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

IN THE MATTER OF

RANDOM ACQUISITIONS, LLC,

and Case No. 7-CA-52473

SHERRIE CVETNICH, an Individual.

RANDOM ACQUISITIONS, LLC'S MOTION FOR LEAVE TO AMEND ANSWER TO CONFORM TO THE EVIDENCE

Respondent Random Acquisitions, LLC (Respondent), respectfully requests leave to file an Amended Answer to Paragraph 8 of the Complaint to conform to the evidence presented at the hearing, by denying Paragraph 8 insofar as it alleges Complainant Sherrie Cvetnich, Teresa Burge and Eric Cvetnich were terminated on October 16, 2006, and also insofar as it alleges Sherrie Cvetnich and Eric Cvetnich were statutory employees of Respondent."

I. INTRODUCTION

Pursuant to 102.23 of the Board's Rules and Regulations, leave to grant Respondent's motion to amend is within the discretion of the National Labor Relations Board (Board). The Board should grant Respondent's motion to amend because: (1) the Board should freely grant leave to amend to permit parties to have their claims determined and heard on the merits; (2) Respondent extensively litigated the date of termination at trial without objection by General Counsel, and also presented evidence that substantially disputes the statutory employment status of Sherrie Cvetnich and Eric Cvetnich; (3) Respondent's counsel inadvertently failed to earlier

amend Respondent's answer to Paragraph 8 of the Complaint to conform it to the trial evidence regarding such termination date and employment status; (4) amendment is clearly required in the interests of justice and to properly frame the issues on appeal; and (5) General Counsel will not be prejudiced by this amendment inasmuch as the subject evidence was introduced at trial and General Counsel had a full opportunity to respond thereto.

II. STATEMENT OF FACTS

By decision dated March 21, 201`1, Administrative Law Judge Mark D. Rubin found that Sherrie Cvetnich (Ms. Cvetnich), and Eric Cvetnich (Mr. Cvetnich) (collectively, the Cvetnichs) were employees of Respondent, and that Respondent discharged the Cvetnichs and a third employee, Teresa Burge (Ms. Burge), on October 16, 2009 in violation of the rights guaranteed in Section 7 of the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("Act"), in violation of section 8(a)(1) of the Act. The employee status of the Cvetnichs was raised by the trial evidence, and argued by Respondent in its post-trial brief. Also, the date of termination of all three individual was hotly disputed by Respondent at the trial of this matter. However, in finding against Respondent on these matters, the ALJ relied in substantial part on Respondent's Answer to Paragraph 8 of the Complaint, as follows:

> [A]s discussed herein, the complaint pleads, and the Respondent's answer admits, that, in fact, Sherrie Cvetnich, Burge, and Eric Cvetnich were discharged by the Respondent on October 16.

Decision, p. 14, fn. 52 (emphasis added).

> [I]n paragraph 8 of the complaint, the Regional Director alleges as follows: On October 16, 2009, Respondent terminated its employees the Charging Party (Sherrie Cvetnich), Eric Cvetnich, and Teresa Burge." The Respondent's answer in response to said allegation is as follows: "RESPONDENT ADMITS SAME." [fn.] The answer of the Respondent was

> filed 2 days before trial by the same counsel who presented the Respondent's defense at trial, and now argues in brief that Cvetnich's are not employees. And complaint paragraph 8, which Respondent admitted in its entirety, didn't just allege that the Cvetnichs were terminated by the Respondent, but that the Cvetnichs were employees of the Respondent, whom it terminated.
>
> The Respondent's answer, admitting the status of Sherrie and Eric Cvetnich, is binding upon the Respondent. In *D.A. Collins Refractories*, 272 NLR 931 (1984), the Board held as follows in respect to the effect of such admissions in a party's answer: "The judge was correct in holding that a statement in a party' pleading is an admission. It is also true that a statement in a pleading constitutes a 'judicial' admission that is binding on the party making the admission. See 4 *Wigmore, Evidence*, Sec. 1064 (Chadbourn rev. 1972). It is also well established, however, that when an amended pleading is filed, the 'judicial' admission loses its binding effect." No amended pleading was filed or moved by the Respondent, and the argument contained in its brief does not constitute such.

