UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98

and **Case 04-CC-223346**

SHREE SAI SIDDHI SPRUCE, LLC, D/B/A FAIRFIELD INN & SUITES BY MARRIOTT

MOTION OF THE ACTING GENERAL COUNSEL TO THE NATIONAL LABOR RELATIONS BOARD TO REMAND THE COMPLAINT TO THE REGIONAL DIRECTOR FOR DISMISSAL OR, ALTERNATIVELY, TO DISMISS THE COMPLAINT

Pursuant to Section 102.24 of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Motion and urges the Board to Remand the Complaint to the Regional Director so that he may withdraw the Complaint in the above case and dismiss the charge, as the Acting General Counsel has determined that further prosecution of the Complaint undermines current Board law and is not in the public interest. Alternatively, the Acting General Counsel moves the Board to dismiss the Complaint.

The Region issued Complaint in this matter on November 18, 2018 alleging, inter alia, that International Brotherhood of Electrical Workers, Local Union 98's (Respondent) use of inflatable rats near the entrances to the Fairfield Inn & Suites by Marriott (Fairfield Inn) and Libertine Restaurant (Libertine) in Philadelphia, Pennsylvania during three days in June 2018, threatened, coerced or restrained Fairfield Inn, Libertine and other persons engaged in commerce in violation

of Section 8(b)(4)(ii)(B). (GCX 1(c)-(d).)[1] A hearing took place on April 9, 2019 before Chief Administrative Law Judge Robert A. Giannasi after which he issued a decision on May 28, 2019, recommending dismissal of that portion of the Complaint concerning the use of the inflatable rats. *See International Brotherhood of Electrical Workers, Local 98 (Fairfield Inn),* JD-45-19 (May 28, 2019).

On July 16, 2019, Counsel for then General Counsel Peter Robb filed exceptions to the ALJ's dismissal of that portion of the Complaint concerning the inflatable rats, urging the Board, inter alia, to overrule *Carpenters Local 1506 (Eliason & Knuth of Arizona),* 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon II),* 356 NLRB 1290 (2011), reverse the ALJ, and find the Union's use of inflatable rats violated Section 8(b)(4)(ii)(B). The case is currently pending before the Board.

Former General Counsel Robb's term ended on January 20, 2021, and Acting General Counsel Peter Sung Ohr was designated by President Biden on January 25, 2021. Acting General Counsel Ohr disagrees with the recommendations set forth in Counsel for the former General Counsel's brief to overturn Board law and find the Union's conduct violative of Section 8(b)(4). Indeed, the Union's conduct here is lawful under the Board's holdings in *Eliason* and *Brandon II* and the reasoning of every federal court to consider the issue. *See, e.g., Overstreet v. United Bhd. of Carpenters, Local Union No. 1506,* 409 F.3d 1199 (9th Cir. 2005) (affirming denial of Section 10(l) injunction as there was no likelihood of success on the merits of the allegation that union's use of banners violated Section 8(b)(4)); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005) (denying Section 10(l) injunction; no reasonable cause to

[1] Throughout this motion, abbreviated references are employed as follows: "ALJD" followed by page and line numbers to designate the ALJ's Decision; "GCX" followed by exhibit number to designate General Counsel's Exhibits.

believe union's use of banner violated Section 8(b)(4)); *Benson v. United Bhd. of Carpenters, Locals 184 and 1498*, 337 F.Supp.2d 1275 (D. Utah 2004) (same; Section 10(l) injunction denied based on no reasonable cause); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155 (C.D. Cal. 2003) (same; Section 10(l) injunction denied based on no likelihood of success on the merits). Notably, the Board's decisions in *Eliason* and *Brandon II* governing inflatables, and the Board's historic inability to convince the federal courts that there is even a likelihood of success and/or reasonable cause to show that such union conduct violates Section 8(b)(4), prevented former General Counsel Robb from obtaining Section 10(l) relief after issuing complaint in two recent cases. *See Ohr v. IUOE Local 150*, -- F.Supp.3d --, 2020 WL 1639987 (N.D. Ill. 2020) (denial of Section 10(l) injunction of union's use of banners and inflatables); *King v. Constr. & Building Laborers' Local 79*, 393 F.Supp.3d 181 (E.D.N.Y. 2019) (same; digital banner and inflatables).[2]

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[2] The Complaint also alleged that Respondent's use of a loud bullhorn over a three-hour period on June 29, 2018 to convey an area standards message constituted unlawful secondary coercion against Fairfield Inn and Libertine in violation of Section 8(b)(4)(ii)(B) of the Act. (GCX 1(c)) The ALJ found merit to that allegation. (ALJD 11:21-22), and on August 20, 2019, Respondent filed cross exceptions to the ALJ's finding.

