UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	**)**	
	)	
VELOX EXPRESS, INC.	**)**	
	)	
Respondent,	**)**	
	)	**Case 15-CA-184006**
and	**)**	
	)	
JEANNIE EDGE,	**)**	
	)	
an Individual.	**)**	

BRIEF IN SUPPORT OF EXCEPTIONS TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF OF RESPONDENT VELOX EXPRESS, INC.

Submitted by:

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I. STATEMENT OF THE CASE

This is not a case about union organizing or protected concerted activity. It is not a case about unfair labor practices. It is a case about a disgruntled former independent contractor of Respondent Velox Express, Inc. ("Velox") that vowed to ruin Velox's business because of an interpersonal dispute she had with a Velox employee, and Regional Director of Region 15 of the Board and Counsel for the General Counsel's aid in her campaign for vengeance.

Charging Party Jeannie Edge ("Edge") worked as an independent contractor medical courier for Velox for seven weeks, until August 21, 2016, when Velox terminated Edge's contract. Edge admitted, under oath, that Velox did ***not*** terminate her for discussing working conditions.[1] Indeed, after her termination, she emailed Velox's Vice-President, Larry Lee, that "the issues [she] had was [sic] with Carol" Christ, Velox's Memphis manager, about whom Edge stated, "I have never dealt with such an unreasonable demanding, hateful person in over 40 years in the workplace. I also have to admit, that she pushed my buttons as I can't remember anyone doing in all those years." (Resp. Ex. 6). Edge also insisted, throughout her time working as an independent contractor for Velox, that she was, in fact, an independent contractor and not an employee. Nevertheless, on September 12, 2016 she submitted a charge to the National Labor Relations Board ("NLRB" or "Board") complaining that her "employment contract" was terminated "in retaliation for and or in order to discourage protected concerted activities." Ultimately, after a trial, ALJ Arthur J. Amchan concluded that Edge and other medical couriers (also referred to as drivers) of Velox were employees, not independent contractors, of Velox. The ALJ further found that the mere misclassification of employees as independent contractors was, by itself, a violation of the National

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[1] Velox took Edge's deposition prior to a Section 10(j) injunction hearing. In that deposition, she made several fatal admissions to her charge. Each was used to impeach Edge at the ALJ hearing, and could have been used as affirmative evidence by the ALJ. Not only did the ALJ not rely on the admissions, he failed to even acknowledge, or explain, them. The Federal Court denied the Section 10(j) motion.

Labor Relations Act ("Act"), as was a non-disparagement provision in the couriers' independent contractor agreements. And finally, the ALJ concluded that Edge was discharged in violation of the Act. The ALJ's decision as to each point is flawed.

Initially, the ALJ wrongly found that the drivers were employees of Velox, rather than independent contractors. In doing so, the ALJ ignored crucial undisputed evidence and twisted the law and facts into unrecognizable forms. For instance, in analyzing control – the most important factor for determining whether an individual is an employee or independent contractor – the ALJ ignored swaths of evidence demonstrating that the drivers, and not Velox, controlled the most substantial aspects of their work. The drivers had complete control over the type of vehicle they utilized for their work and the maintenance of that vehicle. Velox did not prohibit the drivers from utilizing that vehicle for any other work the drivers wanted – whether as medical couriers for a competing company or otherwise. Edge herself used her car for another of her businesses as an independent contractor phlebotomist. The drivers also negotiated the routes they ran for Velox, and, despite the ALJ's finding to the contrary, the undisputed record evidence reflects that drivers could negotiate their compensation, whether through choosing higher- or lower-paying routes or, as the undisputed evidence shows, simply requesting increased pay. Additional undisputed record evidence, which, again, the ALJ completely overlooked, demonstrated that not only was subcontracting of routes not prohibited, but one driver did in fact do so. All of the foregoing facts went unmentioned in the ALJ's analysis of the "control" factor, despite that those facts were undisputed and unequivocally showed that the drivers had significant entrepreneurial opportunities for gain or loss from their independent contractor arrangement with Velox.

Meanwhile, the "control" over the drivers' operations that the ALJ found weighed in favor of employee status was either inherent in the nature of the work to be performed or dictated by Velox's customer, PathGroup. For example, the ALJ preposterously concluded that it was

"control" for Velox to dictate where the couriers would pick up the medical specimens that they were to be couriering. Yet picking up specimens from PathGroup's medical provider customers to be delivered to PathGroup for laboratory analysis is the entire point of the medical couriers' work, not an effort at controlling the means by which they do the work. Other requirements for the drivers came from PathGroup. PathGroup, not Velox, required the medical couriers to not arrive early for pickups; to engage in the procedures for pick up set forth in the route driver agreement Velox presented the drivers; and to wear an appropriate uniform so that PathGroup's medical provider customers would know that the individual opening the lockbox of specimens was authorized to do so. The law is clear that these PathGroup requirements – with which a failure of Velox to comply could result in PathGroup's termination of Velox's contract – do not constitute "control" by Velox suggestive of an employer/employee relationship. *See, e.g.*, *Air Transit, Inc. v. NLRB*, 679 F.2d 1095, 1100 n.17 (D.C. Cir. 1982).

The other factors to be considered in determining whether a worker is an independent contractor or an employee weigh heavily in favor of independent contractor status for the drivers. The parties indisputably intended to enter into an independent contractor relationship, an analysis the ALJ butchers and renders unrecognizable by refusing to consider the parties' undisputed subjective beliefs, the very heart of the inquiry. The drivers supplied the most essential and expensive instrumentalities of their work: their vehicles and all maintenance and insurance for the vehicles. The drivers received pay by route rather than per hour, another factor for which the ALJ twisted the analysis into an unrecognizable form to convince himself that what was indisputably compensation per route run was in "reality" hourly pay. The medical courier work required a specific skill set, including knowledge of complex federal laws regarding patient privacy and security, as well as how to identify, handle, and store medical specimens – knowledge that Edge admitted was valuable for her independent contractor work for Velox and as a contract phlebotomist. The Velox-

driver relationship was impermanent, and medical courier work is typically done in the locality by independent contractors.

Further, even assuming for argument's sake that the medical couriers were employees, rather than independent contractors, the ALJ wrongly concluded that Velox violated the Act. First, as to Edge's contract termination, Edge herself admits it was not related to discussing workplace conditions, an admission the ALJ did not even deign to address in his decision. Further, clear and indisputable evidence reflects that Edge's contract termination occurred because PathGroup directed Velox to preclude Edge from performing future courier work for PathGroup. The ALJ ignores significant evidence, as well as common sense, to reach his conclusion that Velox's legitimate reason for terminating Edge's contract was pretextual.

The ALJ also adopts, without any analysis whatsoever, a truly novel conclusion of law – that mere misclassification of employees as independent contractors is itself a violation of the Act. The ALJ adopts that novel proposition without even identifying a framework by which such analysis should proceed, much less citing a case or any evidence to support the conclusion. The ALJ's unreasoned 55-word decision on that issue must be rejected. Finally, along the same lines, the ALJ incorrectly concluded, without reasoned analysis, citation to law, or identification of record evidence, that the non-disparagement provision in the independent contractor agreements between Velox and the drivers violated the Act.

II. QUESTIONS PRESENTED

The issues presented in these Exceptions are:

1) Whether Edge and other drivers for Velox are independent contractors and are thus outside of the jurisdiction of the Act (Exceptions 1, 2, 6-12, 14, 26-46, 48, and 53-55 are related to this issue).

2) Whether Velox violated Section 8(a)(1) of the Act by terminating Edge's independent contractor agreement after she mishandled medical specimens and PathGroup mandated that she not handle specimens for PathGroup ever again (Exceptions 4, 13-25, and 50-55 are related to this issue).

3) Whether a misclassification as an independent contractor is an ipso facto violation of the Act (Exceptions 3, 47, and 53-55 are related to this issue).

4) Whether Velox violated Section 8(a)(1) of the Act by maintaining a non-disparagement provision in the independent contractor agreement (Exceptions 5, 49, and 53-55 are related to this issue).

III. STATEMENT OF FACTS[2]

Velox is a logistics solutions company that offers shipping and routed delivery services. (Tr. at 270-71) Velox independently contracts with drivers to deliver its customers' goods, including medical specimens in a viable condition such that a testing lab is assured of the quality and viability of each specimen. (Tr. at 271) On November 12, 2015, Velox contracted with Associated Pathologists, LLC d/b/a PathGroup ("PathGroup") to pick up medical specimens from physicians' offices or other health care provider locations, including those in Little Rock, Arkansas, for ultimate delivery to PathGroup's Nashville, Tennessee central lab. (Resp. Ex. 9) Velox satisfied its contractual obligation to cover the Little Rock and Memphis area by using the services of drivers it engaged as independent contractors. (Tr. at 283) One of those drivers was Edge, who covered Little Rock. (*Id.*)

A. Velox's Contract with PathGroup and PathGroup's Requirements for Couriers

PathGroup approached Velox and requested a proposal for the western Tennessee and Arkansas region due to a number of chronic services failures from PathGroup's previous contractor,

[2] The Decision of the Administrative Law Judge is cited as "ALJD" following by the relevant page number(s). The transcript of the hearing is cited as "Tr." followed by the relevant page number(s). The exhibits are cited "GC Ex." or "Resp. Ex." followed by the exhibit number.

LabExpress. (Tr. at 274) LabExpress also used independent contractor drivers in the geographic area, but those contracted with LabExpress did not meet PathGroup's standards. (Tr. at 281-82) PathGroup advised Velox that it had experienced severe service issues with LabExpress, including problems with missed stops, early pickups when not all medical specimens would be ready, and inappropriately dressed drivers. (Tr. at 279) One egregious example is when a LabExpress driver subcontracted a route to a subcontractor that placed the medical specimens in the back of a pickup truck, out of which the specimens flew when the subcontractor was driving on the interstate. The repercussions of this were "horrifying": patient health information was all over the interstate and the specimens were scattered and destroyed by other passing cars. (Tr. at 280) PathGroup understandably wanted a contracted company that would adhere to its particular directives in order to maintain quality control for the protection of the specimens and the patients.

