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## **I. Statement of the Case**

Shortly before a decertification election for a bargaining unit of which he was not a member, Kevin “Dale” Grosso (“Grosso”) wrote certain offensive and threatening comments on three union newsletters distributed in the employee break room which prompted no fewer than four female employees to complain to management that the comments were both offensive and derogatory to women and threatening to their physical well-being. After receiving these complaints and learning from one of the female employees that Grosso was the likely author of these comments, the management of Fresenius USA Manufacturing, Inc. (“Fresenius” or the “Company”) investigated by, among other things, interviewing Grosso. During the interview, Grosso lied and denied that he had written the offensive and threatening comments. After Grosso subsequently confessed to writing the comments, management suspended Grosso to allow sufficient time to complete the investigation and, at that time, asked him to maintain the confidentiality of the investigation so as to protect the female employees who had complained and were scared due to the nature of the comments as well as to protect the sanctity of the investigation. Upon completion of the investigation a few days later, Grosso was terminated due to his misconduct; namely, making offensive and threatening statements in violation of the Company’s human resources policies and due to his dishonesty in the investigation.

At the hearing in this case, Fresenius demonstrated and Judge Brakebusch properly concluded that: (1) Fresenius appropriately commenced and conducted an investigation into Grosso’s conduct prompted by the complaints received from the female employees, one of whom identified Grosso as the likely author of the offensive and threatening comments on the union newsletters; (2) the interview of Grosso was not an unlawful “interrogation” but rather was narrowly and appropriately focused to confirm that Grosso was the author of the offensive and threatening comments; and (3) Fresenius appropriately discharged Grosso for both his violation

of its Equal Employment Opportunity (“EEO”) and Harassment Policies and his dishonesty in the investigation into his misconduct. Contrary to the Judge’s conclusion, Fresenius also established that it did not violate the Act when it requested that Grosso not discuss the investigation with other employees during its pendency in order to protect the female witnesses who were afraid and to protect the integrity of the investigation.

The record evidence establishes that Grosso wrote “Dear Pussies – Please Read,” “Hey Catfood Lovers How’s Your Income Doing?” and “Warehouse Workers – R.I.P.” on union newsletters distributed in the employee break room at the Company’s Chester, NY facility. Upon reading these comments, four female employees lodged complaints with management about the offensive and vulgar nature of the terms “pussies” and “catfood lovers” (which Grosso admitted was a play on the word “pussies”) as derogatory to women. The female employees also complained that the phrase “R.I.P.” (which Grosso acknowledged means “Rest In Peace” or death) was specifically directed at the Chester warehouse workers and was a direct threat of harm causing them to fear for their own safety. After receiving these complaints, management had no choice but to take steps to protect the safety of its employees (which it did) and then investigate the situation pursuant to the terms of its Harassment Policy.

The evidence demonstrates that the Company conducted a full investigation by interviewing the female employees who complained about the handwritten comments on the newsletters, obtaining written statements from these employees about their complaints (a hallmark of a thorough investigation), and then reviewing employee handwriting samples, all of which pointed to Grosso as the likely author of the comments on the newsletters. The Company also conducted a fair investigation by interviewing Grosso on more than one occasion and thereby providing him with an opportunity to explain his conduct. The interviews conducted by

the Company were narrowly tailored to address the specific conduct at issue in the investigation, and were conducted by supervisors with whom Grosso was familiar and comfortable. During one interview, Grosso had the opportunity to explain himself yet he chose to lie about his misconduct multiple times. Only after he was caught in his dishonesty did Grosso finally admit to and acknowledge his misconduct as well as his dishonesty.

After gathering the information obtained through the investigation, management then referred the investigatory file to Human Resources to conduct its own independent investigation, which included reviewing the investigatory file and interviewing several management employees. Due to the seriousness of Grosso's misconduct in writing the offensive, vulgar and threatening comments on the newsletters as well as his dishonesty during the Company investigation, the Senior Human Resources Manager determined that discharge was the appropriate disciplinary action, consistent with the Company's Corrective Action Policy which allows for termination on a first offense of this type of conduct, for both violation of the EEO and Harassment Policies and for Grosso's dishonesty. Moreover, discharge was the same level of discipline issued to other employees in the past who had either violated the Harassment Policy or engaged in dishonesty during a Company investigation. Of course, in Grosso's situation, he engaged in both types of serious misconduct which further supported the decision to discharge. Consequently, as more fully explained herein, Judge Brakebusch appropriately dismissed virtually all of the allegations of the complaint in this case; however, Fresenius excepts to the conclusion that its request of Grosso to keep the investigation confidential was unlawful since such request was not a violation of Section 8(a)(1) of the National Labor Relations Act ("Act").

### A. Procedural History

On or about October 5, 2009, the Union filed the Charge in the above-captioned matter alleging that “the Employer terminated Kevin Grasso [sic], a long time Union supporter and member of the negotiating committee because of his support for the Union and his participation on the Union’s negotiating committee.” The Charge further alleges that during the Company’s investigation of Grasso’s conduct, “Kevin King misrepresented himself over the telephone to Mr. Grasso [sic], allowing Mr. Grasso [sic] to believe he was speaking with Local 445 representative Jerry Ebert and not Mr. King. During this conversation, Mr. King questioned Mr. Grasso [sic] about an incident as though he was Mr. Grasso’s [sic] Union representative and was able to gain information which the Employer claims is the real reason for Mr. Grasso’s [sic] termination.”

On or about December 16, 2009, the Union filed the Amended Charge, setting forth allegations identical to those in the original Charge as well as allegations that the Company violated Sections 8(a)(5) and 8(a)(1) of the Act by: (1) “den[ying] information requested by the Union which was necessary and relevant to its role as collective bargaining representative;” and (2) “advis[ing] employees not to discuss ongoing investigations with other employees.”

After investigating the conduct alleged in the Charge and the Amended Charge, the Regional Director dismissed the allegation that the Company denied certain information requested by the Union but issued a Complaint against the Company. The Complaint alleges, *inter alia*, that the Company violated Section 8(a)(1) of the Act when it (1) “interrogated Grasso [sic] regarding the writing on the Union newspapers;” (2) “conducted an investigation into whether Grasso [sic] had written” the offensive and threatening comments on the union newsletters; and (3) “directed Grasso [sic] not to speak with any employees about the investigation.” The Complaint further alleges that the Company violated Section 8(a)(3) of the

Act when it (1) “suspended Grasso [sic] pending the completion of the investigation;” and (2) discharged Grosso on September 25, 2009.

After a hearing was held regarding the allegations set forth in the Complaint, Judge Brakebusch issued a decision on August 19, 2010 concluding that: (1) Fresenius did not violate Section 8(a)(1) or 8(a)(3) of the Act by disciplining and discharging Grosso due to his conduct because such conduct lost its protection under the Act; (2) Fresenius did not violate the Act by interviewing Grosso and investigating his conduct; and (3) Fresenius unlawfully requested that Grosso keep the investigation confidential during its pendency. Judge Brakebusch declined to order an intranet posting of the notice informing employees of their rights.

## **B. Background on Chester Distribution Center**

Fresenius operates distribution facilities around the country at which it stores and ships dialysis products to its customers. One of these facilities is the distribution center located in Chester, NY. In early September 2009, the Chester facility had two bargaining units – the warehouse unit and the drivers unit. Tr. at 1220.<sup>1</sup> Teamsters Local 445 (the “Union”) represented both bargaining units. Tr. at 1220. The warehouse unit included the warehouse leads, warehouse workers, administrative assistants and the router; the drivers unit was composed only of drivers. Tr. at 1220-21.

### **1. Layout of the Chester Facility**

There are two main areas in the Chester Distribution facility – the administrative office area and the warehouse area. Tr. at 1046-47. The administrative office area contains a series of offices; two desks occupied by the administrative assistants; the conference room; and the break

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<sup>1</sup> The following abbreviations are used throughout this document: ALJD refers to the Administrative Law Judge’s Decision and is cited with page and line number. References to the transcript of the hearing in the case are referred to as “Tr. \_\_\_”. Also, references to the Counsel for the General Counsel’s exhibits are referred to as “GCX \_\_\_” and references to the Respondent’s exhibits are referred to as “RX \_\_\_”. Also, the Counsel for the General Counsel will be referred to as the “General Counsel” in this brief for ease of reference.

room. Tr. at 1046-47. The warehouse area is where the product to be delivered to customers is located and where the warehouse workers perform their duties picking orders for delivery. At the back of the warehouse there is a loading dock for the trucks. Tr. at 1398.

There is an entrance from the warehouse directly into the break room, which contains a series of circular tables. Tr. at 314. The break room provides ingress and egress between the warehouse and the administrative office area. For example, the administrative assistants and warehouse workers walk through the break room each morning and afternoon to punch in and out from work since the time clock is located right outside the break room in the warehouse. Tr. at 792, 894. Similarly, the warehouse workers walk through the break room to get their handheld device (a piece of equipment needed to perform their job) and their “runs” or picking orders for the work day. Tr. at 791. The employee break room is regularly used for breaks, lunches, an area where the drivers complete their daily route logs, and employee meetings if there are too many employees present to use the conference room. Tr. at 1048. Individual employee meetings, small group meetings and even some larger group employee meetings are also regularly held in the conference room. Tr. at 342, 1048.

## **2. The Company’s Human Resources Policies**

The relevant Human Resources policies are the EEO Policy, the Harassment Policy, and the Corrective Action Policy. The Company’s EEO Policy is contained in its Employee Handbook as well as in a separate EEO Policy. GCX 2. Pursuant to the Company’s EEO Policy, Fresenius does not tolerate unlawful discrimination against any individual on the basis of sex. GCX 20. The Employee Handbook is physically distributed to newly hired employees at the Chester facility during the orientation process by one of the administrative assistants, it is reviewed paragraph by paragraph with each new employee, and is available to all employees through the Company’s intranet. Tr. at 56-57; 866-68, 1245-46. Grosso acknowledged

receiving an earlier version of the Company's Employee Handbook at the time he was initially hired and that version also contained the Company's EEO Policy. Tr. at 401-04; RX 27 and 28.

Pursuant to the Company's Harassment Policy, Fresenius "is committed to providing a work environment free from all forms of discrimination including harassment for all employees." GCX 3. The Harassment Policy mandates that a manager or supervisor "will investigate and respond immediately" upon receiving a complaint of harassment and must "administer corrective action up to and including termination of the individual engaging in harassment." GCX 3 (emphasis added).

Finally, the Company's Corrective Action Policy provides for progressive steps of discipline consisting of a verbal warning, a written warning, a final written warning, suspension, or termination. GCX 4. The Policy specifically provides that "[t]ermination may also occur immediately as a result of a serious violation by the employee, including but not limited to misconduct, harassment, insubordination or actions jeopardizing patient care." GCX 4 (emphasis added). The Corrective Action Policy also distinguishes between a disciplinary suspension and an investigatory suspension. While a disciplinary suspension is a form of discipline for a violation of policy, an investigatory suspension is simply "used to investigate an incident in which the details are unclear." GCX 4.

