NORTHEAST REGIONAL FIELD MEETING
October 10, 2024

1199 SEIU
498 7th Avenue
New York, NY

Private Sector Labor Law Update

October 10, 2024
4:00 – 4:50 PM

Session Presenters:

Cristina Gallo, Cohen, Weiss and Simon LLP, New York, NY
Ian Hayes, Hayes Dolce, Buffalo, NY

NLRB Updates through the Lens of the Starbucks Campaign
Cristina Gallo & Ian Hayes

I. Panelist Introductions (1 min)
II. Introduction to Panel (1 min)
    i. General Statistics
    ii. Starbucks Abuses Discovery Process
    iii. Representation Case Litigation in Starbucks Campaign
III. NLRB Statistics / Summary of campaign so far (5 min)
    i. Case Counts for FY 2023
    ii. Starbucks Campaign Case Counts and Election Statistics
IV. Representation Casehandling under Old and New Election Rules (10 min)
    i. Starbucks Litigates Appropriate Unit
    ii. Parties Stipulate to In-Person Elections
    iii. New Election Rules
V. Starbucks' Discovery Abuses (15 min)
    i. Starbucks Serves Invasive Subpoenas in ULP Cases and 10(j) Cases
        1. Recent Board Decision, 21-CA-304228
            a. Appeal to 5th Circuit
        2. *Leslie v. Starbucks*
            a. Overview of Discovery Sought
            b. ALJD in 03-CA-304675
            c. Second Circuit Order
        3. *Poor v. Starbucks*
            a. Overview of Discovery Sought
            b. Order on Rule 72(a) Objections
            c. ALJD in 29-CA-309779
VI. GC Memorandum re Remedies for Work Rule Violations (5 min)
    i. Example from Starbucks Case
VII. Q&A (15 min)

UNITED STATES DISTRICT COURT

for the

Western District of New York

Linda M. Leslie
Plaintiff

v.

Starbucks Corporation
Defendant

Civil Action No. 22-CV-478

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Alexis Rizzo

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Place:	Date and Time:
See cover letter. WD of NY courthouse; in lieu of personal appearance certified mail to Littler Mendelson, 41 High St. Columbus OH 43215 or electronically.	10/7/2022, 5:00 PM

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: _____

CLERK OF COURT

OR

_____ /s/ David A. Kadela

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* _____

Starbucks Corporation, who issues or requests this subpoena, are:

David A. Kadela, Littler Mendelson, P.C. 41 High St. Columbus OH, 43215.

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 22-CV-478

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LINDA M. LESLIE, Regional Director of the Third Region of the National Labor Relations Board for and on behalf of the National Labor Relations Board,

Petitioner,

v.

22-CV-478 (JLS)

STARBUCKS CORPORATION,

Respondent.

ATTACHMENT TO SUBPOENA DUCES TECUM

To: Alexis Rizzo

As indicated on the subpoena served upon you, this attachment contains the documents, electronically stored information and objects that you are commanded to produce. The following definitions and instructions apply.

Definitions and Instructions:

1. "Document," "Documents," and "electronically stored information" ("ESI") have the same meaning and are equal in scope to the usage of those terms as set forth in Fed. R. Civ. P. 34 and the Local Rules of the United States District Court for the Western District of New York, and include, by way of example, letters, correspondence, memoranda, minutes, notes, statements, agreements, summaries, records of telephone conversations, records of personal conversations, interviews or meetings, transcripts, diaries, reports, charts, contracts, calendars, journals, invoices, photographs, audio or video recordings, voicemail messages, text messages, GroupMe messages, Discord messages, other app-based messages, emails, material existing on computer software or hardware, cloud-based platforms, internet chats or communications, social media content (e.g., Facebook, Twitter, TikTok, Instagram), computer tapes or disks, and all data contained thereon that may be retrieved, including material stored on cell phones, hard drives or on a cloud-based platform in the possession of, control of, or available to You or any attorney, agent, representative or other person acting in cooperation with, in concert with, or on behalf of You.

2. "You" or "Your" means Alexis Rizzo, along with Your current or former agents, representatives and attorneys, and all other persons acting or purporting to act for You or on Your behalf.

3. The "Union" means Workers United, an affiliate of SEIU, or any agent, employee, representative, official, or other person acting in cooperation with, in concert with, or on behalf of Workers United.

4. "Region 3" refers to Region 3 of the National Labor Relations Board and any of its representatives, agents, or employees.

5. "Starbucks" and "Employer" refer to Starbucks Corporation and/or any of its predecessors, assigns, affiliated and related companies, officers, directors, shareholders, employees, and agents.

6. "Buffalo stores" mean Starbucks' Buffalo facilities referenced in the Petition for Injunction in this case, and located at 520 Lee Entrance, Buffalo, NY 14228 ("UB Commons store"); 1703 Niagara Falls Blvd., Buffalo, NY 14228 ("NFB store"); 8100 Transit Rd., Suite 100, Williamsville, NY 14221 ("Transit & Maple store"); 933 Elmwood Ave., Buffalo, NY 14222 ("Elmwood store"); 235 Delaware Ave., Buffalo, NY 14202 ("Delaware & Chippewa store"); 3540 McKinley Pkwy, Buffalo, NY 14219 ("McKinley store"); 4770 Transit Rd., Depew, NY 14043 ("Transit & French store"); 2730 Delaware Ave., Buffalo, NY 14216 ("Delaware & Kenmore store"); 5395 Sheridan Dr., Buffalo, NY 14221 ("Williamsville Place store"); 9660 Transit Rd., Suite 101, East Amherst, NY 14051 ("Transit Commons store"); 4255 Genesee St., Suite 100, Cheektowaga, NY 14225 ("Genesee Street store"); 3235 Southwestern Blvd., Orchard Park, NY 14127 ("Orchard Park store"); 5120 Camp Rd., Hamburg, NY 14075 ("Camp Road store"); 5265 Main St., Williamsville, NY 14221 ("Main Street store"); 1 Walden Galleria K-04, Cheektowaga, NY 14225 ("Galleria kiosk"); 1775 Walden Ave., Cheektowaga, NY 14225 ("Walden & Anderson store"); 5590 Niagara Falls Blvd., Niagara Falls, NY 14304 ("Niagara Falls store"); 6707 Transit Rd. #100, Buffalo, NY 14221 ("Transit Regal store"); 3186 Sheridan Dr., Buffalo, NY 14226 ("Sheridan & Bailey store"); 3015 Niagara Falls Blvd., Amherst, NY 14228 ("East Robinson store"); and 3611 Delaware Ave., Tonawanda, NY 14217 ("Delaware & Sheridan store").

7. "Rochester store" means Starbucks' Rochester facility referenced in the Petition for Injunction, and located at 2750 Monroe Avenue, Rochester, NY 14618.

8. "Recording" and "Recordings" mean any photographs, videos, digital images, and sound recordings, made by any device (e.g., camera, cell phone, digital recorder, tape recorder, or other handheld recording device), which You have in Your possession or may have access to. Such Recordings include all formats including but not limited to digital, analog, still, video and audio. This request includes all such Recordings (1) made by You, (2) at Your direction, (3) in Your possession, or (4) made by any attorney, agent, representative or other person acting in cooperation with, in concert with, or on behalf of You.

9. "Communication" and "Communications" mean any manner or form of information or message transmission, however produced or reproduced, whether by Document or

Recording, or orally, electronically, or otherwise, which is made, distributed, or circulated between or among persons or data storage or processing units, and any and all Documents or Recordings containing, consisting of, or relating or referring in any way, either directly or indirectly, to a "communication." The term includes any conversation, discussion, meeting, conference, and any other oral statement, and any email, text, instant message, posting, notes or any other written Document.

10. The terms "concerning" and "relating" mean containing, regarding, with respect to, consisting of, referring to, describing, supporting, tending to establish, evidencing, or constituting, in whole or in part.

11. The connectives "and/or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside its scope. Each of the words "each," "any," "every," and "all" shall be deemed to include each of the other words. The use of the singular form of any word includes the plural and vice versa.

12. Whenever used in this subpoena, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense, and vice versa; reference to parties shall be deemed to include any and all of their officers, agents, and representatives; the masculine shall be deemed to include the feminine, and vice versa.

13. Each request for Documents and/or Recordings shall be deemed to call for the production of the original Documents and/or Recordings to the extent that they are in Your custody, possession and/or control, or of any agent of You, or of any third party acting or purporting to act on Your behalf. If original Documents or Recordings are not in the custody, possession and/or control of You, then a representation is to be made that the Documents or Recordings so exist but not in the custody, possession and/or control of You, and duplicates of such Documents and Recordings are to be produced.

14. This subpoena does not seek Documents or Recordings (or portions of such matters) that You conclude must be withheld because they are covered by the attorney-client privilege, or the work product doctrine. For any Document or Recording withheld on a claim of attorney-client privilege and/or under the work-product doctrine, identify (a) the date, (b) author, (c) recipients, (d) title, (e) general subject of the Document or Recording, (f) privilege claimed, and (g) the factual or other basis for Your belief that all the necessary elements for the privilege or protection to apply.

15. If You cannot produce a Document or Recording or a portion thereof after exercising due diligence to secure it, so state in writing and produce whatever portion of said Document or Recording possible, specifying the reason for Your inability to produce the Document or Recording or the remainder thereof and stating whatever information or knowledge You have concerning the Document or the Recording or the portion thereof that You are unable to produce, including, but not limited to, the content of such Document or Recording, or missing portion thereof which was, but no longer is, in Your possession, custody and/or control, and state what disposition was made of it and the reason for such disposition.

16. These Requests are continuing in nature. Accordingly, if, after producing any Documents or Recordings, You obtain or become aware of additional information or Documents or Recordings pertaining to any request, or portion thereof, You are required to promptly provide such information or Documents or Recordings by way of supplemental responses.

17. Unless stated expressly in a particular request, these requests cover the period from August 2021 to the present.

18. To the extent that these requests call for the production of ESI, the ESI shall be produced in TIFF format with a load file, with the exception that spreadsheets (e.g., Excel, .csv), audio files, video files (i.e., Recordings) shall be produced in native format.

19. Documents produced shall be complete and, unless privileged, unredacted, submitted as found in Your files (e.g., documents that in their original condition were stapled, clipped, or otherwise fastened together, or maintained in separate file folders, shall be produced in such form).

20. Any copies of original documents which are different in any way from the original, whether by interlineation, receipt, stamp, notations, indication of copies sent or received, or otherwise, shall themselves be considered original documents and must be produced separately from the originals or copies of originals.

21. All documents produced pursuant to this subpoena should be organized by the subpoena paragraph to which each document or set of documents is responsive.

22. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

23. If any document responsive to any request herein was, but no longer is, in Your possession, custody or control: identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in Your custody or control; and identify (stating the person's name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.

24. If any document responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons: identify the document (stating its date, author, addressee(s), receipts and intended recipients, title and subject matter); explain the circumstances surrounding the destruction, discarding or disposal of the documents, including the timing of the destruction, discharging or disposal of the document; and identify all persons known or believed to have the document or a copy thereof in their possession, custody or control.

25. The term "Complaint" refers to the Third Consolidated Complaint issued by the National Labor Relations Board ("NLRB") on June 27, 2022, and the term "Petition" refers to the Petition for Injunction filed by the Region 3 Regional Director, for and on behalf of the NLRB, on June 21, 2022.

26. To ensure that the requests that follow are not construed to have the purpose or effect of interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act (the "NLRA"), please redact from responsive Documents the name of any Starbucks hourly employee (excluding Cassie Fleischer, Brian Nuzzo, Edwin "Minwoo" Park, Angel Krempa, Daniel Rojas, Jr., Nathan Tarnowski, Kellen Montanye Higgins, Colin Cochran, Larue Heutmaker, Danka Dragic, Casey Moore, Jaz Brisack, Will Westlake, Alexis Rizzo, Michele Eisen, Kai Hunter, Kayla Desboro, James Skretta, Michaela Wagstaff, and any other witness who has testified at the administrative hearing on the Complaint or who provided an affidavit that was filed in this case), or information from which the identity of any Starbucks hourly employee could be discerned, from any responsive Documents where failing to do so would result in disclosure of the employee's sentiments toward the Union, except where a Document reflects or could be construed to reflect matters that effected the employee's interest, one way or the other, in union organizing or union representation or where the Document otherwise relates to whether Section 10(j) relief would be just and proper, as referenced, if applicable, in Your testimony at the hearing on the Complaint. To be clear, this subpoena does not seek evidence of Section 7 activities that are unrelated to matters that had or may have had an effect on other employee's interest in union organizing or union representation or that otherwise do not relate to whether Section 10(j) relief would be "just and proper." The subpoena likewise does not seek affidavits provided to the National Labor Relations Board. If deemed necessary, Starbucks will agree to the entry of an appropriate protective order with respect to the production of any Documents for which a concern is expressed that production may interfere with, restrain, or coerce an employee in the exercise of the employee's Section 7 rights.

Documents and Other Information to Be Produced:

1. All Documents and Recordings relating to any Communications by you to, or to you from (i) any employee or former employee of Starbucks, (ii) the Union, (iii) the NLRB, or (iv) any digital, print, radio, TV, internet-based or other media outlet concerning any of the following matters:

(a) For each of the Buffalo stores for which an election petition was or has been filed, and the Rochester store, the number of employees (not names) who were considered to be in favor of union representation ("yes" votes) and the number of employees who were considered not to be in favor of union representation ("no" votes) at the time the petition was filed and each week thereafter until an election was held, or if no election has been held or one is scheduled to be rerun, up to the present;

(b) For each employee of the of the Buffalo stores for which an election petition was or has been filed, and the Rochester store, who was or has been considered at any time to have changed from being in favor or union representation to not being in favor of it, any statements the employee made or things that the employee did that factored into that determination and, if there are any, the employee's name;

(c) For each of the Buffalo stores for which an election petition has not been filed, and the Rochester store, the number of employees (not names) considered to be in favor or union representation and the number of employees considered not to be in favor of union

representation since the outset of organizing in Buffalo and at weekly or whatever intervals used since that time.

(d) For each employee of the of the Buffalo stores or the Rochester store for which an election petition has not been filed who was or has been considered at any time to have changed from being in favor or union representation to not being in favor of it, any statements the employee made or things that the employee did that factored into that determination and, if there are any, the employee's name.

(e) The number of Starbucks' employees outside of Buffalo stores and the Rochester store who have communicated with the Union, or any Starbucks' employees or former employees from the Buffalo stores or the Rochester store relating to the subject of unionization, whether in Buffalo or Rochester, at their store or elsewhere.

(f) For each employee or former employee of Starbucks employed outside of Buffalo stores and the Rochester store who has had any communication with the Union, or any Starbucks' employees or former employees from the Buffalo stores or the Rochester store relating to the subject of unionization, whether in Buffalo or Rochester, at their store, or elsewhere, any statements the employee made relating to whether they were in favor or not in favor of union representation and the reasons for their position and, if such statements were made, the employee's name.

(g) The conduct in which Starbucks is alleged to have engaged that the Complaint alleges violated the NLRA, including but not limited to the allegations that Starbucks violated the NLRA by: utilizing support managers at Buffalo stores or the Rochester store to engage in surveillance of employees' union activities; conducting group meetings, listening sessions and one-on-one meetings with employees regarding matters relating to union representation; changing hours availability requirements; interrogating employees regarding their union activities; granting benefits to employees to dissuade them from supporting the union; disciplining and terminating employees because of their support for or activities on behalf of the Union; permanently closing one and temporarily closing other stores; and selectively enforcing rules and other policies and procedures.

2. All Documents relating in any way to statements and information you have posted on any social media platform since August 2021 concerning the union organizing at the Buffalo stores and the Rochester store; organizing by the Union at other Starbucks stores; any of the conduct in which Starbucks is alleged to have engaged that the Complaint alleges violated the NLRA; and rallies, protests, strikes, forums, seminars, programs or the like involving union organizing at, or alleged unfair labor practices by, Starbucks and matters related thereto.

3. All Documents relating in any way to Communications you have had with the Union or agents, representatives, or employees of the Union concerning their putting you in contact or connecting you with any digital, print, radio, TV, internet-based or other media outlet.

4. All Documents relating in any way to Communications you have had with the Union or its agents, representatives, or employees regarding information to be provided to any digital, print, radio, TV, internet-based or other media outlet concerning union organizing, union

elections and other union related matters involving the Buffalo stores or the Rochester store; union organizing, union elections and other union related matters at Starbucks stores around the country; Starbucks' discipline and termination of employees allegedly because of their union activities; and any other matter relating to union organizing at, or alleged unfair labor practices by, Starbucks.

5. All Documents relating in any way to Communications you have had with, including interviews, information you have provided to, and articles published by, any digital, print, radio, TV, internet-based or other media outlet concerning union organizing, union elections and other union related matters involving the Buffalo stores and the Rochester store; union organizing, union elections and other union related matters at Starbucks stores around the country; Starbucks' discipline and termination of employees allegedly because of their union activities; and any other matter relating to union organizing at, or alleged unfair labor practices by, Starbucks.

6. All Documents relating to, including copies of, any speeches, comments, remarks or responses you gave at any rallies, protests, strikes, forums, seminars, programs or the like concerning union organizing, union elections and other union related matters involving the Buffalo stores or the Rochester store; union organizing, union elections and other union related matters at Starbucks stores around the country; Starbucks' discipline and termination of employees allegedly because of their union activities; and any other matter relating to union organizing at, or alleged unfair labor practices by, Starbucks.

7. All Documents (including but not limited to receipts, pay checks, payroll registers, general ledgers, Form 1099s, W-2s, cancelled checks, time reports, and expense reports) relating in any way to any payments made to you since August 2021 by the Union.

8. All Documents (including but not limited to receipts, pay checks, payroll registers, general ledgers, Form 1099s, W-2s, cancelled checks, time reports, and expense reports) relating in any way to any payments made to you since August 2021 by any person or entity at the request of or on behalf of the Union or for your attendance at or participation in any rally, protest, strike, forum, seminar, program or the like involving Starbucks in any way.

9. All Documents relating in any way to Communications you have had with the Union concerning the subject of Recording during the course of your employment at Starbucks, including but not limited to Documents relating to whose conversations to record; how and when to record conversations; the types of conversations to record; the purpose of recording conversations; and the circumstances under which recording would be permissible or lawful and when it would be impermissible or unlawful.

10. All Documents concerning any employment you have held, other than at Starbucks, any self-employment you have had, and any services you have performed as an independent contractor at any time since August 2021.

11. All Documents concerning your attendance at any educational or vocational institution or participation in any education or training program since August 2021.

12. Documents reflecting the date and time of and participants in (except as excluded by Instruction No. 26) virtual calls (Zoom or similar platform) and/or telephone calls to and/or

from Richard Bensinger, Daisy Pitkin, and/or any other of the Union's agents, employees, officials, representatives, and/or officers.

13. All Documents discussing an increase and/or decline in support for the organizing campaigns at the Buffalo stores or the Rochester store.

14. All Documents sent to or received from publicly elected or appointed officials (or their staff) relating to the organizing campaign in Buffalo stores or the Rochester store.

15. All Documents relating to changes to the timing of filing election petitions at any Starbucks store based on the Complaint or underlying charges, other alleged unfair labor practices, or any other factor.

16. All emails from the email account sbworkersunited@gmail.com sent since August 2021 by any Starbucks employee that reflects interest in starting a union campaign at any Starbucks store, attending union meetings, participating in a union bargaining committee, or serving as a Union representative, support for the Union and/or fear of retaliation for engaging in union activities.

17. All Documents relating to and/or discussing reasons other than alleged retaliation that employees have cited as a reason for not supporting the Union.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

September 6, 2024

DECISION AND ORDER

BY MEMBERS KAPLAN, PROUTY, AND WILCOX

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

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

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

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3:

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

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

ORDER

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

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

"1. Cease and desist from:

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

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

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

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

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

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

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

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

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

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

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

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

Marvin E. Kaplan, Member

David M. Prouty, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

STARBUCKS CORPORATION LLC

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

I. JURISDICTION

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

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

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

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

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

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

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

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

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

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

II. ALLEGED UNFAIR LABOR PRACTICES

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

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

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

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

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

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

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

B. Relevant Facts

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

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

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

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

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

C. Procedural Matters

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

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

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

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

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

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

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

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

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

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

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

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

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

Legal Analysis

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

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

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

A. 8(a)(1) Allegation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. 8(a)(4) Allegation

Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. The provision, "otherwise" discriminate is broadly construed in order "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses."' *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mutual Life Insurance v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951). See also *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001). This broad interpretation includes rehiring conditioned upon the dropping of charges with the Board, refusing to hire a job applicant, and refusing to rehire an employee even where the original dismissal was nondiscriminatory. In this instance, the General Counsel argues that the issuance of the September 14 subpoenas duces tecum prior to the hearing was the discriminatory action taken against Hernandez and Cardenas for their participation in the Board process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

5. All other complaint allegations are dismissed.

REMEDY

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

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

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

STARBUCKS CORPORATION

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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STARBUCKS CORPORATION

and **Case 29-CA-309779**
29-CA-323774

WORKERS UNITED

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for the Respondent.
Cristina E. Gallo, *Esq.* (Cohen, Weiss and Siman LLP),
for the Charging Party Union.

DECISION

BENJAMIN W. GREEN, Administrative Law Judge. The complaint in this case alleges that Starbucks Corporation ("Respondent" or "Starbucks") violated Section 8(a)(1) and (4) of the National Labor Relations Act (the "Act") by, in *Poor v. Starbucks Corp.*, 22-CV-7255-ARR-JRC (E.D.N.Y) ("*Poor*"), issuing subpoenas duces tecum and subpoenas ad testificandum to current and former employees of the Respondent's store in Great Neck, New York, an organizer for Workers United (the "Union"), and the Union's custodian of records (collectively the "Subpoenaed Nonparties").[1] *Poor* was a federal district court proceeding brought pursuant to Section 10(j) of the Act, ancillary to the administrative proceeding in *Starbucks Corporation*, 29-CA-292741, 29-RC-290364, et al. (the "Administrative Case"). The individuals who received subpoenas in *Poor* were former employee Joselyn Chuquillanqui, former employee Justin Wooster, employee Taydoe Jones, employee Darren Wisher, employee Max Cook, and Union organizer David Staff. (Jt. Exh. 1)

The parties have traveled down this legal road before. At issue in *Starbucks Corporation*, 03-CA-304675 ("*Starbucks Buffalo II*") were alleged unlawful subpoenas duces tecum (the "*Leslie* subpoenas") Starbucks issued in the 10(j) case *Leslie v. Starbucks Corp.*, 22-CD-00478-JLS (W.D.N.Y.) ("*Leslie*"), which was ancillary to the administrative proceeding in *Starbucks Corp.*, 03-CA-285671, et al. ("*Starbucks Buffalo I"*). The *Leslie* subpoenas were substantially similar to the *Poor* subpoenas duces tecum. (G.C. Exh. 2(a-b)) (Jt. Exh. 1) On March 1, 2023, administrative law judge ("ALJ") Michael A. Rosas issued a decision in *Starbucks Buffalo I*, JD-17-23, concluding that Starbucks committed numerous violations of Section 8(a)(1), (3), (4), and (5) of the Act, including the unlawful discharge of seven employees. On May 12, 2023, ALJ Charles J. Muhl issued a decision in *Starbucks Buffalo II*, JD-33-23, largely finding that the *Leslie* subpoenas violated Section 8(a)(1) of the Act.

[1] The Subpoenaed Nonparties were referred to as such in *Poor* because they were not parties to the 10(j) proceeding. (Tr. 21)

The instant charges were filed on January 4, 2023 (29-CA-309779) and August 14, 2023 (29-CA-323774). (G.C. Exh. 1(a) & (f)) An amended consolidated complaint issued on October 24, 2023 and the Respondent filed an answer thereto on November 7, 2023. (G.C. Exh. 1(j) & (l)) The hearing was held before me on November 29, 2023, January 9, and January 24, 2024, but no testimony was taken. Rather, certain exhibits were entered into evidence and, at the parties' request, I took administrative notice of the complete records of the Administrative Case, *Poor*, *Leslie*, and *Starbucks Buffalo II*.[2] At the parties' request, I also took administrative notice of ALJ Muhl's decision in *Starbucks Buffalo II*.

For the reasons discussed below, I find that the *Poor* subpoenas duces tecum violated Section 8(a)(1) of the Act to the extent they sought Section 7 protected information irrelevant to the *Poor* 10(j) proceeding.[3] I find it unnecessary to pass on whether the *Poor* subpoenas duces tecum violated Section 8(a)(4) of the Act as it would not affect the remedy. I do not find the *Poor* subpoenas ad testificandum unlawful.

On the entire record, and after considering the posthearing briefs filed by the General Counsel, the Respondent, and the Union, I render these

FINDINGS OF FACT

Jurisdiction

The Respondent operates a coffee shop at 6 Great Neck Road, Great Neck, New York. The Respondent admits it satisfies the commerce requirements for jurisdiction and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, I find that this dispute affects commerce and the Board has jurisdiction under Section 10(a) of the Act.