PathGroup implemented a number of practices and procedures that would ensure that Velox's services were compliant with federal law, protected patient privacy, served PathGroup's healthcare provider customers (such as doctors' offices), and delivered specimens to PathGroup in viable condition for PathGroup's lab testing. Velox's contract with PathGroup required Velox to comply with PathGroup's practices and procedures, the violation of any of which constituted a "service failure" under the contract. (Resp. Ex. 9, ¶ 6(g)) Importantly, Velox understood that if it did not follow the practices and procedures implemented by PathGroup, then Velox risked losing the contract with PathGroup altogether. (Tr. at 305)

PathGroup relayed its practices and procedures to Velox in writing and during telephone calls and meetings. (Tr. at 289) Among other things, PathGroup sent Velox detailed standard operating procedures, which specifically laid out procedures for courier service related issues. (Resp. Ex. 12-21) The procedures from PathGroup were detailed and were designed to ensure that Velox would get the specimens to the PathGroup's lab successfully and timely. (Tr. at 291)

For instance, PathGroup specifically instructed that couriers were not to pick up specimens early without special approval. (Resp. Ex. 16) Obviously, PathGroup needed the couriers to arrive after the time PathGroup had told its customer healthcare providers so that specimens would be ready for pickup to make it to the lab on a particular day. If the drivers arrived any earlier, they could miss picking up specimens that the doctors' office timely placed in the lockbox. Accordingly, PathGroup set the pickup times, as determined by its agreements with its medical provider customers. (Tr. at 139, 171-72, 303-304, 335; Resp. Ex. 16; G.C. Ex. 11)

Additionally, PathGroup instructed that couriers were to leave "post-it" notes if they found an empty lockbox, and couriers were instructed to check both the lockbox and the office for specimens. (Resp. Ex. 15) Per PathGroup's instruction, retrieved specimens had to be counted and documented at the time of retrieval, and all specimens must be transported to the vehicle using a carrying container or shoulder bag. (Resp. Ex. 15) PathGroup further set forth specifications on how to handle and keep certain specimens, depending on whether they were ambient, refrigerated, or frozen, in order or preserve the integrity of the specimens during transport. (Resp. Ex. 19) For example, frozen specimens had to be kept in certain containers in order to properly identify them. (Resp. Ex. 20) PathGroup also specifically required that the couriers contact dispatch at a particular phone number in certain circumstances (Resp. Ex. 12), and, when it began servicing a new medical provider customer, PathGroup required the couriers for that customer be monitored (Resp. Ex. 14).

In accordance with the fact that the directives came from PathGroup, when Velox notified independent contractor drivers of such requirements, it specified that they <u>only</u> applied to the drivers servicing PathGroup customers. For example, in an August 1, 2016 email from Carol Christ, the Velox Memphis manager, stated: "Each and every one of you have been advised of the extreme importance in following ALL policy ***involving PathGroup jobs***." (G.C. Ex. 5) (emphasis added) Even the attachment to the email was named "pathpolicy.pdf". (*Id.*)

PathGroup regularly communicated with Velox if there were service failures regarding the transport of specimens. (Tr. at 291-92) Less than two weeks into the contract, PathGroup expressed concerns about service failures, which Velox attempted to allay by outlining how it would improve service for PathGroup in the West Tennessee region. (Tr. at 310; Resp. Ex. 22) Notably, Edge, within days of executing her Independent Contractor Agreement, had herself been involved in a very serious service failure when she lost multiple medical specimens. (Tr. at 83-84; 158-59) When service failures continued just a few short weeks later, PathGroup again expressed serious concerns about Velox's performance and the drivers it contracted. (Tr. at 314) Representatives from PathGroup witnessed a variety of problems that would compromise the integrity of the operations: drivers picking up from certain stops early, drivers failing to use shoulder bags, and drivers failing to wear uniforms. (Tr. at 314) On multiple occasions, PathGroup demanded a credit from Velox of $150 per service failure. (Resp. Ex. 25 and 26)

In early August, Velox distributed to the drivers a Route Driver Agreement that had been created and implemented as a direct result of PathGroup's demands for policies and procedures in order for Velox to maintain its contract. (Tr. at 315) PathGroup had reviewed and approved the Route Driver Agreement before it was distributed. (Tr. at 366-67) Among other things, the Route Driver Agreement addressed recurring issues with the independent contractor drivers that compromised patient safety, patient privacy, and viability of the specimens. The Route Driver Agreement specifically enumerated for the drivers a number of PathGroup policies and procedures: drivers cannot start routes early, lockboxes must be checked and a receipt left in an empty lockbox, specimens must be packaged a certain way, shoulder bags must be used, route sheets should be complete, and so on. (G.C. Ex. 11) The Route Driver Agreement also noted that service failures could subject drivers to a fine of $150 or termination of their contract for a service failure. (*Id.*) As mentioned above, PathGroup charged Velox a $150 fine for each service failure. (Resp. Ex. 25 and

26) Velox had the right under its Independent Contractor Agreements to issue a charge back to any drivers for expenses imposed on Velox by the drivers' failures. (G.C. Ex. 2, ¶ 7)

B. <u>Velox's Independent Contractor Agreements with Medical Couriers</u>

As part of its business, Velox contracts with independent contractor drivers to courier medical specimens from medical providers to the respective laboratories to be processed. (Tr. at 271-73) Velox also provides other services to its customers, including delivery of pharmaceuticals, medical equipment and supplies. (G.C. Ex. 41) Velox offers drivers routes it has developed with its customers, and the drivers can choose to accept or decline the routes. (Tr. at 131, 216)

Medical couriers, such as the independent contractors that picked up medical specimens for PathGroup, require special skills and training. First, they must know and comply with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), for which Velox provided training to drivers without previous training in that area. (Tr. at 125) Edge already had these special skills and knowledge and believed they were a valuable asset to her independent contractor business. (Tr. at 124-26) They also had to know how to identify, handle, and package different types of medical specimens correctly. As noted above, PathGroup had specific requirements for the various types of specimens Velox drivers were collecting. Velox trained drivers who had not previously delivered medical specimens how to handle and package them safely. (Tr. at 125-26; 206-08; 219)

Velox's independent contractor medical couriers had full control over the primary instrumentality of their work: their vehicles. Velox does not dictate vehicle specifications. (Tr. at 129-30) Velox did not purchase insurance for the drivers' vehicles or require a certain level of insurance; the drivers were free to choose their own. The drivers also had full control over the maintenance of their vehicle and the fuel they used, providing the opportunity to control their expenses in the way they thought best to maximize their profit. (Tr. at 134-39) Moreover, while Velox makes certain supplies available to drivers, such as totes and dry ice, it does not mandate their

use by drivers. (Tr. at 219-20) PathGroup supplied receipt books, which were slips of paper dropped into a lockbox. (Resp. Ex. 15; Tr. at 220) Lastly, PathGroup, through Velox, provided a key to the drivers for the lockboxes at PathGroup's customer locations. (Resp. Ex. 16) The drivers are free to use their own tools and supplies as they see fit. (Tr. at 127)

Drivers could negotiate to drive different routes and could choose the most lucrative or attractive route. (Tr. at 189; 215-16) For example, driver Jill Cross testified that when she negotiated her contract with Velox, she told Velox that she wanted the highest paying route. (Tr. at 215-16) Later during Cross's tenure, she negotiated for a smaller route. (Tr. at 217-19)

When a driver contracts and agrees to a certain route, he or she commits to cover that route regularly, and to the extent that driver needs to make other arrangements, the driver could contact Velox to ensure the route is covered and that no patient specimens are placed at risk for failure to pick up. (Tr. at 32, 105, 218, 223) The drivers also could, and did, subcontract their routes to other Velox approved drivers. In that regard, the Independent Contractor Agreements expressly referred to the drivers' subcontractors, agents, and employees. (GC Ex. 2 §§ 4, 5) And driver Bret Woods did subcontract his route. He testified that his wife or another subcontractor, Dustin, would cover his routes, in which case Woods would be paid by Velox for the route and would have the responsibility of paying the subcontractor. (Tr. at 190-191, 203, 210)

Velox paid its drivers by the route and not by the hour. (Tr. at 215-16; 221) Velox would negotiate with the drivers about whether a route's pay amount should be changed. (Tr. at 288-89; Resp. Ex. 11) For example, David Chastain, a driver based in Memphis, requested and received an increase in pay for his route. (Resp. Ex. 11; Tr. at 289-90)

The drivers run their routes in which ever order they determine to be best so long as they did not pick up early, as dictated by PathGroup. (Tr. at 250) Drivers are not required to respond to text messages "24/7." They need to respond to will calls and dispatch when they are on their

routes, (G.C. Ex. 3) and otherwise need to communicate with Velox only when specimens appear to be missing from a bag or some other recording mistake has been made. (e.g., G.C. Ex. 19, 21)

PathGroup required drivers to wear uniforms. This allowed the nurses and office workers for PathGroup's medical provider customers to be able to identify the person accessing the lockbox. (Tr. at 281-282, 345-49; GC Ex. 12) However, drivers were able to negotiate if the specified dress code was not acceptable to them. Edge wore a black or dark polo-type shirt before she received a uniform. (Tr. at 385-86) Cross negotiated that she could wear black pants instead of khakis. (Tr. at 229, 249-50) Closed-toe shoes were also required as a safety precaution. (Tr. at 347-48)

The contracts signed by the drivers provided that either party may terminate the contract upon one day's notice at any time and for any reason. (GC Ex. 2, ¶ 1) Edge only provided services for approximately seven weeks (Tr. at 138) And the General Counsel's other two witnesses, Woods and Cross, were also only contracted for a few months – a "really short period of time," in Woods' words. Neither of them were providing services at the time of the hearing. (Tr. at 184; 213)

Velox did not hold routine mandatory meetings for the drivers. (Tr. at 52) There was one meeting in the Memphis area as a direct result of services failures. (Tr. at 51) On August 15, 2016, Velox conducted a meeting at PathGroup's insistence that Velox ensure compliance with HIPAA and reinstruct its drivers as to the requisites of that law and proper precautions for precious medical specimens. (G.C. Ex. 9; *see also* Tr. at 253) Not all drivers attended; Bret Woods could not call in and was not disciplined for that failure. (Tr. at 199-200)

C. <u>Contractual Relationship Between Velox and Edge</u>

Edge signed her Independent Contractor Agreement with Velox On June 24, 2016. (G.C. Ex. 2) Ultimately, she agreed to drive a single route known as AR-07 that involved transporting PathGroup specimens. (Tr. at 105) Prior to contracting with Velox, Edge independently contracted with another courier business, LabExpress. (Tr. at 28-30) In fact, Edge owned and operated her own

business enterprise, Jeannie B Services, out of which she not only worked as an independently contracted courier but also worked as an independently contracted phlebotomist. (Tr. at 28) Edge clearly understood, as did Velox, that she was not an employee of Velox but an independent contractor who shouldered her own financial risk. (Tr. at 133-38) Edge was engaged in a distinct business with her own company. (Tr. at 28)

Edge insisted that her independent contractor status be recognized by Velox, taking exception to any communications or requests for cooperation that she deemed to cross the line from being properly treated as an independent contractor as opposed to an employee:

> lf you want me to be your employee available at your whim whenever you want then reclassify me pay my taxes provide my benefits and pay my car expenses and I will be your employee. But ***until you do that I am not your employee, I am your contractor and you are my client***. And I will meet your every need as soon as I am able to do it without taking from someone else's time.