### **C. Grosso Writes Offensive and Threatening Comments on the Newsletters**

A decertification election was scheduled in the Warehouse Unit for September 23, 2009. Tr. at 150. On the morning of September 10, 2009, Grosso walked from the warehouse into the employee break room at the Chester facility and noticed union newsletters on the tables in the room. Tr. at 259, 314. Grosso then sat down at one of the tables and wrote "Dear Pussies – Please Read" on the first union newsletter. Tr. at 261, 315; GCX 6(a). On a second union newsletter, on a separate table, Grosso wrote "Hey Catfood Lovers How's Your Income

Doing?”. Tr. at 266, 315-16; GCX 6(b). Grosso used the phrase “catfood lovers” as a play on the word “pussies” which he wrote on the first newsletter. Tr. at 266. Grosso then walked to a third table and wrote “Warehouse Workers – R.I.P.” on a third newsletter. Tr. at 267, 317; GCX 6(c). Although Mark Huertas (“Huertas”), another driver, was in the break room with Grosso when he wrote the comments, Grosso did not discuss with Huertas or with any other employees that he was going to write the comments on the union newsletters. Tr. at 318, 319. Instead, these handwritten comments were Grosso’s own thoughts and he made the decision to write the words “on his own.” Tr. at 318. Grosso did not tell anyone else what he was going to write – he just wrote the comments himself without the knowledge of any other employees. Tr. at 319.

**D. The Female Warehouse Workers Are Upset and Frightened**

On the morning of September 10, 2009, as she was walking through the break room to the time clock to punch in for work, Janet Buxbaum (“Buxbaum”), an administrative assistant, discovered the newsletters in the break room. Upon reading the handwritten comments, she was “quite angry.” Tr. at 870. Regarding “Dear Pussies – Please Read,” Buxbaum testified that “it seemed like it was calling women names. It’s offensive . . . This in a place where we work . . . It’s horrible.” Tr. at 870. Buxbaum further testified that she understood the word “pussies” to refer to a “part of a woman’s body.” Tr. at 871. In addition to being offended by the use of the word “pussies,” Buxbaum felt that “Warehouse Workers – R.I.P.” was a threat and that “RIP . . . means rest in peace, which means that if somebody is willing to write this, somebody would be willing to actually do something . . . they could attack us.” Tr. at 873.

Barbara Moscatelli (“Moscatelli”), the router at the Chester facility, testified that she was upset upon seeing the handwritten comments on the union newsletters. Tr. at 651. She was particularly upset by the use of the term “RIP” because “[t]he initials R.I.P., rest in peace, would

indicate death.” Tr. at 652. Moscatelli also felt that the terms “pussies” and “catfood lovers” were derogatory remarks toward women. Tr. at 652.

Virginia Germino (“Germino”) testified that she was “very upset” at the use of the words “pussies” and “catfood lovers” on the newsletters; she “found it very intimidating and it was just very offensive to me as a woman. They’re talking about a woman’s body, like I just found it very intimidating and that it should have never been written.” Tr. at 796-97. Germino was also intimidated by “Warehouse Workers - R.I.P.” because “it was like a threat. Rest in peace means death.” Tr. at 800.

#### **E. The Female Warehouse Employees Complain to Management**

On the morning of September 10, 2009, upon his arrival at work, Shane Healy (“Healy”), the Distribution Center Manager, was immediately told about the existence of the newsletters by Anthony Dobkowski (“Dobkowski”), Fleet Supervisor. Tr. at 1221. Before Healy had a chance to talk to Dobkowski about the specific comments on the newsletters, Buxbaum entered Healy’s office and complained about the handwritten comments on the newsletters. Tr. at 1221-22. Buxbaum told Healy that the comments were “offensive and vulgar, and she found them threatening.” Tr. at 1222. Buxbaum also told Healy that “all of the women in the facility were upset over the comments.” Tr. at 1222.

After receiving the complaint from Buxbaum indicating that all of the women in the facility were upset with the handwritten comments, Healy then spoke separately with Moscatelli, Germino, and Joan Berardino (“Berardino”) (the other three women at the facility on that day), who each shared with Healy their complaints regarding the handwritten comments on the newsletters. Tr. at 662, 804-06, 1222-26. Specifically, the other three women complained to Healy that the “pussies” and “catfood lovers” comments were offensive and demeaning to women and that the “RIP” reference was threatening. Tr. at 662, 804-06, 1223-26. During the

meeting with Moscatelli, she indicated to Healy that she recognized the handwriting as belonging to one of the drivers but she did not volunteer the name of the specific driver whom she believed wrote the comments. Tr. at 666, 777-78, 1223-24. Healy assured each of the women that he would investigate the situation and take steps to ensure a safe workplace. Tr. at 1222-26.

**F. The September 10, 2009 Employee Meeting**

After separately meeting with each of the four female warehouse employees who were upset by the handwritten comments, Healy then immediately called a meeting in the conference room of all employees at the facility in order to address the comments on the newsletters. Tr. at 598-99, 662, 877-78, 1051-52, 1226. Healy indicated that the comments on the newsletters were inappropriate to the workplace, he reminded them about the Harassment Policy, he indicated that he would investigate the situation since it was an EEO issue and that he would take steps to ensure the employees' safety. Tr. at 1226-27. During the course of the meeting, three female employees (Buxbaum, Germino, and Moscatelli) reiterated that the handwritten comments were vulgar, offensive and threatening and requested the Company to investigate. Tr. at 1053, 1227. Moscatelli also reiterated that she recognized the handwriting on the newsletters. Tr. at 666, 1227.

**G. Healy Immediately Implements Certain Safety Measures**

In light of the female employees' concerns about safety, Healy took several steps immediately to ensure employee safety. First, Healy advised the women where they could park their cars in order to be within the view of the Chester facility's surveillance cameras which were monitored by supervisory employees. Tr. at 1232. Additionally, he stayed late every day to make sure they all left the building safely. Tr. at 1224, 1232. Healy also explored security

options for the facility by reaching out to several security companies to investigate what would be necessary to obtain security for the building<sup>2</sup>. Tr. at 1231.

#### **H. Healy Seeks Legal Advice on Next Steps**

After the September 10, 2009 employee meeting, Healy then sought legal counsel regarding how best to proceed. Tr. at 1173, 1228. Given that a decertification petition was pending, Healy sought advice of legal counsel to ensure that the Company acted correctly under the law since he “viewed it as a catch 22 situation” with, on the one hand, an EEO/Harassment situation which needed to be investigated due to the female employee complaints and the requirement to investigate such complaints under the EEO and Harassment policies and, on the other hand, an upcoming union decertification election. Tr. at 1326-27.

#### **I. The September 21, 2009 Employee Meeting with King and Maloney**

On September 21, 2009, Kevin King (“King”), Vice President of Supply Chain Management, and Doug Maloney (“Maloney”), Director of Distribution Operations, visited the Chester facility to conduct a meeting with the Warehouse Unit employees regarding the upcoming decertification election. Tr. at 150, 1128, 1331. During the course of this meeting, King spoke to the warehouse employees about making an informed decision on election day and encouraged the employees to ask themselves whether they were better off today than a year ago when the Union was certified as their collective bargaining representative. Tr. at 152-53, 1128, 1332. After speaking for fifteen or twenty minutes, King asked the employees at the meeting whether they had any questions. Tr. at 154, 1128, 1332. At that time, Moscatelli, Buxbaum, and Germino once again complained about the offensive and threatening nature of the handwritten

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<sup>2</sup> These safety measures were subsequently reported to Larry Park (“Park”), the head of the Corporate Health, Safety, Environmental Engineering Department which is responsible for employee safety, by Kevin King, Vice President of Supply Chain Management, after he commenced his investigation into the complaints on September 21, 2009. Tr. at 186-87. Park felt that the steps being followed were reasonable and therefore no further security measures were taken. Tr. at 187.

comments on the newsletters. Tr. at 154-58, 672-73, 808, 1055-56, 1129-32, 1229-30, 1332-34.

This meeting marked the third time these employees had complained to management, and the second time they had done so in a public forum.

Since this meeting was the first time that King learned of the specific complaints lodged by the female employees regarding the comments on the union newsletters, King assured the employees that the Company would investigate the complaints. Tr. at 160, 1334. One of the initial steps taken by King was to ask the female employees who had complained in the meeting to reduce their complaints and concerns to written statements. Accordingly, three of the four women prepared written statements memorializing their complaints about the handwritten comments in their own words.<sup>3</sup>

#### **J. King Commences An Investigation into the Female Employees' Complaints**

Upon leaving the September 21, 2009 employee meeting, King was approached by Moscatelli who asked King whether he would be interested in knowing who she thought had written the comments on the newsletters to which King responded in the affirmative. Tr. at 161, 1334. Moscatelli, as the router, had intimate familiarity with the drivers' handwriting since she reviewed the drivers' logs on a daily basis as well as the associated paperwork, such as pretrip inspection reports. Tr. at 162. Moscatelli returned to the conference room shortly thereafter and brought with her a stack of drivers' daily logs approximately twelve inches high. Tr. at 162. She

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<sup>3</sup> Only three of the four female employees who complained to management prepared written complaints. Moscatelli memorialized her feelings regarding the union newsletters in two handwritten complaints, which were given to King on September 21, 2009. Tr. at 169; RX 5 and 6. Buxbaum also memorialized her complaint in a written statement which she gave to Healy. Healy then gave Buxbaum's statement to King. Tr. at 170; RX 8. Germino did not prepare a written statement memorializing her oral complaint regarding the comments on the newsletters since she did not wish to write a statement if it could not be kept confidential and King could not guarantee confidentiality. Tr. at 172. An additional written complaint was given to King by Berardino, a warehouse employee who was absent from the September 21, 2009 meeting. King testified that upon her return to work on September 25, 2009, Berardino informed King that she had heard about what happened at the meeting and that she also was offended by the comments on the union newsletters. Tr. at 170. She then wrote a statement memorializing her complaint, which King received from her on September 25, 2009. Tr. at 170; RX 7.

handed the stack to King, noting that he might want to “pay particular attention to the one on top.” Tr. at 162, 1057, 1135, 1334-35; RX 13. Moscatelli had placed Grosso’s log on top of the stack. Tr. at 162, 1336. Moscatelli informed King that she felt there were similarities between the writing on the union newsletters and Grosso’s handwriting on his daily logs and pretrip inspection reports. Tr. at 162.

At that point, King commenced an investigation pursuant to the mandate of the Company Harassment Policy. Tr. at 204; GCX 3. King and Maloney then reviewed the twelve-inch stack of drivers’ logs, comparing the handwriting on the logs with the handwriting on the newsletters. Tr. at 163, 1135, 1335-36. Both King and Maloney determined that there were significant similarities between the D’s, the H’s and the R’s that were both on the Grosso drivers’ logs and the handwritten comments on the newsletters. Tr. at 163, 1135-36, 1326. King and Maloney did not find any similarities between the handwriting on the three newsletters and the handwriting of the other twenty drivers whose logs they reviewed. Tr. at 163.

