BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

RICHARD RENNER and LINDSEY WILLIAMS,

Charging Parties,

against,

Case Nos. 05-CA-095886 and 05-CA-095908

NATIONAL WHISTLEBLOWERS CENTER,
KOHN, KOHN & COLAPINTO, LLP, and
NATIONAL WHISTLEBLOWER LEGAL
DEFENSE AND EDUCATION FUND,

Respondent and Employer.

POSITION STATEMENT OF RENNER AND WILLIAMS

On the afternoon of November 5, 2012, the joint employer terminated the employment of five employees, including Richard Renner and Lindsey Williams.[1] It did so shortly after these same five employees undertook a series of concerted actions to address wages and the joint employer's lack of transparency about its financial windfall from a client's $104 million whistleblower award.

The joint employer had announced this award at a September 11, 2012, press conference at the National Press Club.[2] Around this time, the employer also brought in five recent graduates. On October 9, 2012, five more senior staff members confronted Stephen Kohn, Michael Kohn, and David Colapinto, the joint employer's three founders, about their refusal to disclose the amount of the employer's share of this award.[3] The staff stated that if they formed a staff union, the union would have a right to seek disclosure of the employer's financial information if the

1 Declaration of Williams, 01/11/2013, p. 29, ¶¶ 58-60; Declaration of Renner, 01/11/2013, pp. 28-29, ¶¶ 112-121; Declaration of Erik Snyder, 11/13/2012, p. 8, ¶ 21; Declaration of Owen Dunn, 11/12/2012, pp. 4-5, ¶ 27; Declaration of Timothy Cheng, 12/07/2012, p. 7, ¶ 23

2 Declaration of Williams, 01/11/2013, p. 10, ¶ 24; Declaration of Renner, 01/11/2013, p. 11, ¶ 34.

3 Declaration of Williams, 01/11/2013, pp. 13-15, ¶¶ 28-31; Declaration of Renner, 01/11/2013, pp. 1, 15-17, ¶¶ 2, 55-66.

employer claimed inability to pay prevailing market wages (which the founders already had claimed). When the staff raised a concern about the influx of new hires, Mr. Stephen Kohn explained that most of the law graduates cost next to nothing as they were subsidized by their law schools.

The founders persisted in their refusal to disclose the amount of their share of the client's award and also stated that attorneys could not form unions. The founders agreed to convene staff meetings to discuss these issues further and to hold a staff meeting on October 18, 2012. On October 10, 2012, the staff confirmed their discussion with an email.[4] The founders postponed the agreed upon October 18, 2012, staff meeting. On October 22, 2012, the five senior staff members invited the five new law fellows to lunch and disclosed to management that the lunch was held to discuss formation of a staff union. Management expressed animus against this luncheon.[5]

On October 25, 2012, management called Renner and Williams to a meeting. Once they arrived at the meeting, founder Stephen Kohn announced that the meeting was the employer's "first ever meeting of managers and supervisors."[6] The parties discussed whether Renner and Williams were really supervisors and whether this meeting was convened to help the employer with its position in bargaining unit determination.

4 Declaration of Williams, 01/11/2013, p. 14, ¶ 30; Declaration of Renner, 01/11/2013, p. 17, ¶ 67.

5 Declaration of Owen Dunn, 11/12/2012, p. 3, ¶ 19 (after learning about the luncheon Estelle Kohn threatened Dunn's employment), p. 4, ¶ 22 ("unapproved staff meetings" now prohibited). The employer also exhibited animus by including a gag clause in a proposed severance agreement. On about November 20, 2012, the employer submitted to Renner and Williams proposed severance agreements that would require them not to "criticize, disparage, or say or do anything that casts in a negative light, any of the Releasees to any other person." This provision would interfere with their concerted activities and is contrary to the public interest. See also Email from Chioma Chukwu reporting that Estelle Kohn told her that "anybody who had anything to do with the meetings (who attended) can't have a key" to the newly changed office locks, 11/08/2012.