(GC Ex. 13) (emphasis added) Plainly, Edge knew that she was an independent contractor. It is also evident that not only was Edge able to engage in other work, she did so as a contract phlebotomist with Iggbo. (Tr. at 28) And just like each of the other drivers, Edge was also responsible for providing her own vehicle and assumed all expenses and risk with respect to fuel, insurance, and accident liability. (Tr. at 129-30)

Edge's failures to properly handle and account for fragile specimens ultimately led Velox to terminate her contract. On July 14, 2016, Edge's documentation stated that 51 specimens were being delivered but only 50 were actually delivered. (G.C. Ex. 19) Edge undertook "consolidation" of the PathGroup specimens in Little Rock for a few weeks in July 2016 as well in order to make additional money. (Tr. at 86) Consolidation is the process by which each driver from the branch would bring their separate specimens to a central location to count all of them together before the specimens would be taken to the lab. (*Id.*) However, shortly after she began this work, Edge made critical errors. (Tr. at 89-90) On July 29, 2016, Edge left specimens on the consolidation room floor,

and as a result, those specimens were not delivered to the lab in a timely manner and jeopardized their viability. (Tr. at 88-89; G.C. Ex. 21) As a consequence of this mishandling, Velox no longer gave Edge the consolidation work. (Tr. at 90)

Edge's failures to meet basic standards continued nonetheless. Edge admitted she forgot to call in "will call" specimens as required by PathGroup. (Tr. at 161) Although she admitted multiple lost or mishandled specimens, Edge denies that she received certain email notifications that there were issues with the specimen documentation from her route. (Tr. at 106-07) These errors place real patients at risk because of the sensitive nature of the specimens—at any given time, the specimens could contain the testing samples for cancer or other diseases for which the patient needs treatment or diagnosis.

The final straw came in August 2016, about seven weeks after she began providing services for Velox. On the morning of August 15, 2016, PathGroup called Larry Lee to let Velox know that a specimen had been found in the parking lot of one of PathGroup's customers, Compassion Women's Clinic. (Tr. at 319; G.C. Ex. 40) PathGroup instructed Velox to have the specimen picked up immediately. (Tr. at 319) Lee notified Christ about the problem, and Christ contacted Edge to have the specimen picked up because Compassion Women's Clinic was on her route. (Tr. at 320)

It was this critical failure by Edge, after a string of repeated problems, that formed the basis of Velox's decision to terminate her contract. (Tr. at 369) PathGroup specifically stated that it did not want Edge touching another PathGroup specimen again after such an egregious error. (Tr. at 321) In an uncomfortable conversation between Lee and Kent Tidwell with PathGroup, Tidwell specified how problematic this mistake was. Lee testified:

> A It was rough. This was horrible timing, and that's exactly what he pointed out to me. He calls and he's, Larry -- I think it was like, Larry, Larry, Larry, what is going on here? You know, all that we're going through. And this couldn't be worse. He goes, the timing couldn't be worse. The situation couldn't be worse. This is horrible. He said that, Apparently the driver is not using a shoulder bag. I

mean, that is the conclusion he jumped to immediately because the specimen was dropped in the parking lot. And he said that -- when we discussed it, he asked me about the driver. And I told him then, I'm not sure who it is. ***And he said, well, listen, I absolutely do not want whoever made this mistake, I do not want them touching a specimen for PathGroup ever again. That's number one.*** And I want you to get that specimen picked up, and I want you to look into how this could have possibly happened.

Q And how did you respond? He -- you testified he told you that whoever that driver is could never touch a PathGroup specimen ever again. And how did you respond to that?

A I said, Kent, I will take care of that. I understand, and I will take care of that as quickly as I possibly can. ***I will get that route covered by a different driver as quickly as I possibly can.***

(Tr. at 322) (emphasis added)

On August 21, 2016, Velox terminated Edge's contract. (G.C. Ex. 14) Larry Lee made the decision to terminate the contract since Velox did not have any non-PathGroup business in the Little Rock market at the time. (Tr. at 323-24) PathGroup was notified that the responsible driver's contract was terminated. (G.C. Ex. 39)

After Edge's contract was terminated, Edge approached Velox with an interesting offer: to sign a new contract with Velox. (Tr. at 176) Edge drafted a proposed independent contractor agreement and submitted it to Velox using her business name, Jeannie B Services. (Tr. at 176-77) The proposed agreement specifically provided that Edge would provide services in accordance with the requirements of PathGroup. (Tr. at 177; Resp. Ex. 6 ¶ 1.2) Further, the proposed contract explicitly stated that Edge would be an independent contractor, not an employee. (Resp. Ex. 6; Tr. at 178) While the proposed contract was never entered into, it shows that Edge knew her responsibilities as an independent contractor to adhere to the requirements set forth by PathGroup.

Of final note, in response to Velox's termination of her contract, Edge promised Velox (in a text message to Ms. Christ) that she would be causing as much trouble for Velox as she possibly could cause:

> I think it is really sad but you are so insecure in your job that you can't handle somebody who is outspoken and knows how wrong you are keeping their job even when their job is done properly. But you don't like me because I speak out in the areas that you are wrong and I try to retain the rights I have by law so you have to get rid of me. Doesn't say much for you does it you're scared of me so you have to get rid of me. ***That's okay because you think you've had a tough time with me now I promise you it's just starting. And it's starting big time so hold on to the seat of your pants. This is not an idle threat if you were smart you have kept me right where I was because I had a contract I wanted to keep now there is nothing to hold me back. You can think I'm talking big but I'm not I'm giving you fair warning.*** Until a few minutes ago I had a reason to restrain and not start any process is because I had a contract to keep now there is nothing to stop me I have nothing to lose. ***Now I have everything to gain by seeing that you're out of a job and velox [sic] may be out of business by the time we're done.*** Which I hope it does not happen for the sake of those that are still working there

(Resp. Ex. 5) (emphasis added) Regrettably it appears that Edge's charges and complaint is a result of her intent to punish Velox and drive it out of business, or at least cause it a great deal of unwarranted pain. Her repeated and express recognition of her status as an independent contractor and insistence that Velox respect that contractual status bolster that conclusion. Indeed, even in this angry message, she understands that she has lost a "contract" and not employment. After making numerous fatal admissions in her deposition, Edge conveniently remembered new, self-serving details at the ALJ hearing. She blames her fatal testimony at her deposition on "blood sugar" issues. (Tr. at 149-51) Clearly, Edge's credibility and the veracity of her statements are questionable at best when taken in context with her threats to Velox.

IV. ARGUMENT

The NLRB only has jurisdiction over employees as defined under the Act, and the allegations of unfair labor practices by Velox only relate to independent contractor drivers. Using the test set forth in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), it is clear from the record that the drivers at issue here are independent contractors. In his decision, the ALJ failed to

recognize a number of undisputed significant facts that favor a finding of independent contractor status. Importantly, the ALJ failed to even analyze the important distinction that control of the details of the work is exercised by Velox's client, PathGroup, and not Velox itself. Instead, the ALJ made numerous erroneous findings of fact, contradicted by the record and documentary evidence.

As to the remaining factors for the determination of the independent contractor/employee status, the ALJ mistakenly determined that the majority of these factors weighed in favor of finding employee status. However, the record shows that the drivers maintained significant entrepreneurial opportunity showing an independent business relationship. Velox and the drivers believed that they are creating a contractor relationship, not an employee relationship. The ALJ did not properly weigh these factors and simply dismissed them to reach his predetermined conclusion that the drivers were employees. The drivers were paid by the route, not by time, and were able to negotiate their rate of pay. Special skills are needed to perform the work of a medical courier because the drivers need to know the requirements under HIPAA as well as how to identify, label, store and transport a variety of types of medical specimens. Generally, there is not in-person supervision of the work, but there is oversight in order to ensure that the specimens are properly handled and transported due to the highly sensitive nature of the medical specimens—there is little room for error. The independent contractor agreements are of limited duration. The ALJ even failed to acknowledge, much less address, one of the factors from *FedEx* that clearly weighs in favor of finding independent contractor status: medical courier work is usually done by independent contractors in the locality. The evidence clearly shows that the weight of each of these elements points to an independent contractor relationship. Thus, all allegations in the Amended Complaint should be dismissed.

But even if the drivers are employees and not independent contractors (which, again, Velox expressly denies), the record shows that Velox still did not violate the Act when it terminated Edge's

independent contractor agreement. Velox terminated Edge's independent contractor agreement for one reason: Edge repeatedly lost or mishandled important medical specimens with which she was entrusted to keep and deliver as an independent medical courier, and PathGroup demanded that she never again touch a medical specimen for PathGroup – the only customer of Velox in Little Rock. The termination of her contract was not in response to any alleged protected concerted activity. The NLRB cannot meet its burden to show there was any unfair labor practice committed by Velox, and therefore the allegations in the Amended Complaint must be dismissed.

A. <u>The Board Does Not Have Jurisdiction Over The Independent Contractor Drivers.</u>

The Board's jurisdiction extends only to an employer's acts directed to "employees" and not to "independent contractors." 29 U.S.C. §152(3); *accord N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 255 (1968). Because Edge and the other drivers are "independent contractors" to Velox, this matter must be dismissed for lack of jurisdiction.

Traditional agency law principles guide the determination of whether an individual is an employee subject to the NLRB's jurisdiction or an independent contractor that is outside it. *United Ins. Co. of Am.*, 390 U.S. at 256. The NLRB and federal courts apply the indicia set forth in the Restatement (Second) of Agency §220:

1. The extent of control which, by the agreement, the master may exercise over the details of the work,
2. Whether or not the one employed is engaged in a distinct occupation or business,
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or with a specialist without supervision,
4. The skill required in the particular occupation,
5. Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work,
6. The length of time for which the person is employed,
7. The method of payment, whether by the time or by the job,
8. Whether or not the work is a part of the regular business of the employer,

9. Whether or not the parties believe they are creating the relation of master and servant,
10. Whether the principal is or is not in the business.

See FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 496 n.1 (D.C. Cir. 2009)*; N.L.R.B. v. Brush–Moore Newspapers, Inc.,* 413 F.2d 809 (6th Cir. 1969) (quoting Restatement (Second) Of Agency § 220 (1957)). "[T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *United Ins. Co. of Am.*, 390 U.S. at 258.

1. Velox exercised minimal control over contracted drivers, which control was wholly driven by the requirements of its customer, PathGroup.

"The test for control 'takes into account the degree of supervision, the entrepreneurial interests of the agent and any other relevant factors.'" *Crew One Prods., Inc. v. NLRB*, 811 F.3d 1305, 1311 (11th Cir. 2016) (*quoting NLRB v. Assoc'd Diamond Cabs*, 702 F.2d 912, 919 (11th Cir. 1983)). However, there are "[s]ignificant limits" on what actions by an employer count as "control" for purposes of the analysis. *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989). Of course, "[w]here the nature of the job itself dictates the manner in which it must be performed, the worker's lack of discretion is not an indication of employee status." *N.L.R.B. v. Silver King Broadcasting, Inc.*, 85 F.3d 637, 1996 WL 253847 at *2 (9th Cir. 1996).

Additionally, "employer efforts to monitor, evaluate, and improve the results or ends of the worker's performance do not make the worker an employee." *Id.* "[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship." *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995). Such control "is 'addressed to the ends to be achieved . . . rather than the means to achieve that result.'" *Id.* (quoting *Central Transport, Inc.*, 299 NLRB 5, 13 (1990)).

Further, when an independent contractor contract's terms "simply incorporate the requirements imposed on [the company] by its commercial contracts," they "benefit[ ] both parties

by insuring continued operation under the contract" and they therefore are "not . . . inconsistent with an independent contractor relationship." *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975). Thus, when requirements are "mandated" by the employer's contract with another entity, and when "[f]ailure to promulgate and enforce such rules and regulations would place that contract in jeopardy," those requirements do not indicate employee status. *Air Transit, Inc. v. NLRB*, 679 F.2d at 1100 n.17. By the same token, when "drivers' conduct place[s] the employer's contract . . . in jeopardy," discipline is not indicia of control. *Air Transit, Inc.*, 679 F.2d at 1100 n.17.

i. The drivers exercised significant control over the means of their work.

