



arrange for the provision of voter gratuities with impunity during the critical period simply by not expressly making them contingent on the election outcome or individual votes.

3. The ALJ erred in ignoring both the undisputed record evidence and applicable law in failing to provide any specific fact findings and to state any legal authorities in support of conclusory determinations, including to not discredit certain witness testimony, to credit others, to determine actual and/or apparent agency, and to decline to find an adverse inference against Petitioner. (Supp. Dec. at 2-5.)

4. The ALJ erred in excluding non-privileged evidence probative of relevant issues, including the dates and places of critical period meetings attended and/or communications had by voters during which lawsuits and legal services were discussed and the participants at such meetings and/or in such communications and the reason(s) for the timing of the filing of voter lawsuits in proximity to the election.

**B. Exceptions to Objection No. 2 -- The Board Agent's Conduct in Improperly Opening, Commingling, and Counting Challenged Ballots Compromised the Election Integrity And Affected the Election.**

5. The ALJ erred in failing to address, much less find, that the Board Agent's dubious course of conduct and established violations of NLRB election rules cast reasonable doubt on the integrity of the election as a matter of law.

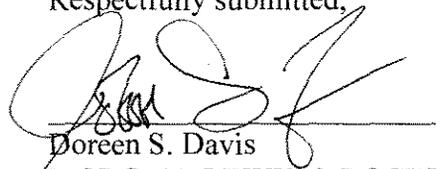
6. The ALJ erred in failing to find that the Board Agent's violations of the Board's election rules affected the election results.

7. The ALJ correctly found that Robert Dizinno was ineligible to vote due to changed circumstances affecting his voter eligibility, but the ALJ erred in not finding that Paul Chiappa was similarly ineligible to vote, including because Chiappa's voter eligibility status was inextricably connected to Dizinno's status.

8. The ALJ erred by recommending further investigation and proceedings as to two un-opened challenged ballots.

**WHEREFORE**, for the reasons stated above and in FHD's accompanying Brief in Support of Exceptions to Supplemental Decision on Objections, FHD respectfully requests that the Board reject the Supplemental Decision and recommendations of the Administrative Law Judge as stated, sustain FHD's Election Objections, and ORDER that the election be set aside.

Respectfully submitted,



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DATED: June 5, 2009

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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<b>FEDEX HOME DELIVERY, A SEPARATE</b>	:	
<b>OPERATING DIVISION OF FEDEX</b>	:	
<b>GROUND PACKAGE SYSTEM, INC.</b>	:	
	:	
<b>Respondent,</b>	:	
	:	
<b>And</b>	:	
	:	<b>CASE NO. 34-RC-2205</b>
<b>TEAMSTERS UNION LOCAL 671</b>	:	
<b>AFFILIATED WITH IBT,</b>	:	
	:	
<b>Petitioner.</b>	:	

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**FEDEX HOME DELIVERY'S BRIEF IN SUPPORT OF EXCEPTIONS TO  
SUPPLEMENTAL DECISION ON OBJECTIONS**

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FedEx Home Delivery (“FHD” or “Company”) submits this Brief in Support of Exceptions to Supplemental Decision on Objections.

## I. Introduction

Because the Act prohibits even subtle forms of vote buying, the Judge’s decision is repugnant to the Act. If affirmed, it would permit a party, here the Teamsters, to arrange with impunity for voters to get valuable gratuities during the critical period simply by not expressly making them contingent on a favorable election outcome. This is not the law, and it cannot be.

As part of the Teamsters’ “FedEx Project,” Petitioner Local 671, Teamsters Local 25, and the International Brotherhood of Teamsters (“IBT”) operated a conspicuous “jointly run and coordinated campaign” to organize Hartford FHD contractors. In that connection, the Teamsters engaged William Gardner as a campaign centerpiece throughout the critical period. Gardner was employed by the Teamsters during this time, and he acknowledged an objective to get Hartford voters involved in lawsuits against FHD. To that end, Gardner spoke with voters at Petitioner-sponsored meetings about voter lawsuits and then with attorneys whom he referred to Petitioner. Those attorneys met with at least six voters just weeks before the election and offered them written agreements that they would “not be charged” for legal work on lawsuits on their behalf seeking substantial sums of money. The voters knew they got something for nothing, and they expected to get money. In the words of one voter, “that’s what lawsuits are for.”

As a matter of law, this strategically timed “something for nothing” scheme orchestrated by the Teamsters throughout the critical period indebted voters to favor Petitioner, and it yielded an election result that turned on as little as 1 vote. According to IBT Campaign Coordinator Welker, “[i]n Connecticut from the group of [Contractors] who voted for [Petitioner], six [] stepped forward to start the lawsuit in that state.”

The Administrative Law Judge (“ALJ”) side-stepped these facts by ignoring precedent. Instead, the ALJ imposed an invalid *express-quid-pro-quo-or-nothing* standard and then concluded that FHD failed to prove that the agreements for free legal services given to voters were contingent on a union election victory or individual votes. This is clear error.

Also, over FHD’s repeated objections, the Board Agent who conducted the election invoked “instructions from the Board” to open the challenged ballots cast by Robert Dizinno and Paul Chiappa without first following the Board’s election rules. There were no such “instructions,” and the Board Agent violated election rules by opening, commingling, and counting these challenged ballots. This dubious course of conduct impugned the Board’s election standards and cast doubt on the integrity of this very close election. The ALJ erred by not even addressing this part of the objection.

In addition, the Board Agent’s violations affected the election because the challenges to the two improperly opened and commingled ballots would have been sustained; there was a three-vote margin (12 to 9), including the two improperly opened and counted ballots; and there were two additional challenged ballots. With the ALJ’s finding that Dizinno’s voter eligibility status had changed from *included* “contract driver” to *excluded* “driver[] hired by [a] contract driver”, it necessarily followed that there was no longer any basis, if there ever was, for Chiappa to have any status other than “multiple-route contract driver”, a classification expressly excluded from the unit. Chiappa indisputably contracted for a second route, which Dizinno serviced as a driver, and, as found in the DDE, “[c]ontract drivers have sole authority to hire and dismiss their drivers.” (DDE at 20.)

The ALJ Judge misapplied the law in overruling FHD’s objections. FHD’s exceptions should be granted, and the election results should be set aside.

## II. Statement of Material Facts<sup>1</sup>

### **OBJECTION 1: The Teamsters Destroyed The Laboratory Conditions By Orchestrating Free Legal Services And Lawsuits For Voters During The Critical Period.**

#### **A. The Multi-District Litigation (“MDL”) and The Hartford Voter Lawsuits.**

1. Plaintiff’s lawyers filed class-action lawsuits against the Company and on behalf of contractors in over 30 states. (Tr. 14 (Cohen).) Under the Multi-District Litigation statute, these actions were consolidated into one action referred to as the “MDL.” (*Id.*)

2. At the time the Teamsters filed their petition for an election at the Company’s Hartford, CT facility in this matter, MDL plaintiffs’ lawyers had not yet filed contractor lawsuits in Connecticut. (Tr. 14, 109 (Cohen).) Then, as part of their organizing campaign, the Teamsters and MDL lawyers from the self-styled “union law firm” of Pyle, Rome, Lichten, Ehrenberg, & Liss-Riordan, P.C. (“Pyle Rome”) caused free legal services to be promised and delivered and lawsuits to be brought on behalf of Hartford voters against the Company in Connecticut Federal Court. (Tr. 14, 109 (Cohen); I. Ex. 2; *see* [www.prlc.com](http://www.prlc.com).)

#### **B. The Teamsters’ “FedEx Project” Is Spearheaded By Teamsters’ Strategist Welker.**

3. At all relevant times, David Welker was the Senior Strategic Research and Campaign Coordinator for the IBT in Washington, D.C. (Tr. 50, 451 (Welker).) Welker coordinated and assisted the Teamsters local unions’ organizing activities. (Tr. 451 (Welker).)

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<sup>1</sup> References herein are as follows: hearing transcript (Tr. \_\_ ([Name])); Company Exhibits (Co. Ex. \_\_); Rejected Company Exhibits (R. Co. Ex. \_\_); Petitioner Exhibits (P. Ex. \_\_); Board Exhibits (Bd. Ex. \_\_); Intervenor Exhibits (I. Ex. \_\_); Joint Exhibits (Jt. Ex. \_\_); and Statement of Material Facts (SMF ¶ \_\_). Each individual Statement of Material Fact in § II incorporates and makes reference to the supporting transcript citation(s) and/or exhibit(s). For ease of reference, statements of fact made within the Argument section of this Brief, § III, refer to the applicable numbered paragraph(s) of the Statement of Material Facts where appropriate.

4. Welker spearheaded and spent a lot of time on the Teamsters' "FedEx Project," which was active throughout 2007. (Tr. 56-57, 451-452, 456 (Welker).) This included compiling information about FHD lawsuits and incorporating it into Teamsters' campaign materials given to FHD contractors to encourage them to contact the MDL attorneys. (Tr. 455-456 (Welker).)

5. A principal aim of the "FedEx Project" was to end FHD's independent contractor business model through MDL lawsuits -- a letter prepared by Welker to Petitioner Local 671 refers to the MDL as the "fight *to end* the 'contractor' classification" and states that "[t]he goal is to . . . encourage the [Contractors] to *put an end to* the independent contractor scam at FedEx Ground." (Tr. 485, Co. Ex. 35 (Welker-prepared IBT Letter to Teamsters Local 671) (emphasis added).) Despite this writing at his own hand, Welker refused to acknowledge this business-model-ending aim of the Teamsters' "FedEx Project." (Tr. 452-453 (Welker, "A direct aim, we -- I don't think that we -- if -- we -- if our aim was to do it then we would have sent a letter" . . . If it were a knock-on effect or our actions that it ended we wouldn't have been upset.").)

6. The MDL was a key part of the "FedEx Project" -- as Welker stated in an instructing letter to Petitioner Local 671, "[t]he more [Contractors] that step forward to join in the legal fight will mean a better chance of victory in the courts." (Tr. 485, Co. Ex. 35 (IBT letter to Local 671).) To this end, Welker and the Teamsters openly "encourage[d] the [Contractors] to add their voice to the legal fight" -- Teamsters-speak for contacting the MDL attorneys and joining lawsuits against FHD. (Tr. 461 (Welker stating, "we wanted to encourage them to participate" in the lawsuits); Co. Ex. 35.) According to Welker, the "FedEx Project" included preparing and distributing campaign materials to encourage contractors to contact the MDL attorneys. (Tr. 455 (Welker).)

7. A co-aim of the “FedEx Project” was to solicit FHD contractors to vote for the Teamsters and become dues paying Teamsters members. (Tr. 453, 483 (Welker).) Welker acknowledged the mutually beneficial arrangement for the Teamsters, who could solicit new members, and for the MDL attorneys, who could get new clients. (Tr. 67, 456 (Welker).) He conceded further that the Teamsters used the MDL and assistance by MDL lawyers in organizing campaigns against FHD -- just as they did in Hartford. (Tr. 69-70 (Welker).) The Teamsters produced campaign communications to voters during the Hartford campaign that advertised the MDL lawsuits to Hartford voters. (Tr. 70-71 (Welker).)

**C. As Part Of The “FedEx Project,” Teamsters Coordinated With MDL Attorneys To Use The MDL To Solicit Teamsters Members And Clients For MDL Attorneys.**

8. In connection with the “FedEx Project,” the Teamsters collaborated with the MDL plaintiffs’ lawyers, whom the Teamsters arranged to deliver free legal services to Hartford voters during the critical period of the Teamsters’ organizing campaign in this matter. (Tr. 56-37, 63, 455 (Welker) (“Q. In connection with the FedEx Project you also coordinated with and had communications with Lynn Faris? A. Correct”); *see also*, 508-511 (Lichten).)

9. Welker acknowledged that the Teamsters worked with and assisted lead MDL lawyers, Lynn Faris and Gerald Cureton, in lawsuits against the Company on behalf of contractors. (Tr. 62-65 (Welker).) Welker had prior discussions with Faris about Teamsters financial assistance in connection with lawsuits against FedEx on behalf of contractors. (Tr. 67-68 (Welker).) Also, Welker included MDL lawyer Cureton on his correspondence to Teamsters locals providing contractor handouts encouraging them to “[c]ontact the lawyers”. (Tr. Co. Ex. 31 (Welker May 18, 2006 email).) Yet, Welker testified as to MDL plaintiff’s attorneys that “we did not coordinate with them in any way.” (Tr. 453 (Welker).)