At that point, King sought to further investigate by examining another sample of Grosso’s handwriting. Tr. at 163-64, 1136, 1336. King obtained a note dated May 11, 2009 written by Grosso, which was in his personnel file, as another sample of Grosso’s handwriting. Tr. at 164, 1136, 1336; GCX 11. From examining that note and comparing its handwriting to the handwriting on the three union newsletters, King and Maloney concluded that “in addition to the D’s, the H’s, and the R’s, the O’s, the W’s, the T’s, the H’s, the A’s, and the E’s also were extremely similar to what was written on top of the union newsletters.” Tr. at 165, 1138, 1337.

After reviewing a 12-inch stack of drivers logs and the note written by Grosso, King and Maloney determined that there were substantial similarities between the writing on the three union newsletters at issue and Grosso’s handwriting. Tr. at 165, 1136, 1336-37. Although King

had not yet concluded that Grosso had written the comments on the union newsletters, King determined that he needed to further investigate by talking to Grosso personally. Tr. at 165, 1137-38.

**K. The September 21, 2009 Interview of Grosso**

Later in the day on September 21, 2009, King conducted an interview of Grosso in the conference room with Healy and Maloney present. Tr. at 173-74, 1138, 1235, 1338; RX 14. When Grosso first entered the conference room, Grosso, King and Maloney engaged in friendly banter about the rivalries between the New York and New England sports teams, as Grosso is a New York sports fan and King and Maloney are New England sports fans. Tr. at 174, 1139, 1235 1338; RX 14. During this friendly banter, Grosso used the term “RIP,” referring to the Red Sox’ dismal baseball season. Tr. at 174-75, 1139, 1235, 1338; RX 14.

King then showed Grosso the note that he had written to his supervisor dated May 11, 2009 and asked him if he had written it. Tr. at 178, 1139, 1235-36, 1338; RX 14. Grosso confirmed that he had, in fact, written that note. Tr. at 178, 1139, 1235-36, 1338; RX 14. King then showed Grosso the three newsletters containing the words “Dear Pussies – Please Read,” “Hey Catfood Lovers How’s Your Income Doing?” and “Warehouse Workers – R.I.P.” and asked him if he noticed any similarities in the handwriting between the note written by Grosso and the newsletters. Tr. at 178, 1139-40, 1236, 1339; RX 14. Grosso stated that he did not see any similarities in the handwriting. Tr. at 178, 1140, 1236, 1339; RX. 14<sup>4</sup>. King also asked

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<sup>4</sup> Grosso testified that, in this interview, he admitted to noticing similarities between the handwriting on the note dated May 11, 2009 and the handwriting on the newsletters. Tr. at 351. Judge Brakebusch did not make a specific credibility finding on this contradiction in the testimony between Grosso on the one hand and the testimony of Messrs. King, Maloney and Healy on the other hand. As noted herein, Grosso’s testimony is not credible due to the numerous untrue statements he admitted to during the investigation into his misconduct as more fully described in footnote 11, *infra*. Moreover, Grosso’s testimony should not be credited over the sequestered testimony of King, Maloney, and Healy and King’s contemporaneous memo to the file memorializing the substance of the interview immediately after it was concluded. RX 14. Grosso’s testimony on this point is simply a transparent attempt on his

Grosso about the use of the term “RIP” earlier in their conversation and whether he found it strange that the same exact expression was used on one of the newsletters. Tr. at 178-79, 1140, 1236, 1339; RX 14. Grosso answered that it was not strange because people use that expression all the time. Tr. at 179, 1140, 1236, 1339; RX 14. Grosso volunteered that he did not know who had written the comments on the newsletters and denied writing them himself. Tr. at 351-52, 1140, 1236-37, 1339; RX 14. During the interview, Grosso initially stated that he did not agree with the employees who had complained that the statements were offensive, vulgar, intimidating and threatening, but eventually admitted that he could see that some of the comments may be offensive to women. Tr. at 179, 355-56, 1141; RX 14.

**L. The September 22, 2009 Phone Call Wherein Grosso Confesses**

Around 8:00 a.m. on the morning of September 22, 2009, King received a phone call on his cell phone. Tr. at 180, 1142, 1343; RX 15, RX 16. King answered the phone in the way he customarily answers the phone by saying “Hello.” Tr. at 180, 1142, 1344; RX 15, RX 16. The person on the line did not identify himself but, instead, asked if King had a minute to talk. Tr. at 180, 1344, RX 15. Up until this point, King did not know with whom he was speaking. Tr. at 180. The person on the line then began recounting the events of the interview the day before – stating that he was questioned but denied knowledge of or responsibility for the comments on the newsletters. Tr. at 181; 1344; RX 15. At this point, King realized that he was talking to Grosso. Tr. at 181; 1344.

Believing that Grosso had called to confess, King then motioned for Maloney, who had been in the room with King since the beginning of the phone call, to bring Frank Petliski (“Petliski), Warehouse Supervisor, into the room to listen and witness the confession. Tr. at 181,

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part to reduce the number of lies he told during the course of the investigation and is contradicted by the overwhelming weight of the evidence.

1142, 1344; RX 15, RX 16, RX 17. King also placed his phone on speakerphone so that Maloney and Petliski could hear the call. Tr. at 181, 1058, 1142, 1344; RX 15, RX 16, RX 17. At that point, Grosso admitted that he wrote the comments on the union newsletters. Tr. at 182, 370-71, 1058, 1142-43, 1344; RX 15, RX 16, RX 17.

After Grosso admitted to having written the comments on the three newsletters, King introduced himself and said, "Dale, this is Kevin King. I'm in the conference room with Doug Maloney and Frank Petliski," and asked Maloney and Petliski to say good morning to Grosso which they did. Tr. at 182, 1058, 1143, 1345; RX 15, RX 16, RX 17. Grosso then paused and said, "This isn't Dale. This isn't happening." Tr. at 182, 373-74, 1058, 1143, 1345; RX 15, RX 16, RX 17. King then instructed Grosso to stop what he was doing and return to the Chester facility immediately. Tr. at 183, 1059, 1143, 1345, RX 15; RX 16, RX 17.<sup>5</sup>

#### **M. Grosso is Placed On Investigatory Suspension**

After Grosso returned to the Chester facility pursuant to King's instructions following the phone call in which he confessed to writing the comments on the newsletters, King, Maloney,

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<sup>5</sup> Judge Brakebusch did not make a specific credibility finding on this contradiction in the testimony between Grosso on the one hand and the testimony of Messrs. King, Maloney and Petliski on the other hand. King's version of events with respect to the September 22, 2009 phone call should be credited over Grosso's version of this telephone call. King was a very credible witness having testified consistently twice at the trial separated by nearly one month in time and his testimony on all key events during the investigation into Grosso's conduct was corroborated by multiple witnesses (i.e., Maloney, Healy, Petliski, Sereno, Dopheide, Rogers, Tyler, Dobkowski, Moscatelli, Buxbaum, and Germino) who were all sequestered, some were non-management employees, and at least one was a former employee involuntarily terminated by the Company. Further, King's version of events for this telephone call is confirmed by Maloney (who was in the conference room at the time the call was received by King and heard King's side of the conversation) and Petliski (who heard the latter portion of the telephone call) as well as King's, Maloney's and Petliski's notes memorializing the telephone conversation immediately after it occurred. Tr. at 1058-59, 1142-43; RX 15, 16 and 17. In contrast, Grosso testified that he actually took notes of the telephone conversation shortly after it concluded while he was in his truck waiting for Adrian Huff, the Union Business Representative, to arrive at the facility, that he gave the notes to Huff, and that he relayed the substance of the telephone call to Huff and Kevin Farrell, his Shop Steward. Tr. at 375-79. Although the General Counsel called Farrell to testify in the case, the General Counsel never asked Mr. Farrell to verify Grosso's version of the telephone call. Moreover, Huff was available in the courtroom during the hearing but was never called by the General Counsel nor the Union to confirm Grosso's version of the telephone call. Finally, the General Counsel never sought to introduce the notes Grosso took of the telephone call to confirm his version of events. For all of these reasons, Grosso's version of the September 22, 2009 telephone call should not be credited over the testimony of King as corroborated by Maloney and Petliski.

and Petliski met him by his truck. Tr. at 183, 1071, 1146, 1347; RX 19, RX 20, RX 21. At that time, Grosso requested union representation. Tr. at 183, 1071, 1146, 1347; RX 19, RX 20, RX 21. King indicated that was fine, and they all waited for Adrian Huff (“Huff”), the Business Representative for Teamsters Local 445, to arrive. Tr. 183, 1071-72, 1146, 1347-48; RX 19, RX 20, RX 21. King then informed Grosso that he was suspended without pay pending the results of the investigation. Tr. at 184, 1072, 1147, 1348; RX 19, RX 20, RX 21. The suspension was not disciplinary, but was instead an investigatory suspension as allowed under the Company’s Corrective Action Policy. Tr. at 185; GCX 4. King told Grosso not to return to the Company’s property until he was instructed to do so, and encouraged Grosso not to discuss the investigation with other employees while it was ongoing. Tr. at 1349; RX 19. Grosso testified that King said, “during this investigation we appreciate that you don’t talk anything about what just happened here. We’d prefer that you not talk about it.” Tr. at 285.

**N. The September 23, 2009 Interview of Grosso with Huff and Farrell**

On September 23, 2009, Grosso was interviewed again by King in the conference room at the Chester facility. Tr. at 184, 1239, 1353. Also present at the meeting were Healy and Grosso’s union representatives, Huff and Kevin Farrell (“Farrell”). Tr. at 1239, 1354; RX 23. When asked directly by King whether he wrote the three comments on the union newsletters, Grosso now admitted to having done so. Tr. at 1239, 1355; RX 23. When given the opportunity to explain himself, Grosso stated that “[i]n the spirit of full disclosure, I was looking out for the little people.” Tr. at 1239, 1355; RX 23.<sup>6</sup> Grosso also admitted to lying to King on September 21

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<sup>6</sup> In her decision, Judge Brakebusch noted that Grosso’s version of this conversation included a comment that Grosso purportedly told King that “he had acted as a football coach rallying the team” and that “he didn’t like bullies.” ALJD p. 10, lines 21-24. However, Judge Brakebusch did not make a specific credibility finding on this contradiction in the testimony between Grosso on the one hand and the testimony of Messrs. King and Healy on the other hand. The record evidence as a whole establishes that Grosso never made such statements. This self-serving testimony is directly refuted by Healy, King, and the notes taken contemporaneously with the interview. Tr. at 1242, 1359; RX 23. Further, neither the General Counsel nor the Union called either Huff or Farrell to testify in order to

when he initially denied writing the comments on the newsletters, and lying on September 22 when he denied that he was “Dale” in the telephone conversation with King, Maloney and Petliski. Tr. at 1240, 1355 -56; RX 23.