Decision, p. 17.

Notwithstanding the ALJ's foregoing findings, there was extensive evidence presented at trial in support of Respondent's position that the Cvetnichs were not statutory employees, and that the Cvetnichs and Burge were not terminated on October 16. This evidence was detailed at length in Respondent's Post Hearing Brief, and is summarized below:

Until August, 2008, Heritage Tower was owned by Art Dore of Dore Industrial (Tr. 18, 192). Art Dore hired Linda Tessin as building manager of Heritage Tower in 1994 (Tr. 18). Dore also hired Linda Tessin's son, Mr. Cvetnich, in 1994 as the building's maintenance supervisor (Tr. 18). In August 2008, Art Dore sold the Heritage Tower property to Respondent (Tr. 319-320). Tim Hogan (Hogan) is a fifty percent owner of Respondent (Tr. 320). After Respondent acquired Heritage Tower, an entity named Mean Ben Syndicate, LLC ("Mean Ben") owned by Ben Bates managed the building and employed the staff who worked there. (Tr. 36, 37, 38 132).

As of the fall of 2009, the financial condition of Respondent was dire, at best, and it did not have enough income to cover the debt service (Tr. 270, 353). The conditions were so bad that Hogan intended to lay off the staff at Heritage Tower, and in fact the jobs of Sherrie Cvetnich, Teresa Burge and Eric Cvetnich have not been replaced (Tr. 353). Hogan's growing distrust of Tessin and her staff at Heritage Tower was heightened by these serious financial problems that Respondent was then experiencing and also by other incidents involving Tessin and her relatives, Sherrie, Eric and Mike Cvetnich in early October, 2009. (Tr. 263, 329, 339-340, 341, 342, 343). Based on a combination of events, by early October 2009 Tim Hogan believed there was foul play being perpetrated on Respondent by Tessin in concert with her relatives at Heritage Tower (Tr. 341, 343-344). As Tim Hogan testified at the hearing, he felt he had "made a huge mistake by trusting Linda Tessin" (Tr. 341). Tim Hogan testified he told Hogarth Joseph "that we need to fire these people." Hogan also said, "'My asset is getting destroyed[,]'" and "'My company's being fleeced'" (Tr. 341). Tim Hogan told Joseph that he was getting ripped off[,]" that he was very upset about the situation at the building, and was concerned that more things were going to be ruined there (Tr. 236). Additionally, Hogan told Joseph he did not know who Sherrie Cvetnich and Teresa Burge were, and that he did not want them working in the building (Tr. 239, 240).

Therefore, at Tim Hogan's direction, on October 5, 2009, Hogarth Joseph called Linda Tessin from Florida and told her, "that this was the last week for Teresa [Burge] and Sherrie [Cvetnich]" to work at Heritage Tower and they were not to be there after that week. (Tr. 242, 255, 256, 365) (emphasis added). Tessin's response to Hogarth was, "Okay" (Tr. 256). Later that same day, Joseph's wife, who handled his email

correspondence for Heritage Tower, also received an email from Tessin (R-3, Tr. 242-243), in which Tessin acknowledged that her employees had been "laid off" (R-3).

On October 11, 2009 Hogarth Joseph returned to Heritage Tower (Tr. 307). While he was there, on October 15, 2009, without any prior notice to Respondent, the sheriff entered Heritage Tower to seize Respondent's assets under a garnishment order for a debt of Linda Tessin (Tr. 275, 276). After Hogarth Joseph alerted Tim Hogan that the sheriff was about to seize Respondent's assets on October 15, Hogan called Tessin and she claimed it was all a mistake and she would take care of it (Tr. 346). Tessin paid the sheriff $2000 toward her debt on October 15, and also signed papers agreeing to pay the remaining balance of $7000 when the sheriff returned at noon the next day, to prevent seizure of Respondent's assets (Tr. 278, 346, 349; R-2). Tessin knew that the sheriff would return to Heritage Tower on October 16 at noon (Tr. 279-280).