10. Welker initially testified also that he had no contact with MDL lawyers who filed the Hartford voter lawsuits, but he later admitted that he did have contact, including before the Hartford election, with MDL Pyle Rome lawyer Shannon Liss-Riordan, the lead attorney listed on the Hartford voter lawsuits. (Tr. 454-455 (Welker); Co. Exs. 11 and 12 (Civil Complaints filed on behalf of Hartford Voters).) Welker previously worked with Liss-Riordan in connection with a Teamsters campaign at the Company's Northboro Home Delivery facility.<sup>2</sup> (Tr. 59-62 (Welker); Co. Ex. 7 (E-mail from Welker to Liss-Riordan).)

**D. The Teamsters' "Jointly Run" and "Coordinated" New England Local Unions Organizing Campaign at FHD.**

11. According to a 2007 document prepared by Welker, "[s]tarting in 2005, Parcel Division local unions in New England have *jointly run* and *coordinated* organizing campaigns" "at FedEx Home Delivery." (Tr. 502 (Welker), Ex. 37 (Welker-prepared FedEx Update) (emphasis added).)

**E. The Teamsters' "Don't Sit Out the Fight at FedEx" Campaign – Soliciting Contractors to "Contact the [L]awyers" for Lawsuits Against FHD.**

12. As part of the "FedEx Project" and the Teamsters New England local unions' jointly run and coordinated campaign at FHD, and shortly before the petition was filed in this matter, Welker and the Teamsters implemented a campaign directed at FHD contractors called "Don't Sit Out the Fight at FedEx". (Tr. 456-457 (Welker).)

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<sup>2</sup> In connection with the Teamsters' campaign, Welker instructed Liss-Riordan in an email entitled "MA/Northboro and beyond" that he was "crashing on a deadline," and he asked her for a "complete list of FedEx Ground/HD facilities in MA". (Tr. 59-62 (Welker); Co. Ex. 7.) Liss-Riordan responded that same day stating, "I will check with my lead plaintiff who has a lot of information and will get it to you quickly." (*Id.*)

13. To advance this campaign, the IBT provided contractor solicitation materials to Petitioner Local 671 and urged it to solicit Hartford Contractors to join the MDL. (Tr. 457-458 (Welker).) In a letter to Petitioner that Welker prepared, Welker:

- urged Petitioner to participate in "a series of actions in our campaign to support the drivers at FedEx Ground/Home Delivery" in connection with their "fight to end the 'contractor' classification at FedEx", which was "reaching a critical stage";
- stated that the "[t]he more drivers that step forward to join in the legal fight will be a better chance of victory in the courts";
- announced a planned "Don't Sit Out the Fight at FedEx month" during which Teamsters "would pass out leaflets" to contractors with a goal of "encourag[ing] the drivers to add their voice to the legal fight"; and
- identified a newly designed "IBT FedEx Watch.com web site" at which contractors could register so that the "IBT will be able to build the namelists" "to support the ultimate organizing goal".

(Tr. 458-460 (Welker), Co. Exs. 29 (Welker-prepared letter to Local 671 enlisting its participation) and 30 (fax cover sheet reflecting transmission to Local 671).)<sup>3</sup>

14. Around this same time, Welker communicated with lead MDL attorney Faris about the MDL attorneys' website because Petitioner Local 671 was shortly going to be distributing materials to FHD contractors directing them to it. (Tr. 462 (Welker).)

15. Shortly thereafter, Welker sent correspondence and contractor solicitation handouts for the "Don't Sit Out the Fight at FedEx" campaign to the Teamsters local unions. (Tr. 463-465 (Welker), Co. Exs. 31 (Welker email to Local Unions) and 32 (fax transmission page by Welker sending contractor solicitation handouts to Lepore).) Welker requested the local unions to distribute the handouts to contractors and instructed the locals to "*tell them* Don't Sit Out the

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<sup>3</sup> This letter was produced for the first time in 2009. Lepore and Local 671 produced no documents at the July 2007 hearing in response to FHD's subpoenas because, according to Lepore at that time, there were none. (Tr. 29 (Lepore).)

Fight, *tell them to go to the lawsuit website . . .*, and *tell them* to register at FedExWatch.com to stay in touch with the IBT.” (*Id.* (emphasis added).)

16. The first of the two contractor solicitation handouts refers to lawsuits, represents that the “law is clear” and “on the drivers’ side” and directs contractors to “*Contact the lawyers*”. (Tr. 463-464 (Welker) (admitting that this is a referral to the MDL plaintiffs lawyers), Co. Ex. 31 (contractor handout) (emphasis added).)

17. Next, Welker corresponded with Lepore by hand-written note stating, “[t]hanks for all your hard work on this”, a reference to the “Don’t Sit Out the Fight at FedEx” campaign to get Hartford contractors to join the MDL. (Tr. 470 (Welker), Co. Ex. 34 (Memorandum from IBT Organizing Director Ken Hall to Local 671, stating “I appreciate your Local Union’s participation in the ‘Don’t Sit Out the Fight at FedEx’ actions”).)

18. Thereafter, Welker sent correspondence to Local 671 enlisting it in “*another* ‘Don’t Sit Out the Fight at FedEx month’” where it would “pass out leaflets” to Hartford contractors. (Tr. 472-473 (Welker), Co. Ex. 35 (Letter from IBT Organizing Director Hall to Local 671 enlisting “participation in the next stage in our campaign” to “encourage [Contractors] to put an end to the independent contractor scam at FedEx Ground” and corresponding fax transmission confirmation).) While Welker testified that contractor solicitation handouts were produced and distributed for this second installment of this campaign, the Teamsters did not produce them, and Welker claimed to not recall their contents. (Tr. 473 (Welker).)

Objection No. 1 must be viewed against this openly functioning IBT and New England Teamsters Local Unions “jointly run and coordinated” FHD union organizing campaign, the Teamsters’ well-publicized alliance with MDL plaintiffs’ attorneys, and their collaborative use of “money for nothing” lawsuits to influence Hartford voters throughout the critical period.

**F. Teamsters Strategist Welker Kicked-Off The Teamsters' Free Legal Services And Lawsuits Vote Influencing Scheme In Hartford.**

19. Welker was directly involved in Petitioner Local 671's campaign to organize Contractors at Hartford FHD. (Tr. 476 (Welker).) After two "Don't Sit Out the Fight at FedEx" solicitations directed from Washington D.C., Welker went to Hartford to speak to Hartford contractors at Local 671's union hall. (Tr. 52, 55 (Welker).) Welker handed out a page from the MDL attorneys' fedexdriverslawsuit.com website, and he personally "*directed*" Hartford Contractors to the MDL lawyers' website. (Tr. 53-55, 476-477 (Welker) (emphasis added).)

20. On February 2, 2007, Teamsters Local 671 filed a petition for election at the FedEx Home Hartford facility. (Tr. 30 (Lepore).)

**G. Petitioner Local 671 Engages Teamsters Local 25 in the "Jointly Run" Campaign to Get Hartford Contractors to Vote for Local 671**

21. Around this time and as part of the New England Teamsters Local Unions' "jointly run" campaign, Lepore had discussions with Teamsters Local 25 Organizing Director Sullivan, and "it was mutually agreed" that Local 25's assistance on the Hartford FHD campaign would be "beneficial". (Tr. 359 (Lepore).) Lepore arranged for Sullivan to be present at Petitioner's Hartford voter meetings. (Tr. 37-38 (Lepore); 188 (Sullivan).)

22. Lepore acknowledged that Teamsters Local 25 provided him with voter communications/solicitations for the Hartford election campaign, including a "whole packet of flyers." (Tr. 33, 39-40 (Lepore).) One of Petitioner's voter handouts dated April 23, 2007 (shortly before the May 11 Hartford election) directed Hartford voters to "[g]o to" a Teamsters' promotional organizing video "at <http://www.youtube.com/teamsters>" – a link to the popular YouTube internet site where videos can be viewed for free. (Tr. R. Co. Ex. 3.) The Teamsters' video there featured Gardner promoting the Teamsters and giving Teamsters union organizing advice to contractors. (Tr. 73 (Welker); *see also* [www.youtube.com/teamsters](http://www.youtube.com/teamsters); 348 (Gardner).)

When asked at the July 2007 hearing about Gardner appearing in the YouTube video, Sullivan answered, “I don’t – I’ve never seen it.” (Tr. 192 (Sullivan).) Yet, when Gardner appeared pursuant to the remand order in 2009, he testified that Sullivan engaged him to appear in the Teamsters “promotional organizing” video produced at Local 25. (Tr. 349 (Gardner).)

**H. The Teamsters Engage Casual Teamsters Employee William Gardner As An Organizing Tool, and Gardner Presents to Voters Throughout the Critical Period.**

23. Sullivan enlisted Gardner to campaign on behalf of Petitioner. (Tr. 188-189, 193 (Sullivan).) At that time, Gardner was, among other things, a Boston FHD contractor, Pyle Rome MDL client, and Teamsters Local 25 employee. (Tr. 9-10 (Dumont); (Tr. 440-443 (Gardner), Co. Ex. 28 (Gardner’s 2007 Form W-2 for Teamsters employment); 365-366 (Sullivan).)

24. Teamsters’ campaign coordinator Welker conceded that the Teamsters engaged Gardner to campaign on behalf of Petitioner at Hartford and to organize Hartford contractors. (Tr. 72-73 (Welker).)<sup>4</sup> Gardner acknowledged that he assisted Teamsters Local 671 in the Hartford election campaign, including by talking to voters at Petitioner’s campaign meetings during the critical period. (Tr. 321-322 (Gardner).)

25. Lepore acknowledged that Gardner sent him a voter handout that the Teamsters had used in an earlier FedEx Home Delivery campaign in Boston. (Tr. 33, 39-40 (Lepore); R. Co. Ex. 3 (Flyer from Gardner to Lepore).) Gardner admitted that he provided this and other information to Lepore to solicit Hartford voters. (Tr. 336 (Gardner).) Shortly before the election, Gardner sent Lepore information to “assist [Petitioner] in any way [he] could in organizing”. (Tr. 337 (Gardner), Co. Ex. 19 (April 29, 2007 email from Gardner to Lepore providing information,

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<sup>4</sup> Welker and Gardner corresponded about lawsuits during the critical period -- by email dated March 15, 2007, Welker responded to Gardner’s email to him about a “Class Action Motion, stating that the Teamsters were “watching this very closely” and that the “folks [contractors] in Boston” would be the first to get “relief” as a result of the lawsuits. (Tr. 74 (Welker); R. Co. Ex. 3.)

stating “I hope you can use this in your campaign.”.) Lepore admitted that he used information provided by Gardner to solicit Hartford voters. (Tr. 354 (Lepore).)

26. Sullivan conceded that the Teamsters paid Gardner three times, including twice in 2007. (Tr. 365-366 (Sullivan).) When asked the dates Local 25 employed Gardner in 2007 -- the critical period spanned February 2 through May 11, 2007 -- Sullivan claimed to not recall and next said “I think you might have that information.” (Tr. 366 (Sullivan).) Local 25 did not produce that “information”, and neither Gardner nor Sullivan denied that Gardner’s Teamsters employment included his work on the Hartford campaign. (Tr. 368 (Sullivan).)

27. When asked about when in 2007 his Teamsters employment occurred and what he did, Gardner replied, “*I told the Teamsters during that time period [(2007)] that I would assist them in any efforts to organize FedEx anywhere, anytime, any place and I performed a number of services, some work pretty much throughout the whole year*” -- “*I worked quite a bit*” and “*was basically available for anything they needed.*” (Tr. 440-443 (Gardner) (emphasis added).)

**I. Teamsters’ Agent Gardner Appears with Teamsters Officials at Critical Period Voter Meetings and Discusses Voter Lawsuits.**

28. Sullivan and Gardner traveled and appeared together and spoke to Hartford voters at no less than two critical period Local 671 voter meetings – one at the Local 671 Union Hall and another one just days before the election. (Tr. 188-189, 193 (Sullivan); 31-32 (Lepore).)