Here, the most significant aspects of the drivers' work were not controlled by Velox. First, the drivers themselves had complete control over the type of vehicle they utilized for their work. (Tr. at 127, 130, 134-136) Whether a sedan, an SUV, or a two-door coupe, whether new or an old clunker, whether leased or purchased outright or shared with another, all of this was under the complete control of the independent contractors, not Velox or anyone else. Nor did Velox require the drivers to place any insignia on their vehicles with the name of Velox or its customer, PathGroup. And the drivers, not Velox, also had the ability to control the way they maintained their vehicles, from the fuel they used to the regularity of their oil changes to the types of inspections and preventative maintenance they used on the cars. (Tr. at 134-136)

The drivers also had autonomy in negotiating the routes they would run for Velox. Drivers could choose to accept or decline routes in connection with their contracts. (Tr. at 131, 216) Drivers could, and did, negotiate to drive different routes, including seeking more lucrative routes if they chose or routes that would require lesser investments on their part. Thus, for instance, Cross initially sought the highest paying route before switching to a less time-consuming route, while Woods sought a route with no weekend work. (Tr. at 189, 215-16, 218-219). Edge also took the

opportunity to increase her earnings by negotiating for an additional weekend route, AR-08, as well as agreeing to take on the consolidation work. (Tr. at 108; 131-33)

Further, contrary to the ALJ's statement that Velox "maintains total control over the drivers' compensation," (ALJD 12), the drivers did in fact have the ability to negotiate their pay. Velox paid its drivers, including Edge, by the route, rather than by the hour. (Tr. at 215-16; 221) As discussed above, the drivers could affect their pay by negotiating the route they ran. That was precisely what Cross did in taking the highest paying route and Edge did in negotiating an additional weekend route. The per-route pay was negotiable as well. When driver David Chastain requested an increase in pay for his route, Velox agreed to increase the daily pay from $186 to $195 for the route. The ALJ wrongly suggests that this increase was a result of Velox's "general compensation policy" of adjusting compensation if stops were added or removed from a route (ALJD 12). However, that increase was ***on top*** of the $11 increase that Chastain had already received as a result of additional pickups being added to Chastain's route, and it came despite Velox not being able to bill PathGroup any additional amounts for the route. (Resp. Ex. 11)

Drivers could, and did, also subcontract their routes to others or hire employees to perform work. These undisputed facts the ALJ simply got wrong, before mistakenly placing great weight on his erroneous finding in that regard. Those undisputed facts cannot be reconciled with the ALJ's "[a]nalysis" that "[t]he maintenance of control by Velox over who drove its routes, which limited the ability of its drivers to 'profit' from the work of other drivers is important to my finding that Velox drivers are employees." The ALJ is incorrect. The Independent Contractor Agreement between Edge and Velox that controlled the terms of their relationship did not prohibit Edge from subcontracting or employing others to fulfill her services to Velox. In fact, it placed certain requirements on Edge to ensure the compliance by her subcontractors or employees. (GC Ex. 2) The Independent Contractor Agreement expressly refers in Section 5(c) to the Edge's "agents,

including, but not limited to, subcontractors" (GC Ex. 2 § 5(c); *see also id.* § 5(g)(k)). And Section 4 refers to the independent contractor's "employees." (*Id.* § 4).

In fact, Woods did subcontract his route to others. He explained that his wife would cover his route, as would another of his subcontractors, Dustin. (Tr. at 190, 203) Woods confirmed that when he subcontracted his route, he would be paid by Velox for the route, and would, in turn, pay his subcontractors. (Tr. at 190-191, 210) Woods did not testify as to what profit he kept for himself on his subcontracting or use of employees. His Independent Contractor Agreement, like Edge's, allowed for this subcontracting of services. (Tr. at 210) Of course, given the HIPAA requirements that drivers needed to understand and with which they had to comply, as well as PathGroup's various requirements for drivers (and ability to terminate Velox's contract for non-compliance with those requirements), it is unsurprising that the drivers would not be able to subcontract to just anyone and would need to utilize drivers that had been approved by Velox. That fact is not indicative of pervasive control by Velox over the drivers, but instead Velox's "exercise of normal business caution to contract with responsible people." *Local 777, Democratic Union Organizing Committee, Seafarers, Int'l Union of North Amer., AFL-CIO v. NLRB*, 603 F.2d 862, 901 (D.C. Cir. 1978).

Moreover, the drivers had autonomy to choose the precise route among their stops that they utilized to pick up the medical specimens, and the time at which they made each stop so long as they did not make any pickups early (a requirement imposed by PathGroup, and not Velox, as discussed in more detail below). (Tr. at 250) Indeed, the ALJ recognized that the only constraint on how late specimens could be picked up was that the specimens would ultimately need to be transported to Memphis and then on to PathGroup's laboratory in Nashville. (ALJD 9). Bizarrely, the ALJ attempted to reframe the fact that the specimens had to be transported to Velox's customer into an instance of Velox "control," stating that there was a "less precise requirement that specimens not be

picked up too late." (*Id.*). Yet even the ALJ acknowledged that the specimens had to be returned in time for transport to PathGroup, and otherwise failed to acknowledge the undisputed testimony by driver Cross that pickups could be in any order as long as they were not too early and could drop off the specimens for timely transport to PathGroup. (*Id.*).

In addition to their control over the most substantial parts of their work for Velox, the drivers also had the ability to perform virtually any other work they wanted, whether as a courier or otherwise, and to utilize their vehicles – the same principal instruments of their work for Velox – to do so. Edge herself used her vehicle that she used as a courier for Velox to work in her other business as an independently contracted phlebotomist. (Tr. at 28, 130). There was no prohibition on working for competitors in the Independent Contractor Agreement (GC Ex. 2), nor was Edge aware of any other non-competition requirement of Velox. (Tr. at 130). The ALJ incredibly finds that a non-solicitation provision is an "in fact non-compete" (ALJD 9). That finding and analysis is confounding. A simple review of the Independent Contract Agreement (GC Ex. 2 ¶ 11) dispels such a notion. The distinction between a non-compete provision and a non-solicitation provision is a very basic legal concept that the ALJ should not so cavalierly conflate without explanation.

ii. The drivers' control over the means of their work gave them significant entrepreneurial opportunity for gain or loss.

The sum result of the significant control maintained by the drivers over their work for Velox was that they had a "'significant entrepreneurial opportunity for gain or loss.'" *FedEx Home Delivery*, 563 F.3d at 497 (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)). By making choices as to what car to use, how to finance the car, how to maintain the car, what routes to hold, in what order to run the routes, whether to run the routes on a given day or have a subcontractor do so, and what other work to perform, including potentially with the car they utilized for Velox's routes, the drivers had the ability to control their profit and loss from their work for Velox. Using a new, leased car and getting oil changes every 3,000 miles to run lengthy but higher-

paying routes on weekdays and weekends is a vastly different business model than using an old car that is owned outright, with oil changes only every 5,000 miles and a shorter, but lower-paying, route on weekends only. That is doubly true when considering the different opportunities for other work that may exist, whether utilizing that same vehicle or not.

The ALJ's analysis of whether there was a "significant entrepreneurial opportunity for gain or loss" is largely conclusory and wholly fails to take into account the genuine choices that the independent contractor drivers for Velox, including Edge, had. (ALJD 13-14). For instance, the ALJ did not consider the ways drivers could increase their profits through the multitude of ways the drivers controlled their work for Velox set forth above, from the type of vehicle they chose, the maintenance schedule, the financing of the vehicle, the levels and deductibles of their insurance, the ability to run routes in the order they wanted, and the ability to contract other drivers to run routes. Indeed, the ALJ wholly failed to even recognize the fact that multiple drivers, Edge included, changed their routes in the mere seven weeks Edge worked for Velox to accommodate their desires, as well as the fact that each driver could utilize their vehicle to work other than for Velox. Instead, the ALJ absurdly reduces the entirety of the drivers' choices that could affect their profit or loss from their work for Velox to their "shopping for example, for cheaper gas." (ALJD 14). The undisputed evidence flatly contradicts the ALJ's thoughtless analysis of the topic.

iii. PathGroup mandated the "controls" on which the ALJ based his decision.

Further, the undisputed evidence demonstrates that what "control" Velox did exercise over the drivers – the control that the ALJ held "weighed heavily in favor of employee status" – was mandated by Velox's customer, PathGroup, and thus does ***not*** suggest an employment relationship under the relevant case law. *See C.C. Eastern, Inc.*, 60 F.3d at 859. Indeed, some of the aspects of

"control" cited by the ALJ were nothing more than the actual end result that Velox sought to achieve for its customer, PathGroup.[3]

For instance, the ALJ cited as evidence of Velox's supposed "control" over the drivers that "Velox mandates the places at which the drivers collect specimens." (ALJD 9) It defies belief that a directive as to where a courier should pick up specimens would somehow constitute "control" so as to make the driver an employee. The ***entire point*** of the drivers' work was to pick up the specimens from PathGroup's medical provider customers. It is absurd to hold that the fact that the drivers had to pick up the medical specimens from the place where those medical specimens were collected and actually located is somehow indicative of an employment relationship; instead, that is the entire nature of the work. *See Silver King Broadcasting*, 85 F.3d 637, 1996 WL 253847 at *2; *see also Herman v. Mid-Atlantic Installation Servs., Inc.*, 164 F. Supp. 2d 667, 672-673 (D.Md. 2000) ("It is in the nature of a contract that the contractor promises to deliver the performance bargained for by the client. . . . A painter will paint a house the colors dictated by the homeowner. That does not make the painter an employee."). Simply put, that drivers had to collect the specimens from the particular places they were located was the very definition of the "ends to be achieved," instead of an effort by Velox to control the means used to achieve the end result. *See C.C. Eastern, Inc.*, 60 F.3d at 859.

So too, Velox's requirement that drivers not arrive to pick up specimens earlier than specified times reflected the "ends to be achieved" rather than an effort to control the means used to achieve the result. Indeed, although the ALJ concluded that this requirement constituted Velox "control" over the drivers (ALJD 9), the undisputed evidence shows that route requirements ***came***

[3] In his decision, the ALJ disregards numerous documents detailing PathGroup's policies and procedures to conclude that various "controls" by Velox came from Velox and not PathGroup. The ALJ cites to just one of the operating procedure memos PathGroup provided to Velox to reach his erroneous ruling on the issue. (ALJD 10 citing Resp. Ex. 12) In fact, Respondent's Exhibits 12-21 reflect various PathGroup policies and procedures by which Velox was required to abide. The Route Driver Agreement (GC Ex. 25) was also mandated by PathGroup. (Tr. at 315)

directly from PathGroup rather than Velox. Specifically, in PathGroup's "Specimen pickup/delivery procedure," PathGroup expressly stated: "Arriving earlier than scheduled is not permitted without prior supervisor approval." (Resp. Ex. 16 at ¶ I(1)(a); *see also* Resp. Ex. 21, Memo at 3) This was such a crucial point for PathGroup that when it circulated those standardized procedures for specimen pickup, it highlighted the issue in the cover email: "Arriving to stops early is not permitted without prior approval." (Resp. Ex. 21, July 6, 2016 Email). ***Even the ALJ himself acknowledged that route requirements came from PathGroup, not Velox*** (ALJ D 2 n.2 ("PathGroup provided Velox with routes it had already designed.")), although he obviously ignored that important fact for purposes of his analysis.