Acting General Counsel Ohr views this Complaint allegation to be inconsistent with extant Board law given the limited nature and extent of the Union's use of the bullhorn in this case This conduct only occurred on a single occasion and falls far short of the conduct found violative by the Board in the two other Section 8(b)(4)(B) non-picketing cases in which the Board found violations based on union noise conduct. Cf. *IBEW 98 (Post Brothers)*, 370 NLRB No. 51 (2020) (a union's use of a stationary sound amplification system to play a non-stop recording of a crying baby at excessive volumes over four weeks constituted coercive conduct that violated Section 8(b)(4)(ii)(B)); *Metropolitan Regional Council, Carpenters (Society Hill Towers)*, 335 NLRB 814, 826-27 (2001) (a union's excessive noisemaking activities over a four-month period rose to the level of unlawfully coercive non-picketing conduct). Counsel for the Acting General Counsel asserts that Respondent's use of the bullhorn on June 29, 2018 did not rise to the level of unlawful secondary coercion against Fairfield Inn and Libertine in violation of Section 8(b)(4)(ii)(B) of the Act.

Acting General Counsel Ohr therefore moves the Board to Remand this matter to the Regional Director so that he may withdraw the Complaint and dismiss the charge, as it is inconsistent with Board law and Circuit Court enforcement thereof. Alternatively, the Acting General Counsel moves the Board to dismiss the Complaint based on his decision to cease prosecution of the Complaint as such pursuit is a waste of valuable Agency resources and not in the public interest.

Accordingly, Counsel for Acting General Counsel Ohr hereby moves the Board to Remand this matter to the Regional Director so that he may withdraw the Complaint in the above case or, alternatively, to dismiss the Complaint.

Respectfully submitted,

Dated: February 4, 2021

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **MOTION OF THE ACTING GENERAL COUNSEL TO THE NATIONAL LABOR RELATIONS BOARD TO REMAND THE COMPLAINT TO THE REGIONAL DIRECTOR FOR DISMISSAL OR, ALTERNATIVELY, TO DISMISS THE COMPLAINT** in Case 04-CC-223346 were served on the 4th day of February 2020, on the following persons by email:

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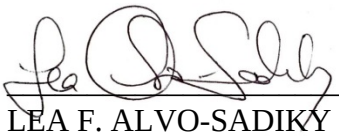
Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, A/W INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and Case 25-CC-228342

LIPPERT COMPONENTS, INC.

MOTION OF THE ACTING GENERAL COUNSEL
TO THE NATIONAL LABOR RELATIONS BOARD
TO REMAND THE COMPLAINT TO THE REGIONAL DIRECTOR FOR DISMISSAL
OR, ALTERNATIVELY, TO DISMISS THE COMPLAINT

Pursuant to Section 102.24 of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Motion and urges the Board to Remand the Complaint to the Regional Director so that she may withdraw the Complaint in the above case and dismiss the charge, as the Acting General Counsel has determined that further prosecution of the Complaint undermines current Board law and is not in the public interest. Alternatively, the Acting General Counsel moves the Board to dismiss the Complaint.

The Region issued Complaint in this matter on December 31, 2018 and an Amended Complaint on February 7, 2019 alleging that Operating Engineers Local Union No. 150's (Union) use of two stationary banners and an inflatable rat near the public entrance of a trade show induced or encouraged persons engaged in commerce to refuse to handle or work on goods or perform services and threatened, coerced or restrained Lippert Components (Employer) and other persons engaged in commerce in violation of Section 8(b)(4)(i) and (ii)(B). (GC Exh. (1(a), 1(c).) A hearing took place on May 14, 2019 before Administrative Law Judge Kimberly Sorg-Graves, after which she issued a decision on July 15, 2019 recommending dismissal of the Complaint. *See Operating Engineers Local 150 (Lippert Components)*, JD-57-19 (July 15, 2019). On October 27, 2020, the Board issued a Notice and

Invitation to File Briefs, which invited the parties and interested *amici* to address the following questions:

1. Should the Board adhere to, modify, or overrule *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon II)*, 356 NLRB 1290 (2011)?
2. If you believe the Board should alter its standard for determining what conduct constitutes proscribed picketing under Section 8(b)(4), what should the standard be?
3. If you believe the Board should alter its standard for determining what nonpicketing conduct is otherwise unlawfully coercive under Section 8(b)(4), what should the standard be?
4. Why would finding that the conduct at issue in this case violated the National Labor Relations Act under any proposed standard not result in a violation of the Respondent's rights under the First Amendment?