29. Some time before February 25, 2007, Lepore asked Sullivan if he “could put together a couple of folks from the FedEx barns in [Boston] to take a ride to Hartford to talk to Hartford workers.” (Tr. 373 (Sullivan).) At Lepore’s request, Sullivan enlisted Gardner to go with him to a Local 671 meeting with Hartford voters in Connecticut on February 25, 2007. (Tr. 373-374 (Sullivan), Co. Ex. 23 (February 19, 2007 email from Sullivan to Gardner).)

30. On February 25, 2007, during the critical period, Gardner appeared with Sullivan at Petitioner's union hall and spoke to voters on behalf of Petitioner. (Tr. 188-189 (Sullivan); 322-323 (Gardner).) Gardner acknowledged that one objective was to get Hartford voters involved in lawsuits against FHD. (Tr. 335 (Gardner).) Lepore and another of Petitioner's officers were present at the voter meeting where Gardner "made [voters] aware of the [MDL]" and "discussed the litigation." (Tr. 35-36 (Lepore); Co Ex. 2 (Feb. 26, 2007 email from Gardner to Lepore); 324-325, 334 (Gardner).) One of the voters in attendance was Robert Dizinno, a driver who voted subject to challenge. (Tr. 217-218 (Dizinno).)

31. In 2009, it was first disclosed through Gardner's examination that Welker also appeared and spoke to voters at this February 25, 2007 meeting. (Tr. 334 (Gardner).) In July 2007, Welker testified about only one alleged pre-critical period meeting with Hartford contractors. On remand in 2009, and with newly uncovered information from Gardner, Welker conceded that he spoke to voters at two other critical period meetings -- "Yeah, that's right, three meetings." (Tr. 477-479 (Welker).) When asked about what he or others said at these meetings about potential voter lawsuits, Welker claimed that he could not recall. (Tr. 480 (Welker).)

32. Welker acknowledged discussions with voters apart from group meetings he attended; however, when asked whether they involved a potential voter lawsuit, Welker replied, "[n]ot that I remember." (Tr. 481-482 (Welker).) Yet, Welker's view was that Connecticut contractors were "under-informed" about the lawsuits, and he testified that he tried to close that gap. (Tr. 483-484 (Welker).) Gardner was one such tool that Welker and the Teamsters used.

**J. Teamsters' Agent Gardner Makes Critical Period MDL Attorney Referral to Local 671 For Hartford Voters "Interested in becoming a plaintiff for a CT class action."**

33. MDL Pyle Rome attorney Maydad Cohen testified that Gardner was the first to call him during the critical period about getting a *Connecticut lawsuit* against FedEx on behalf of Hartford voters. (Tr. 101, 106, 529 (Cohen).)<sup>5</sup> According to Cohen, Gardner told him:

- that he met Hartford voters at the Teamsters Local 671 organizing meeting;
- that Hartford voters were interested in "a lawsuit against FedEx;" and
- that he would be hearing from Hartford voters about a lawsuit against the Company.

(Tr. 102-103, 529 (Cohen).) Gardner testified differently, claiming that he "didn't speak" to Cohen. (Tr. 326-327 (Gardner).)

34. The day after he appeared at Local 671's union hall and discussed lawsuits with voters, Gardner sent Lepore a copy of a "Mass[achusetts] FedEx class action complaint" pleading and the following message: "*I spoke with our Class action att[orneys]* and they would like to speak via telephone to any Home Delivery . . . drivers *who would be interested in becoming a plaintiff for a C[onnecticut] class action.*" (Tr. 327-328, 335 (Gardner), Co. Ex. 2 (February 26, 2007 email from Gardner to Lepore and Sullivan) (emphasis added).) Pursuant to his discussion with "Class action att[orneys]," Gardner referred Lepore to MDL lawyer Cohen of the Pyle Rome firm. (*Id.*) In his email to Lepore, Gardner stated -- "[t]he contact info. is listed below:

Maydad Cohen, Esq.  
Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, P.C.  
Boston, MA 02108  
Phone: (617) 367-7200"

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<sup>5</sup> Cohen claimed to not recall the date when Gardner called him; however, he did "know that it was after one of the [Teamsters organizing] meetings that [Gardner] attended" "in Connecticut with Connecticut drivers." (Tr. 101-102 (Cohen).)

(*Id.*) Gardner testified that he was “giving a reference as to who to contact” about voter lawsuits in Connecticut. (Tr. 326-327 (Gardner).)

35. Cohen testified that after Gardner told him that Hartford contractors would be calling him about a Connecticut lawsuit against FHD -- “around this February time line” -- voter Dizinno contacted him, as did voter Paul Chiappa and about three others, and they discussed potential lawsuits. (Tr. 103-104, 531 (Cohen).) According to Cohen, he next spoke with Hartford voters about bringing a lawsuit against FHD on their behalf, and to that end another Pyle Rome lawyer, Harold Lichten, met with Hartford voters during the critical period at the law offices of Richard Hayber in Hartford, CT. (Tr. 103-104 (Cohen); SMF ¶¶ 44-47, *infra*.)<sup>6</sup>

36. When asked how he was directed to the Pyle Rome firm, lead Local 671 union organizing adherent Dizinno testified -- “I *honestly* don’t remember how exactly” -- but stated that he could have talked to somebody, and he did recall that he talked to Gardner-referred MDL attorney Cohen. (Tr. 220 (Dizinno) (emphasis added).) When asked how he came in contact with Cohen, Dizinno replied, “I don’t remember how that came about.” (Tr. 220 (Dizinno).)

**K. Teamsters Local 671 President Lepore Followed-Up On Gardner’s Hartford Voter Lawsuit Promotion Work With Lead Organizer Dizinno.**

37. Local 671 President Lepore acknowledged that he received Gardner’s February 26 Cohen-referral email and attached pleading. (Tr. 33, 35-36 (Lepore) Co. Ex. 2 (email from Gardner to Lepore).) Lepore did not produce this subpoenaed document and admitted that he did not look for it. (Tr. 33 (Lepore).) While Lepore claimed to not remember much anything else, he

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<sup>6</sup> Cohen testified on remand that he “definitely attended” a meeting with Hartford voters, including Chiappa and Dizinno and about five to six others at attorney Hayber’s office (apart from the meeting that Lichten attended during the critical period). (Tr. 536-537 (Cohen).) Cohen, however, could not remember details, including the meeting date. (*Id.*) Lichten testified also that he might have spoken on the telephone to voters Chiappa, Dizinno, and/or Anderson “on one or two occasions” during the critical period. (Tr. 523-524 (Lichten).)

was somehow able to recall about Gardner's critical period MDL attorney referral email, "I didn't do anything with it. It sat on my e-mail for a while and then I deleted it." (Tr. 357 (Lepore).)

38. When asked if he discussed Gardner's email with any voters, Lepore conceded that he discussed it with voter Dizinno and that Dizinno told him he spoke with a lawyer and there were several contractors "signing on" to a lawsuit. (Tr. 35-36 (Lepore) ("Dizinno and I had conversations concerning this").) According to Lepore, Dizinno thereafter "updated [him] on the status of [the lawsuit]." (Tr. 36 (Lepore).) Yet, on remand, Lepore denied talking to any voters about lawsuits. (Tr. 357 (Lepore).) When asked whether he discussed lawsuits with Lepore, Dizinno answered, "I couldn't remember." (Tr. 220 (Dizinno).) In conflict with Lepore's remand testimony, Welker testified that information he had about positive voter interest in lawsuits came from his daily discussions with Lepore before the election. (Tr. 497 (Welker).)

39. Dizinno claimed that he "spearheaded" "the union and the lawsuit."<sup>7</sup> (Tr. 222 (Dizinno).) Although Dizinno reluctantly conceded that he met and/or spoke with Lepore, Welker (including a meeting with Welker "when [Dizinno] got involved with the Union"), Sullivan, Boston-based contractors, and MDL attorney Cohen, his testimony about free legal services and lawsuits for voters was, at best, evasive. (Tr. 217-224 (Dizinno).) When asked whether lawsuits against FHD were discussed at meetings with Gardner and Welker, Dizinno responded, "I don't recall what we talked about". (Tr. 218-219 (Dizinno).) Yet, Welker testified that during the

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<sup>7</sup> In addition to his critical period discussions and status updates about the Hartford voter lawsuits with Lepore, the Teamsters published Dizinno's photo in a Teamsters campaign communication that quoted Dizinno as saying "I look forward to having the chance to vote to join the Teamsters". (Tr. 217, 224-225 (Dizinno), R.Co.Ex. 4.) Also, Dizinno appeared at the Hartford terminal along with the Local 671 President, Organizer, and Business Agent Lepore and Local 671 Secretary/Treasurer Dave Lucas at the May 11 election, and he served as the Teamsters' election observer. (Tr. 228-229 (Lepore); 164 (Hodavance).)

critical period there was positive feedback lawsuits, including from Dizinno,” who informed Welker about “positive reaction among the [contractors] to the MDL.” (Tr. 493-497 (Welker).)

40. When asked whether lawsuits were discussed at the Local 671 organizing meetings, Lepore answered, “I don’t remember” and “I don’t recall that.” (Tr. 31-32, 34 (Lepore).) When asked whether he had discussed voter lawsuits with voters other than Dizinno, Lepore answered, “I don’t think so.” (Tr. 37 (Lepore).) When presented with the February 26, 2007 email referring to a lawsuit for Hartford voters that he received from Gardner following-up on a meeting at his union hall, Lepore claimed that he did not recall any discussion about lawsuits because he was “in and out of that meeting”. (Tr. 34-35 (Lepore).)

41. Only when confronted with a 2007 document that Gardner turned over in 2009 on remand, Welker acknowledged that he had discussions with voters about joining the MDL when some voters told him that they were going to join. (Tr. 493-497 (Welker).) Welker claimed he could not recall details, including who, when, and where. (*Id.*) Welker did acknowledge discussing joining the MDL with voter Dizinno. (Tr. 495 (Welker).) Likewise, when confronted with a 2007 document produced in connection with the remand by the IBT, Welker acknowledged that he knew about the connection between the campaign and the lawsuits. (Tr. 500-502 (Welker), Co. Ex. 37 (Welker-prepared IBT FedEx News and Update).)

42. Hartford voter Maulucci testified that he attended a Teamsters organizing meeting at the Local 671 Union Hall where Boston-based contractors discussed lawsuits against FHD. (Tr. 127-128 (Maulucci).) Voters Magno, Edwards, and Anderson each testified to having received information about a potential Hartford voter lawsuit against FHD during the critical period. (Tr. 197 (Magno); 202-203 (Edwards); 206 (Anderson).)

**L. Gardner-referred MDL Attorneys Meet With Voters and Offer Them Agreements for Free Legal Services and Lawsuits.**

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43. On April 11, 2007, the Hartford Regional Director issued his Decision and Direction of Election (“DDE”) finding Hartford single work area contractors to be “employees” and directing an election to occur within 30 days. (Jt. Ex. 1 (DDE) at 32.)

44. Days later, on April 16, 2007, Hartford voters Dizinno, Chiappa, Magno, Edwards, Anderson, and Trojanowski met with MDL plaintiffs’ attorneys about voter lawsuits, including Pyle Rome MDL lawyer Lichten, at attorney Richard Hayber’s Hartford law office.<sup>8</sup> (Tr. 205 (Anderson); 386-388 (Chiappa); 404-405 (Edwards); 518-520, 523 (Lichten).)

45. At the meeting at attorney Hayber’s office, MDL attorneys offered Hartford voters written agreements promising them that they would “*not be charged an hourly rate for the firm’s work on the case*”. (Tr. 151, 153, 186 (Cohen); Interested Party Ex. 2 (emphasis added).) The Pyle Rome firm prepared these agreements just prior to the time when Lichten traveled to Hartford to “meet with a group of potential plaintiffs” comprised of Hartford voters, including voters Anderson, Magno, and Dizinno. (Tr. 517-519 (Lichten).)