**O. Human Resources Conducts An Independent Investigation**

On September 25, 2009, King sent Jason Tyler (“Tyler”), Senior Human Resources Manager, the investigative file composed of the memos to the file prepared by King, Maloney, and Petliski, notes of the September 23 interview prepared by Healy, and four written statements from the female warehouse employees who complained about the comments on the newsletters. Tr. at 1364; RX 5, 6, 7, 8, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24. King sent the email to Tyler in order to have Tyler make a decision. Tr. at 1375. Tyler reviewed the investigative file as well as the Company’s Harassment Policy, EEO Policy, the Employee Handbook, and the Corrective Action Policy. Tr. at 84. Tyler then interviewed King, Maloney, and Healy about the events set forth in their investigative file materials in order to conduct his own independent investigation of the events. Tr. at 81, 1150-51, 1244, 1376.

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corroborate Grosso’s version of events at the September 23 interview. Since Huff, as the Union Business Representative, and Farrell, as the Union’s Shop Steward, are (1) within the control of the Union, and (2) are presumed to testify in the Union’s and the General Counsel’s favor if they had been called, an adverse inference should be drawn with respect to Huff’s and Farrell’s failure to testify on this point at the hearing and it should be inferred that Huff and Farrell would not have, in fact, corroborated Grosso’s version of events. See DaiKichi Corp., 335 N.L.R.B. 622 (2001) (“it is well settled that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge”). See also Fresenius USA Mfg., Inc., 352 N.L.R.B. 679, 684 (2008) (drawing an adverse inference due to the Union’s failure to call Farrell, the lead organizer and observer for the Union); Bldg. Material & Dump Truck Drivers, 257 N.L.R.B. 1306, 1316 (1981) (drawing an adverse inference with respect to a witness’s testimony where the Union failed to call the business representative whose testimony “might conceivably have corroborated” the witness’s version of events). As previously noted, the failure to call Huff and Farrell is particularly telling since Huff was in the courtroom during portions of the trial and Farrell was actually called to testify during the trial but not on this point. Furthermore, Farrell testified that he even took notes of this meeting but his notes were never introduced to corroborate Grosso’s testimony on this point. Tr. at 1435.

**P. Grosso is Discharged Due to His Misconduct**

Tyler independently, without soliciting or receiving any recommendation from King, Maloney, Healy, or anyone else, determined that Grosso should be terminated. Tr. at 83, 148-49, 1151, 1245. Tyler viewed the words “pussies” and “catfood lovers” as violative of the Company’s EEO and Harassment Policies. Tr. at 77-78, 108-09<sup>7</sup>. Separate and apart from the EEO violations related to the use of the vulgar terms “pussies” and “catfood lovers,” Tyler also determined that Grosso had violated the Harassment Policy with the use of the term “RIP” or “Rest in Peace” which the female employees and Tyler viewed as a threat. Tr. at 88-89, 118. Tyler viewed the threat “RIP” as similar to a threat made by another employee, Matthew Mierta (“Mierta”), in the Kenosha, Wisconsin Distribution Center. Tr. at 128. Mierta made a threat that he “wanted to kill the members of the Fleet Department” which Tyler investigated and then made the decision to terminate Mierta’s employment for that threat. Tr. at 105. Tyler viewed “RIP” “in the same manner” that he viewed Mierta’s threat since both were violations of the Company’s Harassment Policy, and termination on a first offense was appropriate. Tr. at 111, 118, 128.

Another basis upon which Tyler made the decision to terminate Grosso was his dishonesty during the investigation. Tr. at 78; GCX 5. When investigating Grosso’s conduct and coming to a decision regarding appropriate disciplinary action, Tyler considered two employees

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<sup>7</sup> Tyler specifically considered the perspective of the women when investigating Grosso’s conduct. He testified that, with respect to the “Dear Pussies – Please Read” comment, “what entered into my consideration was I had female employees that were offended and felt that it was vulgar. That’s what entered into and why I chose to make the decision to terminate.” Tr. at 110. Tyler further testified that, as an HR professional, he agreed that the statements were unprofessional and inappropriate. Tr. at 116. Pursuant to Title VII law, even one single incident can be considered a hostile work environment. Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir. 2000). Further, when considering whether conduct constitutes a hostile work environment, an employer must consider the perspective of the victim to determine whether he/she was offended in addition to considering whether a reasonable person would find the comments offensive. Gallagher v. Delaney, 139 F.3d 338, 347 (2d Cir. 1998). Therefore, Tyler rightfully considered: (1) the perspective of the victims in this case - the women who complained; and (2) his own opinion, as a reasonable person trained in human resources, that the comments were vulgar and offensive.

who were terminated for lying during an investigation in Apple Valley, CA. Tr. at 127. The two employees, Alice Reya (“Reya”) and Mary Leyva (“Leyva”), “were both terminated on a first offense for dishonesty during an investigation, which I [Tyler] considered similar to Mr. Grosso’s situation.” Tr. at 128.<sup>8</sup>

## II. Statement of the Issues

A. Whether the Administrative Law Judge properly determined that the Respondent violated Section 8(a)(1) of the Act when it requested that Grosso not discuss the investigation with other employees during its pendency in order to ensure the safety of the female employees who complained about Grosso’s offensive and threatening comments on the newsletters and to ensure the sanctity of the investigation. This issue relates specifically to Exceptions 47, 48, 49, 50, 51, 52, 53, 54, 55, 66, 67, 68, 69, 70, 71, 72, and 73 in the Respondent’s Exceptions to the Administrative Law Judge’s Decision.

B. Whether the Administrative Law Judge properly determined that Grosso’s conduct in writing the offensive and threatening statements on the newsletters was protected concerted activity under Section 7 of the Act though, to the extent such conduct is considered initially protected, Respondent does not dispute the ultimate conclusion that such conduct lost its protection due to its opprobrious nature under the Atlantic Steel analysis. This issue relates specifically to Exceptions 5, 6, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 32, 33, 34,

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<sup>8</sup> Tyler was a joint decision-maker in the decisions to terminate Reya and Leyva. Tr. at 128. He also made that decision without having interviewed the employees, no different than the manner in which he handled the Grosso situation. Tr. at 123, 128. In fact, Tyler indicated that he did not need to re-interview Grosso before making the discipline decision because Grosso had already confessed to writing the comments on the newsletters, he had already confessed to lying during the investigation, and he had already been provided the opportunity to explain himself in the September 23, 2009 interview to which he provided his explanation for his conduct (which differed significantly from his explanation at trial after he was prepared to testify by counsel). Tr. 115-16.

35, 36, 37, 38, 39, and 40 in the Respondent's Exceptions to the Administrative Law Judge's Decision.

C. Whether the Administrative Law Judge, in analyzing the Atlantic Steel factors, properly determined that the subject matter of Grosso's conduct weighed in favor of protection though Respondent does not dispute the ultimate conclusion that Grosso's conduct lost its protection due to its opprobrious nature under the Atlantic Steel analysis. This issue relates specifically to Exceptions 25, 26, 27, 28, 32, 33, and 36 in the Respondent's Exceptions to the Administrative Law Judge's Decision.

D. Whether the Administrative Law Judge, in analyzing the Bourne factors, properly determined that two of the five factors weigh against the lawfulness of the September 21, 2009 interview of Grosso though Respondent does not dispute the ultimate conclusion that the interview was not an unlawful interrogation under the Bourne analysis. This issue relates specifically to Exceptions 7, 8, 41, 42, 43, 44, 45, and 46 in the Respondent's Exceptions to the Administrative Law Judge's Decision.

E. Whether the Administrative Law Judge properly ruled that Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 are not business records within the meaning of Rule 803(6) of the Federal Rules of Evidence and, therefore, were not admissible for the truth of the matter asserted. This issue relates specifically to Exceptions 56, 57, 58, 59, 60, 61, 62, 63, 64, and 65 in the Respondent's Exceptions to the Administrative Law Judge's Decision.

F. Whether the Administrative Law Judge properly denied the Respondent's Motion for Partial Summary Judgment when she determined that the Complaint was not an improper enlargement of the Charge and Amended Charge and, therefore, determined it was permissible for the General Counsel to try the allegations regarding the alleged unlawfulness of the

Respondent's interview of Grosso and its investigation of Grosso's conduct. This issue relates specifically to Exceptions 1, 2, 3, 78, 79, and 80 in the Respondent's Exceptions to the Administrative Law Judge's Decision.

### III. Discussion

#### A. Respondent Did Not Violate the Act When It Requested That Grosso Keep the Investigation Confidential During its Pendency

Judge Brakebusch overlooked important evidence in the record when she determined that the Company violated Section 8(a)(1) of the Act when it encouraged Grosso not to speak to other employees regarding the investigation during its pendency, a period of time limited to just three days. The Company's interest in having Grosso keep the investigation confidential as to other employees outweighed Grosso's interest in discussing the investigation. Therefore, the confidentiality request was lawful.

The Board has recognized that where an employer has substantial and legitimate business reasons for requesting confidentiality, such as the safety of witnesses, a confidentiality rule is lawful. In Desert Palace, the employer imposed a confidentiality rule during an investigation of alleged illegal drug activity in the workplace "to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." 336 N.L.R.B. 271, 272 (2001). The Board found that the employer "has established a substantial and legitimate business justification for its rule and that, in the circumstances of this case, this justification outweighs the rule's infringement on employee's rights." Id.<sup>9</sup>

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<sup>9</sup> In contrast, in SNE Enterprises, Inc., the Board found that the employer violated Section 8(a)(1) by discharging an employee for his failure to obey "an overly broad rule prohibiting employees from discussing disciplinary action taken against them with their co-workers" over a month after the completion of the investigation, which clearly indicated that "the rule was not enforced to protect the sanctity of an ongoing investigation." 347 N.L.R.B. 472, 493 (2006). The Board noted that had the rule been enforced to protect the sanctity of an ongoing investigation, it may well have found differently. Id.

In this case, the Company's substantial and legitimate interest in maintaining the substance of the Grosso investigation confidential outweighed Grosso's Section 7 rights to discuss the investigation. Judge Brakebusch found that the circumstances in Desert Palace were different from the circumstances of the instant case. ALJD p. 26, lines 18 – 19. However, the circumstances between these two cases are similar since both cases involve an employer protecting the safety of its employees. Just as in the Desert Palace case, the Company in this case had a legitimate and substantial business interest in protecting the safety of the female employees who were afraid, threatened, and intimidated and in ensuring that they would not be subject to any retaliation<sup>10</sup>. King testified that he encouraged Grosso not to talk to other employees about the investigation because:

three women complained that they felt threatened and that they didn't feel safe, and I didn't want Mr. Grosso trying to talk to them and make them feel more threatened. My experience is that when there are issues like this and somebody is saying that somebody else made a threat, that to allow or not encourage the person not to talk to other employees it can make the threat worse. Because now they're approaching people and trying to conduct their own investigation. I also wanted to preserve the sanctity of the investigation.

Tr. at 1353. Buxbaum felt that the comment "Warehouse Workers – R.I.P" was a threat and that whoever wrote it was willing to "actually do something . . . they could attack us." Tr. at 873.