Counsel for then-General Counsel Peter Robb filed a brief with the Board on November 27, 2020 urging the Board, *inter alia*, to overrule *Eliason* and *Brandon II*, reverse the ALJ, and find the Union's use of banners and an inflatable rat violated Section 8(b)(4)(i) and (ii)(B). The case is currently pending before the Board.

Former General Counsel Robb's term ended on January 20, 2021 and Acting General Counsel Peter Sung Ohr was designated by President Biden on January 25, 2021. Acting General Counsel Ohr disagrees with the recommendations set forth in former General Counsel Robb's brief to overturn Board law and find the Union's conduct violative of Section 8(b)(4). Indeed, the Union's conduct here is lawful under the Board's holdings in *Eliason* and *Brandon II* and the reasoning of every federal court to consider the issue. *See, e.g., Overstreet v. United Bhd. of Carpenters, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005) (affirming denial of Section 10(l) injunction as there

was no likelihood of success on the merits of the allegation that union's use of banners violated Section 8(b)(4)); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005) (denying Section 10(l) injunction; no reasonable cause to believe union's use of banner violated Section 8(b)(4)); *Benson v. United Bhd. of Carpenters, Locals 184 and 1498*, 337 F.Supp.2d 1275 (D. Utah 2004) (same; Section 10(l) injunction denied based on no reasonable cause); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155 (C.D. Cal. 2003) (same; Section 10(l) injunction denied based on no likelihood of success on the merits). Notably, the Board's decisions in *Eliason* and *Brandon II* governing union bannering and inflatables, and the Board's historic inability to convince the federal courts that there is even a likelihood of success and/or reasonable cause to show that such union conduct violates Section 8(b)(4), prevented former General Counsel Robb from obtaining Section 10(l) relief after issuing complaint in two recent cases. *See Ohr v. IUOE Local 150*, -- F.Supp.3d --, 2020 WL 1639987 (N.D. Ill. 2020) (denial of Section 10(l) injunction of union's use of banners and inflatables); *King v. Constr. & Building Laborers' Local 79*, 393 F.Supp.3d 181 (E.D.N.Y. 2019) (same; digital banner and inflatables).

Acting General Counsel Ohr therefore moves the Board to Remand this matter to the Regional Director so that she may withdraw the Complaint and dismiss the charge, as it is inconsistent with Board law and Circuit Court enforcement thereof. Alternatively, the Acting General Counsel moves the Board to dismiss the Complaint based on his decision to cease prosecution of the Complaint, as such pursuit is a waste of valuable Agency resources and not in the public interest.

Accordingly, Counsel for Acting General Counsel Ohr hereby moves the Board to Remand this matter to the Regional Director so that she may withdraw the Complaint in the above case or, alternatively, to dismiss the Complaint.

Respectfully submitted,

/s/ Tiffany J. Limbach

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion of the Acting General Counsel To The National Labor Relations Board to Remand The Complaint To The Regional Director For Dismissal Or, Alternatively, To Dismiss the Complaint has been filed electronically with the Executive Secretary of the Board through the Board's E-Filing System on this 2nd day of February 2021. Copies of the filing are being served upon the following persons by electronic mail:

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/s/ Tiffany J. Limbach

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, A/W INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and Case 25-CC-230368

MAGLISH PLUMBING, HEATING & ELECTRIC, LLC

MOTION OF THE ACTING GENERAL COUNSEL
TO THE NATIONAL LABOR RELATIONS BOARD
TO REMAND THE COMPLAINT TO THE REGIONAL DIRECTOR FOR DISMISSAL
OR, ALTERNATIVELY, TO DISMISS THE COMPLAINT

Pursuant to Section 102.24 of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Motion and urges the Board to Remand the Complaint to the Regional Director so that she may withdraw the Complaint in the above case and dismiss the charge, as the Acting General Counsel has determined that further prosecution of the Complaint undermines current Board law and is not in the public interest. Alternatively, the Acting General Counsel moves the Board to dismiss the Complaint.