46. Voters accepted the offers by signing them on April 16 or 17, 2007 – just weeks before the election and during the critical period. (*Id.*) (Tr. 386 (Chiappa), Co. Ex. 24 (Chiappa Fee Agreement dated April 16, 2007); 404-405 (Edwards), Co. Ex. 25 (Edwards Fee Agreement

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<sup>8</sup> It is evident that key voter meetings were held at attorney Hayber’s law office and in his presence. (*Id.*; *see also* n.8 *supra.*) After failing and refusing to honor his subpoena, Hayber reluctantly appeared under threat of enforcement. He was, to say the least, uncooperative and argumentative. (Tr. 562, 571 (ALJ) (“Mr. Hayber certainly could not be referred to as a cooperative witness.”).) Even worse, Hayber admitted that he did not search for responsive documents in his electronic documents, including emails and billing statements, even though the subpoena specifically required him to do so -- “I did not take the time to go through those electronic files.” (Tr. 559 (Hayber).) Hayber too repeatedly invoked an inability to recall relevant events given the passage of time. (*See, e.g.*, Tr. 565-566, 573 (Hayber) (“At this time, I do not recall” -- “That’s two years ago.”).)

dated April 16, 2007); 424-425 (Trojanowski), Co. Ex. 27 (Trojanowski Fee Agreement dated April 16, 2007); 516 (Lichten), Co. Exs. 39 (Magno Fee Agreement dated April 16, 2007), 40 (Dizinno Fee Agreement dated April 17, 2007).

**M. Voters Get Free Legal Services and They Expected Also to Get Money; Promises are Delivered When Free Hartford Voter Lawsuits Are Prepared and Filed.**

47. Dizinno, Magno, Edwards, Anderson, Chiappa, and Trojanowski -- all voters and named plaintiffs in the Hartford voter lawsuits -- testified that they were given free legal services during the critical period. (Tr. 217-218, 221 (Dizinno); 197-198 (Magno); 201-202, 408-409 (Edwards); 204-205 (Anderson); 396 (Chiappa); 429-430 (Trojanowski).)

48. Dizinno testified that he expected to receive money from the lawsuit brought on his behalf -- in his words, "that's what lawsuits are for." (Tr. 221 (Dizzino).) Likewise, voters Magno, Anderson, Chiappa, Edwards, and Trojanowski each testified that he expected to receive money from the Hartford voter lawsuits brought on his behalf, and each admitted to paying nothing for legal services rendered during the critical period. (Tr. 198 (Magno); 205 (Anderson); 396-397 (Chiappa); 409 (Edwards); 430 (Trojanowski).)

49. Pyle Rome MDL attorney Cohen confirmed that none of the Hartford voters on whose behalf his firm performed legal services during the critical period paid for those services. (Tr. 108, 118 (Cohen); *see also* 115-116 (Dumont), 524-525 (Lichten).) In addition to consultations, the Hartford voter civil Complaints were prepared by the MDL Pyle Rome firm, beginning some time during the critical period, in April 2007. (Tr. 105-106, 110-111, 113 (Cohen); 524-525 (Lichten); Co. Exs. 10-11 (Hartford Voter Civil Complaints).)

50. Within days after the election, Cohen, Lichten, Liss-Riordan, and Hayber filed the Hartford voter lawsuits in the U.S. District Court for the District of Connecticut. (Co. Exs. 10-11 (Hartford Voter Civil Complaints).) The lawsuits name as Plaintiffs the openly pro-union voters

who accepted agreements for free legal services. (*Id.*; R. Co. Ex. 4 (Teamsters Communication with photo).) The Hartford Voter Civil Complaints, just like the pleading that Gardner gave to Lepore along with the MDL attorney Cohen referral, seek substantial sums of money for Hartford voters. (*Id.*; Co. Ex. 2 (email from Gardner to Lepore with pleading).)

**N. Gardner, Welker, and Sullivan, Along with Lepore, Solicit Hartford Voters In the Days Leading Up to the Election, Including a May 7, 2007 Voter Meeting.**

51. On behalf of Petitioner, Gardner appeared before approximately eight to fifteen Hartford voters at a voter luncheon meeting sponsored by Petitioner on May 7, 2007, four days before the election. (Tr. 328-330 (Gardner), Co. Ex. 18 (Local 671 Meeting Invitation).) Like the February 2007 voter meeting at Petitioner's union hall, Gardner appeared with Petitioner President Lepore, Teamsters Campaign Coordinator Welker, and Teamsters Organizing Director Sullivan. (Tr. 330, 333 (Gardner).)

52. When asked whether lawsuits against FedEx Ground were discussed, including by Lepore and by Welker, Gardner replied, "I don't recall" and "I honestly don't recall," respectively. (Tr. 330-334 (Gardner).)

**O. Two Days Before the Election, Local 671 Engages Gardner to Call and Solicit Voters Who Had Not Already Been Offered Agreements for Free Legal Services.**

53. Shortly before the election, Lepore contacted Sullivan and asked him to arrange for Boston contractors to solicit Hartford voters on behalf of Local 671, using contact information provided by Lepore. (Tr. 364, 370, 375 (Sullivan).) On May 9, 2007, two days before the election, Sullivan sent an email to Gardner with the subject -- "FEDEX Hartford Calls", stating: "Tony Lepore has asked if you can call these people in the next 24 hours." (Tr. 340-341 (Gardner), Co. Ex. 20 (May 9 email from Sullivan to Gardner).) No voter on Lepore's last-minute call list was among the voters who had already accepted the no-fee agreements for lawsuits. (*Id.*) At the July 2007 hearing, Lepore's testimony was in conflict when he responded in the negative to

the question of whether Sullivan provided “any other assistance” in Local 671’s organizing campaign in addition to appearing with Gardner at voter meetings. (Tr. 39 (Lepore).) Lepore’s 2007 testimony was *before* Gardner turned over evidence in 2009.

54. As requested by Lepore, Gardner called and spoke to voters again right before the election. (Tr. 341-342 (Gardner).) According to Sullivan, “I asked them to call the [voters] and ask, you know, for support of the Union.” (Tr. 365 (Sullivan).) When asked to whom he spoke and whether he discussed lawsuits against FHD, Gardner went back again to the “I have no idea” and “I don’t recall” refrains. (Tr. 341-342 (Gardner).)

**P. Welker and Gardner Discuss the Joint Objectives of the Teamsters’ Campaign –  
Lawsuits for Voters and Election Victory.**

55. Within days of the Hartford ballot count (showing 12 votes for Petitioner, 9 votes against, and 2 un-opened challenged ballots), Gardner and Welker exchanged emails in which Gardner referred to Petitioner’s Hartford election and stated “[m]aybe *we* can regain momentum once again.” (Tr. 346 (Gardner) (emphasis added), Co. Ex. 21 (Gardner and Welker email exchange).) Welker responded, the “*CT guys did what they said they’d do – win the election . . . and join the MDL.*” (Tr. 346 (Gardner), Co. Ex. 21 (email exchange) (emphasis added).)

56. Before IBT campaign coordinator Welker became directly involved in Petitioner’s Hartford election campaign, there was no Connecticut MDL action, even after the IBT and Local 671 implemented two month-long campaigns to solicit Hartford FHD contractors to join the MDL. (SMF ¶¶ 1, 12-20.) It was not until Petitioner engaged Welker, Local 25, and Gardner during the critical period to solicit voters and arrange for voters to get agreements for free legal services and lawsuits that, in Welker’s own words, “from the group of [Hartford Contractors] who voted for the Teamsters, six stepped forward to start the lawsuit in that state.” (Tr. 500-502 (Welker), Co. Ex. 37 ((June 26, 2007 FedEx News and Update).)

**OBJECTION 2: The Board Agent's Conduct In Improperly Opening, Commingling, and Counting Challenged Ballots Compromised the Election Integrity And Affected the Election.**

**Q. FHD Properly Challenged the Ballots of Chiappa And Dizinno.**

57. The Hartford NLRB Regional Director issued his Decision and Direction of Election (“DDE”) on April 11, 2007, and the election was held on May 11, 2007. (Jt. Ex. 1 (DDE).) The voter eligibility definition in the DDE expressly **excluded** “*multiple-route contract drivers*” and “*drivers . . . hired by contract drivers*”. (Jt. Ex. 1 (DDE) at 32 (emphasis added).)

58. In the April 11, 2007 DDE, the Regional Director characterized Hartford FHD contractor Paul Chiappa as “*multi-route contract driver Paul Chiappa*” and found that he was one of three contractors “*operat[ing] multiple routes.*” (Jt. Ex. 1 (DDE) at 21 (emphasis added).)

59. In 2003, Chiappa executed an Operating Agreement with FHD for a single Primary Service Area (“PSA”) covering portions of Litchfield County. (Jt. Ex. 1 (DDE) at 21.) In 2004, Robert Dizinno considered becoming a Contractor by executing an Operating Agreement; however, that did not happen because he could not acquire a delivery vehicle on his own. (*Id.*)

60. In 2004, Chiappa executed a multiple-route Operating Agreement when contracting for a second primary service area covering portions of Manchester. (Jt. Ex. 1 (DDE) at 22; Co. Ex. 17 (Chiappa-executed Operating Agreement) at Addendum 4.) Also in 2004, Chiappa executed an Amendment to the Operating Agreement, to reflect a change from sole proprietor to a limited liability company named “Scoville Hill Associates, LLC.” (Tr. P. Ex. 1 (Amendment to Chiappa-executed Operating Agreement).)

61. Chiappa testified that he continued to service the Litchfield work area and that Dizinno serviced the newly contracted work area covering Manchester. (Tr. 400 (Chiappa); (Jt. Ex. 1 (DDE) at 22.) Only Operating Agreement signatory Chiappa and/or Scoville Hill had authority to hire and assign Dizinno -- as found in the DDE, “[c]ontract drivers have sole authority

to hire and dismiss their drivers.” (Jt. Ex. 1 (DDE) at 20; Tr., Ex.17 (Chiappa-executed Operating Agreement) at Art. 2.2 Employment of Qualified Persons.)

62. The April 11, 2007 DDE published for the first time the Regional Director’s finding that, unlike other excluded “multiple-route contract drivers” and “drivers . . . hired by contract drivers,” Chiappa and Dizinno were different: “[U]nlike its treatment of other drivers hired by and working for contract drivers, [FHD] conducts all discussions regarding the Manchester route directly with Dizinno, not with Chiappa.” (Jt. Ex. 1 (DDE) at 23.)

63. In support, the Regional Director found that FHD “never discussed any issues related to Dizinno’s [Manchester] route with Chiappa” and that FHD maintained a separate mailbox for Dizinno at the Hartford terminal. (Jt. Ex. 1 (DDE) at 31.)

64. As of the time of the election, however, none of these factors held, and that is among the reasons why at the May 11 election FHD lodged the following basis for challenging the ballots of Chiappa and Dizinno: “Not a single route driver”. (See SMF ¶¶ 65, 70-80.)

65. FHD properly challenged the ballots of Chiappa and Dizinno, and the Board Agent wrote on the challenged ballot envelopes for both that he was “not a single route driver.” (Tr. 242 (Board Agent); B. Ex. 3.) Petitioner challenged one ballot, and FHD challenged another ballot -- for a total of four challenged ballots accepted. (Tr. 163 (Hodavance); 239-240 (Board Agent).)

**R. Over FHD’s Objections, The Board Agent Improperly Opened, Commingled, and Counted the Challenged Chiappa and Dizinno Ballots.**

66. Prior to the ballot count, the Board Agent represented to FHD that “he had been instructed by the Board to count the ballots of Dizinno and Chiappa.” (Tr. 165 (Hodavance).) Counsel for FHD informed the Board Agent that the commingling and counting of Dizinno’s and Chiappa’s challenged ballots was improper, but the Board Agent stated that he had his “instructions” and that he just “hope[d]” that Chiappa and Dizinno’s ballots were not

“determinative of the outcome of the election.” (*Id.*) At the ballot count, the Board Agent again stated that he had “received instructions from the Board to count those two ballots,” i.e., the Chiappa and Dizinno ballots. (Tr. 166 (Hodavance).) FHD objected again. (*Id.*) The Board Agent again disregarded FHD’s objection, opened Chiappa’s and Dizinno’s ballots, commingled them, and counted the ballots. (*Id.*) He did not open the other two challenged ballots. (*Id.*)

67. The election result was 12 votes for the Union, 9 against, and 2 unopened challenged ballots. (Jt. Ex. 3 (tally).) Had the Board Agent not opened, commingled, and counted the challenged Chiappa and Dizinno ballots, the election result could have been different. (*Id.*)

**S. The Remand Order Concluded that the Board Agent Erred by Opening, Commingling, and Counting the Challenged Chiappa and Dizinno Ballots.**

68. In its 2008 Decision and Order Remanding (“Remand Order”), the Board found that the “Board Agent erred by commingling and counting ballots cast by Dizinno and Chiappa”. (Remand Order at 7.) The Remand Order confirmed that there was no “instruction” to open the properly challenged Chiappa and Dizinno ballots. (*Id.*)

69. The Remand Order found also that the Board Agent’s error “did not *necessarily* affect the outcome of the election,” and that “[a]bsent evidence about the alleged pre-election change in job circumstances for Chiappa and Dizinno, we cannot determine whether the opening of their ballots improperly affected the election results.” (Remand Order at 7 (emphasis added).) Accordingly, the matter was remanded for evidence as to whether the challenged Chiappa and Dizinno ballots would have been sustained. (*Id.*)

**T. By Election Day, FHD was Conducting All Contract Discussions with Operating Agreement Signatory Chiappa.**

70. A “Contract Discussion” (also called “business discussion”) is a formal discussion, memorialized in writing, by FHD operations management with a Contractor about operations and performance under the Operating Agreement, whether that of the Contractor’s or its/his/her

driver(s). (Tr. 275 (Durette); 297-298 (Finch); 399 (Chiappa); Co. Ex. 15 (“Contract Discussion Notes” form).) A “Contract Discussion” is conducted between FHD and Contractors, namely those individuals who execute the governing Operating Agreement, and not with non-signatory drivers hired by Contractors. (Tr. 276 (Durette).)