Alleged Unfair Labor Practices

In about November 2021, after learning of a Union organizing drive at certain Starbucks coffee shops in Buffalo, New York, Chuquillanqui spoke with the Union and began organizing activities at the Great Neck store. Between January 29 and February 7, 2022, Chuquillanqui obtained Union authorization cards from all 15 Great Neck store unit employees. Chuquillanqui also engaged in other open union activity, which included signing a letter from Great Neck employees to Starbucks CEO and making statements featured in a Union press release, public social media posts, and news publications. (Administrative Case G.C. Exhs. 2, 19, 20, 28, 50) On about July 27, 2022, the Respondent discharged Chuquillanqui. (Administrative Case G.C. Exh. 1(dd) & (gg))

On February 10, 2022, the Union filed a petition in case 29-RC-290364.

[2] I used Westlaw to access the courts' electronic case file ("ECF") documents in *Poor* and *Leslie*. Documents docketed in those cases with an ECF document number are cited as such herein (e.g., *Poor* ECF Doc. 1). If a docket entry does not have a document number (such as court minutes), those entries are cited herein by date (e.g., *Poor* 3/27/2023 minute entry).

[3] Herein, I do not address several affirmative defenses raised in the Respondent's answer since the proponent of an affirmative defense has the burden of establishing the same and the Respondent failed to present evidence or argument regarding these defenses at hearing or in its posthearing brief. See *Starbucks Corp.*, 373 NLRB No. 90, slip op. at 1, fn. 2 (2024).

In April 2022, in case 29-RC-290364, a mail ballot election was conducted in a unit of baristas and shift supervisors. The tally of ballots reflects votes cast 6 to 5 against representation with 1 nondeterminative challenged ballot. (Administrative Case G.C. Exh. 1(a), (g) & (o)) The Union filed unfair labor practice ("ULP") charges and objections to the election. (Administrative Case G.C. Exh. 1)

On September 20, 2022, in the Administrative Case, the Regional Director for Region 29 issued a second consolidated complaint alleging the Respondent committed violations of Section 8(a)(1) and (3) of the Act, including threats, the solicitation of grievances, interrogations, promises of benefits, the creation of the impression of surveillance, discriminatory enforcement of work rules, prohibiting employees from exchanging work shifts, and discriminatory action in reducing the work hours, disciplining, and discharging Chuquillanqui. (Administrative Case G.C. Exh. 1(dd)) As part of the remedy, the complaint sought a bargaining order in lieu of another election. On September 21, 2022, the Regional Director of Region 29 issued an order consolidating the ULP charges and the Union's objections to the election. (Administrative Case G.C. Exh. 1(ff)) The objections were substantially identical to certain ULP allegations.

On September 23, 2022, in *Leslie*, District Court Judge John L. Sinatra, Jr. issued an order partially granting and partially denying a motion to quash the *Leslie* subpoenas. (*Leslie* ECF Doc. 49) Judge Sinatra Jr.'s order did not indicate whether the *Leslie* subpoenas were quashed because they sought information irrelevant to the *Leslie* 10(j) case. Rather, the order addressed the Union's arguments that subpoenaed materials were subject to a union-employee privilege and would cause undue burden to produce. Id. at 2-3. Judge Sinatra Jr. quashed several subpoena requests in balancing the "Respondent's need for the requested documents with the Petitioner's need to proceed expeditiously (and the burden of subpoena compliance generally)." Id. at 4.

The Administrative Case hearing was held between October 19 and November 3, 2022. In this hearing, the General Counsel called as witnesses Union organizer Staff, former employee Chuquillanqui, and former employee Wooster. The other Subpoenaed Nonparties did not testify.

On November 30, 2022, the Regional Director for Region 29 initiated *Poor* by filing in U.S. District Court for the Eastern District of New York a petition for injunctive relief under 10(j) of the Act and a motion to try the case on the Administrative Case record. (*Poor* ECF Docs. 1 and 2) The *Poor* 10(j) petition echoed the complaint in the Administrative Case and sought interim relief, including a nationwide cease and desist order, the reinstatement of Chuquillanqui, and a bargaining order based on Union authorization cards. (*Poor* ECF Docs. 1 & 17) At the time, the Second Circuit standard for granting a 10(j) petition was whether the petitioner could demonstrate that there was "reasonable cause" to believe unfair labor practices have been committed and, if so, whether temporary injunctive relief was "just and proper."[4] *Kreisberg v. HealthBridge Management, LLC,* 732 F.3d 131, 141-142 (2013).

[4] Recently, in *Starbucks v. McKinney*, 144 S.Ct. 1570 (2024) ("*McKinney*"), the Supreme Court rejected the "reasonable cause" and "just and proper" standard for 10(j) petitions in favor of the four-part test in *Winter v. Natural Resources Defense Counsil, Inc.*, 555 U.S. 7 (2008) ("*Winter*"). The four-part test "requires a plaintiff to make a clear showing that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *McKinney*, 144 S.Ct at 1575, quoting *Winter*, 555 U.S. at 20, 22.

On December 6, 2022, in *Poor*, Starbucks opposed the Regional petitioner's motion to try the 10(j) case on the record of the Administrative Case and provided notice of its intent to move for expedited discovery. (*Poor* ECF Doc. 12)

On December 15, 2022, in *Poor*, District Court Judge Allyne R. Ross granted the Regional petitioner's motion to use the Administrative Case record to analyze the "reasonable cause" element of the 10(j) standard, but not the "just and proper" element. (*Poor* ECF 12/15/2022 Order of Judge Ross) Accordingly, Judge Ross granted expedited discovery related to whether injunctive relief was "just and proper." Id. In addition, Judge Ross "concluded that the Petitioner's requested nationwide injunctive relief is not warranted and any potential injunctive relief will be limited to the Great Neck store." Id.

On December 19, 2022, in *Poor,* District Court Magistrate Judge James R. Cho set December 23, 2022 as the deadline for the Respondent to serve subpoenas. (ECF Doc. 21) Judge Cho also set January 25, 2023 as the deadline for all expedited discovery. Id.

On about December 23, 2022, in *Poor*, the Respondent served subpoenas duces tecum and subpoenas ad testificandum for deposition testimony (collectively the "December 2022 subpoenas") on the Subpoenaed Nonparties. (Jt. Exh 1(a)-(n)) The subpoenas duces tecum were substantially similar to the *Leslie s*ubpoenas. (Jt. Exh 1(a)-(n)) (G.C. Exh. 2) The *Poor* subpoenas duces tecum included the following in paragraph 23 of the instructions (Jt. Exh. 1(a)-(g)):

> 23. To ensure that the requests that follow are not construed to have the purpose or effect of interfering with, restraining or coercing employees in the exercise of their right under Section 7 of the National Labor Relations Act (the "NLRA"), please redact from responsive Documents the name of any Starbucks hourly employee (excluding Stephanie Olsen, Nicole Green, Akeeb Ali, Abigael Tioship, Joselyn Chuquillanqui, Justin Wooster, and James Carr and any other witness who has testified at the administrative hearing on the Complaint or who provided an affidavit that was filed in this case), or information from which the identity of any Starbucks hourly employee could be discerned, from any responsive Documents where failing to do so would result in disclosure of the employee's sentiments toward the Union, except where a Document reflects or could be construed to reflect matters that affected the employee's interest, one way or the other, in union organizing or union representation or where the Document otherwise relates to whether Section 10(j) relief would be "just and proper" as referenced in the Petition . To be clear, this subpoena does not seek evidence of Section 7 activities that are unrelated to matters that had or may have had an effect on other employee's interest in union organizing or union representation or that otherwise do not relate to whether Section 10(j) relief would be "just and proper." The subpoena likewise does not seek affidavits provided to the National Labor Relations Board that have not already been produced pursuant to the discovery order issued by the Court. If deemed necessary, Starbucks will agree to the entry of an appropriate protective order with respect to the production of any Documents for which a concern is expressed that production may interfere with, restrain, or coerce an employee in the exercise of the employee's Section 7 rights.

The *Poor* subpoenas duces tecum to employees other than Chuquillanqui contained the following requests (Jt. Exhs. (1(b)-(d) & (g)):

1. All Documents and Recordings relating to any Communications by you to, or to you from (i) any Partner employed at any Starbucks store, (ii) the Union, (iii) the NLRB, or (iv) any digital, print, radio, TV, internet-based or other media outlet concerning any of the following matters:

(a) The number of Partners (not names) at the Great Neck store who were considered to be in favor of union representation ("yes" votes) and the number of Partners who were considered not to be in favor of union representation ("no" votes) at the time the Petition was filed and each week thereafter (or whatever other interval was used) thereafter until May 3, 2022, the date the votes cast by the Partners in the election conducted by the NLRB were counted;

(b) For each Partner at the Great Neck store who was or has been considered at any time to have changed from being in favor of union representation to not being in favor of it, any statements the Partner made or things that the Partner did that factored into that determination;

(c) The number of Partners (not names) at the Great Neck store considered to be in favor of union representation and the number of Partners considered not to be in favor of union representation each week (or whatever interval has been used) from (i) the outset of organizing to the date the petition was filed and (ii) since after the votes cast by the Partners in the election conducted by the NLRB were counted on May 3, 2022 to the present.

(d) The number of Partners (not names) not employed at the Great Neck store who have communicated with the Union or any Partners employed at the Great Neck store with respect to the subject of unionization at the Great Neck store.

(e) The conduct in which Starbucks is alleged to have engaged that the Complaint alleges violated the NLRA.

(f) For each employee or former employee of Starbucks employed outside of the Great Neck store who has had any communication with You, or with others of which you were made aware, any statements they made relating to the subject of unionization, whether the employee was in favor or not in favor of union representation and the reasons for their position.

2. All Documents relating in any way to statements and information you have posted on any social media platform since December 2021 concerning union organizing at the Great Neck store, any of the conduct in which Starbucks is alleged to have engaged that the Complaint alleges violated the NLRA, and rallies, protests, strikes, forums, seminars, programs or the like involving union organizing at, or alleged unfair labor practices by, Starbucks at the Great Neck store and matters related thereto.

3. All Documents relating in any way to Communications you have had with the Union or agents, representatives, or employees of the Union concerning their putting you in contact or connecting you with any digital, print, radio, TV, internet-based or other media outlet with respect to union organizing, a union election,

and other union related matters at the Great Neck store.

4. All Documents relating in any way to Communications you have had with the Union or its agents, representatives, or employees regarding information to be provided to any digital, print, radio, TV, internet-based or other media outlet concerning union organizing, a union election and other union related matters involving the Great Neck store or Starbucks' discipline and termination of employees at the Great Neck store allegedly because of their union activities.

5. All Documents relating in any way to Communications you have had with, including interviews, information you have provided to, and articles published by, any digital, print, radio, TV, internet-based or other media outlet concerning union organizing, a union election and other union related matters involving the Great Neck store or Starbucks' discipline and termination of employees allegedly because of their union activities.

6. All Documents relating to, including copies of, any speeches, comments, remarks or responses you gave at any rallies, protests, strikes, forums, seminars, programs or the like concerning union organizing, union elections and other union related matters involving the Great Neck store or Starbucks' discipline and termination of employees allegedly because of their union activities.

7. All Documents (including but not limited to receipts, pay checks, payroll registers, general ledgers, Form 1099s, W-2s, cancelled checks, time reports, and expense reports) relating in any way to any payments made to you since August 2021 by the Union.

8. All Documents (including but not limited to receipts, pay checks, payroll registers, general ledgers, Form 1099s, W-2s, cancelled checks, time reports, and expense reports) relating in any way to any payments made to you since August 2021 by any person or entity at the request of or on behalf of the Union or for your attendance at or participation in any rally, protest, strike, forum, seminar, program or the like involving the Great Neck store in any way.

9. All Documents relating in any way to Communications you have had with the Union concerning the subject of Recording during the course of your employment at the Great Neck store, including but not limited to Documents relating to whose conversations to record; how and when to record conversations; the types of conversations to record; the purpose of recording conversations; and the circumstances under which recording would be permissible or lawful and when it would be impermissible or unlawful.

10. Documents reflecting the date and time of, and participants in (except as excluded by Instruction No. 23), virtual calls (Zoom or similar platform) and/or telephone calls to and/or from Julie Kelly, David Saff, and/or any other of the Union's agents, employees, officials, representatives, and/or officers.

11. All Documents discussing an increase and/or decline in support for the organizing campaigns at the Great Neck store.

12. All Documents sent to or received from publicly elected or appointed officials

(or their staff) relating to the organizing campaign at the Great Neck store.

13. All emails from the email account sbworkersunited@gmail.com sent since August 2021 by any Partner at the Great Neck store that reflects interest in starting a union campaign at the Great Neck store, attending union meetings, participating in a union bargaining committee, or serving as a Union representative, or that reflects support for the Union and/or fear of retaliation for engaging in union activities.

14. All Documents relating to and/or discussing reasons other than alleged coercion or retaliation by Starbucks that employees have cited as a reason for not supporting the Union.

15. All Documents and Communications relating to Your or other Partners' perception of the work environment at the Great Neck store since Joselyn Chuquillanqui separation.

16. All Documents and Communications relating to the relationships among and between Partners at the Great Neck store since Joselyn Chuquillanqui's separation.

17. All Documents and Communications relating to the work environment at the Great Neck store since the vote count on May 3, 2022.

18. All Documents and Communications relating to the relationships among and between Partners at the Great Neck store since the union campaign at the store concluded on May 3, 2022.

19. All Documents and Communications reflecting when Starbucks became aware of the Union's organizing drive at the Great Neck store.

20. All Documents and Communications relating to Your signing a union authorization card, including but not limited to questions or concerns that You expressed about the card.

The *Poor* subpoenas duces tecum to the Union and Union organizer Staff were similar to subpoenas to employees other than Chuquillanqui. (Jt. Exh. 1(e)-(f)) The *Poor* subpoena duces tecum to Chuquillanqui was the same as subpoenas to other employees except, in paragraphs 15-18,[5] the Chuquillanqui subpoena duces tecum sought the following additional information (Jt. Exh. 1(a)):

15. All documents relating to your employment with, or termination of employment from, any employer, sole proprietorship, partnership, corporation, or other entity since he termination of your employment with Starbucks, including but not limited to documents identifying or showing: the name of the entity; the

[5] Requests 19-24 of the Chuquillanqui subpoena duces tecum were the same as requests 15-20 of the subpoenas duces tecum to other employees. Herein, unless stated otherwise, references to *Poor* subpoena duces tecum requests reflect the numbering in subpoenas issued to employees other than Chuquillanqui.

location(s) at which or out of which you work or worked (street address, city, state); your application for employment; your resume; your hire date; position(s) held; your rate of pay (hourly or salary); your holiday and vacation benefits; any insurance benefits; other benefits received; and, if applicable, your termination date and the reason for your termination.

16. Without limitation, all pay stubs, Federal W-2 Wage and Tax Statement Forms since the termination of your employment with Starbucks. Federal Schedule K-1 Forms, Federal 1099-INT Forms, Federal 1099-DIV Forms, and Federal 1099-MISC Forms that you have received from any employer, sole proprietorship, partnership, corporation, or other entity since the termination of your employment with Starbucks.

17. All documents relating to your attendance at any school, college, university or other educational institution, or participation in any trade, craft or apprenticeship program or the like, since the termination of your employment with Starbucks, including but not limited to documents identifying or showing: the name and location of the institution or program; the dates of your attendance or participation; your daily and weekly schedule; any extracurricular activities in which you participate or participated; the daily and weekly hours devoted to any extracurricular activities; and the anticipated duration of your attendance at the institution or participation in the program.

18. If you have been unable or unavailable to work at any time since your termination from Starbucks, documents identifying or showing the period over which you were unable or unavailable to work and the reason for your inability or unavailability, excluding any documents containing confidential or protected health information.

Throughout the *Poor* 10(j) proceeding, the parties disputed to what extent a protective order should restrict the disclosure of information related to union organizing at the Great Neck store and other information protected by Section 7 of the Act. (*Poor* ECF Docs. 26, 44, 80, 87, 91) (*Poor 4/17/2023* minute entry) One major dispute was whether such information should be restricted to "attorneys' eyes only" or be disclosable to Starbucks managers. The court initially issued protective orders which allowed certain Starbucks managers to view such materials on a limited basis (*Poor* ECF Docs. 26, 44), but later, on July 7, 2023, restricted disclosure of Section 7 protected information to attorneys' eyes only. (*Poor* ECF Doc. 91).

On January 13, 2023, in *Poor*, the Regional petitioner filed a motion to quash the Respondent's December 2022 subpoenas based, in part, on an objection to the Respondent's receipt of information protected by the Act. (*Poor* ECF Doc. 46) Likewise, on January 25, 2023, Union counsel submitted letters notifying the court of an intent to file motions to quash the December 2022 *s*ubpoenas based, in part, on the same grounds. (*Poor* ECF Doc. 53, 54)

On January 27, 2023, in *Poor*, at a motion hearing held by Judge Cho, the Respondent agreed to withdraw certain subpoena duces tecum requests which were similar to subpoena requests quashed by Judge Sinatra Jr. in *Leslie*. (Jt. Exh. 2 - *Poor* 3/27/2023 hearing Tr. 6-7) On January 30, 2023, Starbucks withdrew requests 1(d)-(e), 6-10, and 12 from the December 2022 subpoenas duces tecum to the Union custodian of records, Staff, and former employee Wooster. Starbucks also withdrew requests 1(d)-(e), 6-10, 12, and 16-18 of the subpoena duces tecum to former employee Chuquillanqui. (*Poor* ECF Doc. 56)

On March 27, 2023, Judge Cho held a motion hearing and entered upon the docket a motion minute reflecting his rulings on motions to quash the *Poor* subpoenas duces tecum. (*Poor* ECF 3/27/2023 minute entry) (Jt. Exh. 2) Judge Cho quashed subpoena duces tecum requests 1(c), 1(f), 3, 4, 15, 16, 17, 18, 20 and narrowed requests 1(a), 1(b), 5, 11, 14. (*Poor* ECF 3/27/2023 minute entry). Of those requests, Judge Cho quashed requests 1(f), 2, 16, 18, and 20 because they did not seek materials relevant to the 10(j) proceeding. (Jt. Exh. 2 - 3/27/2023 hearing Tr. 33-37) In quashing request 1(f) and narrowing request 14, Judge Cho noted that requests not limited to the Great Neck store were irrelevant. (Jt. Exh. 2 – 3/27/2023 hearing Tr. 33, 36)

On April 17, 2023, in *Poor*, pursuant to Starbucks' motion for reconsideration, Judge Cho permitted post-election discovery from July 27 (Chuquillanqui's discharged) to September 30, 2022 as it related to chill of Great Neck employees' Section 7 activities resulting from Chuquillanqui's discharge. (*Poor* ECF Doc. 81, 86, 89) (*Poor* 4/17/2023 Judge Cho minute entry) Judge Cho further ordered that, "[b]y 4/19/2023, Respondent shall serve amended discovery demands relating to the post-termination period consistent with rulings from the 4/17/2023 conference." (*Poor* 4/17/2023 Judge Cho minute entry)

On April 19, 2023, in *Poor*, the Respondent served new subpoenas duces tecum ("April 2023 subpoenas") on the Subpoenaed Nonparties. (Jt. Exh. 2) The April 2023 subpoenas were understood to amend and limit the original December 2022 subpoenas duces tecum. (*Poor* ECF Doc. 93, 111, 117) The April 2023 subpoenas retained from the original subpoenas duces tecum paragraph 23 of the instructions and modified the December 2022 subpoenas to request only the following information (Jt. Exh. 2):

> 1. All Documents and/or Recordings relating to any Communications by you to, or to you from (i) any Partner employed at any Starbucks store, (ii) the Union, (iii) the NLRB, or (iv) any digital, print, radio, TV, internet-based or other media outlet concerning any of the following matters:
>
> a) The number of Partners (not names) at the Great Neck store who were considered to be in favor of union representation ("yes" votes) and the number of Partners who were considered not to be in favor of union representation ("no" votes) as of July 27, 2022, and each week thereafter (or whatever other interval was used) until September 30, 2022; and
>
> b) Whether Ms. Chuquillanqui's job performance, including matters relating to her compliance, or lack thereof, with Starbucks' policies and procedures, effected, or may be inferred to have effected, any Partner's interests in unionization or sentiments toward the Union;
>
> 2. All Documents from the period July 27, 2022, to September 30, 2022, relating in any way to whether the termination of Joselyn Chuquillanqui's employment had, or did not have, a "chilling" or adverse effect on Great Neck Partners' Section 7 or union activities, including, but not limited to, any Documents relating in any way to:
>
> (a) Whether Ms. Chuquillanqui's termination, or anything Ms. Chuquillanqui said or did, had any effect, or may be inferred to have had any effect, on any Partner's interests in unionization or sentiments toward the Union;

> (b) Whether Ms. Chuquillanqui's job performance, including matters relating to her compliance, or lack thereof, with Starbucks' policies and procedures, effected, or may be inferred to have effected, any Partner's interests in unionization or sentiments toward the Union; and
>
> (c) Whether Ms. Chuquillanqui was an effective union organizer, including whether her performance as a union organizer effected, or may be inferred to have effected, one way or another, any Partner's interest in unionization or sentiments toward the Union.

The Subpoenaed Nonparties did not comply with the *Poor* April 2023 subpoenas and notified the court of the same. (*Poor* ECF Doc. 93)

On May 12, 2023, ALJ Muhl issued his decision in *Starbucks Buffalo II*, JD-33-23 (2023), largely finding the *Leslie* subpoenas unlawful. In so holding, ALJ Muhl applied the Board's three-part test in *Guess?, Inc.*, 339 NLRB 432 (2003) ("*Guess?*").[6] ALJ Muhl divided the *Leslie s*ubpoena requests into five categories, finding one request in category 2 (request 9) and all the requests in categories 3 (requests 2-6, 14) and 4 (requests 7-8, 10-11, 18-21) unlawful at *Guess?* step 1 as seeking information irrelevant to the *Leslie* 10(j) proceeding. *Starbucks Buffalo II*, JD-33-23, slip op. at 13-17. *Leslie* subpoena requests 2-9 were substantially similar to the same numbered requests in the *Poor* subpoenas duces tecum and *Leslie* subpoena request 14 was substantially similar to *Poor* subpoena duces tecum request 12. After addressing individual requests in the *Leslie* subpoenas, ALJ Muhl noted that certain requests were also unlawful at *Guess?* step 1 to the extent they were overbroad, including requests for nationwide information not geographically limited to Buffalo stores. Id. slip op. at 18, fn. 35.

On June 28, 2023, in *Poor*, Starbucks filed a motion to compel the Subpoenaed Nonparties to comply with the April 2023 subpoenas and Judge Cho's March 27, 2023 discovery order as revised on April 17, 2023. (*Poor* ECF Doc. 94) Additional briefing and hearings on the matter ensued. (*Poor* ECF Doc. 94-110)

On August 23, 2023, in *Leslie*, Judge Sinatra Jr. denied motions for reconsideration to conform the court's original discovery order with ALJ Muhl's decision and stay the 10(j) proceeding pending further administrative proceedings. (*Leslie* ECF Doc. 132) Judge Sinatra Jr. further determined that dismissal of the 10(j) petition was required unless the Regional petitioner "terminated all efforts to impede or frustrate this Court's discovery order, including by termination of the *Guess?* proceeding" then before the Board upon exceptions to ALJ Muhl's decision in *Starbucks Buffalo II*, JD-33-23 (2023). (*Leslie* ECF Doc. 132 p. 8) The Regional petitioner did not terminate the administrative proceeding in *Starbucks Buffalo II* and, accordingly, Judge Sinatra Jr. dismissed the *Leslie* 10(j) petition. (*Leslie* ECF Docs. 134, 136) The Regional petitioner appealed the district court order denying motions to quash the *Leslie* subpoenas and dismissing the *Leslie* 10(j) petition. (*Leslie* ECF Doc. 135, 149)

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[6] In *Guess?*, 339 NLRB at 434, the Board described the following test to determine whether an employer's workers' compensation case deposition questioning of an employee was lawful:

> First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act.

On March 29, 2024, in *Poor*, Judge Cho issued an order largely granting Starbucks' motion to compel the Subpoenaed Nonparties to comply with the April 2023 subpoenas. (*Poor* ECF Doc. 111, 117) In so ruling, Judge Cho noted that "the criteria considered in a *Guess?* proceeding before the Board are substantially similar to the analysis the Court conducts under Rules 26 and 45 of the Federal Rules of Civil Procedure."[7] Id. at 13. Judge Cho also noted that, "this Court has repeatedly considered the privacy interests of employees that guarantee their rights under the Act." Id. at 12.