6 Declaration of Williams, 01/11/2013, pp. 18-20, ¶¶ 39-41; Declaration of Renner, 01/11/2013, p. 25, ¶¶ 89-96.

On November 5, 2012 at approximately 4:30 pm, the employer called the staff to a meeting. Williams was at a previously scheduled doctor's appointment and did not attend. At the meeting, the employer terminated the employment of Renner and three of the other staff members who had engaged in protected concerted activity, required these employees to leave the premises without taking any employer information, and terminated access to their email accounts and electronic files. The employer left Williams a voicemail at approximately 6:00 pm, informing her of her termination from employment. The next day, the employer publicly claimed the "layoff" was necessary due to lack of funding.[7] On November 7, 2012, an intern overheard Estelle Kohn stating that Renner was "the reason they all got fired."[8] The joint employer has also refused to return some of Renner and Williams' personal property, including their personal electronic files.

SUMMARY

The timing, animus and use of pretextual reasons to justify the terminations all make clear that the employer's decision to terminate the employment of the five instigators was in reprisal for their protected concerted activities. The charging parties understand that the employer claimed that Renner and Williams are excluded from protection under the National Labor Relations Act (NLRA) as supervisors or managers. In Section A, this memo explains the statutory context and requirements for excluding a supervisor from NLRA coverage. Section B explains how the employer bears the burden of proving exclusions from coverage. Section C sets out how the unusual nature of the joint employer, and other unusual facts, make application of the supervisor exclusion more problematic for the employer here. Section D sets out the Board's jurisdiction over law firms. Section E explains how performing the normal duties of an attorney cannot be sufficient to establish supervisory status. Section F explains how Renner and Williams

7 See http://legaltimes.typepad.com/blt/2012/11/significant-layoffs-made-at-national-whistleblowers-center.html

8 See Email from Chioma Chukwu, 11/07/2012.

did not exercise the independent judgment required for the supervisory exclusion. Section G discusses the indicators that after Renner and Williams announced their protected activities, this employer began fabricating a pretextual basis to support its supervisory defense, and this use of a pretext is itself evidence of a guilty consciousness. Finally, Section H explains that Renner and Williams were not managers as that term is used under the Act. The present record contains substantial evidence that Renner and Williams were employees, and the employer's supervisory and managerial defenses should be rejected.

A. Statutory context of the supervisory exclusion.

The NLRA affords employees the rights to organize and to engage in collective bargaining free from employer interference. 29 USC § 157. In 1947, Congress amended the statute so that the term "'employee' . . . shall not include . . . any individual employed as a supervisor." 61 Stat. 137-138, codified at 29 U.S.C. § 152(3). Congress defined a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
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> 61 Stat. 138, codified at 29 U.S.C. § 152(11).

Under provision 29 USCS 152(11) of the NLRA ("Act"), an employee is a "supervisor" if the employee has the authority, in the interest of the employer, to engage in specified activities – including responsible direction of other employees – in circumstances in which the exercise of such authority requires the use of independent judgment. For an employee to be deemed a supervisor as defined in 29 USCS 152(11), the NLRA requires the resolution of three questions, each of which must be answered in the affirmative:

(1) whether the employee has authority to engage in one of the activities listed in 152(11);

(2) whether the exercise of that authority requires the use of independent judgment; and

(3) whether the employee holds the authority in the interest of the employer.

Merely being a professional cannot automatically make someone a supervisor. Congress specifically authorized the unionization of professionals. Section 9(b).

In *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571 (1994) (HCR), the Supreme Court addressed only the third question. In construing the phrase "in the interest of the employer" (in Section 2(11)), the Court rejected the Board's holding that a nurse's supervisory authority is not exercised in the interest of the employer "if it is incidental to the treatment of patients." *Id*. at 576-580.

The evidence in this case shows that the answers to questions (1) and (2) are both, "No." Renner and Williams did not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or effectively recommend such action. Renner and Williams were not responsible for the direction of other employees. Even in the rare instances in which Renner and Williams may have directed another employee, they were not held responsible for the nature and extent of the direction provided and did not exercise independent judgment.

Rather, Renner and Williams' interactions with other employees was typical of a professional relationship. These attorneys worked together with other employees and split up duties to complete work projects or accomplish job responsibilities. In none of these situations, however, did Renner and Williams have actual authority over any other employee or exercise independent judgment on behalf of the employer. The three founders of the joint employer retained for themselves the exercise of all independent judgment. The founders, independently or collectively, could change any direction that Renner or Williams gave at any time. Only the founders could resolve disputes. Indeed, their decision to terminate the employment of all five employees who engaged in protected concerted activity demonstrates their refusal to share their power as employers.