On the morning of October 16, 2009, having lost all trust in Linda Tessin and with the sheriff scheduled to arrive in a few hours to collect $7000 from her, Tim Hogan told Hogarth Joseph to have Tessin give Joseph the blank checks for the Random account and put them aside for Hogan. Joseph did so and she brought the checks to Joseph that morning. (Tr. 281-282). Also on October 16, Tim Hogan received a call from Joseph, to alert him that Tessin now said she would not pay the garnishment order. Hogan immediately called Tessin, who confirmed to Hogan that she was refusing to pay. (Tr. 283-284, 349). Hogan was extremely alarmed because the sheriff was coming at noon to seize Respondent's assets (Tr. 349).

After the sheriff arrived at Heritage Tower on October 16 to execute on the garnishment, Sherrie Cvetnich appeared in Hogarth Joseph's office with her young son and

Teresa Burge stating that she wanted to get paid (Tr. 170, 285, 286, 287). Sherrie was not talking, but screaming at Joseph (Tr. 285). Joseph testified Sherrie Cvetnich "said she wanted her F'ing paycheck or she was going to go upstairs and trash the dome, the tables. She was going to tear them[,] turn them over. She was going to trash the dome, is what she said." (Tr. 287). Joseph immediately called Tim Hogan, and attempted to calm Sherrie by saying, "We're working on it." (Tr. 285). When Hogan received Joseph's telephone call, Hogan could hear "the F word" and a high-pitched woman's voice in the background, with Joseph talking over that to Hogan (351). Joseph told Hogan that, " 'Sherrie is here. She is screaming, yelling and swearing, and what do you want me to do? She's threatening to damage the building. What do you want me to do?'" (Tr. 294). Joseph also told Hogan that he had asked her to leave and she refused (Tr. 351-352). Out of concern for the immediate safety of Joseph, Tim Hogan called the police to have Sherrie Cvetnich, Teresa Burge, Linda Tessin and Eric Cvetnich escorted from the building (Tr. 351). The police arrived shortly thereafter (Tr. 294). Police Officer Pierce spoke to Tim Hogan on the telephone, and Hogan told the officer, "'I want you to remove those people from the premises safely without anybody getting hurt.'" (Tr. 352). After the police confirmed Respondent's ownership of the building, and allowed these four individuals to gather their personal belongings, the police escorted them from the building (Tr. 298-299).

Linda Tessin testified that just before being escorted from the building by police she asked Hogarth Joseph if this meant everybody was fired, to which he responded, "yes" (Tr. 63, 66). However, none of the General Counsel's other witnesses testified that Joseph said anything to them about being fired on October 16, 2009 (Tr. 145-146, 150, 204). As previously noted, Hogarth Joseph had already instructed Linda Tessin on October 5, 2009

to discharge Sherrie Cvetnich and Teresa Burge (Tr. 242, 255, 364-365). Finally, as of late September, 2009, Tim Hogan had already formulated the intent to terminate all of the staff who were escorted from Heritage Tower on October 16 and, with the exception of Linda Tessin, none their jobs have been replaced (Tr. 362-363).

Evidence was also presented at the trial to contest the status of Sherrie and Eric Cvetnich as statutory employees. First, Sherrie Cvetnich is the daughter of Linda Tessin, who was manager of Heritage Tower with overall supervisory authority over it during the relevant time period. There was also clear evidence that Sherrie Cvetnich enjoyed a special status by reason of her familial relationship to Linda Tessin. (Tr. 155, 161-162, 181, 189).