The reason that PathGroup required that Velox's drivers not arrive early is obvious. PathGroup's business is performing laboratory analysis of the medical specimens for its customers, various health care providers. If PathGroup tells its customers that it will pick up any medical specimens the health care providers want to be analyzed after a particular time, it cannot have drivers arriving to pick up specimens before that time. Indeed, a medical provider may not have even obtained all of its samples from the patients to be sent to PathGroup's lab should a driver arrive earlier than PathGroup communicated to the provider. Common sense and a basic recognition of the business readily explain this point. For example, a doctor's office knows that it has until a certain time to place the specimens in the lockbox and will instruct its nurses and schedule appointments accordingly. Nevertheless, if a courier reported issues with the timing of the routes, then any adjustment had to be approved by PathGroup (which in turn would alter the agreement it had with its customer, the medical provider). (Resp. Ex. 16 at ¶ I(1)(b)) Simply put, the undisputed evidence abundantly reflected that any route timing requirements were issued by Velox's customer, PathGroup. *See Herman*, 164 F. Supp. 2d at 674 (procedures company required of

contractors given nature of job and requirements imposed by company's customer were not compelling evidence of control so as to make contractors employees).

Further, while the ALJ found that Velox's route driver agreement "shows that Velox sought to exercise a great deal of control of its drivers/couriers" (ALJD 9), every aspect of that route driver agreement was included to conform to PathGroup's requirements, and mandated by PathGroup. (Tr. at 315) Of course, PathGroup had a substantial interest in ensuring that the medical specimens were handled correctly. It expressed that to Velox: "Each specimen represents a person. Everything the [courier] does to impact the integrity of the specimen also impacts that person's test result." (Resp. Ex. 21, Memo at 3) It is thus unsurprising that PathGroup would insist on procedures to ensure the integrity of the medical specimens being transmitted to it for laboratory evaluation.

The ALJ largely ignored the documentary evidence which amply demonstrates that the directives of the route driver agreement simply reflect PathGroup's requirements and Velox's efforts to satisfy PathGroup, rather than an effort by Velox to control the means by which the drivers are servicing Velox. Lee's testimony and the documentary evidence are undisputed. As noted above, the directive not to pick up samples early (GC Ex. 11 at ¶¶ 1(a)-(b)) came directly from PathGroup. (Resp. Ex. 16 at ¶ I(1)(a); Resp. Ex. 21, Memo at 3) So did the directives that drivers carefully check the lockboxes at each location (*compare* GC Ex. 11 at ¶ 1(c) *with* Resp. Ex. 16 at ¶ I(1)(d)) and leave a ticket in an empty lockbox (*compare* GC Ex. 11 at ¶ 1(e) *with* Resp. Ex. 15; Resp. Ex. 16 at ¶ I(2)). PathGroup also directed Velox as to how drivers should handle frozen specimens, including covering them with dry ice inside a cooler. (*Compare* GC Ex. 11 at ¶¶ 2(a) *with* Resp. Ex. 19 at ¶ 3(d)-(e)). It was the genesis of the requirements relating to will call (or call in) orders contained in section 3 of the route driver agreement, including the requirement that drivers call the dispatcher with information about the order. (Resp. Ex. 12) PathGroup mandated the use of the shoulder bag provided to the drivers to transport specimens from a lockbox to the drivers' vehicles (*compare* GC

Ex. 11 at ¶ 4 *with* Resp. Ex. 16 at ¶ 1(f); Resp. Ex. 21, Memo at 3), required completed route sheets (*compare* GC Ex. 11 at ¶ 5 *with* Resp. Ex. 21, Memo at 4-5), and demanded that drivers perform a "systematic end of the shift vehicle sweep" (*compare* GC Ex. 11 at ¶ 6 *with* Resp. Ex. 21, Memo at 6). And finally, in undisputed testimony, Lee testified that PathGroup implemented the line haul requirements in paragraph 7 of the route driver agreement due to a service failure out of the Atlanta area from a line haul driver. (Tr. at 367) The ALJ largely ignores PathGroup's requirements and its threats that if they were not followed, PathGroup would terminate the Velox contract. (Tr. at 305)

The ALJ also faulted Velox for requiring drivers to wear a Velox shirt, khaki pants and closed-toed shoes. (ALJD 9) Yet those requirements also stemmed from PathGroup, which requires the drivers to wear uniforms as a security concern because PathGroup's customers could identify that the correct person was accessing the lockbox. (Tr. at 345-49; GC Ex. 12) Once again, common sense must prevail. Lockboxes are outside physicians' offices, but almost always within eyesight of windows or security guards. The doctors' offices must be able to quickly determine visually by recognizing the uniform or clothing that a person with appropriate authorization is approaching or opening the lockbox that contains the specimens and personal health information, *i.e.*, PHI as that term is defined by HIPAA. Indeed, Velox let its couriers for the PathGroup account know that they needed to be in either Velox shirts or a black Polo shirt with khaki pants or shorts, and PathGroup representatives were watching stops to check for this to ensure this safeguard was in place. (G.C. Ex. 12) The ALJ further ignores that, while Velox required drivers to utilize uniforms to satisfy PathGroup's mandates, drivers were able to negotiate if the specified dress code was not acceptable to them. Edge wore a black or dark polo-type shirt before she received a uniform, while Cross negotiated to wear black pants instead of khakis. (Tr. at 229, 385-86) Again, common sense must prevail. For security issues – *i.e.* so that PathGroup's customers could verify that an authorized person is accessing a lockbox – it would be sufficient that a nurse or office

personnel sees an individual with a black Polo approaching the lockbox. It is unlikely that the office personnel would notice a logo on the shirt, but would quickly recognize the black Polo shirt. In any event, as courts have recognized but the ALJ wholly fails to address, a uniform requirement is far from indicative of an employer-employee relationship since, as "ordinary experience confirms, a uniform requirement often at least in part 'is intended to ensure customer security rather than to control the [driver].'" *FedEx Home Delivery*, 563 F.3d at 501 (quoting IRS, Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry 23).

It was vital that Velox comply with PathGroup's requirements. Velox's contract with PathGroup specified that a failure to adhere "PathGroup policies and procedures as shared with Contractor" would constitute a service failure, as would "not following special instructions," "unprofessional conduct or appearance by a driver" and "complaint(s) received by PathGroup from its clients." (Resp. Ex. 9 at ¶ 6(g)) PathGroup shared its policies and procedures through a variety of methods. (Tr. at 289) As detailed above, virtually all of PathGroup's requirements that were incorporated into the route driver agreement were set forth in various documents PathGroup sent, but PathGroup would also communicate procedures by phone, email, or in person. (*Id.*). Velox not only understood that PathGroup ***could*** terminate Velox's contract if Velox violated those procedures (Tr. at 289, 305, 308), but Velox was well aware that PathGroup was unafraid to take that step. After all, PathGroup had terminated its relationship with Velox's predecessor company, LabExpress, due to LabExpress's repeated service failures. (Tr. at 273-274; *see also* Resp. Ex. 10) Understandably, PathGroup added the language defining service failures to its contract with Velox and informed Velox that it would terminate the Velox contract if it failed to comply with those requirements. (Tr. at 272-273, 305)

The imposition of PathGroup's processes and procedures onto the drivers did not make them Velox's employees any more than PathGroup's imposition of procedures onto Velox made

Velox PathGroup's employee. Edge knew this. She testified that LabExpress, Velox's predecessor, also required her, as an independent contractor, to comply with PathGroup's guidelines. (Tr. at 36) And when Edge prepared her own independent contractor agreement and submitted it to Velox after her contract was terminated to try to win back Velox's business, she included a provision acknowledging that she would provide services in accordance with PathGroup's guidelines for "classifying handling and pick up of lab specimens as well as any other requirements" because "PathGroup has to ensure labs are picked up and delivered in a proper manner." (Tr. at 176-177; Resp. Ex. 6)

iv. The record does not support the ALJ's other findings of "control."

Contrary to the ALJ's findings, Velox did not mandate that drivers request permission from Velox to take days off. (ALJD 3, 9) Both Cross and Woods testified that drivers simply needed to inform Velox when they could not run their routes, and the drivers did not have to "ask permission" to do so. Woods expressly stated that when he was unable to run his routes, he would "tell [Velox] you needed a driver" so that Velox could arrange to have the route covered or he would just have a subcontractor such as his wife run the route. (Tr. at 202-03) It was his choice. Similarly, Cross admitted that when she was unable to run her route, she would simply just "let Ms. Carol [Christ] know" and Velox would "get it covered." (Tr. at 223) The <u>only</u> witness that testified that drivers were to ask permission was Edge. And while Ms. Christ sent a single email indicating that drivers were to "request days off," her imprecision with words should not impose a company policy that requires independent contractors to ask permission to take days off. After all, Cross's and Wood's testimony demonstrates that not only was it not a company policy that drivers had to request time off, but the drivers were well aware that it was not, and their actions and those of Velox were consistent with this fact. The ALJ incorrectly concluded that Velox exercised control over the drivers in this manner.

It is also undisputed that there were not routine mandatory meetings for the drivers. (Tr. at 52) Indeed, the ***only*** meeting that Velox ever held for Little Rock drivers was on August 15, 2016 at the insistence of PathGroup to discuss service failures for the PathGroup account on the day the medical specimen was found in the parking lot of Compassion Women's Clinic. (Tr. at 51-52) The purpose was solely to address service failures and to ensure compliance with PathGroup's procedures. (G.C. Ex. 9) Attendance was not mandatory.[4] Not all drivers attended, and those who did not were not subjected to discipline of any sort. Neither Edge nor Bret Woods were present in person. (Tr. at 52-54; 199-200) In short, a single meeting to discuss PathGroup requirements for which there were no consequences for non-attendance is hardly evidence of the sort of control over the drivers that would make them employees. It is important to note for not only this issue, but also the termination of Edge's contract, that this meeting was the same day that PathGroup's furious customer called complaining that a medical specimen had been found in the parking lot.