B. The burden of proof is on the employer.

The National Labor Relations Board (the Board) has long held, in both unfair labor practice cases and representation cases, that the party claiming supervisory status has the burden of proof on this issue. *Ahrens Aircraft, Inc*., 259 NLRB 839, 842 (1981), enf'd, 703 F.2d 23, 24 (1st Cir. 1983) (unfair labor practice case; burden placed on respondent employer to prove that discriminatees were supervisors). With the exception of the Sixth Circuit, reviewing courts have approved the Board's allocation of the burden of proof. *Beverly Enterprises--Massachusetts, Inc. v. NLRB (East Village Nursing)*, 165 F.3d 960, 962 (D.C. Cir., 1999) ("The burden of proving supervisory status rests upon the party asserting it."), citing, *Beverly Enterprises-Pennsylvania, Inc. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997) (employee is a supervisor only if the requisite statutory questions "are answered in the affirmative"; employer "failed to show" that LPNs at issue exercised supervisory authority). The Board has adhered to its position. *Bozeman Deaconess Hospital*, 322 NLRB 1107 n.4 (1997) (rejecting contrary view of Sixth Circuit); *Azusa Ranch Markets*, 321 NLRB 811, 812 (1996).

Conclusory assertions or testimony by the charge employer is not sufficient to establish supervisory status. *Avante at Wilson, Inc*., 348 NLRB No. 71 (Oct. 31, 2006). Whether an employee is a supervisor must be determined on the basis of record evidence. See *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLR*B , 445 F.2d 237, 243, 144 U.S. App. D.C. 167 (D.C. Cir. 1971) ([W]hat the statute requires is evidence of ***actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority***. [Emphasis added]).

C. The unusual facts of this case preclude a finding of supervisory or managerial status.

Around 1988, Michael Kohn, his brother Stephen Kohn, and their college friend David Colapinto (together "the founders"), decided to leave the Government Accountability Project (GAP) and establish both the National Whistleblowers Center and the private law office of Kohn, Kohn & Colapinto, LLP (KKC). They later also established the National Whistleblower Legal Defense and Education Fund (the Fund) to serve certain functions for the other organizations. For example, health insurance for all employees of any of these organizations was and is purchased through the Fund.

Over time, the founders hired other attorneys to represent whistleblowers and to perform other tasks for any of these organizations. Each organization has been used in ways that maximized the advantages for the founders. For example, the Fund also paid the salary of attorney Timothy Cheng, even though he worked for the KKC law firm.[9] The NWC's Public Interest Law Fellow, Owen Dunn, also did work for the KKC law firm.[10] The fluidity of management among the employer entities is further exemplified by the failure of the founders to require time and attendance records showing how much time employees worked for each entity.

The joint employer is also unusual because it does not employ the support staff typical of a law office. Instead, it uses college and law student interns who provide clerical and paraprofessional support for free or for college credit.[11] The internship program depended on the commitment to make the experience an educational one for the interns, and not a vehicle to obtain free labor for the employer. Thus, the interns are not employees of the joint employer, but instead students and volunteers who receive guidance and direction from staff members in contrast to formal supervision within the meaning of the Act.

9 Declaration of Timothy Cheng, 12/07/2012, p. 5, ¶ 18(d).

10 Declaration of Owen Dunn, 11/12/2012, p. 1, ¶ 8.

11 Declaration of Timothy Cheng, 12/07/2012, p. 5, ¶ 18(g).

The joint employer did not use formal discipline (until it fired five employees on November 5, 2012), and did not maintain standard operating procedures, or even regular work hours. No records are kept of sick time or vacation used. No regular performance evaluations were conducted. Key decisions, such has who to hire, what programs to initiate, when to change program practices, and resolutions of disputes, were all made by one or more of the founders. From time to time, the founders would ask Renner or Williams for input or opinion, but they would often reject that input or opinion and everyone understood that it was the founders that had the final say. If Renner or Williams used the KKC credit card or signed documents on behalf of the joint employer it was only done at the direction of the founders or with their prior approval.

The joint employer hired Estelle Kohn, sister of Michael and Stephen Kohn, to serve as Deputy Director of NWC. In this role, she recruited and selected interns and attorney staff for all the joint employer's entities. Estelle Kohn also served as Director of the Fund's Attorney Referral Service (ARS). Part of her ARS duties included rain-making functions of trying to curry favor with other attorneys who might provide lucrative referrals of whistleblower cases. Additionally, Estelle Kohn performed duties for KKC such as setting up client consultations. It was clear that her position, influence and authority flowed from her relationship to her brothers, who created a position for her and supported her exercise of authority on their behalf. As such, she was a managerial employee and a supervisor.