Respondent also argued in his Post Hearing Brief that Tessin's son Eric Cvetnich was disqualified from the protection of the Act based on evidence presented at trial. The evidence that Eric Cvetnich was not a qualified statutory employee was compelling because there was affirmative evidence that Eric is a supervisor in his own right. There was evidence at the trial that Eric Cvetnich worked independently and was in sole charge of maintenance at Heritage Tower without any supervision by Tessin (Tr. 39). There was also evidence that Eric had authority to employ his son Zach as a temporary worker (Tr. 196-197). This evidence arguably established both the special status Eric Cvetnich enjoyed as the *son* of building manager Linda Tessin, and that he qualified as a statutory *supervisor* in his own right, and thus that Eric Cvetnich was not protected under section 7 of the Act under one or both of these bases.

II. ARGUMENT

Leave to grant Respondent's motion to amend to conform Respondent's Answer to the evidence is within the clear authority and sound discretion of this Board under 102.23 of the Board's Rules and Regulations. *See* 29 C.F.R. § 102.23 ("Whether or not the complaint has been

amended, the answer may, in the discretion of the administrative law judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the administrative law judge or the Board."); *Frito Co., Western Div. v. NLRB*, 330 F.2d 458 (1964) (court remanded because the Board had the authority to allow, over general counsel's objection, an amendment to conform evidence admitted in the record because it was a judicial function); *see Ertel Manufacturing Corp.*, 147 N.L.R.B. 312, 328 (1964) (where complaint alleged lay off occurred on May 31, 1963, this allegation was amended to conform to testimony that the discharged occurred on May 22).

In the present case, justice also clearly requires that this Court grant leave to amend the Answer. First, only by granting Respondent's motion to amend will the issues that were actually raised and litigated before the ALJ be properly framed for appeal. Second, Respondent's failure to earlier move to amend the Answer to deny Paragraph 8 of the Complaint was the result of inadvertency by counsel. Moreover, because the date of employee termination and statutory employee status are ultimate legal issues, Respondent's answer to Paragraph 8 arguably did not lose or compromise Respondent's right to contest these legal issues at trial and on appeal. Cf. 29 C.F.R. § 102.20 ("respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint") (emphasis added). Accordingly, counsel's failure to perceive that Respondent's Answer to Paragraph 8 could be a problem until he received the ALJ's decision is both excusable and understandable. Unfortunately, however, *if* the ALJ's view of the effect of Answer 8 is accepted, Respondent may be precluded from presenting critical issues on appeal, despite the fact that these issues were fully litigated at trial and Respondent's position has substantial support in the evidence of record. *See* 29 U.S.C. § 160(e) ("no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court

unless the failure or neglect to urge such objection shall be excused, because of extraordinary circumstances....”); *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 136 (3rd. Cir. 1982) (“Section 10(e) is intended to prevent a litigant from raising a matter in the courts which had never been presented to the Board for its consideration-a circumstance not present in this case.”); *Pincus Elevator And Electric Co.*, 308 N.L.R.B. 684, 685 (“as the matter has been fully litigated and the amendment conforms the complaint to the evidence, the judge should have granted the motion” to amend).

Such an outcome cannot be fair or just. Respondent respectfully submits that it would also be contrary to the express directive that the Board’s rules “shall be liberally construed to effectuate the purposes and provisions of the act.” *See* 29 C.F.R. § 102.121.

Additionally, by granting Respondent’s motion for leave to amend, the Board will be able to decide this case on a more complete record of the merits of Respondent’s position, thereby furthering the goals of justice and efficiency. Finally, General Counsel will not be prejudiced by the requested amendment inasmuch all the evidence upon which Respondent relies in contesting the date of termination and employee status was introduced at trial, and General Counsel had a full opportunity to respond thereto.

III. CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that the Board grant Respondent leave to file an amended answer to Paragraph 8 of the Complaint as follows: "Respondent denies Paragraph 8 insofar as it alleges Complainant Sherrie Cvetnich, Teresa Burge and Eric Cvetnich were terminated on October 16, 2006, and insofar as it alleges Sherrie Cvetnich and Eric Cvetnich were statutory employees of Respondent."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served on Counsel for the General Counsel via email and to the Charging Party via U.S. mail this 13th day of April, 2011, addressed to:

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