71. FHD contracts with corporations. (Tr. 443-444, 448-449 (Finch).) In dealing with performance of the obligations under the Operating Agreement, including breaches of it, FHD’s normal course is to deal with one person, typically the individual who signed the Operating Agreement on behalf of the corporation. (*Id.*) This is the case irrespective of the number of service areas contracted for under an Operating Agreement and/or drivers engaged – if there are 2 or 3 services areas and 2 or 3 drivers, Contract Discussions relating to all service areas and to all drivers are to be conducted with one person. (*Id.*)

72. It would be contrary to FHD’s usual course of dealing under the Operating Agreement to conduct a formal Contract Discussion with a Contractor-retained driver, including because the Operating Agreement provides that it is “Contractor’s responsibility to assure that such persons conform fully to the applicable obligations undertaken by Contractor pursuant to this Agreement.” (Tr. 301 (Finch); Co. Ex. 17 (Chiappa-executed Operating Agreement) at Art. 2.2).)

73. FedEx Ground operations manager Dave Durette was a Contractor Relations Manager at relevant times (July 2006 – March 2007) with responsibilities for the Hartford Home Delivery facility, including working with operations managers in performing the Operating Agreement. (Tr. 272-273 (Durette).) In March 2007, then Trenton, NJ FedEx Home Delivery operations manager Ray Finch became a Contractor Relations manager with jurisdiction over Hartford Home Delivery and 21 other facilities in the Northeast. (Tr. 295-296 (Finch).) In his

experience as an operations manager dealing with Contractors, Durette had not conducted Contract Discussions with Contractor-retained drivers. (Tr. 276 (Durette).)

74. In or around February 2007, Durette learned about reported business discussions by Hartford Home Delivery management with Dizinno, who was a Contractor-retained driver and not a signatory Contractor. (Tr. 276 (Durette); Co. Ex. 17 (Chiappa-Executed Operating Agreement).) Around that same time, Durette reinforced to Hartford Home Delivery Manager Scott Hagar that Contract Discussions are to occur between the Contractor, the person who signed the Operating Agreement, and operations managers at the facility. (Tr. 276 (Durette).)

75. Thereafter, and up to the date of the election, all Contract Discussions relating to either of the two work areas under the Operating Agreement signed by Chiappa were conducted with Chiappa, and not Dizinno. (Tr. 297-302, 318 (Finch),<sup>9</sup> Co. Exs. 15 (March 28, 2007 Contract Discussion) and 16 (March 29, 2007 Contract Discussion).)

76. On March 28 and March 29, 2007, FHD had Contract Discussions with Chiappa about delivery service failures on the work area over which Dizinno had performed the service. (*Id.*) On March 28, Hartford manager Hagar gave Chiappa notice about six packages that driver Dizinno apparently did not attempt to deliver -- a breach of the Operating Agreement -- and Chiappa responded that he would talk with Dizinno about it. (*Id.* at Co. Ex. 15 (March 28, 2007 Contract Discussion).) On March 29, Hagar had a Contract Discussion with Chiappa on a similar service failure issue by Dizinno -- when Chiappa responded that Hagar should talk to Dizinno, Hagar reiterated to Chiappa that any issues with his driver must be handled through Chiappa. (*Id.* at Co. Ex. 16 (March 29, 2007 Contract Discussion).)

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<sup>9</sup> As part of his duties as Contractor Relations Manager, Finch reviews Contract Discussion Notes. (Tr. 297 (Finch).)

**U. By Election Day, FHD No Longer Maintained a Separate Mailbox for Dizinno**

77. In or about February 2007, Durette, in the normal course of his duties, learned that one of the Hartford Home Delivery facility's mailboxes had the name of a driver, Robert Dizinno, on it. (Tr. 273-274, 282 (Durette).) As a result, Durette informed Hartford FHD management that the mailbox needed to be set up either under (1) the contractor's business name or (2) the name of the contractor who signed the Operating Agreement. (Tr. 273-274, 282, 287-288, 290-291 (Durette) (a mailbox "would never be in the name of the [Contractor] retained driver."))

78. Thereafter, Dizinno's name was removed from the mailbox. (Tr. 274 (Durette); Jt. Ex. 1 (DDE) at 23 ("On February 27, 2007, the second day of the hearing in the instant matter, Dizinno's name was removed from his mailbox without explanation."))

79. In his experience as a Contractor Relations Manager, during which he worked in various facilities, and in his 15 years as an operations manager at different facilities, Durette was not aware of any person other than a Contractor having his/her name, or his/her business name, on a mailbox. (Tr. 274-275 (Durette).) In Finch's operations and Contractor Relations management experience, he was unaware of any Contractor-retained driver having his/her name on a mailbox – because mailboxes are for Contractors and not their drivers. (Tr. 295-296 (Finch).)

**V. Chiappa Executed Addenda dated May 1, 2007 for a Multiple-Route Agreement.**

80. As of the May 11 election, Chiappa most recently executed Addenda dated May 1, 2007. (Tr. 304-306 (Finch); Co. Ex. 17 (Operating Agreement Addenda signed by Paul Chiappa).) The May 1, 2007 Operating Agreement Addenda executed by Chiappa reflect that there were two (2) work areas under the Operating Agreement and Addenda that Chiappa signed. (*Id.*) As signatory to a multiple-route Operating Agreement, Chiappa accepted additional settlement called "Primary Plus" (referring to a primary service area, plus additional service areas contracted for), which is paid only to multiple-route contractors. (Tr. 306-308 (Finch).)

### III. Argument

#### A. **Objection No. 1: The Teamsters Destroyed The Laboratory Conditions By Orchestrating Free Legal Services For Voters During The Critical Period.**

##### 1. **The ALJ Erred in Failing to Find that the Provision of Free Valuable Legal Services To Voters During The Critical Period Destroyed The Required Laboratory Conditions As A Matter of Law.**

During the pre-election critical period, the Board requires conditions that are consistent with a “laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires” of voters. *Sara Lee Bakery Group*, 342 N.L.R.B. 136 (2004) (citing *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952).) Voter gratuities during the critical period destroy the laboratory conditions as a matter of law because they “reasonably tend to interfere with the [voters’] free and uncoerced choice in the election.” *Phillips Chrysler Plymouth, Inc.*, 304 N.L.R.B. 16 (1991). Thus, the Act prohibits both crude and subtle forms of vote buying. *Freund Baking Co. v. NLRB*, 165 F.3d 928, 931 (D.C. Cir. 1999).

To find otherwise would be to sanction a rule under which, for example, an employer exercising its prerogative to be a good employer could arrange with impunity for voters to receive agreements for free advice from a financial planning advisor, along with any resultant monetary gains, during the critical period. The Act does not countenance such a maneuver; it cannot sanction the materially similar scheme by the Teamsters here. Employers refrain from exercising otherwise rightful prerogatives vis-a-vis employees during the critical period owing to the Board’s rules. There is no legitimate reason why the Teamsters could not have done the same here. Not only did the Teamsters not do so, but they also made lawsuits for which voters were given formal agreements for free legal services a centerpiece of the election campaign.

Giving free legal services to voters, as was done here, is objectionable as a matter of law because voters objectively get “‘something for nothing,’ and the ‘something [is] quite valuable.’” *Nestle’s Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995) (free legal services “smacked of a ‘purchase’ of votes”); *Freund Baking Co., supra*, (providing free legal advice regarding lawsuit against company during critical period constituted objectionable conduct).

The Board has set aside elections where unions arranged for enticing consideration to voters during the critical period, even where the value is nominal or limited:

- \$5.00 gift certificates impermissibly indebted voters to the union;
- free medical screening arranged by union disturbed the laboratory conditions despite the fact the value was not known by voters;
- \$16.00 union jackets affected the election;
- union-arranged life insurance for voters is a “tangible economic benefit” that disturbed the laboratory conditions.

*General Cable Corp.*, 170 N.L.R.B. 1682 (1968); *Mailing Servs.*, 293 N.L.R.B. 565 (1989); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (1984); *Wagner Elec. Co.*, 167 N.L.R.B. 532, 533 (1967) (value of the benefit and identity of provider not a consideration).

Agreements for free legal services and lawsuits seeking significant sums of money, like here, are far more destructive to the laboratory conditions than fixed, nominal value gift certificates or clothing. In this regard, *Freund Baking Co., supra*, is instructive. In that case, like here, a lawsuit was prepared on behalf of voters during the critical period by an attorney who represented other employees in similar lawsuits against the company. 165 F.3d at 930. The D.C. Circuit Court held that the “Union’s sponsorship of the employees’ lawsuit against the Company clearly violated the rule against providing gratuities to voters in the critical period before a representation election.” *Id.* at 935. As here, the union in *Freund* claimed that it did not pay for

the voter lawsuit. *Id.* at 932. The court found that fact to be immaterial: “[i]t is the *appearance* of support, not the support itself, that *may have interfered with the voters’ decisionmaking.*” *Id.* (emphasis added).

Significantly, the Board acknowledged the authority of the D.C. Circuit’s *Freund Baking* precedent in its 2001 decision in *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 916 (2001). Indeed, the Board recognized that the *Freund Baking* decision “called into question the Board’s rationale in *Novotel [New York, 321 N.L.R.B. 624 (1996)]*”, which found critical period legal services unobjectionable. *Superior Truss*, 334 N.L.R.B. at 916. But, the D.C. Circuit did more than that -- it considered and analyzed all of the Board’s justifications for the *Novotel* decision and held that they were “not based upon any reasonably defensible interpretation of the Act.” *Freund Baking Co.*, 165 F.3d at 935.

In the 2001 *Superior Truss* case, the Board provided that if the union engaged in discussions with voters regarding a potential lawsuit *unrelated to the election process*, the laboratory conditions could have been compromised. *Id.* In finding that no such lawsuit was at issue, the Board found material that there was *no* evidence that “the [u]nion ever contemplated the filing of a lawsuit *similar to that in Freund.*” *Id.* (emphasis added.) It was upon this basis that the Board distinguished the *Freund Baking* precedent.

In material contrast to *Superior Truss*, the Teamsters here purposefully orchestrated voter lawsuits unrelated to the election process and seeking substantial sums of money -- all at no cost to voters and guaranteed in written no-fee agreements given to them during the critical period and shortly before the election.

**2. The ALJ Erred by Requiring Proof that the Petitioner Attached an Express *Quid Pro Quo* to Agreements for Free Legal Services Given to Voters During the Critical Period.**

The ALJ misapplied the law by elevating non-binding dicta supported by only one member of a 2-NLRB-member group to the controlling legal standard in the case. The actual remand instruction in the Remand Order states as follows: “we remand this objection to the judge with directions to reopen the record to admit additional evidence and make appropriate findings concerning the Petitioner’s *involvement in the arrangement of legal services* and what its agents said to unit employees about those services.” (Remand Order at 5 (emphasis added).) Yet, the ALJ concluded that “it is important to focus on the specific issue that the Board remanded to me: ‘did the Petitioner arrange or take credit for the provision of free legal services contingent on a favorable outcome for the Petitioner in the election or, for that matter, on individual plaintiffs’ votes?’” (Supplemental Decision on Objections (“Supp. Dec.”) at 5 (underline emphasis supplied by ALJ).)