On July 8, 2024, in *Leslie*, 23-1194-CV, a three-judge panel of the Second Circuit Court of Appeals issued an order vacating and remanding Judge Sinatra Jr.'s August 23, 2023 discovery order. (*Leslie* ECF Doc. 149) The circuit court found that "the subpoena requests authorized by the district court clearly exceeded the acceptable scope contemplated by the Federal Rules." (Id. at 15) In so finding, the circuit noted that subpoenaed evidence which may suggest someone other than Starbucks was responsible for chilling organizing activity was "largely beside the point" since many of the alleged ULPs, including the retaliatory discharges of active and open union supporters, were "inherently chilling." (*Leslie* ECF Doc. 149 p. 16)

On July 12, 2024, in *Poor*, Judge Ross issued an opinion and order affirming Judge Cho's March 29, 2024 order granting Starbucks' motion to compel discovery. (*Poor* ECF Doc. 117) Therein, Judge Ross noted that Judge Cho appropriately allowed relevant discovery into causes other than ULPs for a chill of employees' Section 7 activity. (*Poor ECF* Doc. 117 p. 10)

On August 14 and 15, 2024, pursuant to stipulations of the parties, the respective district courts issued orders dismissing the *Leslie* and *Poor* 10(j) proceedings without prejudice. (*Leslie* ECF Doc. 156) (*Poor* ECF Doc. 121)

ANALYSIS

The General Counsel contends upon multiple theories that the Respondent violated Section 8(a)(1) and (4) of the Act by issuing, in the *Poor* 10(j) case, subpoenas which sought information protected from disclosure by Section 7 of the Act. Below, I address the 8(a)(1) allegation, but do not reach the 8(a)(4) allegation because it would not affect the remedy.

8(a)(1)

Applicable Legal Precedent

This is the last of three recent decisions I have issued regarding the legality of employer subpoenas in Board proceedings. See *Amazon.com Services LLC*, JD(NY)-06-24, 29-CA-297454 (March 26, 2024) ("*Amazon*") (employer's subpoenas duces tecum issued in objections case found partially unlawful); *Starbucks Corporation*, JD(NY)-18-24, 02-CA-316515 (July 29, 2024) ("*Starbucks Manhattan*") (employer lawfully issued subpoenas duces tecum in ULP case). In the first two decisions, I applied the Board's three-prong standard in *Guess?*, 339 NLRB 432

[7] Under FRCP 26(b), a court may grant a discovery request where the information sought is 1) not privileged, 2) "relevant to any party's claim or defense," and 3) "proportional to the needs of the case." Proportionality involves a consideration of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FRCP 26(b).

(2003).[8] I apply the *Guess?* standard here as well. As noted above, under *Guess?*, for a discovery request of protected information to be lawful and not violate Section 8(a)(1) of the Act, (1) the request must be relevant to the proceeding, (2) the request must not be made for an illegal objective, and (3) the discovering party's interest in obtaining protected information must outweigh employees' confidentiality interests under Section 7 of the Act. Thus, a litigation request is per se unlawful if it seeks irrelevant protected information or is sought for an illegal objective as described in footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 738, fn. 5 (1983) ("*Bill Johnson's*").

In my recent trifecta of *Guess?* cases, including this one, the respondents have argued that they cannot be liable for subpoenas because such discovery is protected by the petitioning clause of the First Amendment of the U.S. Constitution under the *Noer-Pennington* doctrine. In particular, the respondents have asserted that they cannot be held liable for reasonable based subpoenas even if those subpoenas were ultimately determined by the Board or a court to seek irrelevant evidence. See *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002) remanding case to the Board for ruling in *BE & K Construction Co.*, 351 NLRB 451 (2007) ("*BE & K*") (an unsuccessful but reasonably based lawsuit is protected by the First Amendment and cannot be a ULP even if it is retaliatory). In addressing this issue, I have observed at least three situations in which such a constitutional defense would *not* be valid. First, subpoenas would not be protected by the First Amendment if it is determined that they are not conduct incidental to direct petitioning.[9] Second, even if subpoenas are generally conduct incidental to petitioning, specific subpoenas will not be protected by the First Amendment if they are a mere "sham" and not genuine and reasonable attempts to support a litigation position.[10] *BE & K*, 536 U.S. at 525-527, 532-535. Third, subpoenas will not be protected by the First Amendment if they are exempt from such protection under footnote 5 of *Bill Johnson's*, 461 U.S. at 738, fn. 5.[11]

Subpoenas Duces Tecum

A tremendous amount of ink has been spilled addressing the propriety of substantially similar subpoenas duces tecum issued in the *Poor* and *Leslie* 10(j) cases, and I endeavor to avoid redundant and unnecessary analysis. In my opinion, the judges who presided over those

[8] In *Amazon*, I also alternatively applied the straight balancing of interests test in *National Telephone Directory Corp.*, 319 NLRB 420 (1995) ("*National Telephone*") and *Wright Electric, Inc.*, 327 NLRB 1194 (1999) ("*Wright Electric*"). The Board incorporated the *National Telephone*/*Wright Electric* balancing test in the *Guess?* standard at step 3. *Guess?*, 339 NLRB at 434.

[9] As noted in *Amazon*, JD(NY)-06-24, slip op. 10-11, the Board has left open the issue whether subpoenas are protected by the First Amendment as conduct incidental to petitioning. See *Santa Barbara News-Press*, 358 NLRB 1539, 1540-1542 (2012) incorporated by reference in 361 NLRB 903 (2014) ("*Santa Barbara*"). Certain courts have found that litigation discovery and communication between private parties regarding the same enjoy such constitutional protection. See *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 935, fn. 7 (2006); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005); *Experience Hendrix, L.L.C.*, *v. Hendrixlicensing.com, LTD*, 766 F. Supp. 2d 1122, 1146 (W.D. Wash. 2011).

[10] As noted in *Starbucks Manhattan*, JD(NY)-18-24, slip op. at 9, the Board will find subpoenas unlawful if they seek irrelevant protected information regardless of whether those subpoenas are reasonably based.

[11] As noted in *Starbucks Manhattan*, JD(NY)-18-24, slip op. at 10, fn. 7, I find it questionable whether a subpoena has an "illegal objective" simply because it would be unlawful to seek the subpoenaed information in an extrajudicial context.

cases either directly in the district courts or on appeal at the Second Circuit were best situated to determine, for the first prong of the *Guess?* analysis, the relevance of subpoenaed information.[12]

In *Poor*, on March 27, 2023, Judge Cho quashed December 2022 subpoena duces tecum requests 1(f), 2, 16, 18, and 20 because they sought information irrelevant to the 10(j) proceeding. Judge Cho also found *Poor* December 2022 subpoena duces tecum request 14 overbroad and irrelevant to the extent it sought nationwide information not geographically limited to the Great Neck store. Accordingly, under *Guess?* at step 1, December 2022 subpoenas duces tecum requests 1(f), 2, 14, 16, 18, and 20 violated Section 8(a)(1) of the Act.

In *Leslie,* on August 23, 2023, the Second Circuit noted broadly that certain ULPs, including the retaliatory discharge of active and open union supporters, are inherently chilling and, therefore, whether non-ULP factors further contributed to chill was largely "beside the point" (i.e., irrelevant). This ruling effectively rejected the Respondent's primary justification for its subpoena requests in *Poor* and *Leslie* (i.e., whether injunctive relief was "just and proper" if employees' union activity was chilled for reasons other than its ULPs). Note that the Second Circuit described ULPs alleged in both *Poor* and *Leslie*, such as the discharge of active and open Union supporters (e.g., Chuquillanqui), as having an "inherent" chilling effect rather than a "presumptive" chilling effect. A presumptive chill may be rebutted through discovery while an inherent chill may not.

I understand that the Second Circuit found the *Leslie* subpoenas overbroad and remanded the matter back to the district court to narrow the discovery order, thereby suggesting that the circuit court perceived the *Leslie* subpoenas as partially relevant and partially irrelevant. However, after reading the briefs Starbucks filed in *Poor* (*Poor* ECF Docs. 64, 65, 102, 104, 108, 115)*, Leslie* (*Leslie* ECF Docs. 19, 45-47, 56, 59, 114), *Starbucks Buffalo II*, and this case, it is not clear to me that the Respondent has articulated any basis of relevance for its subpoena duces tecum requests other than that which the Second Circuit rejected. Thus, nearly all the *Poor* subpoena duces tecum requests violated Section 8(a)(1) of the Act.[13]

I am also mindful that, unlike the Second Circuit, the district courts in *Leslie* and *Poor* did not reject Starbucks' rational for discovery or completely quash subpoenas duces tecum on grounds of relevance. In *Poor*, the district ordered the Subpoenaed Nonparties to comply with

[12] The Respondent contends that the Board has no jurisdiction or authority to rule on court authorized subpoenas and, rather, the district court alone must determine the proper scope of discovery under Rule 26 of the Federal Rules of Civil Procedure. However, the Board has primary jurisdiction to determine what is or is not a ULP. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). Further, to the extent I rely on determinations made by the courts in quashing and narrowing certain subpoena requests, I note that Judge Cho (*Poor* ECF Doc. 111 p. 13) and the Second Circuit (*Leslie* ECF Doc. 149 p. 14) applied the Federal Rules of Civil Procedure, including Rule 26.

[13] I do not deem it necessary to scour the *Poor* subpoenas duces tecum, including the April 2023 subpoenas, to determine what portions, if any, sought relevant information as it would not affect the remedy. The *Poor* and *Leslie* 10(j) proceedings have both been withdrawn and, accordingly, the remedy here does not include an order directing the Respondent to withdraw specific subpoena requests. However, as noted below, I do find certain requests lawful because they do not appear to seek information regarding employees' Section 7 activity.

the April 2023 subpoenas duces tecum. However, the Second Circuit is the higher court and the district courts handling *Poor* and *Leslie* fall within Second Circuit jurisdiction.[14]

The Respondent's reliance on instruction 23 of the *Poor* subpoena duces tecum is unavailing. As noted by the Second Circuit in addressing a near identical instruction in *Leslie*, "the subpoenas' general name redaction clause paradoxically instructs respondents to produce names if they inform the 'just and proper' inquiry, which is precisely what Starbucks claims its requests were designed to do and the purpose for which the district court authorized them." (*Leslie* ECF Doc. 149) Likewise, in *Starbucks Buffalo II*, slip op. at 12, ALJ Muhl found that exceptions to the same instruction swallowed any allowance for redaction. I agree with the Second Circuit and ALJ Muhl, and the same logic applies to the *Poor* subpoenas duces tecum.

Likewise, the Respondent cannot successfully rely on the protective orders which were adopted by the district court in *Poor*. The protective orders would be a factor to consider at step 3 of the *Guess?* analysis to determine whether the Respondent's interest in subpoenaing relevant information outweighed employees' confidentiality interests, but are not a factor at step 1 where the only issue is whether the subpoenas sought relevant evidence.

I understand that the Respondents has claimed the *Poor* subpoenas were reasonably based and protected by the First Amendment *even if* a court ultimately determined that such requests sought information irrelevant to the 10(j) proceeding. In my opinion, the Respondent's position in this regard is far from frivolous. Nevertheless, under *Guess?*, regardless of any constitutional protection, the Board will find per se unlawful the attempted litigation discovery of Section 7 protected information if that information is irrelevant to the proceeding in which it is sought. Whether *Guess?* findings of statutory liability ultimately clash with First Amendment constitutional protection as interpreted by the Supreme Court in such decisions as *Bill Johnson's*, 461 U.S. 731 (1983) and *BE & K*, 536 U.S. 516 (2002) will be determined at a higher pay grade by the Board and the courts.

Having found the *Poor* subpoenas duces tecum unlawful at *Guess?* prong 1 as seeking irrelevant information protected from disclosure by Section 7, I need not proceed to *Guess?* prongs 2 or 3 (i.e., whether certain subpoena requests had an illegal objective or whether the Respondent proved its need for the information outweighed employees' Section 7 confidentiality interest). However, for clarity, I note that I do not adopt the General Counsel's contention that certain *Poor* subpoena requests had an "illegal objective." First, for reasons articulated in

[14] Independent of any court determination, in *Starbucks Buffalo II*, slip op. 13-16, ALJ Muhl found *Leslie* subpoena requests 2-9 and 14 irrelevant to the 10(j) proceeding, and I find substantially similar *Poor* December 2022 subpoena duces tecum requests 2-9 and 12 irrelevant and unlawful for the reasons articulated by ALJ Muhl. I also find *Poor* December 2022 subpoena duces tecum request 1(e) irrelevant and unlawful as it only sought materials relevant to "reasonable cause," which was not the subject to discovery. I find *Poor* subpoena duces tecum requests 1(e), 2-9, and 12 irrelevant and unlawful even though, as the Respondent notes, the Eastern District of New York "broadly construes Rule 26 [of the Federal Rules of Civil Procedure] to include 'any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.' *Gilead Scis., Inc. v. Safe Chain Sols. LLC,* No. 21-CV-4106, 2024 U.S. Dist. LEXIS 35416, *21 (E.D.N.Y.)." (R. Brf. p. 26) Although requests 15-18 of the *Poor* subpoena duces tecum to Chuquillanqui also sought irrelevant information regarding her employment and other activities after being discharged by Starbucks, I do not find those requests unlawful because they do not appear to seek information regarding Section 7 activity.

Starbucks Manhattan, JD(NY)-18-24, slip op. at 19-21, I do not adopt the General Counsel's argument that *Poor* subpoena request 1(e) had an "illegal objective" because "Section 102.118[(a)] of the Board's Rules and Regulations prohibits the disclosure of documents in the General Counsel's possession without the consent of the General Counsel." (G.C. Brf. p. 25) The General Counsel effectively requests that I extend the Board's holding in *Santa Barbara News-Press*, 35 NLRB 1539, 1540-1542 (2012) (*"Santa Barbara*") that subpoena requests have an illegal objective in seeking *Jencks* statements, as defined and governed by Board Rule 102.118(e) and (g), to include the broader category of "files, documents, reports, memorandum or records of the Board or the General Counsel" covered by Board Rule 102.118(a). In my opinion, as discussed in *Starbucks Manhattan*, JD(NY)-18-24, slip op. at 19-21, the logic of *Santa Barbara* cannot necessarily be applied at this time to find unlawful subpoenas to a nongovernmental person or entity for certain documents simply because those documents are also in the possession of the General Counsel.

Second, for reasons articulated in *Starbucks Manhattan*, JD(NY)-18-24, slip op.10, fn. 8, I do not adopt the General Counsel's argument that subpoena requests 7 and 8 had illegal objectives in seeking documents relating to payments the employees received from or on behalf of the Union. The General Counsel contends that the subpoena requests were "issued with the illegal objective of surveilling employees' dealings with and relationship with the Union." (G.C. Brf. p. 30) However, as discussed in *Starbucks Manhattan*, JD(NY)-18-24, slip op.10, fn. 8, that a request for information would violate the Act in an extrajudicial context does not necessarily mean the same request has an illegal objective in the context of litigation. I note also that a subpoena, as a potential unlawful interrogation, would not logically have an objective any more illegal than the type of retaliatory lawsuit which does not violate the Act.[15] See *BE & K*, 536 U.S. 516 (2002); *BE & K*, 351 NLRB 451 (2007); *Chauffeurs, Teamsters and Helpers Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 834-835 (1991).

Third, for reasons articulated in *Starbucks Manhattan*, JD(NY)-18-24, slip op. 10, fn. 8, I do not adopt the General Counsel's argument that subpoena request 20 had an "illegal objective" in seeking "[a]ll documents and communications relating to Your signing a union authorization card, including but not limited to questions or concerns that You expressed about the card." (G.C. Brf. p. 34-35) The General Counsel relies on *Wright Electric,* 337 NLRB 1194, 1195 (1999). However, as discussed in *Starbucks Manhattan*, JD(NY)-18-24, slip op. 10, fn. 8, it is not clear to me whether *Wright Electric* is still good law as it pertains to an interpretation of an "illegal objective" within the meaning of *Bill Johnson's* footnote 5.

Subpoenas Ad Testificandum

The General Counsel asserts that the *Poor* December 2022 subpoenas ad testificandum for the deposition testimony of the Subpoenaed Nonparties violated Section 8(a)(1) even though the Respondent did not actually proffer any deposition questions to the subpoenaed individuals. In support of this position, the General Counsel asserts that "the Board should extend *Guess?[ ]* and presume the deposition questions will be based on the unlawful requests for records or

[15] The Board's 8(a)(1) interrogation analysis considers, among other factors, the "nature of the information sought, the relevant consideration [being] whether the questioner appeared to be seeking information upon which to take action against individual employees." *John W. Hancock, Jr.*, 337 NLRB 1223, 1224 (2002) citing *Bourne v. NLRB*, 332 F.2 47, 48 (2d Cir. 1964). If the purpose of a lawsuit filed to retaliate against employees for Section 7 activity does not constitute an "illegal objective," the litigation questioning of an employee regarding Section 7 activity would have no "illegal objective" simply because the information is sought for the purpose of potential retaliation.

documents and the responses received therefrom." (G.C. Brf. p. 44) Likewise, the Union asserts that it "is reasonable to assume that the Employer intends to question employees about the voluminous items it requested pursuant to the 2022 and 2023 [subpoenas duces tecum] . . .." (Union Brf. p. 62, fn. 77) As I do not believe there is a valid basis for a finding the mere issuance of a court authorized subpoena ad testificandum is unlawful without evidence that deponents were asked coercive questions about their Section 7 activity, I dismiss this allegation and leave it to the Board to, if deemed appropriate, extend *Guess?* as proposed by the General Counsel.

8(a)(4)

The General Counsel contends that I should analyze the *Poor* subpoenas under *Wright* Line, 251 NLRB 1083 (1980) to find that "the Respondent's subpoena's also violated Section 8(a)(4) of the Act, because Respondent issued them to retaliate against former employees and Union Agents who testified for the General Counsel at the administrative hearing, thereby inhibiting employee participation in Board proceedings."[16] (G.C. Brf. p. 39) In the interest of administrative efficiency, I decline to do so. Among other concerns regarding the allegation, it is unclear to me whether an 8(a)(4) violation requires a finding of an adverse employment action and/or whether subpoenas constitute such an action. However, as a more practical matter, there is no adverse action to remedy since the *Poor* 10(j) petition has been dismissed pursuant to a stipulation of the parties. Under the circumstances, having already found the *Poor* subpoenas unlawful as a violation of Section 8(a)(1), I deem it unnecessary to reach the alleged violation of Section 8(a)(4).[17]

CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(a)(1) of the Act by, in *Poor v. Starbucks Corp.*, 22-CV-7255-ARR-JRC (E.D.N.Y), issuing subpoenas duces tecum to current and former employees and to representatives of the Union.

3. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I will order the Respondent to reimburse, with interest, the individuals upon whom the unlawful subpoenas duces tecum were served for all legal and other expenses incurred, to date

[16] Section 8(a)(4) provides that it shall be a ULP for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

[17] In support of the 8(a)(4) allegation, the General Counsel seeks evidentiary sanctions as a remedy for the Respondent's refusal to comply with a subpoena duces tecum. However, since I do not pass on the 8(a)(4) allegation, I likewise do not pass on the General Counsel's request for sanctions.

and in the future, in defending against those requests. Interest on that amount is to be paid at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

I find that the Board's traditional remedies adequately address the Respondent's unfair labor practices and decline the requests of the General Counsel for additional remedies. I also find it unnecessary to order the Respondent to withdraw any discovery requests since the *Poor* 10(j) case has been dismissed and no discovery requests are outstanding.

ORDER

The Respondent, Starbucks Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing subpoenas which coercively seek information about employees' union and other Section 7 activity; and

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

2. Take the following actions necessary to effectuate the policies of the Act.

(c) Reimburse the individuals upon whom the unlawful discovery requests were served for all legal and other expenses incurred, to date and in the future, in defending against those requests in the manner set forth in the remedy section of this decision.

(d) Post at its Great Neck, New York store, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper

[18] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

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

notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at its Great Neck, New York store at any time since December 23, 2022.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated: Washington, D.C., September 18, 2024.

Benjamin W. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT issue subpoenas in a lawsuit which coercively seek information about your union and other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse, with interest, the individuals upon whom we served unlawful subpoenas for all legal and other expenses incurred, to date and in the future, in defending against those subpoena requests.

STARBUCKS CORPORATION
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

26 Federal Plaza #364, New York, NY 11278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-309779 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (212) 264-0300.

23-1194-cv
Leslie v. Starbucks Corp.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of May, two thousand twenty-four.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
JOHN M. WALKER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

LINDA M. LESLIE, REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner-Counter-Defendant-Appellant,

v. 23-1194-cv

STARBUCKS CORP.,

Respondent-Counter-Claimant-Appellee.

For Petitioner-Counter-Defendant-Appellant: DAVID P. BOEHM, Trial Attorney (Madeline Y. Corkett, Trial Attorney, Paul A. Thomas, Supervisory Trial Attorney, Kevin P. Flanagan, Laura T. Vazquez, Deputy Assistant General Counsels, Robert N. Oddis, Assistant General Counsel, Dawn L. Goldstein,

Richard J. Lussier, Deputy Associate General Counsels, Nancy E. Kessler Platt, Richard A. Bock, Associate General Counsels, Peter Sung Ohr, Deputy General Counsel, Jennifer A. Abruzzo, General Counsel, *on the brief*), National Labor Relations Board, Washington, DC.

For Respondent-Counter-Claimant-Appellee: SARAH M. HARRIS (Lisa S. Blatt, Mark S. Storslee, Tyler J. Becker, Edward L. Pickup *on the brief*), Williams & Connolly LLP, Washington, DC.

Jeffrey S. Hiller, David A. Kadela (*on the brief*), Littler Mendelson, PC, Columbus, OH.

Adam-Paul Tuzzo (*on the brief*), Littler Mendelson PC, Milwaukee, WI.

Appeal from a judgment of the United States District Court for the Western District of New York (Sinatra, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **VACATED** and **REMANDED**.

Petitioner-Counter-Defendant-Appellant Linda M. Leslie ("the Director"), Regional Director of the Third Region of the National Labor Relations Board ("NLRB"), appeals from the August 24, 2023 judgment of the United States District Court for the Western District of New York (Sinatra, *J.*) dismissing the Director's petition for temporary injunctive relief pursuant to 29 U.S.C. § 160(j), Section 10(j) of the National Labor Relations Act ("NLRA"), against Respondent-Counter-Claimant-Appellee Starbucks Corporation ("Starbucks"). On appeal, the Director argues principally that the district court erred in: (1) permitting expedited discovery; (2) denying motions to quash or modify certain subpoenas served on Workers United ("the Union") and Starbucks' current and former employees; and (3) dismissing the petition. We assume the parties' familiarity

with the underlying facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to vacate and remand.

I. Background

A. Expedited Discovery

The Director's Section 10(j) petition, filed on June 21, 2022, seeks temporary relief in connection with a consolidated administrative complaint against Starbucks that the NLRB issued approximately one month earlier. The underlying complaint resulted from an investigation into 35 charges filed by the Union, which was elected as representative of employees at several Starbucks cafes in or around Buffalo and Rochester (collectively, the "Buffalo area") between December 2021 and July 2022. The since-amended complaint alleges that Starbucks engaged in numerous NLRA violations from August 2021, when the Buffalo-area organizing campaign became public, through July 2022.[1] "[P]ending final disposition of the matters . . . before the Board," the petition requests temporary injunctive relief to require that Starbucks rehire seven discharged Union supporters in the Buffalo area; reopen a closed Buffalo-area mall kiosk where workers supported unionizing; bargain with the Union at a Buffalo-area store where alleged unfair labor practices scuttled an election effort; and bargain with the Union at a different Buffalo-area store over any new policies. A55–59. The Director also seeks a nationwide cease and desist order. *Id.*

More than 2,000 pages of affidavits and documentary evidence were submitted with the petition, which the Director claimed sufficient to provide "reasonable cause" to believe that

[1] Specifically, the Director alleges that Starbucks "manipulate[d] employees to vote against the Union" by "threaten[ing] and interrogat[ing] them"; "closed stores with active organizing drives, withdrew benefits, and strictly enforced rules it had previously ignored"; "swarmed Buffalo-area stores" with "[d]ozens of out-of-state managers" who "surveil[led] employee conduct and discourage[d] union activity"; "tried inducing employees to vote in its favor by promising benefits and raising wages"; and "discharged seven organizers at five stores," among other labor violations. SSA4.

Starbucks had "committed the unfair labor practices alleged." SSA5. The Director contended that "interim relief is 'just and proper' because [Starbucks] will otherwise accomplish its unlawful objective of chilling union support, both in Buffalo and nationwide." *Id*. Starbucks opposed the Director's bid to have the petition decided on the attached affidavits. Instead, the company urged the district court either to grant expedited discovery, in the form of depositions and/or an evidentiary hearing, or to stay the case until the administrative record was developed in proceedings before an administrative law judge ("ALJ") slated to begin within three weeks. SSA144, 147, 153. In late June 2022, the district court granted Starbucks' request for "limited, expedited discovery" but shortly thereafter stayed its commencement given the imminence of ALJ proceedings. SA3.

In late August 2022, after the NLRB had finished presenting its three-week-long case-in-chief before the ALJ, Starbucks notified the court that even following the completion of its own three-week-long case-in-chief, the company would still need discovery in the Section 10(j) proceedings, primarily as to whether injunctive relief would be just and proper. Starbucks alerted the district court to the fact that the Board had put on evidence as to whether relief would be just and proper during the ALJ proceedings, over the company's objection. Starbucks also complained that the ALJ had allowed the Board to subpoena Starbucks for documents but had refused Starbucks' efforts to subpoena witnesses, discharged employees, the Union, and the NLRB for documents. On September 7, 2022, the district court lifted the discovery stay and directed Starbucks to serve any document subpoenas.