Moscattelli, while upset by all three comments written on the newsletters, was particularly upset by the comment "Warehouse Workers – R.I.P." because that comment indicates death. Tr. at 652. Germino testified that she felt intimidated and that the comment "Warehouse Workers –

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<sup>10</sup> It is important to recognize that, in the Second Circuit, an employer will be held liable for retaliation if an employee is harassed by coworkers for complaining about discrimination. See Richardson v. NY State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999) ("An employee could suffer a materially adverse change in the terms and conditions of her employment [and therefore successfully state a claim for retaliation] if the employer knew about but failed to take action to abate retaliatory harassment inflicted by co-workers. Just as an employer will be liable in negligence for a racially or sexually hostile work environment created by a victim's co-workers if the employer knows about or should know about that harassment but fails to take appropriately remedial action, so too will an employer be held accountable for allowing retaliatory co-worker harassment to occur if it knows about that harassment but fails to act to stop it.").

R.I.P.” was “like a threat.” Tr. at 800. In fact, Germino was so concerned about confidentiality that she felt uncomfortable submitting a written statement of her complaint when King informed her that confidentiality could not be guaranteed. Tr. at 172. The women were legitimately afraid of Grosso due to the comments he wrote on the newsletters, and the Company thereby sought to protect them from harm. Therefore, the strong employer interests supporting the confidentiality request in the present situation is similar to the strong employer interests in the Desert Palace case.

Judge Brakebusch overlooked the Company’s substantial interests in keeping the investigation confidential in order to protect (1) the safety of the female employees who complained about Grosso’s conduct; and (2) the sanctity of the investigation. In so doing, Judge Brakebusch suggests that the Company no longer had an interest in protecting the sanctity of the investigation since Grosso was aware that he was a suspect in the investigation and he had already confessed. ALJD p. 26, lines 25-30. The investigation, however, was still ongoing at the time of the confidentiality request. In fact, after King requested that Grosso keep the investigation confidential, the Company continued its investigation by interviewing Grosso again with his union representatives present since the Company had conflicting statements from Grosso both denying (September 21, 2009) and admitting (September 22, 2009) to writing the comments on the newsletters. Tr. at 184, 1239, 1353. Simply because Grosso was aware that he was being investigated does not obviate the Company’s need to protect the sanctity of the investigation by attempting to prevent Grosso from interfering with it while it is still ongoing.

In her opinion, Judge Brakebusch indicated that the circumstances of the instant case are more comparable to those circumstances in Mobil Oil Exploration & Producing, U.S., Inc., 325 N.L.R.B. 176 (1997). ALJD p. 26; lines 30-31. However, in reaching this conclusion, Judge

Brakebusch overlooked material distinctions between the facts of the instant case and the Mobil Oil Exploration case. The Mobil Oil Exploration case on which Judge Brakebusch relied is distinguishable for several reasons. First, the employer in Mobil Oil Exploration had no interest in protecting the safety of its employees, as did the Company in this case and the employer in Desert Palace. In Mobil Oil Exploration, the employer's only interest in confidentiality was "to avoid alerting others about the investigation" which was determined to be a very minimal business interest. In contrast, in this case, the Company had a strong interest in ensuring the safety of its female employees who had complained about the comments and indicated they were afraid for their well-being due to the nature of the "RIP" or "death" threat. Second, the Board found, in Mobil Oil Exploration, that the employee's conduct which was held to violate the confidentiality directive imposed by the employer was itself protected concerted activity under Section 7 of the Act; namely, the employee was discussing his views on the union leadership while also discussing the existence of the investigation. In contrast, in this case, there is no finding that Grosso was engaged in protected concerted activity while violating the confidentiality request of the employer. Third, the employer in Mobil Oil Exploration twice directed the employee to keep the investigation confidential whereas the Company never formally directed Grosso to keep the investigation confidential. Instead, the Company merely requested that Grosso not discuss the investigation with other employees, as the Company would "prefer that [he] not talk about it." Tr. at 285. Finally, in Mobil Oil Exploration, the employer not only disciplined but terminated the employee for discussing the investigation which the employer had directed the employee, on more than one occasion, to keep confidential. In this case, Fresenius never accused Grosso of violating the request of confidentiality and never even

disciplined, let alone terminated, Grosso for discussing the investigation with other employees. For these reasons, reliance on the Mobil Oil Exploration case is misplaced.

Judge Brakebusch's decision also indicates that she understood the suspension imposed on Grosso on September 22, 2010 to be disciplinary and that such understanding was a material consideration in the finding that the Company violated the Act by requesting that Grosso keep the investigation confidential during its pendency. Specifically, Judge Brakebusch indicated that the request for confidentiality was given at the time Grosso was suspended and this rendered the request equivalent to a "directive with a threat of discipline" even though no threat of discipline was ever issued. ALJD p. 26, line 46 (emphasis added). Similarly, Judge Brakebusch's recommended remedy requires the Company to post a notice stating that the Company will cease and desist from "[t]elling its employees that they cannot talk with other employees their [sic] discipline." ALJD p. 31, lines 11-12 (emphasis added). However, as King explained at trial, the suspension imposed on Grosso was investigatory, not disciplinary, consistent with the Company's Corrective Action Policy. Tr. at 185; GCX 4. Therefore, since King requested that Grosso keep the investigation confidential without threatening or imposing any discipline whatsoever, the request was not a "directive with the threat of discipline."

In addition to the Company's substantial business interests in keeping the investigation confidential, the Company's infringement of Grosso's Section 7 rights were very slight – he was only encouraged, not mandated, to keep the investigation confidential from other employees for a period of only three days. Tr. at 1148. The Company did not adopt a confidentiality rule or directive. Moreover, as noted above, the Company never threatened to discipline nor did it discipline Grosso for failing to honor the Company's request. Therefore, for all of these reasons,

the Company did not violate Section 8(a)(1) of the Act by encouraging Grosso not to discuss the investigation with other employees during the pendency of the investigation.

**B. Grosso's Conduct Was Not Protected Concerted Activity**

While Judge Brakebusch correctly concluded that the Respondent did not violate Section 8(a)(1) of the Act when it discharged Grosso since his conduct lost its protection under the Act, Respondent excepts to Judge Brakebusch's intermediate finding that Grosso's conduct was protected concerted activity within the meaning of Section 7 of the Act. Section 7 of the Act protects an employee's right to "engage in . . . concerted activities for the purpose of mutual aid or protection." 29 U.S.C. § 157. In order to fall within the protection of Section 7 of the Act, "the activities in question must be 'concerted' before they can be 'protected.'" Meyers Indus., Inc., 268 N.L.R.B. 493, 494 (1984) ("Meyers I"). Therefore, the General Counsel must show both that (1) the activity is concerted; and (2) the activity is protected, in order to fall within the protection of the Act. Even if conduct falls within the ambit of Section 7 protected concerted activity, the Board and courts have recognized that "an employee may engage in conduct . . . which is so opprobrious as to be unprotected." Hawaiian Hauling Serv., Ltd., 219 N.L.R.B. 765, 766 (1975). To decide whether the employee's conduct was so offensive so as to lose protection under the Act, the Board considers the following factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." Atlantic Steel Co., 245 N.L.R.B. 814, 816 (1979). Grosso's conduct in writing the offensive, threatening comments on the newsletters was neither concerted, nor was it for mutual aid or protection, and therefore is not entitled to protection under Section 7 of the Act. Moreover, Judge Brakebusch correctly determined that if Grosso's conduct were found to be protected,

concerted activity under the Act, it lost its protection pursuant to the Atlantic Steel multi-factor analysis.

**1. Grosso's Conduct Was Not Concerted**

Grosso's conduct in writing "Dear Pussies – Please Read," "Hey Catfood Lovers How's Your Income Doing?" and "Warehouse Workers – R.I.P." was not concerted because Grosso neither acted with or on the authority of other employees, nor did he act to seek to initiate or induce group action. When Grosso wrote the comments on the newsletters in the employee break room, he did not discuss the comments with anyone, nor did he get authorization from other employees to write them. Tr. at 318; ALJD p. 5, lines 3-5 ("Grosso does not deny that he wrote the comments totally on his own. He did not discuss the proposed comments with Huertas or any other employees prior to writing the comments and leaving them on the newsletters"). To the contrary, although Huertas was present in the break room while Grosso wrote the comments, Grosso did not discuss what he wrote with Huertas either before, during, or after he did so. Tr. at 318. Further, Grosso testified that the comments he wrote were his own thoughts and he made the decision to write them "on his own." Tr. at 318.

At the hearing, Grosso testified that his purported motive in writing the comments on the newsletters was to get the attention of the warehouse workers, get them to read the union newsletters, and get them to not back down in the upcoming decertification election. Tr. at 262-63. Grosso's testimony on this key point was a transparent, after-the-fact attempt to position himself to argue the concerted nature of his conduct since Grosso was actually given an opportunity to explain his motives during the investigation and he never provided this explanation. Significantly, on September 23, 2009, when given an opportunity to explain his motivation in writing the comments on the newsletters, in the presence of his Union Business Representative (Huff) and Union Shop Steward (Farrell), Grosso only stated that "in the spirit of

full disclosure, I was looking out for the little people.” Tr. at 1239, 1355, RX 23. Grosso’s stated motive at the time of the events in September 2009 is the motive that should be relied upon and not the one that he has now crafted over seven months later at the time of trial.

“Looking out for the little people” does not constitute initiating or inducing group action no matter how one tries to twist it. Consequently, taking into account Grosso’s own motive which he supplied to the Company at the time of the events in question and his testimony that the words he wrote on the newspapers were his own words which he did not review with anyone in advance, there is no credible evidence to support the conclusion that he engaged in concerted activity under Section 7 of the Act. Judge Brakebusch’s finding that “the record reflects nothing to contradict Grosso’s assertions that he wrote the comments as a means of encouraging the warehouse employees to vote for the Union in the decertification election” (ALJD p. 12; lines 18-20) overlooks the fact that Grosso’s explanation for writing the comments at the September 23, 2009 interview in the presence and with the advice of his union representatives directly contradicts his explanation of his motive at the time of trial months later.

Although Judge Brakebusch did not make a specific credibility determination on this point, the record evidence indicates that Grosso’s testimony is not credible for several reasons. First, as noted above, Grosso provided a very different explanation of his motive for writing the comments on the newsletters during an interview with management and his union representatives. Moreover, Grosso admitted to not being truthful during the course of the investigation into his conduct no fewer than six times.<sup>11</sup> In a rare moment of candor, Grosso

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<sup>11</sup> Grosso admitted to the following lies during his testimony:

- Q: And didn’t you indicate in response to that that you didn’t have any knowledge of who had written these newsletters and you specifically indicated that you didn’t write them, right? / A: That’s correct. / Q: That wasn’t a true statement you gave him. That answer was not true. Correct? / A: That answer was not true. Tr. at 352.

admitted that when it is in his best interest to do so and to avoid any harm to himself, he will lie. Tr. at 276. Throughout the course of this hearing, it was in Grosso's self-interest to twist and manipulate the truth, particularly with respect to his motivation for writing the comments on the newsletters. Therefore, Grosso's propensity to not tell the truth when it best suits his interest seriously calls into question the credibility of his testimony on this point and provides further support in the record which contradicts Grosso's assertion that he wrote the comments as a means of encouraging the warehouse employees to vote for the Union. For these reasons and consistent with Grosso's own statements during his investigatory interview, he did not engage in concerted activity when writing the offensive and threatening comments on the newsletters.