To the extent that the Remand Order refers to a *quid pro quo* requirement, therefore, it is dicta and not the controlling legal standard. The function of this dicta appears to be nothing more than to highlight and contrast the ALJ’s original error, which the Remand Order states in the preceding and subsequent sentences: “whether the Union directly financed the [] lawsuits” and “whether the Petitioner actually paid for legal services in connection with the [] lawsuits”, respectively. (Remand Order at 4-5.)<sup>10</sup> The Remand Order did not command or instruct the ALJ to apply an express *quid-pro-quo-or-nothing* legal standard, much less exclusively so.

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<sup>10</sup> The ALJ originally constricted the evidence to the issue of whether “the Union pa[id] to cover for – pa[id] for these lawsuits,” ruling “anything short of that, I’m not going to allow any evidence on or testimony[.]” (Tr. 43 (ALJ).) The Remand Order reversed that decision and remanded.

Further, the *quid pro quo* reference in the Remand Order is based upon the preceding sentence therein that, “[i]n *Novotel*, however, the Board observed that the union in question had not ‘conditioned the continued receipt of legal representation on a favorable result in the election.’” (Remand Order at 4 (citing and quoting *Novotel New York*, 321 N.L.R.B. 624, 635 n.7 (1996).) Significantly, as argued by FHD in its Post-Hearing Brief, but ignored by the ALJ, the 1996 *Novotel* decision does not control because it was decided before the D.C. Circuit’s decision in *Freund Baking*, which decision was acknowledged by the Board’s later 2001 decision in *Superior Truss*. (See FedEx Home Delivery’s Post-Hearing Brief in Support of Election Objections (“FHD’s Post-Hearing Br.”) at 35 n.12.) Indeed, in the 2-member Remand Order here, Chairman Schaumber expressly stated that he “did not participate in *Novotel* and [did] not pass on whether that case was correctly decided.” (Remand Order at 4, n.4.) Thus, in addition to the other infirmities described above, the standard erroneously applied by the ALJ did not have even majority panel support.<sup>11</sup>

Because the ALJ erroneously applied an express-*quid-pro-quo* standard, his fact finding recitation and legal analysis in the Supplemental Decision ignores relevant legal issues and, therefore, lacks pertinent findings of fact and conclusions of law. At a minimum, and as argued by FHD in its Post-Hearing Brief, the ALJ was bound to have acknowledged the Board’s most recent, post-*Novotel* precedent in *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 916 (2001) and to make appropriate findings of fact and conclusions of law accordingly. He did not. Instead, the ALJ’s analysis focused on whether Petitioner expressly conditioned critical period agreements

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<sup>11</sup> This deficiency is in addition to the two-member Board’s lack of lawful authority owing to insufficient members to constitute a statutory Board quorum, which FHD reserves its rights to assert. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 186 LRRM 2417 (D.C. Cir. 2009).

for free legal services for voters upon their support for Petitioner and then found such evidence to be lacking based upon some selected witnesses' claimed inability to recall events.<sup>12</sup>

The ALJ's Supplemental Decision is itself replete with, and heavily reliant upon, claimed recall inability by witnesses that the ALJ himself characterized as "hostile" and "reluctant". (Supp. Dec. at 2.) The ALJ noted that Petitioner agent Gardner "cannot recall any discussion of the lawsuit", "does not recall any discussion of the lawsuit", and had "no recollection of when he received [payment by the Teamsters]"; that Petitioner President and Organizer Lepore "does not recall any discussion about the private lawsuit"; that voter Chiappa "was not certain whether Gardner, Welker, or Sullivan attended [a voter meeting]", "does not recall the lawsuits . . . being discussed", "does not recall any discussion regarding the Fedex (sic) lawsuit", and "cannot recall any communications" from law firms; that voter Trojanowski "cannot remember" meetings and "does not remember" who spoke; and that IBT campaign coordinator Welker "does not remember anything" that he said at voter meetings. (*Id.* at 3-4.)

This very scenario underscores yet another reason why an express-*quid-pro-quo*-or-nothing standard is wrong and unsustainable. In this same vein, FHD requested that any properly identified evidentiary gaps be filled by adverse inference and/or discrediting of witness testimony. (*See* FHD's Post-Hearing Br. at 2-6.) In support, FHD pointed out that since the outset of this objections proceeding the Teamsters failed and refused to comply with subpoenas,

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<sup>12</sup> The ALJ sustained objections to FHD's efforts to adduce evidence probative of the legal standard he ultimately applied, e.g., non-privileged testimony and documents reflecting, among other things, dates and places of critical period meetings attended by voters and Gardner-referred voter lawsuit lawyers and other evidence reflecting the reason(s) for the timing of the agreements and filing of the voter lawsuits in proximity to the election. (*See, e.g.*, Tr. 268-269, 368-369, 391, 502-505, 510-511, 513-515, 572-574, 559-563.) By excluding this evidence, the ALJ committed the same error that caused the remand in the first place -- he precluded litigation probative of a potentially relevant issue and then found that FHD failed to meet its burden on that issue. (*Cf.* Remand Order at 7 ("it was error for the judge to preclude litigation of this changed-circumstances issue and then to find that the Employer failed to meet its burden.")).

including instructing key witness William Gardner not to attend the hearing; made baseless objections to suppress evidence, including about Gardner's status as a Teamsters' agent; and gave evasive and misleading testimony, including about the coordination between Petitioner Teamsters Local 671, the IBT, Teamsters Local 25, Gardner, and attorneys who provided free legal services to voters during the critical period. (*Id.*) FHD provided illustrative examples in further support of its request, and it argued that the Teamsters' tactics throughout the proceeding caused undue and significant delay spanning nearly 2 years, numerous purported memory failures, drib-and-drab production of evidence, and other lapses that prejudiced FHD. (*Id.*) As one voter witness replied when asked about what Petitioner's agents said at critical period meetings about voter lawsuits, "It's hard to think back that far" -- "It's a while ago." (Tr. 382-383 (Chiappa).) Other witnesses also attributed their purported lack of memory to the passage of time caused by the Teamsters.

The ALJ erred in ignoring both the undisputed record evidence and applicable law -- as well as NLRB rules -- in failing to provide issue-specific findings and/or to state any legal authorities in support of his conclusory determinations to not discredit certain witness testimony and to decline to find an adverse inference against Petitioner. (Supp. Dec. at 2-3.) *See* Remand Order at 8; *NLRB Casehandling Manual*, ¶ 11432 (requiring "resolutions of the credibility of witnesses, findings of fact, and recommendations as to the disposition of each issue"); §§102.69(e), 102.45(a) of the Board's Rules and Regulations (same); *Webb Furniture Enterprises*, 272 N.L.R.B. 312 (1984) (vague conclusions by ALJ are not due deference and warrant remand); *Governor's Foods*, 277 N.L.R.B. 427, 427 (1985) (remanding where ALJ "summarily concluded" an issue); *Aramark Corp.*, 353 N.L.R.B. No. 98 (Feb. 26, 2009) (same).

**3. The ALJ Erred in Concluding That There Is No Evidence That Petitioner Arranged for the Free Legal Services.**

In addition to applying an invalid legal standard, the ALJ erred in concluding that “there is no evidence that the Petitioner arranged . . . for the free legal services”. (Supp. Dec. at 5.) In this same vein, and without citation to record evidence, the ALJ found that the voters “*knew* that the lawyers involved in the cases were handling the lawsuits on a complete contingent fee basis *without any involvement of the Petitioner.*” (*Id.*) These findings are unsupported in the record, and they ignore the remand instruction’s reference to Petitioner’s “involvement in *the arrangement of legal services*” -- not its involvement in the handling of voter lawsuits. Also, these findings are contradicted by the undisputed evidence described immediately below.

**4. The Teamsters and Their Agents Arranged To Offer, Promise, And Provide Free Legal Services To Voters During The Critical Period.**

The record evidence -- and all due inferences -- show the following:

- The Teamsters’ leveraged a well-publicized alliance with attorneys to solicit contractors to “contact the lawyers” and support the Teamsters. (SMF ¶¶ 3-22.)
- In this same connection, Petitioner, Local 25 and the IBT operated a conspicuous “jointly run and coordinated campaign” to organize Hartford contractors. (SMF ¶¶ 11-22.)
- The Teamsters engaged Gardner as a centerpiece throughout the election campaign, and he was employed by the Teamsters during this time. (SMF ¶¶ 23-36, 51-55.)
- During the critical period, Gardner spoke with voters at Petitioner’s meetings with an admitted objective to solicit them for FHD lawsuits; then, he spoke with attorney Cohen, who Gardner referred to Lepore. (SMF ¶¶ 28-50.)
- Lepore coordinated with lead Hartford organizer Dizinno, who, along with other voters, spoke with Gardner-referred attorney Cohen about voter lawsuits. (SMF ¶¶ 33-42.)
- MDL attorneys met with Dizinno and at least five other voters just weeks before the election and offered them agreements for free legal services and lawsuits seeking substantial sums of money -- voter beneficiaries knew they got something for nothing, and they expected to get money from the lawsuits. (SMF ¶¶ 1, 43-50.)
- According to Welker, “[i]n Connecticut from the group of [Contractors] who voted for [Petitioner], six [] stepped forward to start the lawsuit in that state.” (SMF ¶¶ 55-56.)

This “something for nothing” scheme orchestrated by the Teamsters throughout the critical period indebted voters to favor Petitioner and destroyed the laboratory conditions as a matter of law. *See, e.g., Freund Baking Co.*, 165 F.3d at 932 (union arranged gratuities “constrain[] [voters] to vote for the Union out of a sense of obligation.”).

As shown above, the undisputed evidence proves that Gardner acted as Petitioner’s agent throughout the critical period and, in that capacity, spoke with voters at Petitioner’s campaign meetings about potential lawsuits against FHD, referred lawyers for that purpose, and was involved in the arrangement by which those lawyers gave voters agreements for free legal services and lawsuits shortly before the election. In an attempt to somehow diminish or avoid this reality, the ALJ erred in relying upon the patently self-serving and selective recollection of Teamsters Organizer Sullivan, who purportedly was “trying to remember” for what purposes the Teamsters employed Gardner during the critical period. (Tr. 368 (Sullivan).) To this end, the ALJ referred to Sullivan’s testimony insinuating that Gardner’s employment with the Teamsters was only for “put[ting] all our ducks in a row for our [Boston] objections hearing, which was sometime in February or March of [20]07.” (Supp. Dec. at 3, 5; Tr. 368 (Sullivan).)

First, the Boston objections hearing had previously concluded in January 2007, and did not occur in February or March as Sullivan testified. (*See* Administrative Law Judge’s Report on Objections, JD-14-07, Wilmington, MA, Cases 1-RC-22034 and 22035 at 3.)

Second, Sullivan’s testimony was a self-serving guess in lieu of subpoenaed pay, tax, and work records -- withheld by the Teamsters -- that would have shown conclusively the dates of Gardner’s employment with the Teamsters and, therefore, the scope of his employment activities. (*See* FHD’s Post-Hearing Br. at 4-5.)

Third, neither Gardner nor the Teamsters presented any evidence to foreclose that Gardner's 2007 Teamsters employment was for his critical period activities on behalf of Petitioner in arranging for Hartford voters to get agreements for free legal services. To the contrary, Gardner testified, "I told the Teamsters during that time period [(2007)] that I would assist them in any efforts to organize FedEx *anywhere, anytime, any place and I performed a number of services, some work pretty much throughout the whole year*" -- "*I worked quite a bit.*" (Tr. 440-443 (Gardner) (emphasis added).) In light of the Teamsters' "jointly run" campaign and other evidence discussed herein, Gardner was Petitioner's agent throughout the critical period. (See §§ II., D.-P. and III., A. *supra*.)

As if acknowledging the lack of record evidence to support his findings and the undisputed facts to the contrary, the ALJ's curt analysis about Petitioner's involvement in the arrangements for free legal services hastily moved to his erroneous fall-back position -- "even if the evidence had established that Petitioner arranged for . . . the free legal services", "the Board remand also required that the provision of free legal services was contingent upon a union victory in the election or individual employee votes." (Supp. Dec. at 5.) As shown above, however, the ALJ's resort to an invalid express-election-outcome-contingent-or-nothing standard was error.