The joint employer also employed Mary Jane Wilmoth as Managing Partner of KKC, Co-Treasurer of the NWC, and trustee of the Fund. Wilmoth handled the books, health insurance, payroll, and the financial relationship among the entities. She is clearly a manager and a confidential employee.

Together, the three founders, Estelle Kohn and Mary Jane Wilmoth constituted the management of the joint employer. No one else could make decisions about the terms and conditions of employment or be held accountable for the direction of other staff.

From 2010 to 2012, the joint employer represented UBS banking whistleblower Bradley Birkenfeld. From the beginning of this case, it was well known (and even publicized) that the Birkenfeld disclosures of fraud and mismanagement created a windfall to the US government and added substantial monies to the federal fisc. The IRS launched an amnesty program that offered Americans the opportunity to self-report their previously undisclosed income from Swiss bank accounts and avoid prosecution. The IRS collected about $5 billion through this program. In addition, UBS paid a substantial fine to the US government.

Under the IRS whistleblower bounty program, Birkenfeld could eventually receive an award of over $1 billion. In the years before 2012, this prospect for a huge recovery was a motivating factor for the staff to continue working with the partners for wages that were significantly below prevailing market rates. Stephen Kohn, in particular, commonly tantalized the staff with talk of his plan to make retroactive payments to the staff to reflect the market rates for their professional attorney services. These payments would involve a substantial increase over the non-profit rates ($50,000 for Renner and $63,000 for Williams). Renner even worked for 15 months in 2010 and 2011 for no compensation at all based on the founders' assurances that they would make up for it when the cases paid off.

In August 2012, word spread among the staff that Birkenfeld was about to receive his first award from the IRS and that it would be $104 million. Stephen Kohn and the other two founders made clear that the staff were not to disclose this to anyone until after NWC could make the announcement at a press conference. The staff complied.

Even before the press conference, the founders and Estelle Kohn, brought in five recent graduates. Renner and Williams were not consulted about these new team members and were not informed of the conferral of any supervisory responsibilities for these new staff members. Stephen Kohn later explained that three of the fellows, Dasha Galperin, Pia Watkins and Chioma Chukwu were paid by their law schools to work for NWC, and that KKC would pay Watkins and Chukwu for 15 hours a week to work on KKC client's cases. However, staff were given no direction about when these law fellows were performing duties as employees, or when they were law fellows paid by their schools. Felipe Bohnet-Gomez and Emily Brundage worked for KKC. Emily quit shortly after she was hired and was replaced by an attorney, Yejin Jang. Shortly after the press conference, the founders also hired an independent contractor, Anne Hopengarten, to perform bookkeeping functions for the joint employer.

D. The Board has jurisdiction over law firms.

The Board has asserted jurisdiction over law firms since 1977, provided a firm has $250,000 in gross revenue. *Foley, Hoag & Eliot*, 229 NLRB 456 (1977); *Wayne County Neighborhood Legal Servs., Inc*., 229 NLRB 1023 (1977) (unit of staff attorneys); *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980) (unit of attorney, paralegal, law clerk and investigator); *Camden Reg'l Legal Servs., Inc*., 231 NLRB 224 (1977); *David Van Os & Assocs., P.C*., 346 NLRB No. 79 (Mar. 31, 2006). The general process of establishing a union would be the same as it is for employees in other fields.

E. Performing normal attorney duties does not make an employee a supervisor.

The joint employer apparently contends that the staff could not unionize because that many of the attorney-staff members "supervise" secretaries and other support staff or even junior associates, and thus might be properly be considered to be "supervisors" and thereby precluded from becoming a member of a union. Undoubtedly, in other contexts, some attorneys may very well be supervisors; however, it is equally likely that many attorneys are not. Hence, any determination of claimed supervisory status of attorneys needs to be examined on a case-by-case basis in accord with the law.

Here, the joint employer operates with an unusual model in which the support personnel are typically unpaid interns. For those support personnel who were paid, the founders with Estelle Kohn and Mary Jane Wilmoth made the decisions about the terms and conditions of employment, including the assignment and direction of their work. When disputes arose among the staff, only the founders could exercise independent judgment to resolve those disputes.