## 2. Grosso's Conduct Was Not Protected

Grosso's conduct was also not protected because he was not acting "for the mutual aid and protection of all the employer's employees similarly situated." GVR, Inc., 210 N.L.R.B. 148 (1973) (emphasis added). Although Judge Brakebusch concluded that Board law does not compel the conclusion that Grosso was not engaged in concerted activity, the fact of the matter is that Grosso was not a member of the bargaining unit which he allegedly sought to protect with his comments. Even if Grosso was acting to "look out for the little people," the "little people"

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- Q: And your comment was "RIP is common language," right? / A: That's correct. / Q: "Everyone uses it, but I didn't write the comments on these three newsletters," right? / A: That's right. / Q: And that second time you said it, that was also an untrue statement, correct? / A: That's correct. Tr. at 353.
  - Q: Do you remember saying at the end of that meeting once again denying having any knowledge about these comments or who may have written them? / A: I had denied saying it. Yes. / Q: And you said it again at the end of the meeting, right? / A: Yes. / Q: You also denied being the one who wrote them, right? / A: I denied being that person. Yes. / Q: And both of those statements were untrue also, right? / A: Yes. They were both untrue. Tr. at 358 – 59.
  - Q: With Mr. Healy. Right after this meeting didn't you deny writing the comments again? / A: Yes. I stuck to my story. Yes. / Q: Yes. And that was an untrue statement again, wasn't it? / A: Yes it was. Tr. at 362.
  - Q: So you will admit that you said "This is not Dale," correct? / A: Yes I did. / Q: And that was not a true statement, was it sir? / A: No it wasn't a true statement. Tr. at 373 – 74.

for whom he was “looking out” were the warehouse employees to whom he directed the comments on the newsletters in the warehouse unit. Grosso, however, was not similarly situated to the warehouse unit employees. He was a driver, and therefore a member of the drivers’ bargaining unit – not eligible to vote in the decertification election and not involved in the Warehouse Unit’s collective bargaining negotiations. Tr. at 251, 1220.

Further, Grosso’s use of the words “pussies,” “catfood lovers” (which Grosso acknowledged was a play on the word “pussies) and “RIP” amounted to nothing more than mere words of offense which were devoid of substantive value or content. Media Gen. Operations, Inc. v. NLRB, 394 F.3d 207, 211 (4th Cir. 2005). Judge Brakebusch similarly overlooked this argument in finding that Grosso’s conduct was protected concerted activity under Section 7 of the Act. In fact, Grosso admitted that he could see how female employees could reasonably interpret the words “pussies” and “catfood lovers” to refer to female genitalia and be considered offensive. Tr. at 330-33, 355-56. Similarly, Grosso admitted that the phrase “RIP” refers to death and could be interpreted as threatening. Tr. at 334-35, 356. Grosso even admitted under cross examination that the motive of the speaker does not really matter since, in the perspective of the recipient of the comments, they can be viewed as offensive. Tr. at 409.

Based on his own admissions, Grosso’s words on the newsletters are not protected under the Act. In fact, Grosso admitted that the alternative interpretations of the offensive words he wrote on the newsletters which he provided for the first time at trial were simply his “spin on it after the fact.” Tr. at 437 (emphasis added).

Based on the record evidence in this case, Grosso’s words of choice written on the newsletters and for which he was terminated bear no relationship to any protected purpose under the Act and, therefore, are not protected concerted activity pursuant to Section 7 of the Act.

**C. The Subject Matter of Grosso's Conduct Weighs in Favor of a Loss of Protection Under the Act**

As discussed above, the following factors are considered in determining whether conduct loses its protection under the Act: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." Atlantic Steel Co., 245 N.L.R.B. 814, 816 (1979). Judge Brakebusch correctly determined that three of the four factors weigh in favor of a loss of protection and that, ultimately, Grosso's conduct lost its protection under the Act. It is Respondent's position that Judge Brakebusch erroneously concluded, however, that one of these four factors, the subject matter of Grosso's conduct, weighed in favor of protection under the Act. ALJD p. 14, line 50 to p. 15, line 4.

In the present case, the subject matter of the discussion was the use of vulgar and threatening words which are devoid of any substantive content or value. Grosso chose to write "Dear Pussies," "Hey Catfood Lovers," and "RIP." The first two comments, by his own admission, are derogatory towards women and relate specifically to female genitalia. Tr. at 356, 407. The third comment refers to death, by Grosso's own admission, and was perceived as a serious threat by four female employees. Tr. at 334.

Unlike the employee's comments in Verizon Wireless, cited by Judge Brakebusch in her decision, Grosso's comments did not directly reference the Union or his support thereof. In Verizon Wireless, the employee used profanity while soliciting union support by talking with other employees. 349 N.L.R.B. 640, 642 (2007) (holding that, despite the subject matter of the discussion weighing in favor of protection under the Act, the employee's conduct lost its protection pursuant to the Atlantic Steel factor test). Grosso's conduct, to the contrary, does not specifically reference the upcoming decertification election, the purported subject matter of his

comments. Soliciting union support face-to-face with fellow employees is categorically different from anonymously leaving offensive comments on union newsletters without specifically referencing the Union or the upcoming election. Therefore, the Verizon Wireless case does not provide analogous set of facts upon which to rely.

At the trial, Grosso testified that he wrote the comments on the newsletters in the hope of having the warehouse workers read a specific article in the union newsletter related to the Employee Free Choice Act. Tr. at 264-65. Importantly, Grosso never testified that he actually read any of the contents of the union newsletter let alone any specific articles buried within the body of the newsletter. To the contrary, Grosso testified that he initially saw the newsletters and then immediately sat down and wrote on the newsletters after spending only “half a second” thinking about what words to write. Tr. at 259-61. Grosso’s story about wanting the warehouse employees to read a specific article in the newsletter is flatly inconsistent with his story about how he wrote the comments on the newsletters since he never actually read the contents of the newsletter before he wrote on the face of the newsletters.

Grosso testified at length about what he purportedly meant when he wrote the offensive and threatening comments on the newsletters in the employee break room. Grosso’s self-serving and after-the-fact so called “motives” in using the words “pussies,” “catfood lovers,” and “RIP” are not relevant, however, to any of the factors in analyzing whether an employee’s conduct loses the protection of the Act pursuant to the test set forth in Atlantic Steel. Further, as discussed at length above, Grosso’s testimony regarding such motives is not credible. Moreover, as noted above, Grosso admitted that people could read his comments and be offended by them, that the comments could be demeaning to women, and that people could read his comments and understand them to be referring to women in a derogatory manner. Tr. at 330, 331, 438.

Consequently, even the subject matter of Grosso's comments does not weigh in favor of protection under the Atlantic Steel analysis.

**D. None of the Bourne Factors Weigh in Favor of a Finding That the September 21 Interview of Grosso Was an Unlawful Interrogation**

In determining whether an interview or interrogation of an employee violates Section 8(a)(1) of the Act, the Board asks "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." Rossmore House, 269 N.L.R.B. 1176, 1177 (1984). The inquiry involves a "case-by-case analysis" whereby the Board examines the following factors: "the background, the nature of information sought, the identity of the questioner, and the place and method of interrogation." Sunnyvale Med. Clinic, Inc., 277 N.L.R.B. 1217, 1218 (1985). A fifth factor, the truthfulness of the reply, is also considered. Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964). While Judge Brakebusch correctly determined that the September 21, 2009 interview of Grosso was not an unlawful interrogation, it is Respondent's position that she wrongly concluded that two of the Bourne factors weigh in favor of a finding that the interview was unlawful. Neither the location and method of interrogation, nor the fact that Grosso responded untruthfully to the questions asked by King, weighs in favor of an unlawful interrogation. ALJD p. 23, line 47 to p. 24, line 13. To the contrary, all five of the Bourne factors lead to the correctly-decided conclusion that the September 21, 2009 interview was lawful and did not violate Grosso's Section 7 rights.

The place and method of interrogation weigh in favor of finding that the interview on September 21, 2009 was lawful. The place of the interrogation, the conference room, was a place where Grosso would be comfortable due to the frequency with which he had been present in that room for meetings in the past. As Grosso himself described, the conference room was frequently used for group meetings. Tr. at 340. Grosso had even been present for smaller

meetings which included just him and members from “corporate,” as he described, such as King and Maloney. Tr. at 341. Importantly, the conference room is the only room in the Chester facility which is private but is not an office which belongs to a manager or other employee. Tr. at 1219; 1343.

Further, the method of interrogation began with lighthearted “chatter and teasing” about sports and the Boston/New York rivalry. Tr. at 174, 343-44, 1139, 1338. Then, King asked Grosso two questions – first, whether Grosso had written a handwritten note which was taken from his personnel file (GCX 11); and second whether Grosso noticed any similarities between his handwriting on that note and the handwriting on the newsletters. Tr. at 1140, 1338-39. In response to the second question, Grosso denied noticing any similarities and then volunteered that he had no knowledge of the newsletters or who wrote them. Tr. at 351-52, 1140, 1236-37, 1339, RX 14. King then asked Grosso whether he thought it strange that Grosso had used the term “RIP” earlier in the conversation and that the same term appeared on the newsletters. Tr. at 1140, 1339. King never even affirmatively asked Grosso whether he had written the newsletters. His questions were straightforward, easy to understand, and tailored narrowly to the issue under investigation – who had written the offensive and threatening comments on the Union newsletters.

The fact that Grosso did not answer the questions truthfully likewise does not weigh more favorably toward a finding that the September 21, 2010 interview was an unlawful interrogation. Judge Brakebusch found that “[h]ad he felt sufficiently comfortable and not threatened, it is reasonable that he may have told the truth during the interview.” ALJD p. 24; lines 11-12. Grosso’s lying during the September 21, 2010 interview was a function of his propensity to lie when it suits him, as discussed above. His lying had nothing to do with how comfortable or

uncomfortable he was during the interview. In fact, Grosso lied again outside the context of the September 21, 2010 meeting when he approached Healy, on his own, upon exiting the conference room. Tr. at 361. In particular, Grosso approached Healy and said, "You should have stuck up for me in there. You know I wouldn't do it," indicating that his character was such that he would not write comments like those on the newsletters. Tr. at 361. At the hearing, Grosso admitted that he lied when he approached Healy after the September 21, 2010 meeting. Tr. at 362-63. Therefore, Grosso demonstrated that even outside the setting of the conference room, without King and Maloney present, without even being asked to make a statement whether he wrote the comments or not, Grosso offered up yet another lie.