The Region issued Complaint in this matter on February 7, 2019, alleging that Operating Engineers Local Union No. 150's (Union) use of two stationary banners and an inflatable rat at a traffic intersection near Maglish Plumbing, Heating & Electric, LLC's (Employer) facility and near the personal home construction jobsite of the Employer's owner induced or encouraged persons engaged in commerce to refuse to handle or work on goods or perform services and threatened, coerced or restrained the Employer and other persons engaged in commerce in violation of Section 8(b)(4)(i) and (ii)(B). (GC Exh. (1(a), 1(c).) A hearing took place on May 15, 2019 before Administrative Law Judge Kimberly Sorg-Graves, after which she issued a decision on October 16, 2019, recommending

dismissal of the Complaint. *See Operating Engineers Local 150 (Maglish Plumbing, Heating & Electric, LLC)*, JD-80-19 (October 16, 2019). Counsel for then-General Counsel Peter Robb filed exceptions and a supporting brief with the Board on November 13, 2019 urging the Board, *inter alia*, to overrule *Eliason* and *Brandon II*, reverse the ALJ, and find the Union's use of banners and an inflatable rat violated Section 8(b)(4)(i) and (ii)(B). The case is currently pending before the Board.

Former General Counsel Robb's term ended on January 20, 2021 and Acting General Counsel Peter Sung Ohr was designated by President Biden on January 25, 2021. Acting General Counsel Ohr disagrees with the recommendations set forth in former General Counsel Robb's brief to overturn Board law and find the Union's conduct violative of Section 8(b)(4). Indeed, the Union's conduct here is lawful under the Board's holdings in *Eliason* and *Brandon II* and the reasoning of every federal court to consider the issue. *See, e.g., Overstreet v. United Bhd. of Carpenters, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005) (affirming denial of Section 10(l) injunction as there was no likelihood of success on the merits of the allegation that union's use of banners violated Section 8(b)(4)); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005) (denying Section 10(l) injunction; no reasonable cause to believe union's use of banner violated Section 8(b)(4)); *Benson v. United Bhd. of Carpenters, Locals 184 and 1498*, 337 F.Supp.2d 1275 (D. Utah 2004) (same; Section 10(l) injunction denied based on no reasonable cause); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155 (C.D. Cal. 2003) (same; Section 10(l) injunction denied based on no likelihood of success on the merits). Notably, the Board's decisions in *Eliason* and *Brandon II* governing union bannering and inflatables, and the Board's historic inability to convince the federal courts that there is even a likelihood of success and/or reasonable cause to show that such union conduct violates Section 8(b)(4), prevented former General Counsel Robb from obtaining Section 10(l) relief after issuing complaint in two recent cases. *See Ohr v. IUOE Local 150*, -- F.Supp.3d --, 2020 WL 1639987 (N.D. Ill. 2020) (denial of Section 10(l)

injunction of union's use of banners and inflatables); *King v. Constr. & Building Laborers' Local 79*, 393 F.Supp.3d 181 (E.D.N.Y. 2019) (same; digital banner and inflatables).

Acting General Counsel Ohr therefore moves the Board to Remand this matter to the Regional Director so that she may withdraw the Complaint and dismiss the charge, as it is inconsistent with Board law and Circuit Court enforcement thereof. Alternatively, the Acting General Counsel moves the Board to dismiss the Complaint based on his decision to cease prosecution of the Complaint, as such pursuit is a waste of valuable Agency resources and not in the public interest.

Accordingly, Counsel for Acting General Counsel Ohr hereby moves the Board to Remand this matter to the Regional Director so that she may withdraw the Complaint in the above case or, alternatively, to dismiss the Complaint.