B. The Subpoenas

In September 2022, Starbucks issued 22 subpoenas for document discovery on various nonparties to the litigation: the Union custodian of records; two Union agents; and 19 Starbucks'

employees or former employees who had testified during the agency's case-in-chief before the ALJ. A375. The subpoenas sought documents in 21 discrete categories from the Union and 27 discrete categories from the current and former employees, spanning "the period from August 2021 to the present," SSA355, SSA366, and thus including not only the union-organizing period at issue in the underlying ALJ proceedings but also the period after the Board had filed its complaint. *See* SSA349–59 (subpoena to employee), SSA360–70 (subpoena to Union custodian).

The subpoenas were nationwide in scope, seeking, for example: "[a]ll emails from the email account sbworkersunited@gmail.com sent since August 2021" by "*any* Starbucks employee that reflects interest in starting a union campaign at *any* Starbucks store," SSA359 ¶ 16, SSA370 ¶ 14 (emphasis added); "any statements" made by employees "*outside* of Buffalo" who communicated with the Union or any Buffalo-area employees "relating to the subject of unionization, whether in Buffalo or Rochester, at their store, *or elsewhere*," SSA368 ¶ 1(f) (emphasis added), *see also* SSA357 ¶ 1(f); and documents "relating to changes to the timing of filing election petitions at *any* Starbucks store," SSA359 ¶ 15, SSA370 ¶ 13 (emphasis added).

The subpoenas specifically requested the names of employees engaged in union activity, including those employees "considered at any time to have changed from being in favor [of] union representation to not being in favor of it" in Buffalo-area stores where election petitions were filed, SSA356 ¶ 1(b), SSA367 ¶ 1(b), Buffalo-area stores where election petitions were not filed, SSA357 ¶ 1(d), SSA368 ¶ 1(d), and locations outside of the Buffalo area, SSA357 ¶ 1(f), SSA368 ¶ 1(f). They also requested documents likely to feature the individual names of Starbucks employees, including those "relating in any way to Communications you have had with the Union" regarding media appearances, SSA357–58 ¶¶ 3–5, *see also* SSA368–69 ¶¶ 3–5; "discussing an increase and/or decline in support for the organizing campaigns" in the Buffalo-area stores,

SSA359 ¶ 13, SSA370 ¶ 11; and "relating to and/or discussing reasons other than alleged retaliation that employees have cited as a reason for not supporting the Union," SSA359 ¶ 17, *see also* SSA370 ¶ 15. The subpoenas to current and former employees specifically sought documents regarding their non-Starbucks employment and education, including tax forms, daily and weekly schedules, extracurricular activities, and job applications, *see* SSA359 ¶¶ 18–21.

The NLRB and the Union moved to quash the subpoenas or for protective orders. The agency argued that the "excessive," "unnecessary" subpoenas were "largely and inappropriately directed at individual government witnesses" and that it was "unable to identify a single instance in which a court has permitted a Respondent to subpoena government witnesses directly for documents in a Section 10(j) proceeding." SSA209, 211 & n.3. The agency also highlighted that it had completed its case-in-chief before the ALJ—meaning Starbucks had "already been given a full and fair opportunity to cross-examine Petitioner's witnesses and examine Petitioner's documentary evidence." SSA209. The Union independently argued that the subpoenas were unduly burdensome and demanded "protected information" under the "employee-union representative privilege." Workers United Motion to Quash, *Leslie v. Starbucks Corp.*, No. 22-cv-478, ECF No. 42 at 4–5. Moreover, the Union argued that most of the requested documents pertained to "Starbucks workers engaging in legally-protected organizing activity," which NLRB precedents required shielding from disclosure.[2] *Id.* at 5.

[2] Although the subpoenas contained a clause permitting respondents to redact names so as "[t]o ensure that the requests . . . are not construed to have the purpose or effect of interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the [NLRA]," the clause contained an exception to redaction "where a Document reflects or could be construed to reflect matters that effected the employee's interest . . . in union organizing or union representation or where the Document otherwise relates to whether Section 10(j) relief would be just and proper, as referenced [in] testimony at the hearing on the Complaint." *See, e.g.*, SSA356.

The district court granted in part and denied in part the motions to quash the subpoenas or for protective orders. *Leslie v. Starbucks Corp.*, No. 22-cv-478, 2022 WL 7702642 (W.D.N.Y. Sept. 23, 2022), *reconsideration denied*, 2023 WL 1969520 (W.D.N.Y. Jan. 25, 2023). The court rejected blanket arguments rooted in privilege and instead instructed that privilege claims be raised via a particularized privilege log. *Id.* at *2. The court then summarily quashed subpoenas as to fifteen categories of information because they risked unnecessary delay, citing an intent to balance "Respondent's need for the requested documents with Petitioner's need to proceed expeditiously (and the burden of subpoena compliance generally)." *Id.* The district court otherwise declined to quash subpoenas as to nine categories of requested information, allowed for specific name redactions but not redaction of store identification information as to one category, and struck parts of two categories.[3] *Id.* at *3, A410.

C. Subsequent Court and ALJ Proceedings

The Union and current and former employees refused to comply with the subpoenas; instead, on October 5, 2022, the Union filed charges with the NLRB, claiming that the subpoenas

[3] Specifically, the court allowed for name redactions but not redaction of store identification information as to a request for "any statements" by employees "outside of [northern New York stores]" regarding "whether they were in favor or not in favor of union representation and the reasons for their position." *See* SSA357 ¶1 (f), SSA368 ¶ 1(f). The district court also struck parts of two requests that sought communications between the Union and employees regarding media publicity about "union related matters at Starbucks stores around the country," while allowing the parts that went to "union related matters involving the [northern New York] stores." *See* SSA357–58 ¶¶ 4–5, SSA368–69 ¶¶ 4–5. Notably, the district court did not provide for redactions or a protective order as to ¶¶ 1(b) and 1(d), which, like ¶1 (f), sought the names of specific employees who had made statements regarding union support. *See* SSA356–57, SSA367–68. Nor did the district court quash or modify requests for other documents likely to contain the names of employees, including communications regarding media contacts, documents discussing the dynamics of union support in the Buffalo area, documents related to changes to the timing of filing election petitions at any store, and emails from employees to the Union email account. *See* SA13–15 (denying requests to quash and for protective orders as to SSA357–59 ¶¶ 3, 13, 15–17 and SSA368–70 ¶¶ 3, 11, 13–15).

were unfair labor practices. The Union alleged that, in requesting such expansive document discovery from itself and Starbucks employees, Starbucks had violated §§ 8(a)(1) and 8(a)(4) of the NLRA.[4] Starbucks then moved the district court to find the Union and the subpoenaed nonparties in contempt and to sanction them pursuant to Federal Rule of Civil Procedure 45(g). On December 15, 2022, the NLRB General Counsel authorized the Regional Director to file an administrative complaint against Starbucks over the Union's charges regarding the subpoenas. *See* Compl., *Starbucks Corp.*, N.L.R.B. Case No. 03-CA-304675; *see also* Workers United Status Report, *Leslie v. Starbucks Corp.*, 22-cv-478, ECF No. 71-1. The agency separately sought a writ of injunction from this Court directing Starbucks to withdraw the subpoenas. *See In re: N.L.R.B.*, 23-120, ECF No. 1 (2d Cir. 2023) (filed Jan. 27, 2023). Meanwhile the Union sought its own writ from this Court, requesting mandamus to vacate the district court discovery order. *In re: Workers United*, 22-3229, ECF No. 1 (2d Cir. 2022) (filed Dec. 28, 2022).

On March 1, 2023, an ALJ ruled on the complaint underlying the Section 10(j) petition, deciding that Starbucks had committed labor violations during its response to Buffalo-area organizing.[5] *See Starbucks Corp.*, N.L.R.B. No. 03-CA-285671, et al., JD-17-23 (2023) (not reported in Board volumes). As a remedy, the ALJ ordered the Buffalo-area relief the agency had sought

[4] Under NLRB precedent, subpoenas can amount to unfair labor practices if irrelevant, if aimed at an illegal objective, or if the employees' confidentiality interests under Section 7 outweigh the employer's interest in obtaining the information. *See Guess?, Inc.*, 339 N.L.R.B. 432, 434 (2003).

[5] The ALJ found, among other things, that Starbucks: violated Section 8(a)(1) of the NLRA by surveilling, interrogating, restricting, threatening and "otherwise coercing employees from engaging in union or other protected activities"; violated Section 8(a)(3) by "enforcing rules selectively" and "retaliating" against union supporters; violated Section 8(a)(4) by retaliating against employees for giving testimony under the Act; and violated Section 8(a)(5) by "refusing to bargain collectively and in good faith with the Union as the collective-bargaining representative" of some stores. *Starbucks Corp.*, N.L.R.B. No. 03-CA-285671, et al., JD-17-23 (2023), at 2–3.

on a temporary basis from the district court—including, among other things, reinstatement of the fired workers, reopening the closed kiosk store, and the instatement of two bargaining orders—as well as a nationwide cease and desist order.[6] *Id.* at 195–96.

On May 9, 2023, this Circuit denied the writ petitions filed by the NLRB and the Union, concluding that the petitioners had not demonstrated extraordinary relief was necessary. None of the subpoenaed nonparties "lack[ed] an adequate, alternative means of obtaining relief" because they could yet "appeal either a civil or criminal contempt sanction if they refuse[d] to comply with the subpoenas." *In re: Workers United*, No. 22-3229, ECF No. 77 (2d Cir. May 9, 2023). We added that "in light of the recent decision by an [ALJ] finding that Starbucks violated § 8 of the National Labor Relations Act, it would be more appropriate for Petitioners to seek reconsideration of the district court's discovery order, which may be subject to material alteration as a result of the administrative factual findings and legal conclusions." *Id.*

Three days later, on May 12, a different ALJ concluded that all but two of Starbucks' subpoena requests in the Section 10(j) proceeding violated Section 8(a)(1) pursuant to *Guess?, Inc.*, 339 N.L.R.B. 432, 434 (2003).[7] *See Starbucks Corp.*, N.L.R.B. No. 03-CA-304675, JD-33-23

[6] Starbucks timely appealed that ruling, and the appeal is now pending before the Board. *See* https://www.nlrb.gov/case/03-CA-285671 (March 1, 2023 Order Transferring Proceeding to the Board).

[7] According to the ALJ, most of the subpoena demands that the district court had permitted were for relevant information. However, even assuming they were not aimed at an illegal objective, the ALJ determined that the employees' protected confidentiality interests outweighed Starbucks' interest in obtaining the relevant documents, particularly those containing names of specific employees. A382–84. The ALJ separately found that some requests permitted by the district court had an illegal objective, citing agency regulations that prohibit the disclosure of documents in the General Counsel's possession without the consent of the General Counsel. A389. In addition, the ALJ found that requests for employment and educational information, which the district court had quashed, and requests for documents as to publicity regarding union activities, which the district court had not quashed, were irrelevant to the Section 10(j) inquiry of "whether the General Counsel has established reasonable cause to believe that unfair labor practices have occurred or [whether] injunctive relief is just and proper because the unlawful conduct caused

(2023) (not reported in Board volumes); A372–392. The ALJ observed that "this is the first Board case" involving allegations that a respondent seeking to defend itself against a Section 10(j) petition made discovery requests that in and of themselves violated the NLRA. A378. Because the Union did not file the unfair labor practice charge over Starbucks' discovery requests until after the district court had acted on them, the ALJ further opined that "the [NLRB] General Counsel and the Union . . . are utilizing this unfair labor practice case to effectively challenge the district court's discovery rulings"—in other words, "not just as a shield to protect employee confidentiality interests, but as a sword to weaken the Respondent's 10(j) defense and obtain an injunction." A378.

Back before the district court, the NLRB in June 2023 urged it to reconsider the discovery orders in light of this Court's recognition that the ALJ decision on the original unfair labor practice charges could materially alter the appropriate scope of discovery. The Union similarly requested reconsideration, highlighting the second ALJ's findings that all but two of the subpoena requests had violated the NLRA. Starbucks pressed the court to grant its motions for contempt sanctions, given the nonparties' refusal to comply with the subpoenas. That same month, Starbucks filed a counterclaim against the NLRB, alleging that the agency's decision to issue a *Guess?* complaint over the subpoenas violated the company's First Amendment right to petition the government and its Fifth Amendment right to due process. Starbucks Countercl., *Leslie v. Starbucks Corp.*, No. 22-cv-478 (W.D.N.Y. June 16, 2023), ECF No. 107.

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irreparable harm." A387–88. The only two requests that the ALJ concluded were not unfair labor practices were those seeking information as to the numbers (but not the names) of employees supporting union efforts in the Buffalo region, which the district court had not quashed. A373.

At an August 2023 hearing, the district court refused to reconsider its discovery orders, finding no controlling decisions or data that it had overlooked. *Leslie v. Starbucks Corp.*, No. 22-cv-478, 2023 WL 5431800, at *5 (W.D.N.Y. Aug. 23, 2023); SA35; A494–95. Although recognizing that this Circuit "thought that the ALJ's decision may obviate the need for discovery on the reasonable cause prong of the 10(j) standard," the district court determined that the authorized discovery "relates to the just and proper prong" and, thus, that the ALJ decision on the merits of the underlying complaint "doesn't impact the discovery order." A495. Moreover, because "[t]he NLRB . . . may not decide for itself what discovery is permissible," the district court held that it would dismiss the Section 10(j) petition unless the Director "certifie[d], by September 1, 2023, that she has terminated all efforts to impede or frustrate this Court's discovery order, including by termination of the *Guess?* proceeding." 2023 WL 5431800, at *4. The district court framed the dismissal as a Rule 37 sanction. *Id.* (citing Fed. R. Civ. P. 37). When the NLRB declined to provide such a certification, its petition was dismissed.

II. Analysis

We review each of the issues on appeal—whether the district court properly allowed expedited discovery; denied motions to quash subpoenas served on the Union and Starbucks' current and former employees; and dismissed the Section 10(j) petition as a sanction against the Board—for abuse of discretion, as each issue concerns the district court's "broad discretion to manage discovery." *Kyros Law P.C. v. World Wrestling Ent., Inc.*, 78 F.4th 532, 545 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 822 (2024).[8]

[8] As district courts have noted, "the Second Circuit has yet to articulate a standard for determining whether to allow expedited discovery." *R.R. Donnelley & Sons Co. v. Marino*, 505 F. Supp. 3d 194, 209 (W.D.N.Y. 2020) (quoting *Schneiderman v. Griepp*, No. 17-cv-3706, 2017 WL 3129764, at *1 (E.D.N.Y. July 20, 2017)). The Federal Rules likewise do not elaborate a standard. *See* Fed. R. Civ. P. 26(d). As

As to Section 10(j) itself, this NLRA provision authorizes the NLRB to petition district courts for "appropriate temporary relief or restraining order" when the agency has filed a complaint over alleged unfair labor practice charges but has not obtained a final judgment in the ensuing agency proceedings. 29 U.S.C. § 160(j). The district court may then "grant to the Board such temporary relief or restraining order as it deems just and proper." *Id.* Our Court applies a "two-prong standard for § 10(j) injunctive relief [that] is well-established." *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 141 (2d Cir. 2013), *cert. denied*, 574 U.S. 1066 (2014). First, "[i]n considering whether to grant a § 10(j) injunction, '[t]he district court does not need to make a final determination whether the conduct in question constitutes an unfair labor practice; reasonable cause to support such a conclusion is sufficient.'" *Id.* (quoting *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 365 (2d Cir. 2001)). Second, "the court must find that the requested relief is just and proper," a determination which "we have recognized . . . incorporates elements of the four-part standard for preliminary injunctions that applies in other contexts." *Id.* (quoting *Hoffman*, 247 F.3d at 365); *see generally*, *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

A. Expedited Discovery

At the start, the district court did not abuse its discretion by allowing "limited, expedited discovery." *Leslie v. Starbucks Corp.*, No. 22-cv-478, 2022 WL 2708915, at *2 (W.D.N.Y. June 27, 2022). To be sure, district courts in this Circuit have decided Section 10(j) petitions numerous

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then-District Judge Lynch once explained, "it seems that the intention of the rule-maker was to confide the matter to the Court's discretion." *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005). *See also Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007) (Chin, *J.*). We see no need to declare a specific standard and instead apply the general abuse of discretion standard that we already apply to discovery-related decisions. *See Kyros Law P.C.*, 78 F.4th at 545.

times without undertaking discovery.[9] But this in no way renders it an abuse of discretion to allow limited expedited discovery as the district court did here, and particularly (though by no means exclusively) when the administrative record is incomplete.[10]

The just and proper inquiry that was the primary focus of the district court preserves "equitable principles" by applying them "in the context of federal labor laws," *Kreisberg*, 732 F.3d at 143 (quoting *Hoffman*, 247 F.3d at 368), so as "to further the policies of the [NLRA]," *Hoffman,* 247 F.3d at 368 (quoting *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975)). In this context, where we typically grant relief when "necessary to prevent irreparable harm or to preserve the status quo," the irreparable harm inquiry probes "whether the employees' collective bargaining rights may be undermined by the . . . [asserted] unfair labor practices and whether any further delay may impair or undermine such bargaining in the future." *Kreisberg*, 732 F.3d at 142 (quoting *Hoffman*, 247 F.3d at 368–69). "[T]he appropriate status quo in need of preservation is that which was in existence before the unfair labor practice occurred." *Id.* at 142–43 (quoting *Hoffman*, 247 F.3d at 369). These aspects of the just and proper inquiry may well involve evidence

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[9] *See, e.g., Murphy v. NCRNC, LLC*, 474 F. Supp. 3d 542, 548 n.2 (N.D.N.Y. 2020) (granting Section 10(j) relief based on NLRB-supplied documentary evidence and a respondent's affidavits and exhibits); *Murphy v. Cascades Containerboard Packaging*, No. 18-cv-375, 2018 WL 3628254, at *1 n.1 (W.D.N.Y. July 31, 2018) (partially granting Section 10(j) relief based on affidavits and exhibits submitted by both parties); *Silverman v. Major League Baseball Player Rels. Comm., Inc.*, 880 F. Supp. 246, 250 (S.D.N.Y. 1995) (Sotomayor, *J.*) (granting Section 10(j) relief based on NLRB-supplied affidavits and exhibits), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

[10] District courts around the country have previously granted such discovery. *See, e.g.*, *Overstreet v. Starbucks Corp.*, No. 2:22-cv-676, ECF No. 7 (D. Ariz. Apr. 25, 2022) (allowing an evidentiary hearing to cross-examine affiants); *Kobell v. Reid Plastics, Inc.*, 136 F.R.D. 575, 579–80 (W.D. Pa. 1991) (requiring union field organizer to appear for deposition); *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 459, 464 (N.D. Ohio 1962) (allowing subpoenas against the Board for "affidavits and statements of those employees who were to appear as witnesses").

that an administrative law judge does not even consider when evaluating unfair labor practice charges.[11] It was thus reasonable to permit Starbucks to file "a proposed discovery order indicating . . . what discovery it need[ed] and why." *Leslie*, 2022 WL 2708915, at *2.

B. The Subpoenas

Although it was not an abuse of discretion to provide for *limited* expedited discovery, we conclude that the subpoenas permitted here are plainly overbroad. A discovery-related ruling must not rest on "an erroneous view of the law or on a clearly erroneous assessment of the evidence," nor exceed "the range of permissible decisions." *Yukos Cap. S.A.R.L. v. Feldman*, 977 F.3d 216, 234 (2d Cir. 2020). Courts may grant subpoena requests where the information sought is 1) nonprivileged, 2) "relevant to any party's claim or defense," and 3) "proportional to the needs of the case." Fed. R. Civ. P. 26(b). In conducting this analysis, courts are to consider factors like "the importance of the issues at stake . . . the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit," among others. *Id.* The Rule also states that the court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" via such actions as "limiting the scope of . . . discovery," "prescribing a [different] discovery method," and even "forbidding the disclosure or discovery." Fed. R. Civ. P. 26(c)(1). Under the Rule governing subpoenas, moreover, a district court "*must*" quash or modify a subpoena that either "requires disclosure of privileged or other protected matter, if no

[11] Somewhat unusually, the ALJ adjudicating the underlying complaint here heard evidence as to the just and proper inquiry. *See, e.g.*, SSA290–91. But when the district court below granted Starbucks' request for expedited discovery, that proceeding had yet to begin and therefore such evidence was yet to be entered into the administrative record. Because the ALJ's hearing of just and proper evidence post-dated the initial expedited discovery decision on review, we do not comment on its impact.

exception or waiver applies," or "subjects a person to undue burden," among other conditions. Fed. R. Civ. P. 45(d)(3)(A) (emphasis added). The district court "may" quash or modify the subpoena if it requires disclosing "confidential research, development, or commercial information." Fed. R. Civ. P. 45(d)(3)(B).

In this Section 10(j) case, the subpoena requests authorized by the district court clearly exceed the acceptable scope contemplated by the Federal Rules. For instance, requiring the Union, as well as former and current employees, to search for and produce to Starbucks "[a]ll emails from the email account sbworkersunited@gmail.com sent since August 2021" by "*any* Starbucks employee that reflects interest in starting a union campaign at *any* Starbucks store [or] support for the Union," SSA359 ¶ 16, SSA370 ¶ 14, is not proportional to the inquiry required in connection with this Section 10(j) petition and requires disclosure of confidential labor organizing activities. *See Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012) (Kavanaugh, *J.*) (stating that it is "well settled" that the NLRA "gives employees the right to keep confidential their union activities" (quoting *Guess?*, 339 N.L.R.B. at 434)); *see also Dunbar v. Landis Plastics, Inc.*, 977 F. Supp. 169, 176 n.8 (N.D.N.Y. 1997) (finding that an "attempt to raise issues of credibility" was "improper exploration of the merits of the underlying [NLRB] proceedings"). This disproportionality is especially true given that, by the time the district court declined to limit the subpoenas' scope, an extensive administrative record was readily available.

The district court ruled that these broad requests should be upheld because the sought-after discovery might unveil whether "the union or someone else [] is responsible for chilling organizing activity," which it saw as a relevant defense to the NLRB's claim that Section 10(j) relief was just and proper. *See* SA27; *see also* SSA5. Similarly, Starbucks argues that the purpose of its discovery is to gather evidence that purported chilling effects are "either nonexistent or not traceable

to Starbucks." Starbucks' Br. at 34–35. But many of the alleged unfair labor practices here are inherently chilling. For example, we have recognized that retaliatory discharges of "active and open union supporters" risk "a serious adverse impact on employee interest in unionization." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980). Likewise, "conduct which gives the impression of surveillance violates [the NLRA] if that conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Days Inn. Mgmt. Co. v. N.L.R.B.*, 930 F.2d 211, 214–15 (2d Cir. 1991) (internal quotation marks omitted and alterations adopted). And threatening to withhold benefits if employees unionize violates the NLRA. *See, e.g.*, *N.L.R.B. v. Jamaica Towing, Inc.*, 632 F.2d 208, 213–14 (2d Cir. 1980) (deeming it an unfair labor practice to "threaten[] that unionization will result in decreased benefits"). Whether the Union contributed further chill by publicizing news of the alleged unfair labor practices is largely beside the point, as Starbucks has provided no basis on which to suspect the Union "spread[ ] rumors or sensationalized wholly unsubstantiated charges against" it.[12] *McKinney v. Starbucks Corp.,* 77 F.4th 391, 400 (6th Cir. 2023) (quoting *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 374 (11th Cir. 1992)), *cert. granted sub nom*. *Starbucks Corp. v. McKinney*, No. 23-367, 2024 WL 133821 (U.S. Jan. 12, 2024); *see also DIRECTV, Inc. v. N.L.R.B.*, 837 F.3d 25, 33 (D.C. Cir. 2016) (employees' statements airing employment-related grievances in news interview were "protected concerted activity").[13]

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[12] Starbucks' sole asserted "mischaracterization[]" involves the Union's February 2022 social media statement that a Starbucks employee involved in union organizing had been fired. *See* Starbucks' Br. at 36 n.4. That statement does not appear to be "wholly unsubstantiated," however: although the employee testified that she was not formally terminated from the company, *see* SSA288, there is evidence indicating that she was constructively terminated, *see* A332–33.