Grosso's propensity for lying, both inside and outside the setting of an interview, demonstrates that it is not reasonable that Grosso may have told the truth during the interview had he been comfortable, as speculated by Judge Brakebusch. Therefore, in this case, the fact that Grosso responded untruthfully during the September 21, 2010 interview does not support the inference that the interview was an unlawful interrogation in violation of Section 8(a)(1).

**E. Respondent's Exhibits Were Business Records Under Rule 803(6) and Should Be Admitted For the Truth of the Matter Asserted**

Judge Brakebusch improperly excluded Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 because they are business records within the meaning of 803(6) and therefore admissible for the truth of the matter asserted. The Company's managers, King, Maloney, Petliski, and Healy, memorialized the substance of Grosso's statements and other employee statements during the course of the investigation into who had written the offensive and threatening comments on the union newsletters by recording "memos to the file" and taking detailed notes of the interview of Grosso on September 23, 2009. These documents are admissible for the truth of the matter asserted therein, as they are excepted from the hearsay rule

as business records pursuant to Rule 803(6) of the Federal Rules of Evidence. Pursuant to Rule 803(6), “[i]nvestigative reports are admissible as business records where they are maintained in the regular course of business, are sufficiently reliable and trustworthy, and free from bias.” Independence Residencies, Inc., 2004 NLRB LEXIS 597, at \*113 (Sept. 30, 2004).

Memoranda written contemporaneously with an investigation which are kept in the regular course of business are business records which are admissible pursuant to Rule 803(6). See, e.g., Wilson v. Chrysler Motors Corp., 1998 U.S. Dist. LEXIS 2089, at \*2 (N.D. Ill. Feb. 25, 1998) (holding investigative memoranda created during the investigation of sexual harassment in the workplace are admissible as business records); see also La Day v. Catalyst Tech., Inc., 302 F.3d 474, 481 n.7 (5th Cir. 2002) (holding that notes of a vice-president’s account of an investigation into employee complaints of sexual harassment were admissible pursuant to the business records exception).

The Board has adopted this same rule with respect to the admissibility of managerial notes taken during the course of investigations and interviews. See, e.g., Independence Residencies, Inc., 2004 NLRB LEXIS 597, at \*113 (Sept. 30, 2004) (admitting into evidence an investigative report as a business record); California Forensic Med. Group, Inc., 2002 NLRB LEXIS 295, at \*19 (July 16, 2002) (admitting a supervisor’s memorandum memorializing an employee’s misconduct and the supervisor’s conversation with the same employee over objections that the memorandum was manufactured for litigation).<sup>12</sup>

In this case, both (1) the memos to the file recorded by King, Maloney, and Petliski; and (2) the notes taken by Healy transcribing the investigatory interview of Grosso, qualify as

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<sup>12</sup> Further, handwritten notes of an investigatory interview and the typewritten report formed therefrom are admissible business records. See, e.g., Crimm v. Missouri Pac. Railroad Co., 750 F.2d 703, 709 (8th Cir. 1984) (holding that notes of an investigatory interview and the substance of what was added to form the typewritten record were admissible under the business records exception).

business records within the meaning of the exception to the hearsay rule articulated by Rule 803(6) of the Federal Rules of Evidence. The proper foundation was laid for each document at the hearing through witness testimony.<sup>13</sup> Simply because Maloney and Petliski testified that these documents were the first memos of this kind that they prepared during their tenure with the Company does not negate the fact that the memos to the file were business records within the meaning of Rule 803(6). As testified to at the hearing, Petliski and Maloney recorded the memos to the file in the direct aftermath of the events, based on their own personal knowledge, pursuant to a regular practice and maintained in the regular course of business. Tr. at 1059-60, 1144-45.

The General Counsel argued that the memos to the investigative file and Healy's notes of the September 23, 2009 interview lack trustworthiness because they were prepared in anticipation of litigation. This argument is without merit. Simply because memoranda are prepared during the course of an investigation which could potentially result in the discipline or termination of an employee, or eventually, a lawsuit, does not automatically exclude such memoranda from the business records exception. See, e.g., Crimm, 750 F.2d at 709 (admitting memoranda prepared during the course of a sexual harassment investigation and rejecting the argument that the memoranda were prepared in anticipation of litigation).

The memos to the investigative file and the notes of the September 23 interview were all recorded during the course of the investigation, at which point no decision or recommendation

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<sup>13</sup> For example, Petliski testified that he prepared his notes to the file regarding the September 22 phone call with Grosso "right after the end of the conversation," based on his own personal knowledge, pursuant to his "regular practice," maintained "in the regular course of business." Tr. at 1059 – 60. Additionally, Petliski testified that he created the memos to the file at the direction of King, his superior and the chief investigator in this matter. Tr. at 1116 – 17. Therefore, Petliski had a business duty to create the documents, as his superior instructed him to do so. See Crimm, 750 F.2d at 709 (noting that where a manager was instructed to conduct an investigation and prepare such memoranda, the memoranda were admissible as business records). Healy also testified that he took notes at the September 23 interview and typed up his notes afterward in the regular course of business which is his regular business practice when conducting an investigation. Tr. at 1316 – 18. Maloney's and King's investigative memos were similarly demonstrated to have the proper foundation under FRE 803(6). Tr. at 1143-45, 1149-50; 1340-42, 1346-47, 1349-51, 1358.

had been made regarding the potential discipline of Grosso for his conduct. Therefore, the argument that King and Healy could have potentially foreseen litigation in the future presupposes that King and Healy could have foreseen the Human Resource Manager's decision to discipline Grosso in the first place. Since neither King nor Healy was involved in the decision making process with respect to Grosso's discipline, the General Counsel's argument that the notes were prepared in anticipation of future litigation necessarily fails.<sup>14</sup>

Further, Judge Brakebusch's conjecture that the trustworthiness of the documents were reduced since they were prepared with perhaps some anticipation of litigation fails to recognize that the Company was simply seeking ongoing legal advice about how to handle the situation consistent with Healy's initial consultation with counsel when the four female employees complained about the comments on the newsletters. ALJD p. 28; lines 45-50. The record evidence indicates that the investigatory notes were copied to counsel because of the severity and nature of the complaints lodged in this case by Moscatelli, Buxbaum, Germino, and Berardino,

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<sup>14</sup> The difference between a memo prepared in anticipation of litigation as compared to memos to an investigative file or the notes of an investigative interview is demonstrated by considering the Board's decision in Champion Home Builders Co., 343 N.L.R.B. 671 (2004). In that case, the ALJ found that a labor relations manager's notes of meetings with employees were prepared "in anticipation of litigation" where the notes included a statement evidencing the anticipation of litigation such as the following:

At no time in our investigation and at no time in any of our conversations with [the employee] or anyone else was the idea of a union even mentioned or considered. No kind of collective bargaining agreement was ever mentioned and no other employee at any time came to any supervisor either before or after this incident to indicate that anyone else had any kind of concerns. We believed then and do believe now that this whole situation was only about [the employee] and any complaints he might have had against other employees.

Id. at 679, n.2. The ALJ in that case found that the above "passage clearly indicates . . . that [the manager] was writing a memorandum designed to defend any litigation or charge brought against Respondent" and that therefore the document lacked the "normal attributes of trustworthiness found in business records." Id. In the present case, however, the notes to the investigative file prepared by King, Maloney, and Petliski, as well as the notes of the interview prepared by Healy, do not include any statements such as the above self serving statement in the above passage from the Champion Home Builders Co. case. In fact, the notes in the present case do not mention the Union, the decertification election, collective bargaining, or the Company's impressions or beliefs about Grosso's conduct or the investigation thereof. The documents instead methodically recount events which took place during the course of the investigation. Further, the contents of the documents are consistent with the live testimony from multiple witnesses thereby demonstrating their trustworthiness.

not due to an anticipation of any particular litigation surrounding the investigation of Grosso's conduct. Tr. at 1387-88. As Healy so aptly noted, the Company was in a "catch 22" or dilemma since in the midst of a decertification election campaign, the Company had a legal obligation under Title VII to investigate the harassment complaints. Tr. 1325-26. Moreover, if the complaints were determined to have merit, the Company would have to take prompt and effective remedial relief. Certainly, seeking legal counsel on an ongoing basis during the course of an internal investigation and decertification election does not inevitably lead to the conclusion that the investigatory notes were prepared in anticipation of litigation or somehow undermine their trustworthiness. Instead, it indicates that management was seeking to act prudently and consistent with all applicable legal principles.

As the memos to the file and the notes transcribing the investigatory interview of Grosso are business records within the meaning of Rule 803(6), they are excepted from the hearsay rule and are admissible. Therefore, the Board should find that the memos to the file and the notes transcribing the investigatory interview are admissible for the truth of the matter asserted.

**F. Under Section 10(b) of the Act, the Allegations in the Complaint That Respondent Unlawfully Interrogated and Investigated Grosso Were Outside the Scope of the Charge and Amended Charge and Should Have Been Dismissed**

The Complaint filed by the Regional Director sets forth an allegation that the Company violated Section 8(a)(1) of the Act when it interrogated Grosso on September 21, 2009 and then conducted an investigation regarding the offensive and threatening comments handwritten on the union newsletters distributed in the employee break room. The allegation of an unlawful interrogation of Grosso on September 21, 2009 and a subsequent unlawful investigation into Grosso's conduct is not contained in the original unfair labor practice charge ("Charge") filed by the Union on or about October 5, 2009. These allegations are also not included in the amended

unfair labor practice charge (“Amended Charge”) filed by the Union on or about December 16, 2009. Even though the Union had ample opportunity to allege that the initial interview of Grosso on September 21, 2009 was an unlawful interrogation and that the subsequent investigation into his misconduct was also somehow unlawful, it failed to do so in either the initial Charge or the Amended Charge. Consequently, these allegations should not have been permitted to be litigated at the hearing since they were outside the scope of the allegations set forth in the Charge and the Amended Charge, and such allegations in the Complaint unlawfully enlarged the allegations in the Charge and Amended Charge in violation of Section 10(b) of the Act.<sup>15</sup>

While a complaint filed by the Regional Director “is not restricted to the precise allegations of the charge,” additional allegations in the complaint will be permissible only when they are “sufficiently related to or growing out of the charged conduct.” See National Labor Relations Board (“NLRB”) Division of Judges Bench Book (“Bench Book”) § 3-220 (citing NLRB v. Fant Milling Co., 360 U.S. 301, 309 (1959)). There must be “a significant factual affiliation between the charge allegations and the complaint allegations” in order to comply with “10(b)’s mandate that the Board not originate complaints on its own initiative.” Nickles Bakery of Indiana, Inc., 296 N.L.R.B. 927, 928 (1989) (holding that Section 8(a)(1) complaint allegations must be subject to the “requirements of the traditional ‘closely related’ test”).

