanctions as she did so here. When parties have failed to comply with duly issued subpoenas, the Board has found it appropriate to institute sanctions against offending parties, and such determinations have been met with approval in *some* federal courts. See *McAllister Towing & Transportation*, 341 NLRB at 396–397. The Board has held that the appropriate sanction is within the discretion of the administrative law judge. *McAllister Towing & Transportation*, 341 NLRB at 396.

The Board may impose a range of sanctions for subpoena noncompliance, "including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross–examining witnesses about it, and drawing adverse inferences against the noncomplying party." Id. However, the Board must balance the need to protect its processes against its Section 10(c) mandate to remedy unfair labor practices. See *Toll Mfg. Co.*, 341 NLRB 832, 836 (2004). The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance. See, e.g., *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with the subpoena, due to its harshness and "perhaps unprecedented" nature and the availability of lesser sanctions). The burden of establishing noncompliance lies with the party that directed issuance of the subpoena. See *R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994), affd. mem. 74 F.3d 1240 (6th Cir. 1996).

By its definition, the adverse inference rule states "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). The adverse inference permits the administrative law judge to proceed and find that the failure to produce documents is likely due to unfavorable information. Id.

Such a motion for sanctions presents a quandary in this instance as this matter arose in the Ninth Circuit where sanctions imposed by administrative law judges are not favored. In *NLRB v. International Medication Systems*, 640 F.2d 1110, 1116 (9th Cir. 1981), the court held that sanctions for failing to comply with a Board issued subpoena may not be imposed in administrative proceedings since enforcement of the subpoena must be pursued in Federal court. Other circuits have disagreed with the Ninth Circuit. See *Hedison Mfg. Co.*, 643 F.2d 32, 34 (1st Cir. 1981); *NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970); *NLRB v. American Arts Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). While Ninth Circuit law is not controlling and I am to follow Board law,[16] approving sanctions seems short sighted in this instance where the General Counsel may receive only a pyrrhic victory. However, permitting employers to refuse to comply with a valid subpoena which may result in a delay in the unfair labor practice proceeding would vastly undermine the Act.

Notwithstanding the position of the Ninth Circuit, I deny the General Counsel's motion. An adverse inference as to why Respondent issued the subpoenas to Hernandez and Cardenas would fill an evidentiary gap in the General Counsel's case. As in *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995) ("the judge's use of the adverse inference to fill this evidentiary gap sweeps too broadly"), such an adverse inference would constitute the General Counsel's entire case regarding animus, an element necessary to proving a Section 8(a)(4) violation. See also *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 652 (1989) (rejecting judge's reliance on adverse inference to prove General Counsel's hiring hall discrimination allegation), enfd. 70 F.3d 1256 (3d Cir. 1995). The evidence presented by the General Counsel otherwise does not establish animus

[15] Much of the motion is moot since no further evidence was presented by any party when the hearing resumed on August 1, 2023.

[16] See, e.g., *Western Cab Co.*, 365 NLRB 761, 761 fn. 4 (2017); and *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

proving that Respondent issued the subpoenas to Cardenas and Hernandez discriminatorily for cooperating with the Board investigation. The General Counsel speculates that Respondent's counsel must have learned about Hernandez and Cardenas' cooperation in the Board proceeding, which would explain their overbroad subpoena requesting among other items the employees' Board affidavits. Likely, Respondent's counsel simply issued an overbroad subpoena which ultimately violated Section 8(a)(1) of the Act. Drawing an adverse inference here would constitute the General Counsel's entire case regarding proving a prima facie case of discrimination. Thus, I decline to draw an adverse inference.

Since the General Counsel did not prove a prima facie case of discrimination by Respondent when issuing the subpoenas duces tecum to Hernandez and Cardenas, I dismiss the allegation that Respondent violated Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Starbucks Corporation, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Workers United Labor Union International, affiliated with Service Employees International Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

> Issuing subpoenas duces tecum to employees, requiring them to produce information and/or documents about their union and/or protected concerted activities or the union and/or protected concerted activities of other employees, including information about their participation in Board processes.

4. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. All other complaint allegations are dismissed.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I will order that the employer post a notice at the facility in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id., supra at 13. The General Counsel also requests that the Board modernize its approach to remedial postings, along with amending its standard remedial language (GC Br. at 33–34). Of course, any such changes in existing law must come from the Board.

The General Counsel also requests a reading of the notice. As for the notice reading, I decline the General Counsel's request as high–level management officials did not openly participate in a widely disseminated course of unlawful conduct. *Starbucks Corp.*, 372 NLRB No. 122, slip op. 1, fn. 3 (2023) (citing *Gavilon Grain, LLC*, 371 NLRB No. 79 (2022) and *Absolute Healthcare d/b/a Curaleaf Arizona,* 372 NLRB No. 16 (2022)).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

Respondent, Starbucks, Corporation, La Quinta, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing subpoenas duces tecum to employees, requiring them to produce information and/or documents about their union and/or protected concerted activities or the union and/or protected concerted activities of other employees, including information about their participation in Board processes; and

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its La Quinta store in La Quinta, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the store involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 14, 2022.

(b) Within 21 days after service by the Region, file with the

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If the facility is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility is closed due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68, slip op. 4 (2020).

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 2, 2023

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue subpoena duces tecum to you, requiring you to produce information and/or documents about your union and/or protected concerted activities or the union and/or protected concerted activities of other employees, including information about you and/or other employees' participation in Board processes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

STARBUCKS CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-304228 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.