The ALJ also wrongly relied upon a finding that drivers needed an Android phone to find that Edge was an employee, rather than an independent contractor. (ALJD 9). First, Edge was not even driving for Velox, her contract having been terminated, by the time that discussion of the Android phones occurred. Edge admits as much (Tr. at 63-65) It is thus mystifying how that issue could in any way impact whether or not Edge was an employee or independent contractor. It also requires rejection of her testimony on the subject, which clearly did not come from personal knowledge. Further, the record reflects that having an Android phone was a "want," not a "demand," as presented by PathGroup to Velox. (Tr. at 231-232; G.C. Ex. 15)

Additionally, in contrast to the ALJ's finding that "several" provisions of the Independent Contractor Agreement "are more consistent with employee status than independent contractor

[4] The ALJ finds otherwise based on an email from Christ, but the undisputed record evidence shows that Velox did not in fact mandate attendance. (ALJD 5, n. 6) Indeed, even the ALJ notes that Velox "did not enforce this requirement," although that conclusion is merely placed into a footnote for the sentence finding that Velox required the drivers to attend the meeting.

status (ALJD 9), the Independent Contractor Agreement strongly supports independent contractor status. As addressed below, it certainly evinces an intent by the parties that they would have an independent contractor relationship. Moreover, it imposes very little in the way of control by Velox over the independent contractor drivers. Indeed, despite the ALJ's reference to "several" provisions, he only identifies two of them as supporting employee status – one permitting drug testing (an unsurprising request given that the independent contractors would be driving vehicles) and a non-solicitation provision. Drug testing and background checks are neutral, and do not denote an employer/employee relationship. *Herman*, 164 F. Supp. 2d at 673. And with respect to the latter, the ALJ far oversells the "control" the provision provided Velox, calling it an "in fact non-compete" provision. Yet all that the non-solicit provision precluded was the drivers from independently contracting directly with Velox's customer, PathGroup. (GC Ex. 2 at § 11(a)) It did not prohibit the drivers from working as medical couriers for any of Velox's competitors, a fact that Edge acknowledged. (Tr. at 130) It certainly did not prevent the medical couriers from utilizing their vehicles they utilized to service Velox to operate another business, as Edge herself did.

Finally, the ALJ erroneously concludes that the fact that Velox could "fine" drivers $150 for service failures is an indication of control by Velox. The "fine" to which the ALJ refers was nothing more than a charge back to ensure the drivers' complied with PathGroup's requirements. PathGroup could and did charge Velox $150 for service failures. (Resp. Ex. 25 and 26) Section 7 of the Independent Contractor Agreement specified that Velox "shall charge back to Independent Contractor at the time of payment or settlement, any expense [Velox] has borne that, under this Agreement, Independent Contractor is obligated to bear." (GC Ex. 2 § 7) Accordingly, the route driver agreement in turn specified that a driver would be subject to a $150 fine or removal from a route if the driver's "negligence or failure to follow the standard operating procedure results in a

service failure."[5] (GC Ex. 11) As one court explained in finding that a charge back did not indicate "control" over a contractor so as to make the contractor an employee:

> It is common in contractual relationships for the client to withhold money if work is not done correctly. For example, in most construction contracts a certain percentage is generally withheld from each payment pending complete performance of the contract and satisfactory completion of the "punch list" items. If complete and acceptable performance is not made, the full contract amount is not paid. Similarly, in this case, MAT has the right to charge its contractors if they fail to meet the contract specifications. Such a right does not implicate "control" or "employee" status. In fact, the Secretary [of Labor] has been unable to point to a case in which *employees* are generally docked pay as a result of their mistakes.

Herman, 164 F. Supp. at 673.

2. The other factors weigh heavily in favor of independent contractor status.

Although the ALJ twists himself in knots to find otherwise, the other factors besides control weigh heavily in favor of the drivers being independent contractors rather than employees. Specifically, as described in more detail below, the parties indisputably believed they were creating an independent contractor relations, Velox paid the drivers per route rather than per hour, the drivers supplied the largest and most important instrumentalities of their work, the undisputed record evidence reflected the special skills needed to be a medical specimen courier, the drivers performed services for a limited duration, and medical courier work is typically performed by independent contractors in the locality. As to the last of those, the ALJ failed to even address the issue at all, while the ALJ mangled the analysis as to many others.

a. The parties intended to create an independent contractor relationship.

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[5] The ALJ states that "Velox's fine could be levied in a situation in which there was no loss to PathGroup, such as a missed specimen pick-up that does not result in the specimen having to be redrawn. (ALJD 10). This conclusion ignores the language of the Independent Contractor Agreement relating to charge backs, and is otherwise pure speculation that has no basis in the record evidence and what actually occurred. Specifically, there is no evidence that Velox ever did, intended to, would, or believed it could levy a fine on a driver for a service failure unless PathGroup had demanded a charge back from Velox.

It is beyond dispute that the parties believed they were creating an independent contractor relationship from the outset. The parties entered into an Independent Contractor Agreement, which is strong evidence of the intent to create such a relationship. *See Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1312 (11th Cir. 2016). The Independent Contractor Agreement specifically stated that the contracted driver is not an employee of Velox and assumes all costs associated to the services performed under the agreement. (G.C. Ex. 2, ¶ 4) Additionally, Velox did not pay the drivers' Social Security or income taxes, and it issued 1099s to the drivers. Those facts are also "a strong indication of the absence of employee status." *Id.* (citing *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 924 n. 3 (11th Cir. 1983)).

Edge, unsurprisingly, understood that she was an independent contractor and admitted that she had "desired" to create such a relationship with Velox. (Tr. at 34) Edge repeatedly confirmed her belief that she was independent contract of Velox, writing to Velox's representative:

> lf you want me to be your employee available at your whim whenever you want then reclassify me pay my taxes provide my benefits and pay my car expenses and I will be your employee. But ***until you do that I am not your employee, I am your contractor and you are my client***. And I will meet your every need as soon as I am able to do it without taking from someone else's time.

(G.C. Ex. 13) Indeed, even after her contract was terminated, Edge still considered that she had been an independent contractor throughout her time at Velox. Her LinkedIn page stated that she had worked as an "Independent Courier" for Velox (Resp. Ex. 1) and she testified as follows about her belief that she was an independent contractor for Velox:

> Q And you still maintained that you were an independent contractor?
>
> A ***I have always considered myself an independent contractor in my intention and desire.***

(Tr. at 120)

Edge was not the only driver to believe she had an independent contractor relationship – Woods and Cross both believed that they were independent contractors too. (G.C. Ex. 22 and 24)

Stunningly, the ALJ somehow concluded that the factor of whether or not the parties believe they were creating an independent contractor or employment relationship "weighs in neither direction." (ALJD at 13) To get to that baffling conclusion, the ALJ ignores the actual factor he was supposed to be applying – what relationship did the parties believe they were creating – and reformulates it entirely. In that regard, the ALJ stated that "Edge's subjective belief as to whether she was employee or independent contractor is far less important than the economic realities of her relationship to Velox." (*Id.*). This "analysis" is nonsensical and renders meaningless the factor concerning the parties' ***intent*** – that is, their ***subjective belief*** as to the relationship they were creating – which is precisely the inquiry at issue in this factor. *See Crew One Productions, Inc.*, 811 F.3d at 1312 (Board erred by failing to give any weight to parties' intent as demonstrated by independent contractor agreement and failure of company to withhold taxes); *FedEx Home Delivery*, 563 F.3d at 498 n.4 (failure to provide benefits or withhold taxes goes to intent, which is relevant factor).

b. Velox paid drivers per route rather than per hour.

It is also indisputable that Velox paid drivers per route rather than per hour. Despite acknowledging that "[t]he fact that the drivers are paid by the job, rather than by time usually favors independent contractor status," the ALJ somehow finds that this factor weighs in favor of ***employee*** status. (ALJD 12). Edge readily admits she was paid by the job, and not the hour. (Tr. at 133) The ALJ's conclusion is preposterous.

For one thing, in spite of the ALJ's novel conclusion that the drivers' per route pay was actually equivalent to hourly pay and that this factor weighs in favor of employee status, the ALJ cites to no law that suggests such twisting of the undisputed facts is permissible. The ALJ simply ignores Edge's candid admission that she was paid by the route and not by the hour. (Tr. at 133)

Moreover, the ALJ is simply wrong that "Velox drivers' situation is more similar to an employee paid by the hour than an individual contractor paid to do a discrete job regardless of the time it takes." (ALJD 12). As noted in section IV(A)(1)(a), *supra*, Velox's drivers own and maintain their own cars and make financial choices regarding such ownership and maintenance. The per route pay affords them that flexibility to make financial choices, giving them the opportunity to significantly affect their gain or loss by deciding whether to own or lease, whether to use a more or less efficient car, whether to use a newer car or an older one, and how often and in what ways to maintain the car. This is in stark contrast to an hourly employee paid only for his or her time. The ALJ wholly fails to grapple with these facts.

Additionally, the amount of time a driver takes to complete his or her route is hardly as rigid as the ALJ paints. True, a driver cannot pick up specimens earlier than the designated pick up time. But, as noted in section IV(A)(1)(c), *supra*, the outer boundary for pickups is not set in stone, providing the opportunity for a driver to run routes at his or her own speed. Perhaps a driver with few time burdens thinks that driving slowly, carefully, and on slower but more efficient routes would result in a better profit margin, while a driver that runs another business might choose to take the fastest possible route even if it lowered overall efficiency since his or her time was more valuable.

Simply put, the evidence is undisputed that drivers' pay was per route rather than by the hour. The ALJ clearly and seriously erred in concluding otherwise. This factor weighs in favor of independent contractor status.

c. Drivers supply the principal tools and instrumentalities for their work.

The drivers supply the principal instrumentalities for their work. Even the ALJ recognized as much. (ALJD 11) After all, the most essential and expensive tools of the drivers' work were their cars, which they supplied. Moreover, the drivers were responsible for their own maintenance, fuel, and insurance costs. This factor strongly weighs in favor of independent contractor status.

d. Drivers need special skills in the occupation.

Further, contrary to the ALJ's finding (ALJD 11), the undisputed record evidence reflected that there are special skills and knowledge required of medical couriers, who have to comply with safety and privacy regulations and expectations. Edge herself confirmed that medical courier work required a specific skill set and more sophistication than, for instance, food delivery. (Tr. at 124-126). She acknowledged the training and skill necessary to identify, handle, and transport medical specimens, and also the complexity of federal law concerning HIPAA and privacy rights. She even acknowledged this constituted a valuable asset for her independent contractor business. (Tr. at 126)

Of course, the drivers have to understand how to identify and store the various specimens they handled so as not to compromise the viability of the specimens. (Tr. at 125-126, 303-04). For example, drivers handling medical specimens must understand the differences between a "thin prep," an ambient prep, and how to package and carry frozen specimens properly. (Tr. at 206, 219)

But the skillset needed to be a medical courier was not limited to ensuring the integrity of specimens because medical courier work also requires compliance with HIPAA, (Tr. at 125) a complex federal law that has significant implications for violators. Accordingly, and as required by its customers, Velox teaches drivers who have not previously delivered medical specimens – which Edge had for another company – how to handle and package them safely and maintain privacy. (Tr. at 125-26; 207-08; 219) Interestingly, Edge relied on this skill and training to explain away one of her many errors: "There is very seldom a specimen damaged by a two-day wait." This was her excuse on why it was not a big deal when she left numerous medical specimens on a storage room floor mere days after starting as an independent contract courier for Velox. (Tr. at 89)

The ALJ largely discounts the skills required of the medical couriers, stating that "[a] driver must also be somewhat familiar with the requirements of HIPPA [sic]" (and telling of the ALJ's unfamiliarity with this highly complex area of law is his consistent misspelling of its acronym) and

suggesting that it would be surprising if any employee in health care related industries "did not receive some training in its requirements." (ALJD 11). But the fact that HIPAA covers nearly all workers in health care fields hardly makes the fact that training in HIPAA was needed to be medical courier trivial. Courts have recognized that HIPAA is "a complex piece of legislation that addresses the exchange of health-related information." *Nat'l Abortion Fed'n v. Ashcroft*, 2004 WL 555701, at *2 (S.D.N.Y.); *see also Citizens for Health v. Leavitt*, 428 F.3d 167, 171 (3d Cir. 2005) (referring to a HIPAA rule promulgated by the Department of Health and Human Services as "only one aspect of a complex set of regulations" relating to "two competing objectives of HIPAA").