In determining whether the allegations in the complaint are “closely related” to the allegations in the underlying unfair labor practice charge and therefore not an “unlawful enlargement” of the charge allegations, the Board will look to (1) whether the otherwise

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<sup>15</sup> A more detailed discussion of the arguments set forth in this section of the brief can be found in the Respondent’s Motion for Summary Judgment, admitted into the record and marked as RX 44, which is hereby incorporated by reference herein.

untimely allegations involve the same legal theory as the allegations in the pending timely charge; (2) whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge; and (3) whether a respondent would raise similar defenses to both allegations. Id. (citing Redd-I, Inc., 290 N.L.R.B. 1115 (1988)).

The allegations about an unlawful interrogation on September 21, 2009 and subsequent unlawful investigation are not closely related to the other allegations in the Charge and/or the Amended Charge. Initially, it is important to recognize that the Charge and the Amended Charge assert only four purported violations of the Act: (1) the alleged directive to Grosso to not speak with any employees about the investigation was unlawful, (2) that King allegedly tricked Grosso into a confession when Grosso called King and admitted to writing the offensive and threatening comments on the newsletters, (3) that the discharge of Grosso was unlawful, and (4) that the Company unlawfully denied information requested by the Union, an allegation which was subsequently dismissed by the Regional Director.

Pursuant to the first factor of the “closely related” test, the untimely allegations in the Complaint must “all involve the same legal theory” as the allegations in the underlying unfair labor practice charge(s). See Redd-I, 290 N.L.R.B. at 1118. The allegations in the Complaint regarding the interrogation on September 21, 2009 and the investigation do not involve the same legal theory as the allegations set forth in the Charge and the Amended Charge.

The allegations in the original Charge contend that King somehow tricked Grosso into certain admissions that were used to terminate Grosso and then terminated Grosso due to his support for the Union in violation of Section 8(a)(3) of the Act. Significantly, the General Counsel never pursued the “trickery” allegation in her arguments at trial or in her post-hearing brief. The legal theory relevant to the termination allegation is the Wright Line analysis. See

Wright Line, 251 N.L.R.B. 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The allegations in the Amended Charge set forth yet another legal theory; namely, the legal theory that management's encouragement that Grosso not talk to other employees about the ongoing investigation was unlawful because it allegedly violated Section 8(a)(1) of the Act. As previously noted, to determine whether a confidentiality request violates Section 8(a)(1) of the Act, the Board analyzes whether "the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications." Desert Palace, Inc., 336 N.L.R.B. at 272. The allegations in the Complaint set forth new, completely separate and distinct legal theories regarding an alleged unlawful interrogation and investigation into Grosso's conduct relying on the Bourne and Rossmore House analysis.

Therefore, since the untimely allegations relating to the alleged unlawful interrogation and investigation of Grosso's threatening and harassing conduct arise under a separate legal theory from any of the allegations set forth in the original Charge or the Amended Charge, the first factor of the "closely related" test supports the conclusion that the untimely allegations are not closely related to any allegations in either of the two underlying unfair labor practice charges in this case.

The second factor of the "closely related" test also weighs against the untimely allegations in the Complaint being considered as closely related to the allegations in either the Charge or the Amended Charge. Although the allegations related to the interrogation of Grosso on September 21, 2009 and the investigation of his violations of Company policy thereafter may arise from the same sequence of events as the allegations in the original Charge and the Amended Charge, they are completely factually distinct. While the original Charge and the

Amended Charge set forth allegations related to conduct of the Company throughout the investigation and discipline of Grosso, neither unfair labor practice charge ever alleges that the “interrogation” or the investigation into Grosso’s conduct was itself unlawful.

Instead, the original Charge includes only two allegations: 1) the termination of Grosso violated the Act, and (2) that King somehow tricked Grosso into incriminating himself when Grosso admitted to writing the offensive and harassing comments on the newsletters. The Amended Charge only includes one additional allegation that is involved in this case; namely, that the request to Grosso to keep the ongoing investigation confidential was unlawful. In contrast, the Complaint sets forth allegations regarding completely factually separate events – the interrogation of Grosso on September 21, 2009 and the continued investigation of his conduct on September 22, 2009 were allegedly unlawful.

Finally, the third factor of the “closely related” test weighs in favor of the improperly enlarged allegations being excluded from the Complaint pursuant to Section 10(b). A “reasonable respondent” would not have “prepared a similar case in defending against [an] otherwise untimely allegation” when that allegation sets forth a completely different legal theory and factual circumstances. See Redd-I, 290 N.L.R.B. at 1118. As explained above, the allegations in the Complaint regarding the interrogation and investigation set forth an entirely new and different legal theory and rely on different factual circumstances than the allegations in the underlying unfair labor practice charges. This new legal theory therefore necessitated that the Company prepare a different defense than the defense associated with the allegations in the Charge and the Amended Charge. In order to respond to the allegations in the Complaint, the Company had to prepare for trial to defend the appropriateness of the interview of Grosso on September 21, 2009 and the ensuing investigation as well as the alleged directive to Grosso to

maintain the investigation as confidential and the ultimate termination of Grosso. Therefore, the third factor of the “closely related” test further demonstrates that the interrogation and investigation allegations in the Complaint are not closely related to the actual allegations set forth in the Charge or Amended Charge.

Since all three factors of the “closely related” test fail in this case, the allegations set forth in the Complaint arising out of the interrogation of Grosso on September 21, 2009 and the investigation of Grosso’s handwritten comments on the union newsletters are not “closely related” to the allegations in the original Charge and/or Amended Charge and therefore should have been excluded from the Complaint and not allowed to be part of the trial in this case.

In addition to the allegations in the Complaint not being closely related to those in the Charge and Amended Charge, the Company has suffered prejudice as a result of the allegations about an unlawful interrogation and unlawful investigation being permitted to remain in the case.<sup>16</sup> In cases in which the General Counsel asserts, within the applicable statute of limitations, new allegations in a Complaint that were not included in the underlying unfair labor practice charges, the Board will not allow such allegations to remain in the case when the allegations in the Complaint do not place the Respondent on sufficient notice of the unlawful conduct and/or the Respondent is prejudiced by the circumstances. Buckeye Mold & Die Corp., 299 N.L.R.B. 1053 (1990). Importantly, the Respondent needs to have been adequately apprised of the new allegations in the Complaint so that it is provided the opportunity to participate in the

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<sup>16</sup> For the same reasons Respondent suffered prejudice due to the unlawful enlargement of the Charge and Amended Charge, as described herein, Respondent further suffered prejudice due to the Judge’s granting General Counsel’s Motion to Amend the Complaint to both allege that Grosso’s suspension and termination were violations of both Sections 8(a)(1) and 8(a)(3) of the Act and to remove certain allegations regarding Respondent’s purported motives for “interrogating” and investigating Grosso. ALJD p. 1, n.1. A more detailed discussion of the arguments regarding the prejudice suffered due to the grant of the motion to amend can be found in the Respondent’s Opposition to Counsel for the General Counsel’s Motion to Amend, admitted into the record and marked as RX 45, which is hereby incorporated by reference herein.

investigation into the allegations since the notice requirements are “designed to encourage an early statement of position by the party charged in the hope of quick disposition of most matters through settlement or dismissal or withdrawal of the charges.” Service Emps. Local 399 v. NLRB, 798 F. 2d 1245, 1249 (9th Cir. 1986).

In the present case, the Company was not provided notice of the new allegations about an alleged unlawful interrogation or ensuing investigation through the Charge, the Amended Charge, the Region’s investigation into the unfair labor practice charges, or even the Board Agent’s indication about the substance of the forthcoming Complaint. See RX 44. In fact, the Company never had the opportunity to respond to these new allegations relating to the alleged unlawful interrogation and investigation of Grosso through an “early statement of position” since the lawfulness of its “interrogation” on September 21, 2009 and ensuing investigation into Grosso’s conduct was not addressed through legal and factual argumentation in its position statements submitted to the Region. By denying the Company this opportunity, the General Counsel failed to comply with the notice and service obligations contemplated by Section 10(b) of the Act.

Moreover, these new allegations in the Complaint were very vague since they did not indicate how or why the interview of Grosso on September 21, 2009 was unlawful nor how or why the ensuing investigation of Grosso was unlawful. Thus, the Company was prejudiced in its ability to properly prepare for the trial in this case since it had not received adequate notice before trial of the reasons why the General Counsel contended that its conduct related to the alleged interrogation and investigation was being challenged as unlawful. In this case, the Region actually required the Company to respond to the Amended Charge without even serving a copy of the Amended Charge on the Company until after its position statement and supporting

evidence was due to the Region.<sup>17</sup> Quite frankly, it was simply not fair for the Region and General Counsel to play “hide the ball” with its allegations in order to conduct a trial by surprise. For these reasons, even though Judge Brakebusch ultimately dismissed the allegations of unlawful interrogation and conducting an improper investigation into Grosso’s conduct on the merits, the General Counsel’s attempt to improperly enlarge the scope of the allegations in the Charge and Amended Charge through the new and broader allegations in the Complaint should not be countenanced and such allegations should have been dismissed without the need for a trial.

#### **IV. Conclusion**

For all the reasons set forth herein, the Company respectfully requests that the Board uphold each of the Respondent’s exceptions as set forth in the accompanying Exceptions filed simultaneously with this brief and incorporated herein by reference. In so doing, the Company respectfully requests that the Board conclude that: 1) the allegations of an unlawful investigation and interrogation of Grosso be dismissed as an improper enlargement of the allegations in the Charge and Amended Charge pursuant to Section 10(b) of the Act; 2) the Respondent’s memoranda to the file documenting the information gathered during the investigation be admitted into evidence pursuant to Rule 803(6) of the Federal Rules of Evidence; 3) all of the factors under the Bourne and Rossmore analysis be found to weigh in favor of the lawfulness of the interview of Grosso on September 21, 2009; 4) Grosso’s conduct in writing offensive and threatening comments on the union newsletters not be found to

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<sup>17</sup> Judge Brakebusch recognized that the Region “could have done better” with respect to timely serving the Respondent with the Amended Charge and with acknowledging the Respondent’s request for an extension of time to respond to the Amended Charge, which had not even been received by Respondent at the time the response was due. Tr. at 245 – 46.

constitute protected concerted activity under Section 8(a)(1) of the Act; 5) all of the factors under the Atlantic Steel analysis be found to weigh in favor of the loss of protection of Grosso's conduct under Section 8(a)(1) of the Act; 6) the Company's request that Grosso maintain the confidentiality of the investigation during its pendency not be found to violate Section 8(a)(1) of the Act; and 7) the notice ordered by the Administrative Law Judge to be posted by the Company be vacated since its contents inaccurately refer to "discipline" and, in any event, it is not warranted for the reasons set forth herein.

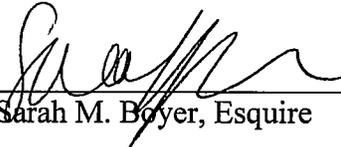
**CERTIFICATE OF SERVICE**

This is to certify that on October 13, 2010, I caused the foregoing Brief in Support of Exceptions to the Administrative Law Judge's Decision to be served electronically, properly addressed as follows:

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Dated: October 13, 2010