**5. The Teamsters' Post-Hoc Attempts to Distance Themselves from Critical Period Promises to Voters of Free Legal Services Buttress FHD's Position.**

While IBT campaign coordinator Welker again and again claimed to have no memory of recent events he claimed to remember a distant "disclaimer" about lawsuits -- telling contractors that the Teamsters were "not a party to" nor "behind" the MDL. (Tr. 53, 55, 70 (Welker).) Gardner too was self-servingly amnesic -- "*the only thing I remember*" is that Welker "disclaimed any association, or affiliation, or anything that I had to say." (Tr. 334 (Gardner))

(emphasis added.) Gardner's lone "recollection" predictably expands the breadth of Welker's otherwise uncorroborated "disclaimer" from the IBT not being a party to a case to having no "association" or "affiliation" with Gardner.<sup>13</sup>

In its post-hearing brief, FHD argued that Welker's and Gardner's expedient epiphanies should be discredited as patently incredible, as belied by the overwhelming evidence of their and the Teamsters' fervor to get Hartford voters to commence a CT lawsuit against FHD, and because no voter testified about any "disclaimer" by Welker. (FHD's Post-Hearing Br. at 36-37; SMF ¶¶ 1, 5-38.) The Teamsters' belated attempt to point the finger at Gardner gets them nowhere because he was Petitioner's agent, and it serves only to buttress that they know a line had been crossed.

Further, objectionable conduct is no less objectionable because it is carried out by surrogates. The Act is plain that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified *shall not* be controlling." NLRA, § 2(13) (emphasis added). Apparent authority suffices, and such appearance in this critical period laboratory conditions context is in the legally objective eye of the reasonable voter. *See, e.g., Bio-Medical of Puerto Rico*, 269 N.L.R.B. 827, 828 (1984); *Corner Furniture Discount Center*, 339 N.L.R.B. 1122 (2003); *Freund Baking Co.*, 165 F.3d at 932 ("[i]t is the appearance of support, not the support itself, that may have interfered with the voters' decisionmaking.") (emphasis added).)

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<sup>13</sup> In addition, Welker placed his "disclaimer" at a meeting in December 2006, not the February 2007 meeting when Gardner presented lawsuits to voters. (SMF ¶ 19.) As to that February 2007 meeting, Sullivan recalled Welker attending, but did not remember him addressing voters, and claimed that Welker was "just there to watch the process." (Tr. 372 (Sullivan).)

Here, Petitioner openly connected itself and its pre-election campaign to Welker and the IBT, Local 25 and Gardner, MDL attorneys, and lead Hartford-proper organizer Dizinno. (SMF ¶¶ 5-34.) One thing they all had in common was soliciting voters for lawsuits against FHD and involvement in arrangements to provide free legal services to voters during the critical period along with written promises that they would “*not be charged*”. (SMF ¶¶ 5-35, 55.)

A reasonable voter in these circumstances would conclude what the facts establish -- the Teamsters and their agents worked openly and notoriously to give voters a strategically-timed valuable benefit as part of its election campaign and shortly before the election. As a matter of law, the Teamsters’ efforts fatally corrupted the laboratory conditions and affected the election outcome, which turned on as little as one vote. Six times that number were voters who were given written promises for free legal services during the critical period. (SMF ¶¶ 46-50.) *Cf. NLRB v. V&S Schuler Engineering, Inc.*, 309 F.3d 362, 372 (6th Cir. 2002) (“Given the extreme closeness of the election . . . misconduct can taint the election result easier.”). The election results were tainted and must be set-aside, and the ALJ erred in finding and recommending otherwise.

**B. Objection No. 2: The Board Agent’s Conduct In Improperly Opening, Commingling, and Counting Challenged Ballots Fatally Compromised the Election Integrity and Affected the Election Results.**

**1. The ALJ Erred as a Matter of Law in Failing to Find that the Board Agent’s Dubious Course of Conduct And Established Violations of NLRB Rules Cast Reasonable Doubt On The Integrity of the Election.**

The NLRB’s challenged ballot rules are designed to “assure that [the Board’s] role in the conduct of elections is not subject to question.” *Paprikas Fono*, 273 N.L.R.B. 1326 (1984). Violation of these rules is grounds to set aside an election. *Id.* (setting aside an election where the “normal procedures for handling determinative challenges were not followed”).

Despite having accepted FHD's challenges to the Chiappa and Dizinno ballots, the Board Agent deliberately pursued a dubious course that short-circuited the Board's rules for ensuring the fairness and validity of elections. (SMF ¶¶ 64-67.) Over repeated objections by FHD, the Board Agent suspiciously acted on "hope" and phantom "instructions from the Board" that the challenged ballots "should be opened". (*Id.*) The Remand Order confirmed that there were no "instructions" and found that the "Board Agent erred by commingling and counting ballots cast by Dizinno and Chiappa." (Remand Order at 7.)

The Remand Order went on to state, however, that there is "not a 'per se rule [that] . . . elections must be set aside following any procedural irregularity'" and that the Board Agent's error "did not *necessarily* affect the outcome of the election". (Remand Order at 7 (emphasis added).) To this, FHD argued in its Post-Hearing Brief that the Board "does *not* require proof that irregularities in the handling of ballots necessarily affected the election results before an election will be set aside." *Fresenius USA Mfg, Inc.*, 352 N.L.R.B. No. 86, slip. op. at 2, n.6 (May 30, 2008) (emphasis added).

The Board Agent's conduct violated the Board's election standards, destroyed the purpose of the challenged ballot rules as to two ballots, and impugned the Board's election standards. This harm to the Board's election standards is a matter of established fact and law, and not mere speculation or possibility. As argued above, moreover, the Board Agent's violations and course of conduct were not just "any procedural irregularity". They indisputably made the NLRB's role in this close election "subject to question" and cast "reasonable doubt as to the fairness and validity of the election." *Cf. Fresenius USA Mfg, Inc.*, 352 N.L.R.B. No. 86, slip. op. at 2, n.6 (setting aside election due to Board Agent conduct citing the "*closeness of the*

*election*”) (citations omitted); see *NLRB v. Mr. Porto, Inc.*, 590 F.2d 637, 639 (6th Cir. 1978) (“a close election is a factor which demands that even minor infractions be scrutinized carefully”).

In its Post-Hearing Brief, FHD argued the election results should be set aside for these reasons alone without delving into speculation and further litigation about the impact on the election outcome. The ALJ, however, erred by failing to even address these points and authorities. The Board should now sustain Objection 2 accordingly. See *supra.* at § III.A.2.

**2. In Addition to Fatally Subjecting the Election to Question, the Board Agent’s Violations of the Board’s Election Rules Affected the Election Outcome.**

The Board Agent’s violations *did* also affect the election outcome because the result could have been different had the Board Agent not improperly opened, commingled, and counted the challenged Chiappa and Dizinno ballots. Given the 12-9 tally and the 2 un-opened challenged ballots, there is a scenario under which the result could have been *unfavorable* to Petitioner had the Board Agent not violated the rules. Cf. *Fresenius USA Mfg.*, 352 N.L.R.B. at n.6 (setting aside election due to Board Agent conduct citing the “*closeness of the election* [(9-7)], where even one mistake in the distribution or counting of the ballots *could have* altered the election outcome.”) (emphasis added.) The question about and uncertainty in the election outcome caused by the Board Agent’s violations is more than enough to set aside the election.

**a. FHD’s Challenges to the Chiappa and Dizinno Ballots Would Have Been Sustained, and Those Ballots Should Not Have Been Tallied.**

The Hartford NLRB Regional Director issued his Decision and Direction of Election (“DDE”) on April 11, 2007, and the election was held on May 11, 2007. (Jt. Ex. 1 (DDE).) The unit description in the DDE specifically excluded “*multiple-route contract drivers*” and “*drivers . . . hired by contract drivers*”. (Jt. Ex. 1 (DDE) at 32 (emphasis added).)

The DDE correctly characterized and acknowledged Chiappa as “*multi-route contract driver Paul Chiappa*” and found also that Chiappa was one of three contractors “*operat[ing]*

*multiple routes.*” (Jt. Ex. 1 (DDE) at 21 (emphasis added).) The DDE, however, published for the first time on April 11, 2007 the Regional Director’s finding that, unlike other excluded “multiple-route contract drivers” and “drivers . . . hired by contract drivers,” Chiappa and/or Dizinno were different: “[U]nlike its treatment of other drivers hired by and working for contract drivers, the Employer conducts all discussions regarding the Manchester route directly with Dizinno, not with Chiappa.”<sup>14</sup> (Jt. Ex. 1 (DDE) at 23 (emphasis added).) The Regional Director found also that FHD “never”<sup>15</sup> discussed issues related to the Manchester work area with Chiappa and that FHD maintained a separate contract driver’s mailbox for Dizinno. (Jt. Ex. 1 (DDE) at 31.) These were the bases for the Regional Director’s differential treatment regarding the statuses of Chiappa and Dizinno.

**b. As of Election Day, Material Findings in the DDE Regarding Chiappa and Dizinno Did Not Hold.**

As of the day of the election, May 11, 2007, however, none of these factors held, and this was among the reasons why FHD asserted the following basis for challenging the ballots of Chiappa and Dizinno: “Not a single route driver”. (SMF ¶¶ 64-65, 70-79.) By that date, FHD conformed its dealings with Chiappa to its usual course of performance under the Operating

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<sup>14</sup> This is a finding that Dizinno was a “driver hired by and working for contract driver[]”.

<sup>15</sup> This “never” finding in the DDE, unsupported by record citation, is contradicted by evidence that Petitioner itself presented at the Objections hearing. Petitioner counsel asked Chiappa whether, prior to March 2, 2007, he had ever participated in a Contract Discussion with Hartford manager Hagar about the Manchester route, and Chiappa responded, “No, not really, you know, I can’t.” (Tr. 399-400 (Chiappa).) Yet, when Petitioner’s counsel presented Chiappa with a document dated December 22, 2006 (before the petition was even filed) reflecting a Contract Discussion between Chiappa and Hagar about service failures by Dizinno, Chiappa responded: “Yes, this one, this is one that I may have forgotten about, but, right, it jarred my memory a little bit.” (Tr. 401 (Chiappa), Pet. Ex. 3 (December 21, 2006 Contract Discussion with “Scoville Hill Associate (Chiappa)”) (Hagar: “Paul, your driver, Bobby D[id] N[ot] A[tempt delivery of] 64 pkgs . . . yesterday. Do you have anything to say about that?” Chiappa: “Not really.”) This December 22, 2006 Contract Discussion supports FHD’s position regarding Chiappa’s and Dizinno’s respective statuses as multiple-route contractor and driver hired thereby.

Agreement, conducting *all* Contract Discussions, including about the contracted second route serviced by Dizinno, with Chiappa as the Operating Agreement signatory. (SMF ¶¶ 70-79.)

Also, FHD did not hire Dizinno -- the authority for doing so rested solely with Chiappa and/or Scoville Hill Associates under the Operating Agreement. (SMF ¶ 61.) Article 2.2 provides that a “Contractor may employ or provide person(s) to assist Contractor in performing the obligations specified by this Agreement.” (*Id.*) As found in the DDE, “[c]ontract drivers have *sole* authority to hire . . . drivers.” (DDE at 20 (emphasis added).) When exercising the right to hire and employ, Contractors agree that “such persons shall not be considered employees of FHD and that it is *Contractor’s responsibility to assure that such persons conform fully to the applicable obligations undertaken by Contractor* pursuant to this Agreement.” (SMF ¶¶ 61, 72 (emphasis added).)

Also as of the election day, FHD conformed its dealings with Chiappa and Dizinno to its usual course of performance under the Operating Agreement, removing driver Dizinno’s name from a facility mailbox designated for the second service area under the Operating Agreement executed by Chiappa. (SMF ¶¶ 77-79.)