[13] The district court supported its "chill causation" theory by citing a recent Sixth Circuit case, now on review on other grounds by the Supreme Court. *See McKinney,* 77 F.4th at 400. But this case in fact

Starbucks contends that the district court properly weighed the relevant factors in deciding to allow the subpoena requests, citing the fact that the district court quashed many categories of requests and that it required name redactions as to one of the categories. These arguments are unavailing. Quashing some subpoena requests does not cure the error of allowing others where "the burden or expense of the proposed discovery outweighs its likely benefit" or "subjects a person to undue burden." Fed. R. Civ. P. 26(b)(1), 26(c)(1), 45(d)(3)(A)(iv). As for redaction, the subpoenas' general name redaction clause paradoxically instructs respondents to produce names if they inform the "just and proper" inquiry, which is precisely what Starbucks claimed its requests were designed to do and the purpose for which the district court authorized them. *See* SSA424 (conceding that "every one of [Starbucks'] subpoena requests this Court's discovery orders approved relates to whether injunctive relief is just and proper"). In effect, then, the subpoenas do not permit redacting names in multiple categories of sought-after discovery where names would likely appear, including with regard to statements by Buffalo-area employees about union support, documents related to media contacts, documents discussing increasing or decreasing support for Buffalo-area organizing, documents relating to changes in the timing of filing election petitions at any Starbucks stores, union-employee emails, and documents discussing reasons that employees cited for not supporting the Union. *See* SA13–15; SSA356–59 ¶¶ 1(b), 1(d), 3, 13, 15–17; *see also* SSA367–70 ¶¶ 1(b), 1(d), 3, 11, 13–15. And although the district court limited the non-

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supports our conclusion. The Sixth Circuit, in affirming the district court's grant of Section 10(j) relief, rejected Starbucks' claim that such relief was inappropriate because the Union had precipitated any chill: "Starbucks does not identify any rumors or unsubstantiated charges made by the Union" and instead "merely points out that the Union publicized the actual facts of" relevant terminations. *Id.* The Sixth Circuit went on to note that "Starbucks fails to identify any authority suggesting that a union that informs its members of anti-union activities should be precluded from obtaining temporary injunctive relief." *Id.* The same reasoning applies in this case.

Buffalo-area reach of two categories of requests, *see* SA14–15, SSA357–58 ¶¶ 4–5, SSA368–69 ¶¶ 4–5, it did not do so with regard to a request for "[a]ll [d]ocuments relating to changes to the timing of filing election petitions at any Starbucks Store based on . . . alleged unfair labor practices [or] any other factor," SSA 359 ¶ 15, SSA370 ¶ 13, nor with regard to emails by "any Starbucks employee that reflect[] interest in starting a union campaign at any Starbucks store," SSA 359 ¶ 16, SSA370 ¶ 14.

To be sure, the district court acted well within the scope of its discretion in refusing to recognize a blanket "privilege" such as to render *all* the sought-after documents undiscoverable, properly observing that our caselaw recognizes no such discovery privilege. But the fact that the sought-after information was not *per se* privileged does not mean it is not "protected matter." *See Veritas Health Servs., Inc.*, 671 F.3d at 1274; *see also* 29 U.S.C. § 151 ("[E]ncouraging . . . collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" is the "policy of the United States."). We note as well that neither Starbucks nor the agency ably presented its case on these discovery issues—as to Starbucks, the specific need for each category of discovery and the reasons why such discovery was proportional to these needs, and as to the agency, the burdens of producing specific categories, including precisely the reasons why particular requests were unduly burdensome. In sum, we conclude that the district court was not well-situated to conduct the relevant weighing analysis on the record before it. We therefore vacate rather than reverse the district court's judgments as to the permitted subpoenas, allowing it an opportunity for closer inspection on remand.

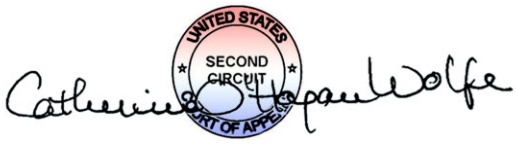
C. Dismissing the Petition

Given our conclusion that the permitted subpoenas were overbroad, it follows that the district court's dismissal of the Section 10(j) petition as a sanction for noncompliance with these subpoenas was in error. Accordingly, we need not further address the dismissal of the Section 10(j) petition. For the benefit of the district court on remand, however, we note that Federal Rule of Civil Procedure 45, rather than Rule 37, constitutes the basis on which the court may consider contempt sanctions if the subpoenaed nonparties to this litigation persist in declining to comply with the district court's discovery orders on remand.

* * *

We have considered the Director's and Starbucks' remaining arguments and find them to be without merit. Accordingly, we **VACATE** and **REMAND** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Starbucks Corporation, Petitioner, v. National Labor Relations Board, Respondent.	Case No. _____

PETITION FOR REVIEW

Pursuant to 29 U.S.C. § 160(f) and Federal Rule of Appellate Procedure 15(a), Starbucks Corporation hereby petitions the Court for review of the National Labor Relations Board's Decision and Order, dated September 6, 2024, reported at 373 NLRB No. 101. Attached as Exhibit A is a copy of the order to be reviewed. Venue is proper in this Court "because Section 10(f) of the NLRA allows review of Board decisions not only in the Circuit in which the unfair labor practice was alleged to have occurred, but also in the Circuit in which the person aggrieved by the Board's order 'resides or transacts business.'" *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016) (quoting 29 U.S.C. § 160(f)). Starbucks "transacts business" in Louisiana, Mississippi, and Texas. *See* 29 U.S.C. § 160(f).

WHEREFORE, Petitioner respectfully requests that the Court, on review, vacate or modify, in whole or in part, the foregoing order for which Starbucks has petitioned for review. Starbucks also requests such other and further relief to which it may be justly entitled.

Dated: September 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25(d), I hereby certify that on September 30, 2024, true and correct copies of the foregoing Petition for Review was served by electronic mail and first-class mail, in addition to filing the Petition for Review electronically with the Clerk.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TERESA POOR, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-against-

STARBUCKS CORPORATION,

Respondent.

22-CV-7255 (ARR) (JRC)

OPINION & ORDER

ROSS, United States District Judge:

Non-parties Workers United (the "Union"), affiliated with the Service Employees International Union, and David Saff, an employee of the Union's New York-New Jersey Regional Joint Board, jointly with Joselyn Chuquillanqui and Justin Wooster, former employees[1] of Starbucks and supporters of the Union, (collectively, with the Union and Mr. Saff, "the Subpoenaed Non-Parties"), appeal Magistrate Judge Cho's order granting Starbucks' motion to compel compliance with its subpoenas and denying the Subpoenaed Non-Parties' motion to stay proceedings, or in the alternative, for reconsideration of his March 27, 2023 discovery order. *See* Subpoenaed Non-Parties' Objs. to Magistrate Judge's Order (the "Appeal") 1–2, ECF No. 113; *see also* Starbucks' Opp'n to Subpoenaed Non-Parties' Objs. ("Opp'n") 1, ECF No. 115. For the following reasons, I affirm Judge Cho's order.

BACKGROUND[2]

This case arises out of employees' efforts to organize a union at a Starbucks store in Great

[1] Starbucks employees are also referred to as "partners."

[2] For a full summary of the facts and procedural history of this case, see Judge Cho's March 29, 2024 Order. *See Poor v. Starbucks Corp.*, No. 22-CV-7255 (ARR) (JRC), 2024 WL 1347394 at

Neck, New York. *See Poor v. Starbucks Corp.*, No. 22-CV-7255 (ARR) (JRC), 2024 WL 1347394 at *1 (E.D.N.Y. Mar. 29, 2024). Workers United initially filed a representation petition with the National Labor Relations Board (the "Board" or the "NLRB")[3] in February 2022, seeking to represent employees at the Starbucks Great Neck location. *Id.* Soon thereafter, Starbucks allegedly engaged in various unfair labor practices aimed at dissuading Starbucks' employees from unionizing. Appeal 1–2; *Poor*, 2024 WL 1347394, at *1. Ultimately, Starbucks' employees voted not to unionize. Appeal 2. Shortly after the election, Starbucks also discharged Ms. Chuquillanqui, who was a prominent Union supporter. *Id.*

In response to these alleged actions, the Union filed numerous unfair labor practice charges with the Board. *Poor*, 2024 WL 1347394, at *1. After investigating the Union's charges, Teresa Poor, the Regional Director of Region 29 of the Board (the "petitioner") issued a complaint, Appeal 2, and in October 2022, a trial was held before an administrative law judge ("ALJ"), *Poor*, 2024 WL 1347394, at *1.[4] To date, the ALJ has yet to reach a decision on the merits of the

*1–5 (E.D.N.Y. Mar. 29, 2024).

[3] The NLRB is an agency that Congress created "to investigate, adjudicate, and stop unfair labor practices" that are prohibited by the National Labor Relations Act. *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1582 (2024) (Jackson, J., concurring in part).

[4] The NLRB's different functions are divided between different offices within the agency. It is "headed by a five-member board that is charged with resolving unfair labor practice cases." *McKinney*, 144 S. Ct. at 1582 (Jackson., J., concurring in part). "The enforcement role is occupied by a General Counsel. The General Counsel is charged with investigating and prosecuting unfair labor practice cases, as well as overseeing Regional Offices that carry out much of the day-to-day work of enforcing labor law and policy." *Id.* (citation omitted). The Board follows a four-step process to evaluate and remedy unfair labor practices. *Id.* First, a charge is filed before the Board, and the Regional Director investigates the charge. *Id.* "Second, if the investigation yields sufficient information to show an unfair labor practice, the Regional Director can issue a complaint. Third, an administrative law judge holds a hearing and issues a decision on the merits of the complaint, which a party can then appeal to the Board." *Id.* (citation omitted). The instant case is at this step in the four-step process; an administrative law judge has held a hearing on the merits of the Union's unfair labor practices claim but has yet to issue a decision. Appeal 2. "Finally, if the unfair labor

complaint.

In November 2022, petitioner filed a § 10(j) petition on behalf of the Board requesting that I issue preliminary injunctive relief while the Board decision is pending. *Id.* "Section 10(j) of the National Labor Relations Act ["NLRA"] authorizes the Board to seek a preliminary injunction from a federal district court while . . . administrative enforcement proceedings take place." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1574 (2024). Petitioner seeks interim reinstatement of Ms. Chuquillanqui to her former position of employment and an interim bargaining order, among other forms of injunctive relief. Pet. for Temporary Inj. under Section 10(j) of the NLRA ("10(j) Pet."), XI, subsections 2(a), 2(c), ECF No. 1. Petitioner also requested that I "adjudicate the 10(j) petition on the basis of the administrative record" developed before the ALJ, instead of granting Starbucks' request for discovery. *Poor*, 2024 WL 1347394, at *1.

At the time that petitioner filed the petition, the Second Circuit applied a two-prong standard for § 10(j) injunctive relief; if "reasonable cause" supported the conclusion that an employer committed unfair labor practices and if the requested relief was "just and proper," then § 10(j) relief was warranted.[5] *See Leslie v. Starbucks Corp.*, 2024 WL 2186232, at *5 (2d Cir. May

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practices alleged in the complaint are sustained, the Board can seek enforcement of the order, and any aggrieved party can seek review, in a federal court of appeals." 144 S. Ct. at 1582–83 (Jackson, J., concurring in part).

[5] In *McKinney*, the Supreme Court determined that courts must apply the "traditional four-factor test for a preliminary injunction articulated in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)" when evaluating § 10(j) petitions, not the two-prong reasonable cause and just and proper standard. 144 S. Ct. at 1574. Under the *Winter* test, a court may only grant a petitioner a preliminary injunction if the petitioner demonstrates that it is "likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 1575 (quoting *Winter*, 555 U.S. at 20). Although courts must now apply the four-factor test when evaluating § 10(j) relief, the just and proper prong of the test that the Second Circuit previously applied "incorporates elements of the four-part standard for preliminary injunctions" articulated in *Winter*, including whether preliminary relief is necessary to "prevent irreparable harm." *Leslie*, 2024 WL

15, 2024). With this standard in mind, I granted petitioner's request that I determine its petition for temporary injunctive relief on the basis of the administrative record as to the issue of reasonable cause, but I denied its request as to "the issue of the 'just and proper' remedy." *See* Docket Order dated Dec. 15, 2022. On the just and proper prong of the standard, I granted Starbucks' request for expedited discovery. *Id.* I referred management of discovery to Judge Cho. *Id.*

Over the course of nearly two years, the parties have argued about the permissible scope of discovery. The parties' disputes have concerned document and deposition subpoenas that Starbucks issued in December 2022 to various non-parties, including five of Starbucks' employees and officials at the Union. *Poor*, 2024 WL 1347394, at *2. Since Starbucks first filed the subpoenas, Judge Cho has significantly narrowed their scope. In March 2023, Judge Cho "limited discovery to the period between February 9, 2022 (the date the Union filed the petition for a representation election) and May 3, 2022 (the date of the election)—referred to as the 'campaign period.'" *Id.* at *2. Later in April 2023, on Starbucks' motion for reconsideration, Judge Cho permitted additional discovery, but only for the "limited period between July 27, 2022 and September 30, 2022 (referred to as the 'post-termination period') relating to any chill on Great Neck employees' Section 7 activities[6] resulting from Ms. Chuquillanqui's termination." *Id.* at *3.[7]

2186232, at *5–6. The Court's decision in *McKinney* does not alter my analysis of the instant matter. I am deciding a discovery dispute, which requires application of the relevant Federal Rules of Civil Procedure; I am not deciding the merits of petitioner's motion for § 10(j) relief.

[6] Pursuant to Section 7, 29 U.S.C. § 157, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section (8(a)(3)) of this title."

[7] Starbucks terminated Ms. Chuquillanqui's employment on July 27, 2022. 10(j) Pet., Ex. N, ¶

He also clarified that his March and April 2023 rulings apply to both "written discovery and depositions." Docket Order dated Apr. 17, 2023. Finally, Judge Cho issued a robust protective order, which also applies to both requests for documents and deposition testimony. This protective order requires the redaction of employee names and identifying information (excepting Ms. Chuquillanqui and Mr. Wooster), restricts confidential information for attorneys' eyes only, and implements a key system for identifying information. *Poor*, 2024 WL 1347394, at *3.

In response to Judge Cho's March and April 2023 orders, Starbucks served amended subpoenas (the "2023 Amended Subpoenas" or "Amended Subpoenas") upon the Subpoenaed Non-Parties and three additional Starbucks employees. *Id.* The Amended Subpoenas include two requests with subparts. *Id.* The first request ("Request 1") seeks materials concerning "the level of support for the Union from Great Neck Starbucks employees during the post-termination period . . . [and] the reasons why employees changed from favoring Union representation" to opposing it. *Id.*[8] The second request ("Request 2") seeks materials related to "whether Great Neck Starbucks

18(c), ECF No. 1.

[8] Request 1, as modified by Judge Cho's March 2024 Order, seeks:

> All Documents and/or Recordings relating to any Communications by you to, or to you from (i) any Partner employed at any Starbucks store, (ii) the Union, (iii) the NLRB, (iv) any digital, print, radio, TV, internet-based or other media outlet concerning any of the following matters:
>
> (a) The number of Partners (not names) at the Great Neck store who were considered to be in favor of union representation ("yes" votes) and the number of Partners who were considered not to be in favor of union representation ("no" votes) as of July 27, 2022, and each week thereafter (or whatever other interval was used) until September 30, 2022
>
> (b) For each Partner at the Great Neck store who at any time (i) from February 9, 2022 (the date on or about which the Union filed its representation petition) to May 3, 2022 (the date the votes cast by Partners in the election were counted) and (ii) from July 27, 2022, to September 30, 2022, changed or was considered to have changed from being in favor of union representation to not being in favor of union representation, all reason(s) why the Partner may have changed his/her/their sentiments regarding the Union.

employees were discouraged . . . from engaging in protected concerted activities because of Starbucks' termination of Joselyn Chuquillanqui during the post-termination period." *Id.*[9]

After Starbucks issued the 2023 Amended Subpoenas, the Subpoenaed Non-Parties refused to comply, and Starbucks filed a motion to compel. Mot. to Compel, ECF No. 94. Soon thereafter, the Subpoenaed Non-Parties filed a motion to stay proceedings or in the alternative for reconsideration of Judge Cho's March 2023 discovery order. Mot. to Stay Proceedings or in the Alternative for Recons., ECF No. 101. The Subpoenaed Non-Parties sought to stay the proceedings because petitioner had filed an administrative complaint before the Board against Starbucks, alleging that Starbucks' service of the December 2022 subpoenas was, itself, an unfair labor practice. *Poor*, 2024 WL 1347394, at *4. On March 29, 2024 Judge Cho granted Starbucks' motion to compel, with minor modifications, and denied the Subpoenaed Non-Parties' motions. *See Poor*, 2024 WL 1347394, at *11.

Appeal 24, n.18; *see also Poor*, 2024 WL 1347394, at *10 (granting Starbucks' motion to compel as to Request No. 1(b) "with the modification as proposed by [p]etitioner in its objections email . . . clarifying that the request is limited to the campaign and post-termination periods").

[9] Request 2 seeks:

> All Documents from the period July 27, 2022, to September 30, 2022, relating in any way to whether the termination of Joselyn Chuquillanqui's employment had, or did not have, a "chilling" or adverse effect on Great Neck Partners' Section 7 or union activities, including, but not limited to, any Documents relating in any way to:
>
> (a) Whether Ms. Chuquillanqui's termination, or anything Ms. Chuquillanqui said or did, had any effect, or may be inferred to have had any effect, on any Partner's interests in unionization or sentiments toward the Union;
>
> (b) Whether Ms. Chuquillanqui's job performance, including matters relating to her compliance, or lack thereof, with Starbucks' policies and procedures, effected [*sic*], or may be inferred to have effected [*sic*], any Partner's interests in unionization or sentiments toward the Union; and
>
> (c) Whether Ms. Chuquillanqui was an effective union organizer including whether her performance as a union organizer effected, or may be inferred to have effected [*sic*], one way or another, any Partner's interest in unionization or sentiments toward the Union.

Appeal 16, n.12.

The Subpoenaed Non-Parties now appeal Judge Cho's March 2024 discovery order, and they object to "that portion of [Judge Cho's] March 27, 2023 Order . . . that denied their motion to quash Starbucks' [deposition requests]." Appeal 1. They request only that I overturn Judge Cho's decisions not to quash Starbucks' 2023 Amended Subpoenas for documents and its requests for deposition testimony. *See* Appeal 1, n.1 (clarifying that they "do not object to the portions of [Judge Cho's] Order denying the motions to stay or for reconsideration").[10]

LEGAL STANDARD

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and the Federal Magistrates Act, a district judge must consider objections to a magistrate judge's ruling on a non-dispositive motion and must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Pretrial discovery matters are generally considered non-dispositive, and as a result, they are reviewed under this clear error standard. *See Thomas E. Hoard, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). A magistrate judge's order is clearly erroneous if the district court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 235 (2001). Further, "[a]n order is contrary to law when it fails to apply or misapplies relevant statutes, caselaw, or rules of

[10] Initially, the Subpoenaed Non-Parties argued that "[b]ecause Judge Cho held that the 2023 Subpoenas supplanted the 2022 Subpoenas, the [March] 2023 Order declining to quash Requests 1(a), 1(b) (as modified), 11, and 14 of the 2022 Subpoenas is moot." Appeal 9. Alternatively, the Subpoenaed Non-Parties argued that if the 2023 Subpoenas did not, in fact, supplant the 2022 subpoenas, the "Court should also hold that Judge Cho's 2023 Order is clearly erroneous and contrary to law to the extent it requires production by the Subpoenaed Non-Parties." *Id.* In their reply brief, however, the Subpoenaed Non-Parties "withdr[ew] their objections to the 2023 Order with respect to their motion to quash Requests 1(a), 1(b) (as modified), 11, and 14 of the 2022 Subpoenas *duces tecum*." Appellant's Reply Brief 2 ("Reply"), ECF No. 116. As a result, I review only Judge Cho's decisions to not quash the 2023 Amended Subpoenas and the requests for depositions.

procedure." *Wood v. Mut. Redevelopment Houses, Inc.*, No. 22-CV-9493, 2023 WL 8603334, at *1 (S.D.N.Y. Dec. 12, 2023). Ultimately, the clear error standard is highly deferential and imposes a heavy burden on the party seeking to overturn a magistrate judge's discovery order. *See Wilson v. City of New York*, No. 06-CV-229 (ARR), 2008 WL 1994860, at *3 (E.D.N.Y. May 8, 2008).

DISCUSSION[11]

The Subpoenaed Non-Parties argue that I should reverse Judge Cho's decision granting Starbucks' motion to compel. I will address the Subpoenaed Non-Parties' arguments regarding each discovery request in turn.

I. Request 2

The Subpoenaed Non-Parties first argue that Judge Cho's decision to compel their response to Request 2 was clear error because it "directly contravenes" my December 15, 2022 order permitting discovery on whether the petitioner's requested relief was just and proper. In a hearing on the petitioner's motion to try this case on the administrative record, I stated that I would not allow discovery of "other employees' observations of Ms. Chuquillanqui . . . as to her work practices and ability to perform the duties required by her position, including whether they observed her violating Starbucks' policies." Tr. of Proceedings held on Dec. 15, 2022 at 5:17–25 ("Dec. Tr."). The Subpoenaed Non-Parties contend that Request 2 contradicts this prohibition because it requests documents relating to Ms. Chuquillanqui's actions, including her job performance and effectiveness as a union organizer. Appeal 16–17. Request 2, however, is not that

[11] Starbucks argues that I should dismiss the Subpoenaed Non-Parties' appeal as untimely. Starbucks' Opp'n 17. This argument is unavailing. The Subpoenaed Non-Parties submitted their appeal within fourteen days of Judge Cho's decision on Starbucks' motion to compel. *See* Appeal. Further, in April 2023, I ordered that objections to any order issued by Judge Cho concerning subpoenas were due within fourteen days of "a full adjudication of disputes arising from those subpoenas"—here, Judge Cho's decision on the motion to compel. *See* Docket Order dated April 24, 2023.

open-ended. Instead, it seeks documents related to Ms. Chuquillanqui's actions, job performance, and effectiveness as a union organizer *only if* those documents also reflect that Ms. Chuquillanqui's actions and behaviors affected any employee's interests in unionization. *See supra* note 9. Request 2 does not require Subpoenaed Non-Parties to produce documents that relate only to Ms. Chuquillanqui's actions and behaviors; such a request would violate the limitations I initially set on discovery.

The Subpoenaed Non-Parties next argue that Judge Cho's determination that Request 2 seeks relevant material was clearly erroneous. Appeal 17. Rule 26(b)(1) of the Federal Rules of Civil Procedure requires that the scope of discovery be limited to matters that are "*relevant* to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1) (emphasis added). "The party moving to compel the disclosure of information bears the initial burden of demonstrating that the information sought is relevant and proportional." *Sportvision, Inc. v. MLB Advanced Media, L.P.*, No. 18-CV-3025, 2022 WL 2817141, at *1 (S.D.N.Y. July 19, 2022). Information is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The relevance standard is "liberally construed," and it is even more liberally construed when applied in discovery rather than at trial. *New Falls Corp. v. Soni*, No. 16-CV-6805 (ADS), 2020 WL 2836787, at *2 (E.D.N.Y. May 29, 2020) (quoting *MacCartney v. O'Dell*, No. 14-CV-3925, 2018 WL 5023947, at *2 (S.D.N.Y. Oct. 17, 2018)).

Judge Cho determined that Request 2 is a relevant inquiry because both the petitioner and counsel for Mr. Wooster and Ms. Chuquillanqui recognized that it was, at least potentially, a relevant inquiry. *Poor*, 2024 WL 1347394, at *11. This is supported by the record. *See* Tr. of Proceedings held on Apr. 17, 2023 at 4:1–8 ("Apr. Tr.") (petitioner acknowledging that

"[r]espondent . . . wants to discover the impact of the chill on employee Section 7 activities by Ms. Chuquillanqui's termination. . . . That's a relevant inquiry."); *id.* at 18:8–14 (counsel for Mr. Wooster and Ms. Chuquillanqui explaining that: "I could understand an argument that workers were not chilled by the termination because they stopped supporting the union because they didn't like Ms. Chuquillanqui if there were any evidence to support that which frankly there isn't. But that would be potentially a relevant inquiry.").[12] Request 2's inquiry into whether Ms. Chuquillanqui's discharge had a chilling impact on union activities—or whether something else caused employees' support for the Union to erode—is especially relevant because the petitioner asserts that Ms. Chuquillanqui's termination is "part of our argument for why a bargaining order is necessary." Tr. of Proceedings held on Mar. 27, 2023 at 15: 9–21 ("Mar. Tr."). By asserting Ms. Chuquillanqui's termination as a reason for the requested relief, petitioner makes evidence related to the impact of her termination relevant. The Subpoenaed Non-Parties further contend that even if there is evidence supporting that workers "celebrated Ms. Chuquillanqui's termination because they did not like her . . . it does not follow that those workers were not *also* afraid to support the Union [because Starbucks fired her]." Appeal 21. This may be the case, but whether the evidence supports this argument is a determination I must make after reviewing all relevant evidence; it is not a reason to prohibit a search for such evidence.

The Subpoenaed Non-Parties also argue that Starbucks failed to meet its burden of demonstrating that Request 2 is more than a fishing expedition. Appeal 17–18; *see also United*

[12] The Subpoenaed Non-Parties assert that Judge Cho took Ms. Chuquillanqui and Mr. Wooster's counsel's statement out of context. Appeal 19 n.15. They explain that counsel intended to argue that "evidence that workers did not like Ms. Chuquillanqui would *not* be relevant, and that only evidence that showed a causal relationship between workers' dislike of Ms. Chuquillanqui *and* their disaffection from the Union could potentially be relevant because . . . it would bear on the question of chill." *Id.* As I previously explained, this is exactly the type of evidence Request 2 seeks.