Respectfully submitted,

/s/ Tiffany J. Limbach

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion of the Acting General Counsel To The National Labor Relations Board to Remand The Complaint To The Regional Director For Dismissal Or, Alternatively, To Dismiss the Complaint has been filed electronically with the Executive Secretary of the Board through the Board's E-Filing System on this 4th day of February 2021. Copies of the filing are being served upon the following persons by electronic mail:

Charles R. Kiser, Esq.
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/s/ Tiffany J. Limbach

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MOUNTAIRE FARMS, INC.
Employer

And **Case 05-RD-256888**

OSCAR CRUZ SOSA
Petitioner
And

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27, a/w UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO
Union

MOTION OF THE ACTING GENERAL COUNSEL TO THE NATIONAL LABOR RELATIONS BOARD TO WITHDRAW THE FORMER GENERAL COUNSEL'S BRIEF WITH LEAVE TO FILE A SUPPLEMENTAL BRIEF OR, ALTERNATIVELY, TO WITHDRAW THE BRIEF

Pursuant to Section 102.24 of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Motion and urges the Board to allow the Acting General Counsel to withdraw former General Counsel Peter B. Robb's brief in this matter, and to allow the Acting General Counsel to submit a supplemental brief in its stead. Alternatively, the Acting General Counsel urges the Board to allow him to withdraw former General Counsel Robb's brief.

On February 25, 2020, Petitioner Oscar Cruz filed a decertification petition with the

National Labor Relations Board (the "Board") under Section 9(c) of the Act, seeking to decertify the United Food and Commercial Workers Union, Local 27 (the "Union") as the collective-bargaining representative of approximately 800 employees employed by Mountaire Farms, Inc. (the "Employer") at its poultry processing plant in Selbyville, Delaware. The parties had a collective-bargaining agreement effective from December 22, 2018 until December 21, 2023. On April 8, 2020, Sean R. Marshall, Regional Director of the Board's Region 5, issued a Decision and Direction of Election (DDE) finding that the parties' contract did not bar an election, inasmuch as the collective-bargaining agreement contained an unlawful union-security clause. *See, e.g., Paragon Products Corp.*, 134 NLRB 662, 666 (1961).

On June 23, 2020, the Board granted the Union's request for review of the Regional Director's DDE. On July 7, the Board issued a Notice and Invitation to File Briefs, which instructed the parties and interested *amici* to address whether the Board's contract-bar doctrine should be rescinded, retained without modification, or retained with modifications.

On October 7, 2020, Counsel for then-General Counsel Peter B. Robb filed a brief with the Board urging the Board to either (1) retain the contract bar, with an expanded 90-day window period for filing a representation petition with the Board; or (2) rescind the contact-bar doctrine if the Board's current blocking charge rule is rescinded or deemed unenforceable.

Former General Counsel Robb's term ended on January 20, 2021 and Acting General Counsel Peter Sung Ohr was designated by President Biden on January 25, 2021. Acting General Counsel Ohr disagrees with the recommendations set forth in former General Counsel Robb's brief to overturn longstanding Board law and greatly expand the current 30-day window period, and to potentially rescind the contract bar altogether if the Board's blocking charge rule is rescinded or held unenforceable. The current contract bar, and its 30-day window period, was

established in *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962) as a means of protecting the stability of collective-bargaining relationships and industrial peace. It has served as a reliable guide for employees, unions, and employers for nearly sixty years, and there is no compelling reason to modify it. Similarly, the Acting General Counsel believes the ultimate status of the Board's new blocking charge rule (which was changed as of July 31, 2020, *see* Section 103.20 of the Board's Rules and Regulations), should have no impact on the Board's long-standing contract bar and 30-day window period.

Acting General Counsel Ohr therefore moves the Board to withdraw former General Counsel Robb's October 7, 2020 amicus brief and allow Acting General Counsel Ohr to file an amicus brief setting forth his recommendation that the Board retain its longstanding contract-bar doctrine because altering it now, after nearly sixty years and without good cause, will inevitably lead to confusion among contracting parties and cause unnecessary disruption to stable bargaining relationships. Alternatively, the Acting General Counsel moves the Board to withdraw former General Counsel Robb's brief from consideration.

Respectfully submitted,

s/ Kyle Mohr_____

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Division of Advice
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Dated: February 9, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Motion of the Acting General Counsel in Case 05-RD-256888 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 9th of February, 2021.

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Sean R. Marshall Andrea Vaughn NLRB Regional Director, Region 5 100 S. Charles Street, Ste. 600 Baltimore, MD 21202	Electronic mail sean.marshall@nlrb.gov andrea.vaughn@nlrb.gov

s/ Kyle Mohr
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