Giving directions to other employees is not sufficient to establish that a person serves a supervisor under the Act. *NLRB v. Sec. Guard Serv.*, 384 F.2d 143 (5th Cir. 1967); *Food Store Employees v. NLRB*, 422 F.2d 685, 690 (D.C. Cir. 1969) ("Almost any employee 'directs' other employees in some fashion at some time."); *Miss. Power & Light Co*., 328 NLRB 965, 971 (1999) ("Both the Board and courts have recognized that not every act of assignment or direction makes an employee a supervisor."), abrogated by *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263 (1st Cir. 2004) ("[T]he mere fact that an employee gives other employees instructions from time to time does not . . . render him . . . a supervisor.").

The Sixth Circuit explains its standard in *NLRB v. Child World Inc*. (6th Cir. 1987), 817 F.2d 1251, 1254, as follows:

> This Circuit has emphasized that the mere performance of routine tasks or the giving of instructions to others is not sufficient to afford an individual supervisory status. The true test involves an inquiry into the significance of the individual's judgment which is usually determined by observing whether the individual "identif[ies] with the interests of the employer rather than the employees." *Lauren Mfg. Co*., 712 F.2d at 248. Thus, an individual does not become a supervisor merely because he possesses greater skills and job responsibilities than other employees, but he must exercise independent judgment in performing those responsibilities.

F. Renner and Williams did not exercise independent judgment on matters of the employer's relationship to its employees.

To be "independent," the exercise of judgment must be beyond regular or customary activities and not controlled by outside sources. *Training Sch. at Vineland*, 332 NLRB 1412 (2000).

In *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006), the Board clarified that "to exercise 'independent judgment' an individual must at [a] minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." 348 NLRB at 692-93. "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Id*. at 693. Rather, "the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id. (citations omitted).

The DC Circuit has said that *Oakwood Healthcare, Inc*., "undisputedly reflects sound law." *Avista Corp. v. NLRB*, 2013 U.S. App. LEXIS 1377 (D.C. Cir. January 18, 2013), Board Case No. 19-CA-33103 (reported at 357 *NLRB* No. 41) (holding that NLRB is entitled to deference in its decision that distribution dispatchers are not supervisors). In *Oakwood Healthcare*, the Board applied *NLRB v. Kentucky River Community Care, Inc.*, 523 U.S. 706 (2001). There, the Court recognized that some nominally supervisory judgments may be performed without a sufficient degree of judgment or discretion, and thus would not warrant a finding of supervisory status. The Court added that "the degree of judgment . . . may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." *Id*. at 714; see also *Hospital General Menonita v. NLRB*, 393 F. 3d 263, 268 (1st Cir. 2004). In dicta, the *Kentucky River* Court also indicated that the Board can distinguish between employees who "direct the manner of others' performance of discrete tasks from employees who direct other *employees*." *Id*. at 720 (emphasis in original). These cases fit well with Williams' experience working with Owen Dunn. On October 24, 2012, Stephen Kohn gave Williams a written memo detailing how she should oversee Dunn's work.[12] This memo indicates that Williams did not have the authority to exercise ***independent*** judgment over other employees.

In *Los Angeles Water & Power Employees' Ass'n*, 340 NLRB 1232 (2003), one employee occasionally notified other employees that they must fill in for someone who was out and initialed time cards and time-off requests in the supervisor's absence. That employee was not considered a supervisor. The employee did not actually verify attendance, and signed off on time-off requests as a routine matter. Further, although the employee participated in interviews for new hires, he did not make any independent hiring recommendation. Rather, he discussed with more senior management whether they should recommend that the person be hired. This case well fits Williams' experience in recommending Owen Dunn for hire. Williams recommendation alone was not enough, she needed the approval of Estelle Kohn who actually held the authority to make an effective recommendation to her brothers.

Similarly, in *Armstrong Machine Co., Inc*., 343 NLRB No. 122 (2004), the Board held that a job repair foreman was not a supervisor. This was because he did not exercise independent judgment in assigning work or in addressing customer inquiries; merely giving some instructions or minor orders to other employees does not confer supervisory status on the employee in question. Only individuals with "***genuine management prerogatives***" are considered supervisors. *Id*. at n.4.