States v. UBS Sec. LLC, No. 18-CV-6369 (RPK), 2020 WL 7062789, at *3 (E.D.N.Y. Nov. 30, 2020) (explaining that the party seeking discovery must "make a *prima facie* showing that the discovery sought is more than merely a fishing expedition"). A discovery request is a fishing expedition if it is "based on pure speculation" and probes "into the [recipient's] actions or past wrongdoing [and is] not related to the alleged claims or defenses." *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004). The Subpoenaed Non-Parties contend that Request 2 is a fishing expedition because there is no evidence in the administrative record demonstrating that support for the Union eroded *because* employees disliked Ms. Chuquillanqui. Appeal 20. There is, however, evidence in the administrative record to support that tension in the workplace existed because other employees disagreed with Ms. Chuquillanqui about the Union. *See, e.g.*, Mot. to Try Pet. on Basis of Admin. R., Off. Rep. of Proc. ("Admin. R.") 913:8–914:19, 916:23–918:1, ECF No. 2-6 (employee testifying that she disagreed with Ms. Chuquillanqui about the Union and that when she expressed this disagreement, it caused an altercation between them); *id.* at 977:8–978:2, 979:18–980:2 (employee testifying that Ms. Chuquillanqui's attitude toward fellow employees shifted after the Union election). Starbucks' request for documents connecting employees' feelings toward Ms. Chuqillanqui to their feelings about the Union is, therefore, not based on pure speculation; instead, it is based on a plausible inference derived from evidence that already exists in the record.

Request 2 is also not a fishing expedition because it seeks materials directly related to Starbucks' defense: that other employees' dislike of Ms. Chuquillanqui—not her discharge—caused their support for the Union to erode. As I previously discussed, and as I acknowledged during the initial discovery hearing, "information about why an employee likes or distrusts the union," which is the information that Request 2 seeks, "is relevant to the question of just and proper

relief because it could potentially influence whether I issue a bargaining order." Dec. Tr. 17:14–19. For all these reasons, Judge Cho's decision not to quash Request 2 for lack of relevance was not clear error.

The Subpoenaed Non-Parties next argue that Request 2 is unduly vague because it seeks "documents from which it 'may be inferred' that employees lost interest in unionization for reasons related to Ms. Chuquillanqui's conduct." Appeal 22. They contend that the phrase "may be inferred" renders Request 2 impermissibly vague because "different people can reach vastly different conclusions about what may be inferred from a given document." *Id.* Their primary concern is that the "may be inferred" language is an attempt by Starbucks to capture documents that are only about Ms. Chuquillanqui's conduct but do not also reflect how her conduct affected employees' feelings toward unionization. *Id.* As Judge Cho reasoned, however, Request 2 "limits any discovery to that which relates to 'whether the termination of Joselyn Chuquillanqui's employment had, or did not have, a "chilling" or adverse effect on Great Neck Partners' Section 7 or union activities.'" *Poor*, 2024 WL 1347394, at *11. This language limits the breadth of permissible inferences. Request 2 re-enforces this limitation in each of the sub-parts by only requiring production of documents about Ms. Chuquillanqui's conduct that *also* reflect how her conduct affected employees' interest in unionization. *See supra* note 9. The meaning of the word "infer" is further clarified by my directive in the initial discovery hearing, in which I prohibited discovery into Ms. Chuquillanqui's work practices and abilities to perform her duties alone. Dec. Tr. 5:17–25. Request 2 does not—and cannot—seek documents that reflect only information about Ms. Chuquillanqui's conduct. The Subpoenaed Non-Parties also argue that Request 2 is vague because it seeks all documents "relating to" the possible chilling effect of Ms. Chuquillanqui's termination. Appeal 23, n.17. They contend that the phrase "relating to" is "so vague and

ambiguous that it [makes compliance with Request 2] . . . unreasonable or even impossible." *Id.* To the contrary, "relating to" is not a vague phrase here given its standard dictionary definition—"to show or establish logical or causal connection between," Merriam-Webster Online, https://www.merriam-webster.com/dictionary/relate (last visited June 27, 2024)—and that Request 2 is clear in stating to which subject matters the documents must relate, *see supra* note 9. For these reasons, Judge Cho's determination that Request 2 is not impermissibly vague was not clear error.

Finally, the Subpoenaed Non-Parties argue that Request 2 is unduly burdensome on employees' privacy and confidentiality rights, especially considering that "Starbucks' need for the requested documents is negligible." Appeal 13, 23.[13] The Federal Rules of Civil Procedure require district court judges to prohibit discovery when the "burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *id.* (b)(2)(C)(iii). The word "burden" captures the adverse consequences that would result from the "disclosure of sensitive, albeit unprivileged, material," *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 562 (S.D.N.Y. 1996), and therefore, "[a] subpoena may impose a burden by invading privacy or confidentiality interests," *Va. Dep't of Corrs. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019); *see also Leslie*, 2024 WL 2186232, at *7 ("Under the Rule governing subpoenas, moreover, a district court '*must*' quash or modify a subpoena that either 'requires disclosure of privileged or other protected matter, if no exception or waiver applies,' or 'subjects a person to undue burden.'") (quoting Fed. R. Civ. P.

[13] The Subpoenaed Non-Parties indicate that "[f]or the same reasons the 2022 Subpoenas are unduly burdensome . . . Request 2 is unduly burdensome on privacy." Appeal 23. They do not articulate any arguments specific to the 2023 Amended Subpoenas. As a result, my citations to their Appeal refer to the burdens-benefits analysis the Subpoenaed Non-Parties crafted with respect to the 2022 subpoenas, which—excluding the 2022 subpoenas *ad testificandum*—they are not challenging. *See* Reply 2.

45(d)(3)(A)).

The Subpoenaed Non-Parties first argue that Judge Cho failed to give adequate weight to the burdens that the 2023 Amended Subpoenas impose. Appeal 11. They contend that the Union and employees have weighty privacy interests in their "personal sentiments regarding union representation." *Id.* (quoting *Pac. Molasses Co. v. NLRB Reg'l Office # 15*, 577 F.2d 1172, 1182 (5th Cir. 1978)). The Union and the employees do have privacy interests in their feelings regarding unionization; as the Second Circuit has recognized, "it is 'well settled' that the NLRA 'gives employees the right to keep confidential their union activities.'" *Leslie*, 2024 WL 2186232, at *7 (quoting *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012).[14] Despite the

[14] The right that the NLRA provides to employees to keep confidential their union activities does not necessarily create a blanket privilege prohibiting any disclosure of employee-union communications in federal court. *See Leslie*, 2024 WL 2186232, at *8 ("To be sure, the district court acted well within the scope of its discretion in refusing to recognize a blanket 'privilege' such as to render *all* the sought-after [union-activity related] documents undiscoverable, properly observing that our caselaw recognizes no such discovery privilege."); *Hernandez v. Off. of the Comm'r of Baseball*, 331 F.R.D. 474, 477–78 (S.D.N.Y. 2019) (declining to recognize a union relations privilege partially because it was aware of no Second Circuit case law that recognizes such a privilege). In fact, the Subpoenaed Non-Parties do not assert that such a *blanket* privilege applies in this case; instead, they argue that the existence of a union privilege in some circumstances, "further tips the weighing analysis in [their] favor." Reply 16 n.14. This argument is not persuasive, however, because the out-of-circuit cases that Subpoenaed Non-Parties cite as recognizing a union privilege do not recognize a privilege that is expansive enough to apply to Starbucks' requests. *See Hooks v. Hood River Distillers, Inc.*, No. 21-CV-268, 2021 WL 3732751, at *1–2 (D. Or. Mar. 30, 2021) (explaining that the court recognizes the union privilege only in the context of considering whether the movant has a likelihood of success on the merits because the NLRB, which is tasked with considering the likelihood of success, would be limited by that privilege, but that, in considering the other equitable factors the court is not so limited because NLRB will not consider these factors); *Bell v. Vill. of Streamwood*, 806 F. Supp. 2d 1052, 1055–57 (N.D. Ill. 2011) (recognizing that an "employee-union representative privilege" exists in the context of disciplinary proceedings); *U.S. Dept. of Justice v. Fed. Lab. Rels. Auth.*, 39 F.3d 361, 369 (D.C. Cir. 1994) (declining to question the reasoning of an ALJ who applied an employe-union representative privilege in the context of communications made "in the course of . . . a disciplinary proceeding"); *Int'l Union v. Garner*, 102 F.R.D. 108, 114, 116 (M.D. Tenn. 1984) (determining that "union authorization cards" that employees signed "should be protected from discovery as privileged communications" because the employees who signed the cards "did so under a promise of confidentiality," and that these documents were, in any event, not relevant

Subpoenaed Non-Parties arguments to the contrary, Judge Cho has been mindful and protective of employees' privacy concerns. *See, e.g.*, Apr. Tr. 35:12–14 (acknowledging that "the Court is mindful of the confidentiality concerns for the employees"). In fact, to protect employees' privacy interests Judge Cho issued a robust Protective Order that requires documents discussing activity protected by Section 7 of the NLRA be maintained on an attorneys' eyes-only basis, that those documents be used only in connection with the litigation, and that the names and identifying information of Starbucks employees, precluding Ms. Chuquillanqui and Mr. Wooster—who have self-identified—be redacted. *See* Revised Protective Order ¶¶ 4(a)–(c), ECF No. 91; Apr. Tr. 42:23–25.

The cases that Subpoenaed Non-Parties cite to argue that Judge Cho should have quashed these subpoenas are also unpersuasive, partially because the subpoenas in this case are narrow in scope and protect employees' identifying information. *See, e.g.*, *Jordan*, 921 F.3d at 191–92 (determining that subpoenas were unlawfully burdensome partially because they sought documents created over a years-long period and because said documents would reveal the identity of the responding party); *Pac. Molasses Co.*, 577 F.2d at 1177, 1182 (determining that the Freedom of Information Act does not compel a union to disclose union authorization cards—that include employees' *names*—to the requesting employer because divulging the identity of union supporters would invade the employees' "strong privacy interest in their personal sentiments regarding union representation") (emphasis added). The Subpoenaed Non-Parties principally rely on *United Nurses Association of California v. NLRB*, 871 F.3d 767 (9th Cir. 2017)—a case in which the Ninth Circuit determined that the employer's subpoenas were violative of the employees' rights under the NLRA—to argue that Request 2 is overly burdensome. *Id.* at 785; Appeal 12–13. That case,

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because defendants could get the information it sought through other means).

however, is not on point. First, the employer in *United Nurses* sought production of "*all* communications with union representatives, all documents relating to union membership card solicitation, and all membership cards signed by [employee nurses.]" 871 F.3d at776 (emphasis added). Request 2 is much narrower; it does not seek all communications with the Union, but instead seeks only documents related to whether Ms. Chuquillanqui's termination had a chilling effect on other employees' Section 7 activities. *See supra* note 9. Second, the court in *United Nurses* applied a standard that is not applicable to this discovery dispute. In that case, the Ninth Circuit reviewed a decision by the NLRB to ensure that "[s]ubstantial evidence" supported the Board's finding that the employer violated the NLRA by serving the subpoenas on employees and the Union. 871 F.3d at 777. As the Ninth Circuit explained, "[to] determine an employer's liability for an unfair labor practice," the Board is not required to balance the employees' Section 7 rights against the employer's interest in obtaining information. *Id.* at 785. The Federal Rules of Civil Procedure, on the other hand, explicitly require that judges reviewing the lawfulness of discovery requests engage in exactly this type of balancing inquiry to reach a decision. Fed. R. Civ. P. 26(b)(1); *id.* (b)(2)(C)(iii). Finally, even if the Board was required to consider the employer's interest in obtaining information, the Ninth Circuit reasoned that the employer in that case "had no interest to balance." 871 F.3d at 786. As explained below, however, Starbucks has an interest in the documents it seeks with Request 2.

The last argument that Subpoenaed Non-Parties raise on the burden side of the balancing test is that the harm occasioned by the subpoenas "is not obviated by the protective order . . . . [because] even redacted disclosures . . . are nonetheless chilling." Appeal 12. They contend that "[p]ermitting an employer to obtain communications among *any* employees concerning their union activities . . . will invariably have a chilling effect on *all* employees." *Id.* If I were to decide that

any request by an employer for information about employees' union activity creates an unlawful burden under the federal rules, I would be, in effect, applying the union relations privilege by another name, and I have already declined to recognize this privilege. *See supra* note 14. Given the narrow scope of Request 2 and the broad protective order, I decline to determine that Judge Cho committed clear error when he decided not to quash Request 2 due to the Subpoenaed Non-Parties' privacy concerns.

On the other side of the balancing test, the Subpoenaed Non-Parties argue that "Starbucks has not demonstrated any real need for the documents it now seeks," especially considering that it already had the opportunity during the administrative hearing to ask employees whether they became disaffected from the Union because of Ms. Chuquillanqui's conduct. Appeal 13–14. The petitioner, however, made these same arguments nearly two years ago when it first requested that I grant § 10(j) relief based on the administrative record alone. *See* Mot. to Try Pet. on Basis of Admin. R. 6, ECF No. 2. I rejected those arguments then, and they remain unpersuasive today. *See Leslie*, 2024 WL 2186232, at *6 (determining that the district court did not abuse its discretion in granting expedited discovery on the just and proper inquiry of a § 10(j) petition because such an inquiry "may well involve evidence that an administrative law judge does not even consider when evaluating unfair labor practice charges").[15] As I explained then, Starbucks' counsel faced

[15] In *Leslie v. Starbucks*, the Second Circuit, in affirming the district judge's decision to grant expedited discovery on the just and proper prong, explained that "[s]omewhat unusually, the ALJ adjudicating the underlying complaint . . . heard evidence as to the just and proper inquiry." 2024 WL 2186232, at *6 n.11. The Second Circuit elaborated, however, that when the district court granted Starbucks' request for expedited discovery "that proceeding had yet to begin and therefore such evidence was yet to be entered into the administrative record." *Id.* As a result, the Second Circuit clarified that it was not commenting on how or whether the existence of evidence on the just and proper prong in the administrative record should impact a district judge's decision to grant expedited discovery. *Id.* In this case, the full administrative record was available when I initially granted Starbucks' request for discovery on the just and proper prong. Further, in the administrative hearing, ALJ Gardner received at least some evidence on whether a bargaining

limitations during the administrative hearing that he does not face in federal court, including that the ALJ prohibited Starbucks from asking employees certain questions due to a "[union] privilege."[16] Dec. Tr. 10: 12–17. Likewise, Starbucks needs the information Request 2 seeks to form its defense. I have already acknowledged that "information about why an employe likes or distrusts the union"—the very information that Request 2 seeks—"is relevant to the question of just and proper relief because it could . . . influence whether I issue a bargaining order." *Id.* at 17:14–23, 24:20–24. As a result, Starbucks should be given an opportunity to discover such information.

The Second Circuit's recent decision in *Leslie v. Starbucks Corp*, which was issued shortly after Judge Cho's decision, does not alter the balancing test analysis. In that case, the Second Circuit determined that Starbucks' subpoenas, which sought materials related to employees' union-related activities at a location in Buffalo, New York, were "plainly overbroad." 2024 WL

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order was just and proper. *See, e.g.*, Admin. R. 919:4–20 (explaining that he would allow a line of questioning into an altercation between one employee and Ms. Chuquillanqui because "the Respondent is entitled to make its case for . . . its defense on the subject of the . . . bargaining order"); *id.* at 980:3–12 (overruling an objection to a line of questioning regarding post-election events because such events "would be part of the bargaining order analysis"). Because, however, the record reflects limited inquiry into the just and proper prong of the analysis, including limited inquiry into precisely the sort of information that Request 2 seeks, I maintain that Starbucks needs discovery to develop its argument that the petitioner's requested relief is not just and proper. *See id.* at 749:4, 790:1–25, ECF No. 2-5 (sustaining an objection to a question asking Ms. Chuquillanqui whether she understood that workers' feelings toward her "may have carried over to how people voted"); *id.* at 851:21–852:21 (sustaining an objection to a question regarding Ms. Chuquillanqui's organizing tactics); *id.* at 918:7–919:20, ECF No. 2-6 (instructing Starbucks' counsel to keep questioning short because he was not sure how relevant an altercation between Ms. Chuquillanqui and another employee was to whether a bargaining order was necessary); *id.* at 920:23–921:4 (sustaining an objection to a question asking the employee whether she thought any of her co-workers felt free to make their own choice in deciding whether to unionize); *id.* at 922:18–926:2 (sustaining an objection to a line of questioning seeking information from an employee on when, in "the Judge's word," the employee's opinion of the Union "soured").

[16] *See supra* note 14 (declining to recognize a union privilege in this case).

2186232, at *7. It remanded the case back to the district court for a "closer inspection" of the subpoenas. *Id.* at *8. The subpoenas in that case, however, were substantially broader than the subpoenas in this case. The subpoenas in *Leslie*: (1) sought "all emails" from a particular email account sent by "*any* Starbucks employee that reflects interest in starting a union campaign at *any* Starbucks store"; (2) sought "all documents relating to changes to the timing of filing election petitions at *any* Starbucks store"; and (3) did not require the redaction of employee names if the documents could "inform the 'just and proper' inquiry,' which [was] precisely what Starbucks claimed its requests were designed to do and the purpose for which the district court authorized them." *Id.* (emphasis added). In contrast, Request 2 seeks information related only to events at the Great Neck location—not any Starbucks store across the nation—and the Protective Order requires the redaction of all employee names and identifying information, precluding Ms. Chuquillanqui and Mr. Wooster, who have self-identified. *See supra* note 9; Revised Protective Order ¶¶ 4(a)–(c).

Given the breadth of Judge Cho's protective order, the narrow scope of Request 2, and Starbucks' need for the requested information, I cannot conclude that Judge Cho's decision to grant Starbucks' motion to compel was clear error or contrary to law.

II. Request 1

The Subpoenaed Non-Parties mostly recycle the same arguments they made regarding Request 2 to argue that Request 1 is unlawful. *See* Appeal 24–26. They first contend that Request 1 is not relevant because it "largely seeks documents pertaining to employees' support for the Union postdating the May 3, 2022 election." *Id.* at 24. As they put it, "information responsive to such requests is wholly irrelevant to the restoration of the status quo prior to Starbucks' alleged

commission of [unfair labor practices]." *Id.*[17] As I previously explained, however, documents relating to employees' support for the Union postdating the election are relevant because petitioner is seeking Ms. Chuquillanqui's reinstatement and asserting that her termination—which occurred after the election—is a reason why an interim bargaining order is just and proper. As Judge Cho reasoned in his March discovery hearing: "[Petitioner cannot] . . . rely on Ms. Chuquillanqui's termination as a basis for a bargaining order, but then . . . cut[] Starbucks off at the knees . . . [by] not allow[ing it] to have any discovery at all post-election[,] which would encompass [her] termination." Mar. Tr. 15:22–17:22. Accordingly, Judge Cho's decision not to quash Request 1 for its purported lack of relevance was not clear error.

The Subpoenaed Non-Parties also argue that Request 1 is overly burdensome and that it violates my initial order limiting discovery to the Great Neck store because it seeks "all documents and/or recordings" from "any partner employed at any Starbucks store." Appeal 25. This argument ignores that the breadth of Request 1 is limited by its subparts. It requests "all documents" from "any partner employed at any Starbucks store" concerning *only* matters at the Great Neck store. *See supra* note 8. Accordingly, the subject of the documents that Request 1 seeks is not national in scope. The Subpoenaed Non-Parties also contend that Request 1 is unlawfully burdensome because it seeks "all documents . . . relating" to the other subparts of the request, "despite the fact that there is already a voluminous record from the Great Neck [ALJ adjudication]." Appeal 26. As I have already explained, I reject this argument for the same reasons that I rejected it in the initial December 2022 hearing. Finally, the Subpoenaed Non-Parties argue that Request 1 infringes on

[17] In the context of the just and proper inquiry, courts typically grant relief when "necessary to prevent irreparable harm or to preserve the status quo," and "[t]he appropriate status quo in need of preservation is that which was in existence before the unfair labor practice occurred." *Leslie*, 2024 WL 2186232, at *6.

the employees' confidentiality and privacy rights. Appeal 25. As Judge Cho reasoned, "[g]iven that the request does not seek to identify any individuals by name" and given the strong protective order, the Subpoenaed Non-Parties have failed meet their burden of demonstrating why this request should be quashed. *Poor*, 2024 WL 1347394, at *9. Accordingly, Judge Cho's decision to not quash Request 1 as overly burdensome was not clear error.

III. Requests for Deposition Testimony

The Subpoenaed Non-Parties lastly argue that Judge Cho's decision to allow Starbucks' depositions to proceed over their objections was "clearly erroneous and contrary to law because the depositions Starbucks seeks are unduly burdensome on both employees' confidentiality rights and their time and resources, and will necessarily involve testimony about protected and privileged information." Appeal 26. These arguments largely mirror the arguments that Subpoenaed Non-Parties advanced to quash the requests for documents, and as in the documents-context, these arguments are unavailing.

The Subpoenaed Non-Parties, without citing any law, first contend that the "coercive impact of subpoenas is heightened in the case of a deposition, which seeks live testimony," and that "this is especially true for a worker," who will be forced to sit for a "court-sanctioned interrogation . . . by their employer's lawyers about their and their coworkers' Section 7 activity." *Id*. at 27. Even assuming these heightened concerns, I cannot conclude that Judge Cho committed clear error in declining to quash the deposition subpoenas out of concern for the employees' privacy. First, all the privacy protections and subject matter limitations that apply to the requests for documents also apply to the deposition subpoenas. *See* Revised Protective Order ¶ 5(b)–(c). In fact, the Protective Order explicitly prohibits any questions that "are unrelated to" the topics that Requests 1 and 2 cover. *Id.* Further, the Protective Order employs additional deposition-specific

protections that address the Subpoenaed Non-Parties' concerns about coercion and privacy interests. Deponents are required to use a key that anonymizes the identities of employees and ensures that in giving their answers, deponents will not divulge the identities of other employees. *Id.* ¶ 5(d). Second, the Protective Order clarifies that counsel for any party may direct the deponent to "refrain from answering questions that are unrelated to" Requests 1 and 2. *id.* ¶ 5(c). This provision addresses the Subpoenaed Non-Parties' concern—expressed in an earlier motion—that a prior version of the protective order compelled witnesses to "answer questions first and seek the designation of 'confidential' later." Mem. in Supp. of Union Non-Parties' Mot. to Quash Subpoenas 21, ECF No. 58. Finally, the Protective Order restricts who may be present during a deposition: "[o]nly attorneys and reporting service personnel." Revised Protective Order ¶ 5(e).

The Subpoenaed Non-Parties also argue that Starbucks' need for deposition testimony is especially slight because "questioning that follows coercive [unfair labor practices] . . . is unlikely to adduce probative evidence regarding chill." Appeal 27 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969)). In *Gissel Packing*, the Supreme Court addressed whether union authorization cards[18] were generally reliable enough to provide a valid path to establishing a bargaining obligation or if they were too often obtained by coercion and misrepresentation. *Id.* at 596–610. The Court rejected the employers' argument that authorization cards were unreliable but explained that "in hearing testimony concerning a card challenge [based on evidence of

[18] Typically, union authorization cards are used to secure a union election; once the Union receives signed cards from 30% of the company's employees, it can petition the Board to conduct an election. *Abbey's Transp. Svs., Inc. v. NLRB*, 837 F.2d 575, 577 (2d Cir. 1988). Further, "the most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures." *Gissel Packing*, 395 U.S. at 596. An election is not, however, the only way a union may establish a bargaining obligation; "possession of [authorization] cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes" is an alternative route. *Id.*

misrepresentation and coercion], trial examiners should not neglect their obligation to ensure employee free choice." *Id.* at 607–08. The Court explained, however, that because "employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union," especially where the company previously threatened reprisals for union activity, it would "reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." *Id.* at 608. That the Supreme Court rejected a rule that would always require a probe of employees' subjective motivations in the context of a dispute over the authenticity of authorization cards does not mean that probing what caused an employee to disfavor a union is always unhelpful. Here, the scope and coercive effect of the depositions will be limited by the strong Protective Order. The Protective Order's subject-matter limitations ensure that there is little risk that the depositions will be endless, and its privacy protections ensure that there is little risk that a coercive environment will make the testimony unreliable. Ultimately, due to the narrow scope of the deposition subpoenas, the strong privacy protections that the Protective Order establishes, and the relevance of the information sought to Starbucks' defense, I decline to find that Judge Cho committed clear error in concluding that there are no "material distinction[s] between discovery at a deposition versus the document production." Apr. Tr. 23:18–20.

CONCLUSION

For the foregoing reasons, I affirm Judge Cho's March 2024 discovery order granting Starbucks' motion to compel.

SO ORDERED.