Further, Chiappa executed various Operating Agreement Addenda dated May 1, 2007 -- ten days before the election -- accepting, among other things, a Primary Plus settlement enhancement. (SMF ¶ 80 (Co. Ex. 17 (Chiappa-executed Operating Agreement) at Attachment 3.4 to Addendum 3).)<sup>16</sup> This additional settlement component is available only to Contractors with “two or more Primary Service Areas (PSA) under contract,” i.e., multiple-route contractors. (*Id.*) By the May 1, 2007 addenda, Chiappa reconfirmed his status as a “multiple-route contract

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<sup>16</sup> Chiappa, not Dizinno, executed the Operating Agreement, amendments thereto, and all Addenda dated May 1, 2007. (Pet. Ex. 1 (Signature Page Amendment executed by Paul Chiappa); Co. Ex. 17 (Operating Agreement executed by Chiappa).)

driver” and Dizinno’s status as a “driver[] hired by [a] contract driver”-- both excluded from voting eligibility under the April 11, 2007 DDE. (DDE at 32; SMF ¶ 80.) And, Chiappa repeatedly confirmed his multiple-route status each time he accepted, and realized the monetary benefits of, Primary Plus settlement.

**3. The ALJ Correctly Found that Dizinno was Ineligible to Vote Due to Changed Circumstances Affecting His Voter Eligibility, but the ALJ Erred in not Finding that Chiappa was Similarly Ineligible to Vote.**

The Remand Order found that the ALJ erred when he did not “allow the parties to litigate the issue of whether there had been a *change of circumstances affecting the voter eligibility* of Dizinno and Chiappa.” (Remand Order at 6 (emphasis added); *and see id.* at 7 (“it was error for the judge to preclude litigation of this changed-circumstances issue”.) The Remand Order concluded that remand was warranted “as to whether the challenges to the ballots of Chiappa and Dizinno would have been sustained based on changed job circumstances” -- not, as found by the ALJ, changes only in Chiappa’s “job responsibilities.”<sup>17</sup> (Supp Dec. at 7.) The ALJ erred in focusing on whether there had been a change in “Chiappa’s job responsibilities” and then concluding that FHD failed to establish any such change. (Supp. Dec. at 7.)

Because FHD’s Objection No. 2 involves the unit description’s inclusions and exclusions, the ALJ correctly acknowledged that “a close reading of the DDE” “is necessary to determine the basis of the Regional Director’s DDE to determine why he included Chiappa and Dizinno in the unit”. (Supp. Dec. at 7.) The ALJ, however, erred when he neglected to follow this prescription.

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<sup>17</sup> Compounding this error, the ALJ incorrectly found that the “sole evidence produced” by FHD to support Objection No. 2 was “the testimony of Durette and Finch” about contractor mailboxes and business discussions with contractors. (Supp. Dec. at 6-7.) As established in the record and as detailed in FHD’s Post-Hearing Brief, FHD indisputably produced documentary evidence too, and there was other supporting testimony and documentary evidence in the record upon which FHD relied in support of Objection 2. (See SMF ¶¶ 59-80; FHD’s Post-Hearing Br. at 40-44.)

The DDE is crystal clear that “multiple-route contract drivers” were expressly excluded from the petitioned-for unit. (DDE at 32.) The DDE likewise unambiguously refers to “three” “multiple-route contract drivers” “at the time of the hearing”:

Since the Hartford Terminal opened in 2000, a total of six contract drivers have at one time or another *operated multiple routes*. At the time of the hearing, only *three of these drivers were currently doing so*.

(DDE at 21 (emphasis added).) This indisputably includes Chiappa -- the signatory to an Operating Agreement covering multiple routes.<sup>18</sup> (DDE at 21, 22, 29.) Other findings in the DDE are in manifestly in accord:

- “Chiappa[] has *two routes assigned to him*” and contracted for compensation “paid to multi-route contractors.” (DDE at 4, 22 (emphasis added));
- In 2004, “Chiappa signed an addendum to his Agreement covering the open Manchester route” -- the second route ( DDE at 22);
- Dizinno is a “disputed driver who operates *one of Chiappa’s routes*”, and “[c]ontract drivers have sole authority to hire . . . drivers” (DDE at 2, 20 (emphasis added));

Notably, nothing in the DDE states that Chiappa *was* included in the petitioned-for unit in the first instance. In contrast, the DDE expressly states, “I shall include Dizinno in the petitioned-for unit.” (DDE at 32.) There was no such declaration as to Chiappa. Rather, there was merely a finding that Chiappa was not a statutory “supervisor”. (See DDE at 3, 30-31 (“I further find that the Employer failed to satisfy its burden of establishing that Chiappa is a supervisor within the meaning of Section 2(11) of the Act.”), 21-22, 30 (headings referring to the “Supervisory status of Paul Chiappa and unit status of Robert Dizinno” and finding a lack of evidence that Chiappa “engaged in any of the indicia enumerated in Section 2(11) of the Act”).)

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<sup>18</sup> The other two “multiple-route contract drivers” were Roger Jones and Keith Ignaziak, who, like Chiappa, contracted for two routes. (DDE at 2 n.4, 4.)

This finding of Chiappa's non-statutory supervisor status, however, did not change his status as a "multiple-route contract driver" expressly excluded from the unit.

A "close reading" of the DDE makes clear that Chiappa's status was "multiple-route contract driver," a classification expressly excluded from the petitioned-for unit. While the DDE does not state that Chiappa was included in the petitioned-for unit nonetheless, the only thing that *potentially* placed Chiappa outside of the "multiple-route contract driver" exclusion was the Regional Director's determination that FHD's treatment of Dizinno in certain respects was "unlike [FHD's] treatment of other drivers hired by and working for contract drivers" who also were excluded from the unit. (DDE at 23, 31.) In this regard, the DDE found that FHD "treats [Dizinno] . . . as a contract driver in his own right" by "never discuss[ing] any issues related to Dizinno's route with Chiappa" and by "maintaining a separate contract driver's mailbox for Dizinno". (DDE at 23, 31.)

The ALJ correctly found, however, that these bases for including Dizinno in the unit had changed and did not hold as of the election -- FHD's "treatment" of Dizinno was no longer "unlike its treatment of other drivers hired by and working for contract drivers" who were excluded from voting eligibility. (DDE at 23.) Dizinno was a "driver[] hired by [a] contract driver" expressly excluded from the unit. (SMF ¶ 61.) FHD did not hire Dizinno -- the authority to hire him rested solely with Operating Agreement signatory Chiappa and/or Scoville Hill Associates, LLC. (SMF ¶¶ 60-61.) Again, the DDE is crystal clear -- "[c]ontract drivers have *sole* authority to hire . . . drivers." (DDE at 20 (emphasis added).)

With the ALJ's finding that Dizinno's voter eligibility status had changed from included "contract driver" to excluded "driver[] hired by contract driver", it necessarily follows that there was no longer any basis, if there ever was, for Chiappa to have any status other than "multiple-

route contract driver” expressly excluded from the unit. For several reasons, the statuses of Dizinno and Chiappa are inextricably linked, particularly as a matter of the express exclusions from the petitioned-for unit. Because, as the ALJ found, Dizinno is properly excluded from the unit as a driver hired by a contract driver, Chiappa must also be excluded as a multiple-route contract driver, including because he was a contract driver who executed a contract covering two routes and was responsible for the hiring and employment of Dizinno. It was error, therefore, for the ALJ to have construed the DDE as including Chiappa in the petitioned-for unit in the first instance. It was further error for the ALJ to conclude that Chiappa remained in the unit irrespective of a change in Dizinno’s voter eligibility status.

**4. Allegations and Findings Based on Extrinsic and Parol Evidence Are Immaterial and Serve Only to Buttress FHD’s Position.**

As FHD argued in its Post-Hearing Brief, Petitioner’s claims about articles of organization and Dizinno’s activities are immaterial and serve only to buttress FHD’s position. As to the Articles of Organization for Scoville Hill Associates, L.L.C. (Pet. Ex. 2), other than noting that Chiappa executed this document also, the Articles are of no moment because the Operating Agreement provides that “[it], the Addenda hereto, and the Attachments to the Addenda, constitute the entire agreement and understanding between the parties,” which “shall not be modified, altered, changed, or amended in any respect unless *in writing and signed by both parties.*” (Tr. Ex. 17 at Art. 10, Merger of Understanding (emphasis added).)

While Chiappa executed an amendment to the Operating Agreement to reflect a change from sole proprietor to a limited liability company named Scoville Hill Associates, LLC, FHD had no right (under the Operating Agreement or otherwise) to dictate how Chiappa, Dizinno, and/or Stephanie Chiappa established or conducted their business relations with each other within Scoville Hill Associates, LLC. The statuses they claimed or that Petitioner asserts under

that entity are immaterial because, absent a writing signed by both parties to the contrary -- as required by the Operating Agreement -- what determined any relations between them and FHD is the Operating Agreement. Significantly, moreover, the DDE did not change the Operating Agreement nor constrain FHD's course of dealing under it.

For this same reason, any alleged or purported "agreement" or "understanding" between Chiappa and FHD management in 2004 is immaterial and was of no effect as of election-day, if ever, in any event. (*See* Supp. Dec. at 7 (ALJ referring to an alleged "agree[ment]," "favor" and/or "understanding" involving Chiappa and an FHD manager).) Again, there was no signed writing to give legal effect to any claimed agreement, and it is error to do so. *See e.g., Metz Baking Co.*, 339 N.L.R.B. 1095, 1099, fn. 7 (2003) ("the Board will not use parol evidence about intent to vary the plain language of a contractual provision.")

In addition to the preclusive effect of the integration clause in the Operating Agreement (Tr. Ex. 17 at Art. 10), Chiappa necessarily accepted again and again that the Operating Agreement he executed, and not a finding in the DDE or any other alleged agreement or understanding, constituted the "entire agreement and understanding between the parties", including when he allowed the Operating Agreement to renew, when he executed Addenda dated May 1, 2007, and when he otherwise continued to perform under the Operating Agreement.<sup>19</sup> (SMF ¶¶ 59-61, 70-80.) All of these actions by Chiappa came after FHD's manager's representations to him, including on March 28 and 29, 2007, that FHD was dealing with him, and

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<sup>19</sup> In addition, on March 28, 2007, and before the election, the Operating Agreement executed by Chiappa renewed for a one year term by contractual operation. (Co. Ex. 17 (Chiappa-executed Operating Agreement) at Articles 8.1 (Initial Term) and 8.2 (Renewal Terms) and p. 30 (Chiappa execution dated March 28, 2003).) Further, Chiappa could have terminated his Operating Agreement at any time with 30 days notice. (*Id.* at Article 9.1 (Termination).) Chiappa's actions and inaction in this regard are additional relevant circumstances occurring before the election.

not Dizinno, with respect to service performance obligations under the Operating Agreement on both routes. (*Id.*)

In sum, as of the day of the election, the material findings upon which the April 11, 2007 DDE rested as to Chiappa and Dizinno did not hold such that both fell squarely within the express unit exclusions of “multiple-route contract drivers” and “drivers [] hired by contract drivers”, respectively. (Jt. Ex. 1 (DDE) at 32.) Accordingly, had the Board Agent not violated the Board’s election rules and properly segregated the challenged ballots of Chiappa and Dizinno, those ballots would not have been opened, commingled, and counted. Because the vote tally margin -- adding two votes with the Board Agent’s error -- was three votes (12 to 9) and because there were two other challenged ballots, the Board cannot say with confidence that the election results would have been the same without the election rule violations as with them. For this additional reason, the only proper course is to set aside the election results.<sup>20</sup>

#### IV. Conclusion

The record shows that the Teamsters arranged for voters to be given free legal services for lawsuits seeking substantial sums of money during the critical period. This scheme corrupted the laboratory conditions as a matter of law. In addition, the Board Agent’s dubious course of conduct in opening and commingling challenged ballots in violation of Board rules designed to ensure election integrity subjected this election to question as a matter of law and also affected the election results. The ALJ erred in finding otherwise.

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<sup>20</sup> As such, the ALJ also erred in recommending that the Regional Director initiate further proceedings on the two un-opened challenged ballots, which is both improper and unnecessary for the reasons above.

FHD's exceptions should be granted; its election objections should be sustained; and the election should be set aside.

Respectfully submitted,



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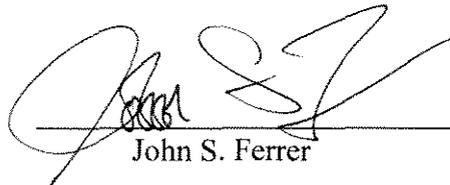
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of FedEx Home Delivery's Exceptions to Supplemental Decision on Objections and Brief in Support of Exceptions to Supplemental Decision on Objections, which was electronically filed today using the Board's electronic filing system, was served via electronic mail on:

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