Indeed, the skillset of medical couriers substantially differs from those of non-medical couriers or delivery drivers. *Compare Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590, 608-609 (E.D.N.Y. 2012) (freight trucking involved skills including knowledge of federal regulations and freight-handling skills) *with Campos v. Zopounidis*, 2011 WL 2971298, at *7 (D.Conn. July 20, 2011) (pizza delivery required no skills other than possession of a driver's license and ability to drive an automobile, which were "routine life skill[s]"). Edge openly acknowledged that the skills required of medical couriers were above and beyond the routine life skills known by the vast majority of the population. (Tr. at 125). This factor weighs in favor of independent contractor status.

e. Drivers perform services for limited duration.

The impermanency of the relationship between the individual worker and the company weighs in favor of independent contractor status. *Collegiate Basketball Officials Ass'n, Inc. v. NLRB*, 836 F.2d 143, 148 (3d Cir. 1987); *Local 777*, 603 F.2d at 899. Here, the Independent Contractor Agreements permit the driver or Velox to terminate the contract, for any reason whatsoever, upon one day's notice. (GC Ex. 2, ¶ 1) This impermanency was not purely theoretical either. The evidence reflects that the relationships between Velox and the drivers were in fact short. Edge performed services for a mere seven weeks (Tr. at 138), and Woods and Cross performed services

for only a few months. (Tr. at 184; 215, 238) There were no other witnesses on which the ALJ could rest a finding of permanency. Despite the clear record evidence reflecting the impermanency of the relationships between Velox and the drivers, the ALJ nevertheless concluded that this factor weighed in favor of employee status because he believed that the very same impermanency made the relationships equivalent to an "employment at-will relationship." (ALJD 11) The law unequivocally says otherwise. *Collegiate Basketball Officials*, 836 F.2d at 148; *Local 777*, 603 F.2d at 899.

f. Medical courier work is usually done by independent contractors in the locality.

Yet another factor weighing heavily in favor of independent contractor status is whether this "kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or with a specialist without supervision." *FedEx Home Delivery*, 563 F.3d at 496 n.1. The ALJ wholly failed to even address this factor. (*See generally* ALJD). The undisputed evidence shows that other medical courier companies in the region used independent contractors. LabExpress, one of Velox's direct competitors and its immediate predecessor to the PathGroup contract, used independent contractor drivers. (Tr. at 282) Edge and Woods were both independent contractors for LabExpress. (Tr. at 29; 185) Velox's other competitors also use independent contractors. (Tr. at 310) Further, the drivers were not subject to any restrictions on working for any of Velox's competitors, providing them the significant entrepreneurial opportunity to perform services for multiples companies at the same time using the same vehicle they used for Velox.

g. The factors favoring employee status are minimal and do not outweigh the factors favoring independent contractor status.

As set forth above, the vast majority of factors weigh, often heavily, in favor of independent contractor status. However, there are two factors that do weigh in favor of employee status, namely whether or not the independent contractor is engaged in a distinct occupation, and whether or not the work is part of the regular business of the employer. *See* Restatement (Second) of Agency §220. These factors do not come close to mandating a finding of employee status.

Indeed, the fact that the essential nature of an independent contractor's role is the same as that of the company with which the contractor has contracted is insufficient to accord the contractor employee status. Any such ruling would rewrite the law, and would overturn significant precedent finding drivers in a variety of situations to be independent contractors. As the D.C. Circuit stated in *FedEx Home Delivery*, 563 F.2d at 502:

> While the essential nature of a worker's role is a legitimate consideration, it is not determinative in the face of more compelling countervailing factors, *see Aurora Packing v. NLRB*, 904 F.2d 73, 76 (D.C.Cir. 1990), otherwise companies like FedEx could never hire delivery drivers who *are* independent contractors, a consequence contrary to precedent, *see St. Joseph News Press*, 345 N.L.R.B. at 479.

Simply put, in light of the other factors that weigh heavily in favor of independent contractor status, these two factors weighing in favor of employee status are insufficient to tip the scale. Those other factors amply demonstrate that the drivers exercised substantial control over their own operations, providing them significant entrepreneurial opportunities. They owned their own vehicles, controlled their own expenses, could (and in Edge's case did) operate other businesses, determined whether to take more time-consuming but higher-paying routes, and could subcontract their routes. The ALJ largely ignored these salient facts in concluding that the drivers were employees, rather than the independent contractors they intended to be and as which they were treated. The ALJ's conclusion thus must be rejected.

B. Velox Did Not Terminate Edge's Independent Contractor Agreement In Retaliation For Any Alleged Protected Concerted Activity

In testimony given under oath, Edge openly admitted that even she did not believe that she had her contract terminated in retaliation for discussing Velox's working conditions:

> Q And if you do not – when I deposed you, I asked, what do you think led to the termination of your contract? Do you remember that?
>
> A I think it – yeah, I remember.
>
> Q And I asked you do you think it had to with the Compassion Women's Clinic issue?

A Right.
Q And how did you answer?
A I said no.
Q And then, I asked you do you think it had anything to do with discussing working conditions? And how did you answer?
A I told you no at the time.
Q So it had nothing to do, despite your charge and your complaint saying that the termination of your contract was retaliation for talking about working conditions, and you testified it had nothing to do with a that; is that correct?
THE WITNESS: May I comment on that?
JUDGE AMCHAN: No. You can just answer yes or no.
THE WITNESS: Okay. That is what I said then, yes.

(Tr. at 167-168) ***Without even acknowledging the fact that the complaining witness had previously testified under oath that she was not terminated for discussing working conditions***, the ALJ concluded that Velox violated Section 8(a)(1) of the Act by discharging Edge for complaining to management about working conditions and discussing those working conditions with other contractors. (ALJD 16) The ALJ's analysis must be rejected.

To show that Velox violated the Act by discharging Edge, the General Counsel must establish that (1) Edge was engaged in a protected activity; (2) Velox knew she was engaged in a protected activity; and (3) the protected activity was a substantial or motivating factor in Velox's decision to terminate her contract. *Wright Line*, 251 NLRB 1083 (1980). Not every action by a worker is a protected concerted activity. "[A]s the Supreme Court has repeatedly recognized, . . . it is protection for joint employee action that lies at the heart of the Act." *Meyers Industries, Inc.*, 281 NLRB 882, 883 (1986). Generally, for an activity to be "concerted," it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* at 885 (internal quotation marks omitted). Individual activity is considered protected only when it is connected to such collective activity. *Id.* at 885. Only if the General Counsel satisfies its burden does the burden shift to the company to provide a legitimate reason for terminating the individual

and that the company would have taken the same action notwithstanding the individual's protected conduct. *N.L.R.B. v. Rockline Indus., Inc.*, 412 F.3d 962, 967 (8th Cir. 2005).

Even assuming for argument's sake that Edge was an employee, the General Counsel came nowhere close to meeting its burden of showing that she was terminated for engaging in a protected activity. As detailed above, Edge herself testified that she did not believe she was. Moreover, when Cross had previously testified at the 10(j) injunction hearing, she was asked whether there had been any talk among the drivers about Edge's termination, and she answered, "Somebody did say something that a Little Rock employee had gotten fired for missing specimens." (Tr. at 247-248)[6]

Of course, the ALJ wholly fails to grapple with the sworn testimony of Edge and another driver that Edge was not fired for exercising any protected rights, instead relying solely on circumstantial evidence relating to the timing of the firing and Edge's communications with Velox concerning whether she was an employee or independent contractor and her review over the route driver agreement. (ALJD 17) Needless to say, that circumstantial evidence should bow to Edge's own testimony on the issue. Since the ALJ could not explain it away, he simply ignored it.

Further, the evidence that Edge's contract was terminated for anything that could conceivably be protected activity under the Act was sparse, at best. As discussed in more detail below, the ALJ's unthinking acceptance without analysis of the argument of General Counsel that mere misclassification of an individual as an independent contractor violates the Act must be rejected. Additionally, while the ALJ concluded that "the timing between [Velox's] knowledge that Edge was consulting an attorney over the route driver agreement and her termination is sufficient to satisfy the General Counsel's burden in establishing a relationship between her protected activity and

[6] In front of the ALJ, Cross decided to change her previous sworn Federal Court testimony and claim instead that her "understanding" was that Edge's contract was terminated "because she refused to sign a driver agreement." (Tr. at 247). Beyond the absurdity of Cross's claim to a new-found understanding of why Edge's contract was terminated, Edge's activity with respect to the route driver agreement was not protected concerted activity for the reasons mentioned in the main text.

her discharge," that conclusion is totally at odds with the ALJ's correct conclusion that the promulgation of the route driver agreement did not violate the Act. (ALJD 4 n.4) And, there is no indication in the record that Velox was aware or believed that Edge was engaged in protected concerted activity relating to the route driver agreement. In that respect, there is not a scintilla of evidence that Velox believed Edge acted with or on the authority of other employees with respect to the route driver agreement. For instance, Edge texted that Woods had already decided to sign the route driver agreement and only she was "debating" whether to do so and had "not decided that for sure yet." (GC Ex. 17). By all indications, whoever Edge may have been discussing the route driver agreement with, any concern she was raising regarding the document was on her behalf alone.

The only other evidence from which the ALJ extrapolates that Edge was fired for "protected activity" is that Edge's discharge was three days after text exchanges between Christ and Edge regarding Edge's refusal to provide Christ with a picture of Edge's Social Security card and driver's license. But those text exchanges regarding whether Edge would provide the documents to Christ as Christ requested do not contain any indication that Edge's refusal to do so was done "with or on the authority of other employees, and not solely by and on behalf of the employee." *Meyers Industries, Inc.*, 281 NLRB at 885. Indeed, Edge's texts utilized the first person exclusively. For instance, she noted, "***I*** am not contracted to you 24 hours a day" and "If you want ***me*** to be your employee available at your whim whenever you want then reclassify ***me*** pay ***my*** taxes provide ***my*** benefits and pay ***my*** car expenses and ***I*** will be your employee." (GC Ex. 13) (emphasis added). In her responses to Edge's texts, Christ noted that every other driver had already complied, further showing that the text dispute on which the ALJ relied to find a nexus between Edge's firing and her supposedly "protected activity" had nothing to do with Edge's actions "with or on the authority of other employees," as opposed to solely by and on behalf of herself.

The ALJ notes that there is evidence in the record that suggests that Edge discussed her classification as an independent contractor with other contractors, and that there is evidence that Christ and Lee knew that other contractors believed classification to be an issue. (ALJD 16). Yet that is a thin reed on which to hang the conclusion that when Edge later refused to sign the route driver agreement without attorney review and engaged in a dispute with Christ solely relating to her own objections to having to provide a driver's license and Social Security card on Christ's desired timeline, Edge was doing so as part of protected concerted activity, rather than solely for herself.