/s/
Allyne R. Ross
United States District Judge

Dated: July 12, 2024
Brooklyn, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STARBUCKS CORPORATION

and Case 03–CA–304675

WORKERS UNITED

Caroline V. Wolkoff, Esq., for the General Counsel.

David A. Kadela, Esq., Jeffrey S. Hiller, Esq., Adam-Paul Tuzzo, Esq., and *Brittany L. Stepp, Esq. (Littler Mendelson, P.C.),* for the Respondent.

Ian Hayes, Esq. (Hayes Dolce), for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This is the second case involving Starbucks Corporation (the Respondent) and Workers United (the Charging Party or Union) at an assortment of the Respondent's coffee shops located in and around Buffalo, New York. This case presents a novel set of facts and application of existing Board precedent to those facts.

On May 6, 2022,[1] the General Counsel issued a complaint against the Respondent, alleging the corporation had committed hundreds of unfair labor practices at Buffalo area stores in response to a union organizing campaign (*Starbucks Buffalo I*). Principal among those allegations were the discharges of seven employees who were leading the campaign. On June 21, the General Counsel filed against the Respondent a petition for injunctive relief under Section 10(j) of the National Labor Relations Act (the Act) with the United States District Court for the Western District of New York (the 10(j) proceeding). On July 11, the hearing in *Starbucks Buffalo I* commenced (the ULP hearing), running concurrently thereafter with the 10(j) proceeding. On August 29, the General Counsel rested the case-in-chief in the ULP hearing.

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

Shortly thereafter, the district court issued an order permitting the Respondent to engage in discovery in the 10(j) proceeding. Consistent with the district court's order, the Respondent issued subpoenas on September 10 with document requests to 22 individuals. On October 5, the Union filed the original unfair labor practice charge in this case (*Starbucks Buffalo II*).

The General Counsel's complaint in *Starbucks Buffalo II* alleges all of the discovery requests the Respondent made to the 22 individuals to support its defense in the 10(j) proceeding violated Section 8(a)(1) and Section 8(a)(4) of the Act.

In *Guess?, Inc.*, 339 NLRB 432, 434 (2003), the Board set forth its three-part test for determining whether a respondent's discovery requests "in a separate proceeding"[2] were lawful. First, the request must be relevant. Second, if the request is relevant, it must not have an illegal objective. Third, if the request is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' confidentiality interests under Section 7 of the Act. I conclude that *Guess?* is controlling precedent and the appropriate legal framework to evaluate the General Counsel's complaint allegations in *Starbucks Buffalo II*.

The Respondent's document requests were extensive, verbose, and sought information that could be used to determine the identities of union supporters (and detractors), their union activities, and the Union's organizing strategy. Many requests sought the information for an extended time period and for stores nationwide, not just in the Buffalo area. I conclude that nearly all of the requests violate Section 8(a)(1) under *Guess?*, either because they seek irrelevant information or the employees' confidentiality interests outweigh the Respondent's interest in supporting its defense in the 10(j) proceeding. However, I also hold that two of the requests which sought the number, not the names, of individuals who supported the union over a certain period of time are lawful. Those requests are relevant to the Respondent's 10(j) defense and did not seek the identities of employees who supported or did not support the Union. Finally, I conclude that none of the requests violate Section 8(a)(4).

On February 9, 2023, I heard this case via videoconferencing.[3] On March 16, 2023, the

[2] *Pain Relief Centers, P.A.*, 371 NLRB No. 143, slip op. at 2 (2022).

[3] At the hearing, the parties submitted this case to me via a stipulated record. The record consists of the General Counsel's formal papers (GC Exhs. 1(a) through 1(f)); the parties' stipulations in the case (Jt. Exh. 1); and the 22 subpoenas issued by the Respondent in the 10(j) proceeding (Jt. Exh. 2). I also took judicial notice of the administrative record in NLRB Case 03–CA–285671 (*Starbucks Buffalo I*); the record in Case 22–CD–00478–JLS in the U.S. District Court for the Western District of New York (the 10(j) proceeding); and the record in Cases 22–1230 and 23–3229 in the United States Court of Appeals for the Second Circuit. The hearing originally was scheduled to be held in-person. However, the parties advised me prior to the hearing of their intent to submit the case to me via stipulated record without any witness testimony. As a result, the hearing format was changed to videoconferencing without objection from any party.

General Counsel, the Charging Party, and the Respondent filed posthearing briefs, which I have read and carefully considered. On the entire record, I make the following findings of fact and conclusions of law.[4]

I. THE UNFAIR LABOR PRACTICE HEARING AND 10(J) PROCEEDING IN STARBUCKS BUFFALO I

FINDINGS OF FACT[5]

The Respondent is engaged in the business of the retail operation of coffee shops throughout the United States, including in and around Buffalo, New York (the "Buffalo stores").[6] The Respondent is a Washington state corporation with its headquarters in Seattle.

On May 6, the General Counsel issued a consolidated complaint and notice of hearing against the Respondent in *Starbucks Buffalo I*. The General Counsel amended the complaint on both May 19 and June 27. The complaint, over 50 pages in length, alleged the Respondent committed nearly 300 unfair labor practices at the Buffalo stores in response to its employees' union organizing campaigns. The allegations included the discharges of seven lead organizers at five Buffalo stores.

On June 21, the General Counsel filed a petition for injunctive relief under Section 10(j) of the Act in the U.S. District Court for the Western District of New York. On that same date, the General Counsel filed with the district court a motion to determine the 10(j) petition on the basis of affidavits and documentary evidence. The General Counsel filed with the petition the affidavits of 37 individuals taken during the Region's investigation of the Union's unfair labor practice charges. The names of the 37 individuals were not redacted in the General Counsel's filings.

On June 24, the Respondent filed a cross-motion seeking to stay the 10(j) proceeding until the completion of the ULP hearing or, in the alternative, for expedited discovery and an evidentiary hearing. The parties' attorneys attended a status conference with the district court

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[4] On December 15, 2022, the General Counsel, through the Regional Director for Region 3 of the Board, issued a complaint against the Respondent in Case 03–CA–304675. The complaint was premised upon an unfair labor practice charge filed by the Union on October 5, 2022. On December 29, 2022, the Respondent filed an answer to the complaint denying the substantive allegations and asserting numerous affirmative defenses.

In its answer, the Respondent admitted, and I so find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. At the hearing, the Respondent entered into a joint stipulation pursuant to which it admitted, and I so find, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[5] The findings of fact in this section are based upon the dockets of all of the involved cases, associated documents in the docket entries, and the General Counsel's formal papers.

[6] Par. 2(a), fn. 1 of the complaint contains a list of all the involved Buffalo stores.

judge on that same date and presented their arguments concerning the proper procedural path for the 10(j) proceeding.

On June 27, the district court granted the Respondent's motion for limited discovery, including specifically the ability to depose the affiants and other potential witnesses. The district court denied the Respondent's motion to stay the case. The district court granted the General Counsel's motion to decide the petition on the papers, including affidavits, documentary evidence, and any submitted deposition testimony. The district court left open the possibility that live witness testimony could be taken in the 10(j) proceeding.

On June 30, the district court modified its June 27 order and stayed the 10(j) proceeding to at least the completion of the General Counsel's case-in-chief for its unfair labor practice complaint. The district court still left open the possibility that discovery would be allowed once the stay was lifted.

On July 11, the ULP hearing on the General Counsel's complaint commenced before NLRB administrative law judge Michael Rosas. On August 29, the General Counsel rested the case-in-chief after having called and examined 39 witnesses, including the seven discharged individuals. The judge allowed the parties to question the witnesses regarding "just and proper" evidence to use in the 10(j) proceeding. The judge also quashed the Respondent's administrative subpoenas in their entirety, except for certain audio recordings.

On August 30 and 31, the General Counsel and the Respondent filed ULP hearing status reports with the district court. The Respondent asked the district court for clarification concerning whether it was going to be permitted to conduct discovery.

On September 7, the district court lifted the stay in the 10(j) proceeding and permitted the Respondent to serve document subpoenas. The court imposed a September 9 deadline to do so. On September 10, the Respondent issued 22 document subpoenas, 19 of which went to employees or former employees who already testified for the General Counsel in the ULP hearing. Among that group were the seven discharged employees. The Respondent issued the remaining 3 subpoenas to two union agents and the union's custodian of records. Each of the Respondent's subpoenas to the employees contained the same 21 requests. The Respondent's subpoenas to the union representatives contained 15 of those 21 requests.

On September 16, the General Counsel and the Union both moved the district court to quash the Respondent's subpoenas.

On September 20, the ULP hearing was completed.

On September 23, the district court issued an order granting in part and denying in part the General Counsel's and the Union's motions to quash the Respondent's subpoenas. As to the partial denial, the district court rejected the movants' argument that communications from

employees to the NLRB or to the Union were privileged. For requests that were quashed, the district court relied upon burdensomeness, not lack of relevance. The court further ordered that responsive documents be produced by October 14.

On October 5, the Union filed the unfair labor practice charge in *Starbucks Buffalo II*, alleging that the Respondent's issuance of the subpoenas violated the Act.

October 14 passed without the Union or any of the subpoenaed individuals providing any documents to the Respondent. As a result, on October 20, the Respondent moved the district court for sanctions.

At the October 27 oral argument on that sanctions motion, the Union informed the district court of its intention to petition the U.S. Court of Appeals for the Second Circuit for a "writ of mandamus" challenging the district court's denial of the motion to quash the Respondent's subpoenas. As a result, the district court again stayed the 10(j) proceeding.

On December 29, the Union filed its petition for a writ of mandamus with the Second Circuit. On January 30, 2023, the General Counsel filed with the same court a "writ of injunction" seeking to have the Court order that the Respondent withdraw its subpoenas in the 10(j) proceeding.

On March 1, 2023, Judge Rosas issued a decision in *Starbucks Buffalo I*, concluding that the Respondent committed hundreds of violations of Section 8(a)(1), (3), (4), and (5) of the Act. Those violations included the unlawful discharges of the seven employees.

On May 9, 2023, the Second Circuit denied both writ petitions. The appellate court found that neither the General Counsel nor the Union had demonstrated that they or the subpoenaed nonparties lacked an adequate, alternative means of obtaining relief. One of the means identified by the appellate court was the petitioners' ability to appeal either a civil or criminal contempt sanction if they refuse to comply with the subpoenas. The other means identified was the petitioners' ability to seek reconsideration of the district court's discovery order, in light of Judge Rosas' factual findings and legal conclusions in *Starbucks Buffalo I*.

II. DOES THE BOARD LACK JURISDICTION TO HEAR THIS CASE?

Before addressing the complaint's substantive allegations, a preliminary legal issue that must be addressed is whether the Board has jurisdiction to hear this case. The Respondent argues that the district court in the 10(j) proceeding has the sole authority for determining what discovery is or is not permissible. The Respondent is correct that, under the Federal Rules of Civil Procedure (FRCP), the district court has the exclusive authority to determine if and what discovery is allowed in the 10(j) proceeding. But the legal question in this case is not whether discovery should be allowed at all in the 10(j) proceeding and, if so, what document requests are permissible under the FRCP. Rather, the question is whether specific document requests

made by the Respondent in the 10(j) proceeding constitute unfair labor practices under the Act. Jurisdiction over that question rests solely with the Board. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938). The Board is not deprived of its jurisdiction to decide the question simply because the district court has concurrent jurisdiction in the 10(j) proceeding. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 428 (1967). Furthermore, if any violations of the Act are found in the ULP proceeding, the remedy is to order the Respondent to withdraw the unlawful discovery requests, not to order the district court to quash them.

III. LEGAL FRAMEWORK FOR THE ALLEGED 8(A)(1) VIOLATIONS

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(1) by issuing document subpoenas in the 10(j) proceeding to 19 current and former employees of the Respondent who testified on behalf of the General Counsel in *Starbucks Buffalo I*. The complaint also alleges the Respondent issued another 3 unlawful subpoenas for documents to 3 union representatives, two of whom testified at the ULP hearing.

Both the General Counsel and the Charging Party evaluate the legality of the Respondent's subpoenas under the Board's *Guess?* framework. In contrast, the Respondent argues that the *Guess?* framework is not applicable to this case.

The Respondent first argues that *Guess?* is not applicable because it relies upon the preemption doctrine to enjoin discovery in state court lawsuits. In *Pain Relief Centers P.A.*, 371 NLRB No. 143, slip op. at 2 (2022), the Board held that certain of the employer's discovery requests in its state court lawsuit were preempted. However, the Board also concluded that non-preempted discovery requests in the same suit violated Section 8(a)(1) under *Guess?*. The General Counsel is not alleging in this case that any of the Respondent's discovery requests are preempted. Thus, the Respondent's argument lacks merit.

The Respondent also argues that *Guess?* only applies to discovery requests made in state court lawsuits. It does appear that *Guess?* and all of the Board's decisions subsequent to *Guess?* involved only state court lawsuits. But the Board stated in *Pain Relief Centers*, supra, that the *Guess?* framework is to assess whether discovery requests "in a separate proceeding" (not "in state court lawsuits") violate the Act. Federal lawsuits are separate proceedings from the Board's unfair labor practice cases. No logical reason exists for not applying *Guess?* to discovery requests in state court lawsuits but not in federal ones.[7]

[7] In *Century Restaurant & Buffet, Inc.*, 358 NLRB 143 (2012), and *Chinese Daily News*, 353 NLRB 613 (2008), the Board found 8(a)(1) violations related to discovery in federal lawsuits under the *Guess?* framework. However, those decisions were issued by Boards that were not validly constituted, either due to recess appointments or having only 2 members. The Board currently has a case on exceptions where the administrative law judge found a *Guess?* violation based upon discovery questions in a federal wage and hour lawsuit. See *Chemtrade W US LLC*, 2022 NLRB LEXIS 520 (2022).

The more difficult question is whether *Guess?* should apply when the federal lawsuit is a 10(j) proceeding and the party making discovery requests is a respondent seeking to defend against an action brought by the General Counsel. Unlike *Guess?* and the cases following it, the General Counsel is a party in the separate proceeding while simultaneously prosecuting alleged unfair labor practices arising out of that proceeding. To my knowledge, this is the first Board case involving this factual situation. As the Respondent correctly points out, this case posture is cause for serious concern. In the 10(j) proceeding, the district court denied, in part, the General Counsel's and the Union's motions to quash the Respondent's subpoenas. The General Counsel and the Union obviously did not agree with the denials, given the subsequent refusal to comply with the district court's order. The General Counsel and the Union certainly were permitted to try and appeal the district court's discovery order to the Second Circuit, which they did with the writs. But the General Counsel and the Union also are utilizing this unfair labor practice case to effectively challenge the district court's discovery rulings. The Union did not file the unfair labor practice charge in *Starbucks Buffalo II* when the Respondent issued the subpoenas. Rather, it waited until after the district court's adverse discovery order. The General Counsel and the Union are using *Guess?* not just as a shield to protect employee confidentiality interests, but as a sword to weaken the Respondent's 10(j) defense and obtain an injunction. Ultimately, the Board may determine that *Guess?* does not apply to this specific factual situation. For now, though, my duty as an administrative law judge is to apply established Board precedent which the U.S. Supreme Court has not reversed. It is for the Board, not me, to determine whether Board precedent should be altered. *Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 fn. 4 (2017). At this moment, *Guess?* applies to "a separate proceeding" and the 10(j) proceeding is separate from this one. Thus, the Respondent's discovery requests must be evaluated under the *Guess?* framework.[8]

IV. THE RESPONDENT'S DOCUMENT REQUESTS[9]

Each of the Respondent's 22 subpoenas to the employees contained the same 21 document requests. The Respondent's subpoenas to the union representatives contained 15 of those 21 requests. Unless otherwise stated, the time period covered by the requests was from

[8] The Respondent makes two additional arguments regarding *Guess?*. First, the Respondent argues that the illegal objective component of the Board's *Guess?* framework is invalid because it conflicts with existing U.S. Supreme Court precedent by imposing liability for a defendant's relevant discovery requests during civil litigation. *BE&K Construction v. NLRB*, 536 U.S. 516 (2002). Second, the Respondent argues that the *Guess?* balancing test is impermissibly vague and imposes an impermissible burden on free speech. Again, administrative law judges must apply established Board precedent, which *Guess?* is. Because the Respondent's arguments seek to have *Guess?* overturned, I decline to address them and leave their evaluation to the Board.

[9] In an attempt to provide the greatest possible clarity in this decision, I have organized the remainder of it by categories of information the Respondent sought in its document requests. I will make findings of fact and then analyze the legality of the requests for each category.

August 2021, when the Union's organizing campaign began, to the present.[10]

1. *The requests concerning employees' level of union support*

FINDINGS OF FACT

One category of documents sought by the Respondent's subpoenas was the employees' communications with other employees/former employees, the Union, the NLRB, and any media outlet concerning the employees' level of support for the Union. The Respondent sought documents reflecting the following information:

- the number, but not the names, of employees who were in favor and not in favor of union representation at the Buffalo stores;[11]

- the names of employees who had changed their position from being in favor to not in favor of union representation, as well as the reasons for that change at the Buffalo stores;[12]

[10] Jt. Exhs. 2(a) to 2(v). I rely upon Jt. Exh. 2(h) for the actual text of the Respondent's requests. Subpoena pars. 10, 11, and 18–21 were not made to the union agents. The union representatives who were subpoenaed were Richard Bensinger and Daisy Pitkin. The seven discharged employees were Cassie Fleischer, Daniel Rojas, Edwin Park, Brian Nuzzo, Nathan Tarnowski, Angel Krempa, and Kellen Higgins.

[11] Subpoena pars. 1(a) and 1(c). Paragraph 1(a) requests: "For each of the Buffalo stores for which an election petition was or has been filed, and the Rochester store, the number of employees (not names) who were considered to be in favor of union representation ("yes" votes) and the number of employees who were considered not to be in favor of union representation ("no" votes) at the time the petition was filed and each week thereafter until an election was held, or if no election has been held or one is scheduled to be rerun, up to the present."

Subpoena par. 1(c) requests: "For each of the Buffalo stores for which an election petition has not been filed, and the Rochester store, the number of employees (not names) considered to be in favor or union representation and the number of employees considered not to be in favor of union representation since the outset of organizing in Buffalo and at weekly or whatever intervals used since that time."

[12] Subpoena pars. 1(b) and 1(d). Paragraph 1(b) requests: "For each employee of the Buffalo stores for which an election petition was or has been filed, and the Rochester store, who was or has been considered at any time to have changed from being in favor of union representation to not being in favor of it, any statements the employee made or things that the employee did that factored into that determination and, if there are any, the employee's name."

Subpoena par. 1(d) requests: "For each employee of the Buffalo stores or the Rochester store for which an election petition has not been filed who was or has been considered at any time to have changed from being in favor of union representation to not being in favor of it, any statements the employee made or things that the employee did that factored into that determination and, if there are any, the employee's name."

- the names of employees who made statements related to whether they were in favor or not in favor of union representation at any store nationwide outside of Buffalo;[13]

- discussions about an increase or decrease in support for the organizing campaign at the Buffalo stores;[14]

- e-mails sent by employees from a union e-mail address which included discussion of support for the Union and/or fear of retaliation for engaging in union activity at any store nationwide;[15] and

- reasons other than alleged retaliation that employees cited as a reason for not supporting the Union.[16]

ANALYSIS

To evaluate the legality of these document requests, the *Guess?* legal framework first requires a determination as to whether the documents are relevant to the 10(j) proceeding. As previously noted, the U.S. Court of Appeals for the Second Circuit is the appellate body over the district court where the General Counsel filed the 10(j) petition. Thus, determining the relevance of the Respondent's document requests requires an evaluation of the Second Circuit's legal framework for 10(j) petitions.

The Second Circuit applies a two-prong test to determine if a 10(j) injunction should be granted. *Murphy v. Cayuga Medical Center of Ithaca*, 715 Fed. Appx. 108 (2d Cir. 2018). First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper. *Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364–365 (2d Cir. 2001). When conducting the 10(j) test,

[13] Subpoena par. 1(f). Paragraph 1(f) requests: "For each employee or former employee of Starbucks employed outside of Buffalo stores and the Rochester store who has had any communication with the Union, or any Starbucks' employees or former employees from the Buffalo stores or the Rochester store relating to the subject of unionization, whether in Buffalo or Rochester, at their store, or elsewhere, any statements the employee made relating to whether they were in favor or not in favor of union representation and the reasons for their position and, if such statements were made, the employee's name."

[14] Subpoena par. 13. Paragraph 13 requests: "All Documents discussing an increase and/or decline in support for the organizing campaigns at the Buffalo stores or the Rochester store."

[15] Subpoena par. 16. Paragraph 16 requests, in part: "All emails from the email account sbworkersunited@gmail.com sent since August 2021 by any Starbucks employee that reflects…support for the Union and/or fear of retaliation for engaging in union activities."

[16] Subpoena par. 17. Paragraph 17 requests: "All Documents relating to and/or discussing reasons other than alleged retaliation that employees have cited as a reason for not supporting the Union."

courts in the Second Circuit are to give "[a]ppropriate deference" to the NLRB Regional Director, *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995), such that "the Regional Director's version of the facts should be sustained if within the range of rationality . . . inferences from the facts should be drawn in favor of the" Region, and "even on issues of law, the district court should be hospitable to the views of the General Counsel, however novel." *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980) (internal citation and quotation marks omitted).

Section 10(j) injunctive relief is just and proper in the Second Circuit when "it is necessary to prevent irreparable harm or to preserve the status quo." *Kreisberg v. HealthBridge Management, LLC*, 732 F.3d 131, 141 (2d Cir. 2013). "[T]he appropriate test for whether harm is irreparable in the context of § 10(j) . . . cases is whether the employees' collective bargaining rights may be undermined by the . . . [asserted] unfair labor practices and whether any further delay may impair or undermine such bargaining in the future." *Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd.*, supra at 369. "[T]he appropriate status quo in need of preservation is that which was in existence before the unfair labor practice occurred." Id. In considering whether a 10(j) injunction is just and proper, the court applies equitable principles "in the context of federal labor laws." Id. at 368. To establish irreparable harm, the Second Circuit has relied upon the inherent chilling effect that an employer's discharges of active and open supporters have on employees' interest in unionization. *Kaynard v. Palby Lingerie,* 625 F.2d 1047, 1053 (2d Cir. 1980). See also *Kreisberg v. HealthBridge Management,* supra at 142–143. The Court also has relied upon actual showings of a chilling effect on union activity or support. *Paulsen ex rel. NLRB v. PrimeFlight Aviation Servs.*, 718 Fed. Appx. 42, 45 (2d Cir. 2017).

As to the first *Guess?* prong, the Respondent's requests on the level of employee support for the Union in the Buffalo stores are relevant to its defense in the 10(j) proceeding. That information is relevant on the question of whether injunctive relief is just and proper to prevent irreparable harm. For example, the documents could show that employee interest in organizing or attendance at union meetings did not decrease after the Respondent's discharges of the lead employee organizers and other alleged unfair labor practices. See *Murphy v. NCRNC, LLC*, 474 F. Supp. 3d 542, 562 (N.D.N.Y. 2020).

The General Counsel takes no position on the relevance of this category of requests. The Union argues that the evidence the General Counsel presented at the ULP hearing, i.e. employee testimony of actual chilling effect, is sufficient to establish irreparable harm. The Union also relies upon the inherently chilling effect of the Respondent's alleged unfair labor practices, i.e. the seven discharges, to demonstrate irreparable harm. At the end of the day, the district court may agree with those arguments. But the Union's contention that documents showing a lack of chilling effect would not defeat the claim of irreparable harm lacks merit. Such documents certainly would bolster the Respondent's defense in the 10(j) proceeding.

As to the second *Guess?* prong, neither the General Counsel nor the Union argue that, individually, these requests have an illegal objective. Therefore, I assume, without deciding, that the requests were not issued for an illegal objective.

That leaves the question of whether the employees' confidentiality interests outweigh the Respondent's interest in the requested information to mount a defense in the 10(j) proceeding.

Section 7 of the Act long has given employees the right to keep their union and other protected activity confidential from their employers. See, e.g., *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999) ("The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identities of employees engaged in organizing"), enfd. 200 F.3d 1162 (8th Cir. 2000); *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012) ("Section 7 of the Act gives employees the right to keep confidential their union activities . . ." (quoting *Guess?*, *Inc.*, 339 NLRB at 434)); *Pac. Molasses Co. v. NLRB*, 577 F.2d 1172, 1182 (5th Cir. 1978) (a "right to privacy" is "necessary to full and free exercise of the organizational rights guaranteed by the [Act]"). Thus, the subpoenaed individuals have a weighty right to keep their own and other employees' protected activities confidential.