In *Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006), the Board noted that there is a distinction between requesting certain action and having the authority to require certain action to be taken, such as mandating that employees stay late. For an individual to be a supervisor, he or she must have the authority to take supervisory action. *Id*., slip op. at 3. In

12 Declaration of Williams, 01/11/2013, p. 18, ¶ 38

Croft Metals, Inc., 348 NLRB No. 38 (Sept. 29, 2006), the third case in the trio, the Board noted that a lead person occasionally switching tasks that need to be performed is not a supervisory "assignment" because that is similar to ad hoc instructions involving a discrete task. *Id*., slip op. at 6.

In *735 Putnam Pike Operations, LLC v. NLRB*, 474 Fed. Appx. 782, 783, 2012 U.S. App. LEXIS 6594, 192 L.R.R.M. 3251, 2012 WL 1138773 (D.C. Cir. 2012), the Court explained as follows:

> The record supports the Board's finding that Putnam Pike's registered nurses did not exercise disciplinary authority. The "write-ups" and performance evaluations that they completed regarding other staff members were not "final and authoritative" disciplinary actions, see *Jochims v. NLRB*, 480 F.3d 1161, 1170, 375 U.S. App. D.C. 278 (D.C. Cir. 2007), and they had no negative effects on the reviewed employees' job status or pay, see *id*. at 1173.
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> Nor did inclusion in the employee handbook of a progressive disciplinary system establish the charge nurses exercised disciplinary authority under Section 2(11).
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> Putnam Pike's contentions regarding the nurses' authority to direct and assign work fail as well. Although the record indicated that the registered nurses directed staff in the performance of patient-care tasks and resolved minor disputes between staff members, there was no evidence that the nurses were held accountable if the staff failed to perform as directed. A party cannot establish "responsibility to direct" supervisory authority under Section 2(11) without demonstrating accountability. See *Oakwood Healthcare*, 348 NLRB at 691-92; *Beverly Enters.-Minn., Inc*., 348 NLRB 727, 730-31 (2006).

Whether an employee is a supervisor must be determined on the basis of record evidence. See *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB* , 445 F.2d 237, 243, 144 U.S. App. D.C. 167 (D.C. Cir. 1971) ([W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.). Paper authority alone does not make a worker a supervisor. See *Beverly Enters*., 165 F.3d at 962 (citing *Food Store Employees Union, Local 347 v. NLRB*, 422 F.2d 685, 690 (D.C.

Cir. 1969)). Thus, the joint employer's contract with Owen Dunn does not determine who his supervisors were. Actual exercise of supervisory authority, outside the detailed and specific instructions of one of the founders, is required. Moreover, providing a contract to Dunn has little effect on the status or authority of Renner and Williams if they were not provided with copies during their employment.

G. The employer sudden conferral of purported supervisory status at a supervisors and managers meeting is transparent and highly pretextual and itself provides highly probative evidence to support the inference that the employer knew that Renner and Williams were not supervisors or managers.

On October 25, 2012, the founders called a meeting that they labeled the "first ever meeting of managers and supervisors." They directed Renner and Williams to attend without disclosing the purpose or significance of this meeting in advance. The founders knew that the charging parties would not be happy to be labeled as supervisors or managers. Given the fact that these individuals had already engaged in concerted activity from the October 9, 2012, meeting and thereafter, the obvious purpose was to deny statutory protection to the two attorneys who spearheaded the unionization. Equally probative of pretext, the founders never before, and never after, held any "managers and supervisors" meetings. On the same day, the founders informed Erik Snyder that Renner and Williams were supervisors. Snyder found this "odd" as "to my knowledge Lindsey and Richard had no actual supervisory authority …."[13]

As such, the October 25, 2012, meeting was nothing more than an ill-concealed pretext to create facial evidence of the conferral of supervisory and managerial status by the founders notwithstanding the fact that they knew full well that their actions could not otherwise establish this purported status. The pretextual "managers and supervisors" meeting is evidence of a consciousness of guilt – the founders knew that the true facts were not sufficient to establish their burden of proof, and they undertook an effort to generate false evidence. "Resort to a pretextual

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13 Declaration of Erik Snyder, 11/13/2012, p. 7, ¶ 17. See also Declaration of Timothy Cheng, 12/07/2012, p. 5, ¶ 18(b).

explanation is, like flight from a scene of the crime, evidence of consciousness of guilt, which is, of course, evidence of illegal conduct." *Sheridan v. DuPont*, 100 F.3d 1061, 1069 (3d Cir. 1996), quoting *Binder v. Long Island Lighting Co*., 57 F.3d 193, 200 (2d Cir. 1995).

H. Renner and Williams were not managerial employees.

Some attorney-employers may argue that attorneys cannot unionize because they are "managerial employees." The NLRA itself is silent with respect to the issue. However, the legislative history of the 1947 amendments to the NLRA indicates that Congress intended to exclude true managerial employees from the definition of "employee" under the Act despite not explicitly including the term in the Act. As a result, the managerial exclusion is the product of case law developed by the NLRB and U.S. Supreme Court based on the legislative history of these amendments. *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974) (After the Supreme Court's decision in *Bell Aerospace*, the Board on remand held that the employees at issue (buyers) were not managerial employees, noting that the employees did not exercise sufficient discretion to be aligned with management.).

In *Bell Aerospace* , the Supreme Court specifically dismissed the employer's job titles as a factor in determining whether or not an employee is a managerial employee. 416 U.S. at 290, footnote 19. There, the Court explains as follows:

> Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management.

Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative decisions of their employer." The central inquiry made by the NLRB and the courts is whether the employee "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682–83 (1980). The party seeking to exclude employees as managerial has the burden of proof. *LeMoyne-Owen Coll*., 345 NLRB No. 93 (2005) (holding that faculty were managerial employees because they effectively make decisions in critical areas such as curriculum, course content, determination of honors, grading, admission standards, and participation in tenure decisions).

To be aligned with management, the employee's duties must be "outside the scope of duties routinely performed by a similarly situated professional." *Nurses United*, 338 NLRB 837, 840 (2003). As the D.C. Circuit explained: "The Supreme Court has made it clear that employees whose decision making is limited to the routine discharge of professional duties in projects to which they are assigned are not managers under the Act." *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827 (D.C. Cir. 2004).

Occasional advice to management does not transform someone into a managerial employee, particularly where he or she is simply providing information or advise to management. The critical question is whether the employee could take "discretionary action" and whether his or her recommendations "control or implement" company policy. *NLRB v. Meenan Oil Co*., 139 F.2d 311 (2d Cir. 1998).

The managerial exclusion is obviously similar to the supervisory exclusion. However, the managerial exclusion can pertain to executives who may or may not have direct supervisory responsibility. Thus, even if an employee is not a supervisor, he or she may still not be a simple employee under the Act, but rather a manager. However, as with the other categories of excluded employees discussed above, the facts of each case must be carefully examined.

Staff physicians and dentists, without authority to do more than the normal duties of their professions, are generally not managerial employees. *Third Coast Emergency Physicians*, 330 NLRB 756 (2000); *Montefiore Hosp. & Med. Ctr*., 261 NLRB 569 (1982). The same should hold true with respect to staff attorneys. As most staff attorneys and associates are not involved in the management of the law firm or organization that that employs them, most attorneys will not be considered to be "managerial employees."

Renner and Williams did not perform duties outside the scope of duties routinely performed by similarly situated professionals and their occasional professional recommendations did not control or implement company policy. Therefore, Renner and Williams were not managers.

CONCLUSION

Renner and Williams were not supervisors or managers of the joint employer as these terms have long been used by the Board and the courts. This belatedly asserted label is pure pretextual action on the part of the joint employer. The case for causation could hardly be clearer. All five employees who engaged in the protected concerted activity were fired less than a month after their initial meeting with the founders and two weeks after escalating their activities by inviting the new hires to an organizing lunch. The employer's assertion that the employees were terminated because they were out of money is simply not credible due to the $104 million award their client received in September. The employer's efforts to characterize Renner and Williams as supervisors or managers after they engaged in protected concerted activity is simply an attempt to avoid liability for their illegal actions and is not based on how Renner and Williams functioned in their positions. The record already contains substantial evidence that would support a finding that Renner and Williams were employees. As such, it is clear that the D.C. Circuit would affirm a Board finding that Renner and Williams were employees.

For all of the reasons set forth in this memorandum and based on the evidence gathered during the investigation, the charging parties urge the Regional Director issue a complaint in the above-captioned case and seek full make-whole and other appropriate relief under the Act.

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Respectfully Submitted,

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