The Respondent contends that it has adequately addressed employees' confidentiality interests in its document requests by including a savings clause/safe harbor provision in the requests.[17] That clause starts with an instruction to redact from responsive documents the name

[17] Subpoena par. 26 of the "Definitions and Instructions" section states:

> To ensure that the requests that follow are not construed to have the purpose or effect of interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act (the "NLRA"), please redact from responsive Documents the name of any Starbucks hourly employee (excluding Cassie Fleischer, Brian Nuzzo, Edwin "Minwoo" Park, Angel Krempa, Daniel Rojas, Jr., Nathan Tarnowski, Kellen Montanye Higgins, Colin Cochran, Larue Heutmaker, Danka Dragic, Casey Moore, Jaz Brisack, Will Westlake, Alexis Rizzo, Michele Eisen, Kai Hunter, Kayla Desboro, James Skretta, Michaela Wagstaff, and any other witness who has testified at the administrative hearing on the Complaint or who provided an affidavit that was filed in this case), or information from which the identity of any Starbucks hourly employee could be discerned, from any responsive Documents where failing to do so would result in disclosure of the employee's sentiments toward the Union, except where a Document reflects or could be construed to reflect matters that effected the employee's interest, one way or the other, in union organizing or union representation or where the Document otherwise relates to whether Section 10(j) relief would be just and proper, as referenced, if applicable, in Your testimony at the hearing on the Complaint. To be clear, this subpoena does not seek evidence of Section 7 activities that are unrelated to matters that had or may have had an effect on other employee's interest in union organizing or union representation or that otherwise do not relate to whether Section 10(j) relief would be "just and proper." The

of any Starbucks employee (excluding the 19 employees who testified at the ULP hearing and were served document subpoenas or employees who provided an affidavit in the 10(j) proceeding) or any information from which a Starbuck employee could be identified where it would reveal an employee's sentiments towards the Union. Had the clause stopped there, employee confidentiality interests would not have outweighed the Respondent's interest in the relevant information, because any employee engaging in protected Section 7 activity would not have been identified.

However, the clause immediately proceeds to an exception to the redaction rule. Employee names cannot be redacted from documents that reflected matters effecting the employees' interest in union organizing or union representation. The exception also applied to documents that related to "whether Section 10(j) relief would be just and proper," i.e. employee support for the Union. Thus, the exception swallows the rule, as it would apply to nearly all of the Respondent's discovery requests. Complying with the document requests requires employees to reveal their identities and the union activities of themselves and other employees. The employees' interest in keeping that information confidential outweighs the Respondent's interest in obtaining that information for its 10(j) defense. See *National Telephone Directory*, 319 NLRB 420, 421 (1995) ("the confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to the [employer's] need to obtain the identities of such employees for cross-examination and credibility impeachment purposes"); *Chino Valley Med. Ctr.*, 362 NLRB 283, 283 fn. 1 (2015) (finding employer subpoena—seeking communications between employees and their union, authorization and membership cards, and communications relating to card distribution and solicitation—unlawful because it would "subject employees' Sec. 7 activities to unwarranted investigation and interrogation"), enfd. 871 F.3d 767 (9th Cir. 2017).

I further note that the Respondent has the ability to subpoena information on employees' support for the Union without identifying the names of employees. In fact, two of the Respondent's requests here specifically state that the information sought is the "number, not the names" of employees who did and did not support the Union. Because those requests do not require revealing the identity of employees, the Respondent's need for that information outweighs the employees' confidentiality interests.[18] Beyond that, the Respondent could remove the exception to its redaction instruction and allow all employee names to be redacted. It also could subpoena other information relevant to its just-and-proper defense without the

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subpoena likewise does not seek affidavits provided to the National Labor Relations Board. If deemed necessary, Starbucks will agree to the entry of an appropriate protective order with respect to the production of any Documents for which a concern is expressed that production may interfere with, restrain, or coerce an employee in the exercise of the employee's Section 7 rights.

[18] The General Counsel argues that these requests do not unambiguously exclude documents revealing the identities of union supporters because of the language in the Respondent's savings clause/safe harbor provision. I disagree. The language in the specific request, not a general instruction, objectively controls and permits name redaction.

need for employee names. That information includes attendance at union meetings, number of emails from employees to the Union, and the number of employee resignations before and after the alleged unfair labor practices.

Accordingly, I conclude that the Respondent's document requests regarding employee support for the Union violate Section 8(a)(1) under *Guess?*, except for the requests where the Respondent sought the number, not the names, of employees supporting or not supporting the Union.[19]

2. *The requests concerning union activities and organizing strategy*

FINDINGS OF FACT

The next category of information sought by the Respondent was employees' union activities and union organizing strategy. The Respondent sought documents reflecting the following information:

- The date, time, and participants in any telephone or videoconference calls with union officials;[20]
- Emails between the union and employees reflecting interest in starting an organizing campaign at any Starbucks store, attending union meetings, participating in union bargaining committees or serving as a union representative;[21]
- Changes the Union made to the timing of its filing of election petitions at any store nationwide due to the Respondent's alleged unfair labor practices;[22] and
- Instructions from the Union to employees about their lawfully recording conversations at work.[23]

[19] Subpoena pars. 1(a) and 1(c) are lawful, while pars. 1(b), 1(d), 1(f), 13, 16, and 17 are unlawful. The latter conclusion is not altered by the Respondent's language in Par. 26 indicating that it would agree to a protective order, because that offer was qualified by the phrase "if deemed necessary."

[20] Subpoena par. 12. Paragraph 12 requests: "Documents reflecting the date and time of and participants in (except as excluded by Instruction No. 26) virtual calls (Zoom or similar platform) and/or telephone calls to and/or from [identified Union officials] and/or any other of the Union's agents, employees, officials, representatives, and/or officers."

[21] Subpoena par. 16. Paragraph 16 requests in part: "All emails from the email account sbworkersunited@gmail.com sent since August 2021 by any Starbucks employee that reflects interest in starting a union campaign at any Starbucks store, attending union meetings, participating in a union bargaining committee, or serving as a Union representative…"

[22] Subpoena par. 15. Paragraph 15 requests: "All Documents relating to changes to the timing of filing election petitions at any Starbucks store based on the Complaint or underlying charges, other alleged unfair labor practices, or any other factor."

[23] Subpoena par. 9. Paragraph 9 states: "All Documents relating in any way to Communications you have had with the Union concerning the subject of Recording during the course of your employment at Starbucks, including but not limited to Documents relating to whose conversations to record; how and

ANALYSIS

Assuming without deciding that the requests for emails, calls, and changes to petition filing dates are relevant and not made for an illegal objective, I conclude the requests are unlawful under prong 3 of *Guess?*. For the same reasons stated concerning the requests involving employee support for the Union, the employees' strong interest in keeping their union activities confidential outweighs the Respondent's need for the information. Again, the Respondent sought the names of call participants (not the number of calls), meaning their communications with the Union would be revealed. The second request is so broad that it encompasses essentially all emails regarding employees' union activities nationwide, including any organizing campaigns. The request on changes to the timing of petition filings seeks the Union organizing strategy nationwide. Requests to obtain union organizing strategy are unlawful. *Laguna College of Art & Design*, 362 NLRB 965, 965 fn.1 (2015) (upholding hearing officer's determination to quash a subpoena seeking pro-union supervisor's personal emails and text messages with the union organizing committee and union officials involving organizing strategy because the "considerable interests" of the workers "in keeping their Section 7 activity confidential" outweighed the employer's need for the subpoenaed information).

As to the request for recording instructions, I find it unlawful under prong 1 of *Guess?*, because the information is not relevant to the 10(j) proceeding. The Respondent argues that the recording instructions may show that employees are illegally recording conversations or violating company policies when recording. Although instructions could violate the law or the Respondent's policies, they are instructions. The information would not show that employees actually violated company policy when recording or illegally recorded conversations. The information is not relevant to the reasonable cause or just-and-proper issues in the 10(j) proceeding.

3. *The requests concerning publicity of union activities and alleged unfair labor practices*

FINDINGS OF FACT

The next category of information requested by the Respondent was employee and union efforts to publicize their union activities and the Respondent's alleged unfair labor practices. The Respondent sought documents reflecting the following information:

- Social media postings by employees and the Union concerning their organizing activities and any alleged unfair labor practices by the Respondent;[24]

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when to record conversations; the types of conversations to record; the purpose of recording conversations; and the circumstances under which recording would be permissible or lawful and when it would be impermissible or unlawful."

[24] Subpoena par. 2. Paragraph 2 requests: "All Documents relating in any way to statements and information you have posted on any social media platform since August 2021 concerning the union

- Employee conversations with the Union about contacting the media and the information the employees should provide to the media, again concerning union organizing and unfair labor practices by the Respondent;[25]
- Employees' interviews with the media and any published media articles, again concerning union organizing and unfair labor practices by the Respondent;[26]
- Speeches made by employees at public events concerning the same topics;[27] and
- Communications with publicly elected officials or their staffs regarding union organizing.[28]

ANALYSIS

I conclude that these document requests are unlawful under prong 1 of *Guess?*, because they are not relevant in the 10(j) proceeding. The Respondent argues that these requests are

organizing at the Buffalo stores and the Rochester store; organizing by the Union at other Starbucks stores; any of the conduct in which Starbucks is alleged to have engaged that the Complaint alleges violated the NLRA; and rallies, protests, strikes, forums, seminars, programs or the like involving union organizing at, or alleged unfair labor practices by, Starbucks and matters related thereto."

[25] Subpoena pars. 3 and 4. Paragraph 3 requests: "All Documents relating in any way to Communications you have had with the Union or agents, representatives, or employees of the Union concerning their putting you in contact or connecting you with any digital, print, radio, TV, internet-based or other media outlet." Paragraph 4 requests: "All Documents relating in any way to Communications you have had with the Union or its agents, representatives, or employees regarding information to be provided to any digital, print, radio, TV, internet-based or other media outlet concerning union organizing, union elections and other union related matters involving the Buffalo stores or the Rochester store; union organizing, union elections and other union related matters at Starbucks stores around the country; Starbucks' discipline and termination of employees allegedly because of their union activities; and any other matter relating to union organizing at, or alleged unfair labor practices by, Starbucks."

[26] Subpoena par. 5. Paragraph 5 requests: "All Documents relating in any way to Communications you have had with, including interviews, information you have provided to, and articles published by, any digital, print, radio, TV, internet-based or other media outlet concerning union organizing, union elections and other union related matters involving the Buffalo stores and the Rochester store; union organizing, union elections and other union related matters at Starbucks stores around the country; Starbucks' discipline and termination of employees allegedly because of their union activities; and any other matter relating to union organizing at, or alleged unfair labor practices by, Starbucks."

[27] Subpoena par. 6. Paragraph 6 requests: "All documents relating to, including copies of, any speeches, comments, remarks or responses you gave at any rallies, protests, strikes, forums, seminars, programs or the like concerning union organizing, union elections and other union related matters involving the Buffalo stores or the Rochester store; union organizing, union elections and other union related matters at Starbucks stores around the country; Starbucks' discipline and termination of employees allegedly because of their union activities; and any other matter relating to union organizing at, or alleged unfair labor practices by Starbucks."

[28] Subpoena par. 14. Paragraph 14 requests: "All Documents sent to or received from publicly elected or appointed officials (or their staff) relating to the organizing campaign in Buffalo stores or the Rochester store."

relevant to whether union support was chilled or not in support of its just-and-proper defense. However, the text of the requests make no reference to communications addressing that specific issue. Rather, the requests are seeking to determine what the Union's strategy was for employee communications with the media that would support the organizing campaign and what information employees ultimately communicated to the media. That information would not bolster the Respondent's defense in the 10(j) proceeding. The Respondent also argues that the documents could establish that the Union is pushing a "false narrative about Starbucks for the purpose of motivating potential voters to support the Union." Even if true, that information likewise is irrelevant to whether reasonable cause exists that the Respondent violated the Act or employee support for the Union was impacted by the Respondent's unfair labor practices.

4. *The requests concerning the employment activities of current and former employees outside of Starbucks*

FINDINGS OF FACT

The next category of information requested by the Respondent was the employment activities of employees outside of Starbucks. The Respondent sought documents reflecting the following information:

- Any payments made by the Union to employees;[29]
- Any employment outside of Starbucks;[30]
- Attendance at any educational or vocational training;[31]
- Any subsequent employment and earnings, or participation in educational or vocational training, by the employees whom the Respondent was alleged to have discharged due to their union activity;[32] and

[29] Subpoena pars. 7 and 8. Paragraph 7 requests: "All Documents (including but not limited to receipts, pay checks, payroll registers, general ledgers, Form 1099s, W-2s, cancelled checks, time reports, and expense reports) relating in any way to any payments made to you since August 2021 by the Union." Paragraph 8 requests: "All Documents (including but not limited to receipts, pay checks, payroll registers, general ledgers, Form 1099s, W-2s, cancelled checks, time reports, and expense reports) relating in any way to any payments made to you since August 2021 by any person or entity at the request of or on behalf of the Union or for your attendance at or participation in any rally, protest, strike, forum, seminar, program or the like involving Starbucks in any way."

[30] Subpoena par. 10. Paragraph 10 requests: "All Documents concerning any employment you have held, other than at Starbucks, any self-employment you have had, and any services you have performed as an independent contractor at any time since August 2021."

[31] Subpoena par. 11. Paragraph 11 requests: "All Documents concerning your attendance at any educational or vocational institution or participation in any education or training program since August 2021."

[32] Subpoena pars. 18, 19, and 20. Paragraph 18 requests: "All documents relating to your employment with, or termination of employment from, any employer, sole proprietorship, partnership, corporation, or other entity since the termination of your employment with Starbucks, including but not limited to documents identifying or showing: the name of the entity; the location(s) at which or out of

- The inability of any of the discharged employees to work since their termination from Starbucks.[33]

I conclude that these requests likewise violate Section 8(a)(1) under the first prong of *Guess?*, because they are not relevant to the 10(j) proceeding. All of the requests were directed to the questions of whether any employees were working for, being paid by, or being trained by the Union since the beginning of the organizing campaign and/or after their employment with Starbuck ceased. The relationship of employees and the Union has no bearing on whether the General Counsel has established reasonable cause to believe that unfair labor practices have occurred or that injunctive relief is just and proper because the unlawful conduct caused irreparable harm.

The Respondent argues that these requests are relevant on the issue of whether an employee is available for reinstatement if the district court were to order it in the 10(j) proceeding. Were the court to make such a finding, the Respondent would be ordered to offer reinstatement to the discharged employees, irrespective of whether they were available for or uninterested in reinstatement.

5. *The request for documents provided to the NLRB*

FINDINGS OF FACT

Finally, the Respondent's remaining document request sought documents provided to the NLRB regarding the complaint allegations in *Starbucks Buffalo I*.[34]

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which you work or worked (street address, city, state); your application for employment; your resume; your hire date; position(s) held; your rate of pay (hourly or salary); your holiday and vacation benefits; any insurance benefits; other benefits received; and, if applicable, your termination date and the reason for your termination."

Paragraph 19 requests: "Without limitation, all pay stubs, Federal W-2 Wage and Tax Statement Forms, Federal Schedule K-1 Forms, Federal 1099-INT Forms, Federal 1099-DIV Forms, and Federal 1099-MISC Forms that you have received from any employer, sole proprietorship, partnership, corporation, or other entity since the termination of your employment with Starbucks."

Paragraph 20 requests: "All documents relating to your attendance at any school, college, university or other educational institution, or participation in any trade, craft or apprenticeship program or the like, since the termination of your employment with Starbucks, including but not limited to documents identifying or showing: the name and location of the institution or program; the dates of your attendance or participation; your daily and weekly schedule; any extracurricular activities in which you participate or participated; the daily and weekly hours devoted to any extracurricular activities; and the anticipated duration of your attendance at the institution or participation in the program."

[33] Subpoena par. 21. Paragraph 21 requests: "If you have been unable or unavailable to work at any time since your termination from Starbucks, documents identifying or showing the period over which, you were unable or unavailable to work and the reason for your inability or unavailability, excluding any documents containing confidential or protected health information."

[34] Subpoena par. 1(g). Paragraph 1(g) seeks documents provided to the NLRB regarding: "The

ANALYSIS

I conclude that this request is unlawful under prong 2 of *Guess?*, because it has an illegal objective. Section 102.118 of the Board's Rules and Regulations prohibits the disclosure of documents in the General Counsel's possession without the consent of the General Counsel. This request seeks all documents in the General Counsel's possession on the complaint allegations. Complying with the request would directly violate Section 102.118.[35]

V. DID THE RESPONDENT'S DISCOVERY REQUESTS VIOLATE SECTION 8(A)(4)?

The General Counsel's complaint also alleges that the Respondent violated Section 8(a)(4) and (1) by issuing the document requests to individuals who testified at the ULP hearing, gave testimony to the General Counsel in the form of an affidavit, or otherwise cooperated with the General Counsel's investigation in *Starbucks Buffalo I*.

Section 8(a)(4) of the Act prohibits an employer from discharging or otherwise discriminating against an employee because the employee has filed charges or given testimony under the Act. The Supreme Court has interpreted this language broadly to encompass, for example, providing testimony during the General Counsel's investigation of an unfair labor practice charge. *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972). In so doing, the Court relied upon the congressional purpose of Section 8(a)(4): "Congress has made it clear that it wishes all persons with information about [unfair labor practices] to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). The Board has found threats, even those unaccompanied by any adverse employment action, violate Section 8(a)(4). *Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1386 (2010); *AM*

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conduct in which Starbucks is alleged to have engaged that the Complaint alleges violated the NLRA, including but not limited to the allegations that Starbucks violated the NLRA by: utilizing support managers at Buffalo stores or the Rochester store to engage in surveillance of employees' union activities; conducting group meetings, listening sessions and one-on-one meetings with employees regarding matters relating to union representation; changing hours availability requirements; interrogating employees regarding their union activities; granting benefits to employees to dissuade them from supporting the union; disciplining and terminating employees because of their support for or activities on behalf of the Union; permanently closing one and temporarily closing other stores; and selectively enforcing rules and other policies and procedures."

[35] Subpoena pars. 1(a), 1(b), 1(c), 1(d), 1(e), and 1(f), to the extent they requested documents provided to the NLRB, also are unlawful on the same basis as par. 1(g).

Having discussed all of the Respondent's individual requests, I further note now that certain of the Respondent's requests seek documents for its stores nationwide, not just from the Buffalo stores. Other requests define the time period for which documents are being sought as August 2021 to the present. The geographic and temporal scope of these requests is overly broad and irrelevant to the 10(j) proceeding. The relevant geographic scope is the Buffalo stores. The relevant time period is from the date an election petition was filed to the date of an election, unless no petition has been filed. To the extent any of the Respondent's requests go beyond that, they violate Sec. 8(a)(1) under prong 1 of *Guess?*.

Property Holding Corp., 350 NLRB 998 fn. 4 (2007), *reconsideration granted on other grounds*, 355 NLRB 721 (2010).

The Board's well-known *Wright Line*[36] standard applies to Section 8(a)(4) claims. *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002). Under *Wright Line*, the General Counsel bears the initial burden of showing by a preponderance of the evidence: (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. *Austal USA, LLC*, 356 NLRB 363, 363 (2010). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). A discriminatory motive may be established by, among other things, the timing of an employer's discharge or other discriminatory action and evidence that an employer's proffered explanation for the adverse action is a pretext. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). Pretext may be demonstrated by, among other things, disparate treatment. *Windsor Convalescent Center*, 351 NLRB 975, 984 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009). If the General Counsel makes the initial showing, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

I conclude that the General Counsel has not met the initial *Wright Line* burden. The preponderance of the evidence fails to establish that the Respondent harbored animus towards the individuals who testified in *Starbucks Buffalo I*. To begin, the Respondent did not initiate a lawsuit against the individuals in federal or state court. The General Counsel initiated the 10(j) proceeding against the Respondent by filing a petition for an injunction, before the ULP hearing even started. Section 10(j) requires that such actions be filed in a United States district court, meaning the Federal Rules of Civil Procedure, including those on discovery, apply to those proceedings. Courts are permitted to allow discovery in 10(j) proceedings and the district court did so here. The fact that the Respondent issued document requests after the district court allowed discovery does not establish a retaliatory motive.

The General Counsel points to the timing of the discovery requests to support an animus finding. The timing actually does the opposite. On September 7, after the General Counsel completed the case-in-chief in the ULP hearing, the district court in the 10(j) proceeding lifted the stay on that case and ordered that the Respondent could issue discovery requests by a certain deadline. Three days after that order, the Respondent issued the 22 subpoenas. Thus, the timing of the discovery requests was not retaliatory, but mandated by the district court's order. *Cf. Pain Relief Centers*, 371 NLRB No. 143, slip op. at 3 (retaliatory motive for discovery requests proven by timing where requests were sent one month after the General Counsel issued an unfair labor practice complaint against the employer and employer sought all

[36] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

documents five former employees gave to the General Counsel in support of its state-court defamation lawsuit against them).

That the Respondent served the requests on individuals who had testified in the General Counsel's case-in-chief likewise does not establish a retaliatory motive. Having heard the witnesses' testimony at the ULP hearing (including just-and-proper evidence), the Respondent was aware that the witnesses had relevant information concerning the reasonable cause and just-and-proper issues. In the General Counsel's case-in-chief at the ULP hearing, the General Counsel presented evidence favorable to her case through those witnesses. The Respondent identified a subset of those witnesses (22 out of the 39 who testified for the General Counsel), and issued discovery requests to them in order to determine if they possessed any exculpatory evidence. That is a legitimate, not retaliatory, purpose.

The General Counsel argues that pretext is established by disparate treatment, because the Respondent only subpoenaed individuals who testified at the ULP hearing or provided affidavits submitted to the district court in the 10(j) proceeding. The Respondent subpoenaed a subset of individuals who testified at the ULP hearing who it knew, for certain, had information relevant to the 10(j) proceeding. That the Respondent did not subpoena other individuals whom it did not know for certain had relevant information or conduct additional investigation to determine if other individuals had relevant information does not establish pretext. The Respondent simply took the expedient route given the district court's imposed deadline for the discovery.

Accordingly, I conclude that the Respondent's discovery requests to the 22 individuals did not violate Section 8(a)(4).

CONCLUSIONS OF LAW

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

2. The Charging Party, Workers United, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on September 10, 2022, by issuing certain discovery requests to current and former employees and to representatives of the Charging Party.[37]

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

[37] All of the paragraphs in the subpoenas are unlawful, except paragraphs 1(a) and 1(c).

5. The Respondent has not violated the Act in any of the other manners alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In particular, I shall order the Respondent to withdraw and, if necessary, otherwise seek to dismiss all of its discovery requests in *Leslie v. Starbucks Corp.*, Case 22–CD–00478–JLS in the U.S. District Court for the Western District of New York, except for paragraphs 1(a) and 1(c). I also shall order the Respondent to withdraw its sanctions or contempt motions filed in the same case to the extent those motions are premised upon noncompliance with the unlawful discovery requests. Finally, I shall order the Respondent to reimburse, with interest, the individuals upon whom the unlawful discovery requests were served for all legal and other expenses incurred, to date and in the future, in defending against those requests. Interest on that amount is to be paid at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[38]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Starbucks Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Issuing discovery requests which coercively seek information about employees' or other individuals' union and protected concerted activity; and

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

[38] I find these traditional remedies adequate to address the Respondent's unfair labor practices in this case. Therefore, I decline the requests of the General Counsel and the Charging Party for additional remedies.

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

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

(a) Within 7 days after service of this Decision and Order by the Region, if the Respondent has not already done so, withdraw and, if necessary, otherwise seek to dismiss the unlawful discovery requests contained in the September 10, 2022, subpoenas issued to 22 individuals, as identified in the remedy section of this decision, in the lawsuit docketed as *Leslie v. Starbucks Corporation*, Case 22–CD–00478–JLS in the U.S. District Court for the Western District of New York.

(b) Within 7 days from the date of this Decision and Order, withdraw and, inf necessary, otherwise seek to dismiss all contempt or sanction motions that were filed in the lawsuit docketed as *Leslie v. Starbucks Corporation*, 1:22-cv-00478-JLS to the extent those motions are premised upon noncompliance with the unlawful discovery requests identified in this decision.

(c) Reimburse the individuals upon whom the unlawful discovery requests were served for all legal and other expenses incurred in defending against those requests, to date and in the future, in the manner set forth in the remedy section of this decision.

(d) Post at its Buffalo, New York area stores (as identified in paragraph 2(a), fn. 1 of the General Counsel's complaint) copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices

[40] If a facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at its Buffalo stores at any time since September 10, 2022.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., May 12, 2023.

Charles J. Muhl
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT issue discovery requests in a lawsuit which coercively seek information about the union and protected concerted activity that you or other individuals have engaged in.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and, if necessary, otherwise seek to dismiss our unlawful discovery requests contained in our September 10, 2022, subpoenas issued to 22 individuals in the lawsuit docketed as *Leslie v. Starbucks Corporation*, Case 22–CD–00478–JLS in the U.S. District Court for the Western District of New York.

WE WILL withdraw and, if necessary, otherwise seek to dismiss all contempt or sanction motions that we filed in the lawsuit docketed as *Leslie v. Starbucks Corporation*, Case 22–CD–00478–JLS to the extent those motions are premised upon noncompliance with our unlawful discovery requests in that lawsuit.

WE WILL reimburse, with interest, the individuals upon whom we served the unlawful discovery requests for all legal and other expenses incurred, to date and in the future, in defending against those requests.

STARBUCKS CORPORATION
(Respondent)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 03-CA-304675 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (518) 419-6669.