In short, the evidence cited by the ALJ as showing that Edge's "protected activity" was a motivating factor in the termination of her contract is thin as is, and especially if considered in tandem with the fact that Edge herself admitted under oath that her contract was not terminated for discussing working conditions. It pales in comparison to the robust evidence that Edge was terminated due to her mishandling of specimens, including, most importantly, the specimen found in the parking lot of Compassion Women's Clinic that caused PathGroup to mandate that Edge never touch another PathGroup specimen ever again. That evidence was more than sufficient to satisfy Velox's burden of showing a legitimate reason for termination of Edge's contract. The ALJ's rationales for finding that Velox's legitimate reason – *i.e.* Edge's mishandling of specimens – was pretextual (ALJD 17) are contradicted by the record and common sense.

At the outset, there can be no dispute that mishandling specimens is an extremely serious issue that would fully warrant termination of a drivers' contract. After all, the mishandling of specimens could have extreme consequences for Velox, PathGroup, PathGroup's healthcare provider customers, and, perhaps most importantly, the healthcare providers' patients. As PathGroup stressed, each specimen represented an individual getting laboratory tests to determine important medical issues and accordingly make important medical decisions. (Tr. at 305; Resp. Ex. 21, Memo. at 3) The health care provider customers of PathGroup had to ensure that their patients

received timely and correct results from the laboratory tests to provide medical advice to their patients. The providers relied on PathGroup for these laboratory results, and PathGroup in turn relied on Velox to properly handle and timely deliver the specimens. A drivers' failure to collect specimens properly and timely placed each of Velox, PathGroup, PathGroup's customers, and the patients at risk. Unsurprisingly, then, as described in section IV(A)(1)(c), *supra*, PathGroup retained the right to terminate Velox's contract in the event that Velox failed to properly handle specimens.

In short, common sense strongly supports Lee's testimony that Edge's contract was terminated due to her mishandling of the specimen. But it is not just common sense that corroborates Lee's testimony; the documentary evidence does too. In that regard, Marcia Black, PathGroup's Transportation Supervisor that monitored Velox's performance of its contract with PathGroup (*see* Tr. at 311-12), emailed Lee on the morning of August 15 regarding the missing specimen. (Resp. Ex. 27) And an internal PathGroup email later that morning corroborates Lee's testimony that PathGroup demanded Edge not run any further routes for PathGroup, to which Lee agreed. In that internal PathGroup email, Tidwell notified Mike Fuller that "[t]his driver has been terminated." (Tr. at 320-21; Resp. Ex. 28) Fuller is the highest level executive of PathGroup that deals with Velox. The fact that he was involved demonstrates the severity of the matter. The ALJ incorrectly notes that Fuller is Tidwell's subordinate. (*Compare* ALJD 7 *to* Tr. at 275)

Edge's failure, and PathGroup's concern over the issue, occurred even as Velox was already concerned about its contract with PathGroup. (Tr. at 308-10, 314-15, 321) Velox had recently promulgated the route driver agreement and called a meeting for drivers on August 15 to assure that PathGroup's concerns were being met after failures by drivers had led to service failures. (*Id.*)

Despite Lee's testimony as to the reason that Edge's contract was terminated and the corroboration of that testimony by contemporaneous third-party emails and common sense, the ALJ claimed not to credit Velox's reason for terminating the contract and found that it was pretextual.

(ALJD 17) But the ALJ's rationales for making that determination are contradicted and explained by undisputed record evidence with which the ALJ entirely fails to grapple.

For instance, the ALJ notes that other drivers had made mistakes that had not resulted in termination. (ALJD 7-8) The ALJ is, at best, naïve in drawing a credibility conclusion based on that fact. PathGroup demanded that Edge, and not the other drivers, never again touch a medical specimen on its behalf. As the ALJ notes, as to other drivers' mistakes, PathGroup only demanded credits. (ALJD 8) And it is not difficult to ascertain the difference in the types of mistakes and PathGroup's reaction. Only the sample found in the parking lot elicited a furious interaction between PathGroup and its health care provider customer. Indeed, generally speaking, samples must be redrawn for a variety of valid reasons, including those unrelated to human failure. A specimen found in a parking lot can only be the result of driver error, and it was an error of which PathGroup's own customer (*i.e.* the clinic) would no doubt be made aware, potentially resulting in far more significant repercussions for ***PathGroup*** than specimens for which PathGroup only needed to ask its customer be redrawn. The error by Edge also implicated HIPAA laws, since private patient information was exposed to the public for days, in ways that errors in maintaining specimens at the wrong temperature, or not properly logging them, or being late on runs would not.

The ALJ also suggests that the fact that Velox did not immediately terminate Edge's contract, waiting six days and treating her as a driver in the meantime, somehow cast doubt on Lee's explanation. (ALJD 7) Yet, this ignores that Velox still had to cover the route and needed to find a driver to do so. Lee explained that he told Tidwell, "I will get that route covered by a different driver ***as quickly as I possibly can***." (Tr. at 321) (emphasis added). Nor was the ALJ correct in suggesting that Lee simply "decid[ed] he did not believe" Edge's excuse. (ALJD 7 n.10) Lee explained in detail precisely the reasons that Edge's excuse made no sense. (Tr. at 357-361)

The ALJ engages in pure conjecture that is contradicted by record evidence in attempting to raise other possible explanations for why the specimen appeared in the parking on Monday August 15th. For instance the ALJ suggests that the specimen may have been drawn on Saturday or Sunday, rather than the Friday that Edge picked up specimens. (ALJD 6) But Edge herself admitted that the clinic was only open on Tuesdays and Fridays. (Tr. at 96) The ALJ also suggests, without factual support, that someone would have "immediately" noticed a discrepancy in the number of specimens left by the clinic and those picked up by the courier. (ALJD 6) But that simply is not true and not logical. If a driver drops a specimen prior to getting back to his or her vehicle and filling out a route sheet, then it would not be noted by the driver or at consolidation. (Tr. at 357) It would take the laboratory and clinic comparing records to figure out that a specimen was missing, which takes much longer. (Tr. at 96, 357) In fact, if not found in the parking lot, it would probably go undetected until the health care provider inquired of the lab.

Moreover, the ALJ failed to engage with the fact that although Edge was adamant that she did not mishandle the specimen, she had previously admitted to multiple lost or mishandled specimens. In that regard, when asked about the error regarding the August 12th specimen, Edge firmly stated that she "immediately" "knew that [she] did not make it." (Tr. at 91) Her only explanation for why she "immediately" knew that was that she had "been doing this work for a while" and "kn[e]w the importance of double-checking your box," "making sure everything is secure" and "that nothing has been overlooked." (Tr. at 91-92) Yet she also openly admits to other lost or mishandled medical specimens, including numerous left on a storage room floor. (Tr. at 85-90) Edge admitted these specimens were lost "because I had already counted, I didn't recount." (Tr. at 89) Important to note, those earlier lost specimens were discovered by PathGroup and not PathGroup's customer, explaining why PathGroup made its demand on August 15, but not earlier.

C. <u>The ALJ's Novel Conclusion that Misclassifying an Employee as an Independent Contractor Violates the Act Must Be Rejected.</u>

Never before has the NLRB or a court concluded that mere misclassification as an independent contractor rather than employee, without more, is in and of itself a violation of Section 8(a)(1) of the Act. Here, the ALJ does so without citation to any law or framework for analysis ***whatsoever***. (ALJD 14) Indeed, the sum total of the ALJ's novel interpretation of the law that has no background in cases decided by the Board or courts are the following 55 words:

> By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.

(ALJD 14)

Notwithstanding the ALJ's thoughtless acceptance without analysis of the new-found legal theory of the General Counsel (which itself provided no analysis in a recognized framework to support its theory), there is no reason to conclude that a misclassification of an individual as an independent contractor should be subjected to anything less than the standard of review applicable to any other of a company's work rules that are challenged as violative of the Act.

In that regard, for a work rule to be in violation of the Act, it has to ***explicitly*** restrict Section 7 activity. *Lafayette Park Hotel*, 326 NLRB 824, 824 (1998). If it does not, then the Board must show one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (hereinafter "*Lutheran Heritage*").[7] The NLRB

[7] Although the Board relies upon the *Lutheran Heritage* test for determining whether rules that do not expressly restrict Section 7 activity violate the Act, Velox urges the Board to overrule the "reasonably construe" test as expressed in *Lutheran Heritage* for all the reasons urged by Chairman Miscimarra in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7-17 (2016) (Acting Chairman Miscimarra, dissenting in part).

noted in *Lutheran Heritage* that a rule does not necessarily violate the Act just because the rule ***could*** be interpreted to cover Section 7 rights. *Id.* at 647.

First, the simple classification of an individual as an independent contractor is not in any way an ***explicit*** restriction on Section 7 activity. It does not expressly prohibit the individual from undertaking any protected activities. Nor is there any evidence in this matter that the misclassification of drivers, without more, was something that the drivers would "reasonably construe" to prohibit them from engaging in protected activity. Any conclusion to the contrary is nothing more than a theoretical possibility without evidentiary support. *Lutheran Heritage* dispenses with the notion that such theoretical possibilities are sufficient. 343 NLRB at 647. Nor is there a scintilla of record evidence that Velox classified drivers as independent contractors in response to union activity, or that it used that classification to restrict the drivers' rights. *Id.*

As such, even presuming for argument's sake that Velox did misclassify drivers as independent contractors, that is insufficient to establish a violation of the Act. The ALJ's acceptance of the contrary conclusion without any analysis whatsoever must be rejected.

D. The Non-Disparagement Provision In The Independent Contractor Agreement Does Not Violate Section 8(a)(1) Of The Act.

Finally, the ALJ concluded, without any analysis or elaboration, that Velox maintained an unlawful non-disparagement provision in the independent contractor agreement (ALJD 17). The ALJ did so without any evidence whatsoever for that contention. As noted above, for a rule to be a violation of the Act, it has to explicitly restrict Section 7 activity, *Lafayette Park Hotel*, 326 NLRB at 824, or the Board must show one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 NLRB at 647.

Here, the entire "analysis" of the ALJ is comprised of two sentences, noting the General Counsel's allegation, and a quote of the actual provision. There is ***no*** further discussion. There is no case cited. There is no evidence cited. It is merely those two sentences, nothing more. And, in fact, the General Counsel failed to submit one iota of evidence showing that the non-disparagement provision in the Independent Contractor Agreement explicitly restricts Section 7 activity, that it would reasonably be construed to prohibit such activity, that it was promulgated in response to union activity, or that it was applied to restrict Section 7 rights. Thus, it must be dismissed.

E. <u>The Record Does Not Accurately Reflect Testimony By Edge.</u>

Finally, the record does not accurately reflect certain proceedings at the ALJ hearing that go directly towards the credibility of Edge and call into question the veracity of Edge's charges. Audio clips of Edge's sworn deposition testimony prior to the 10(j) injunction hearing were played on the record at the hearing of this matter but were not transcribed by the court reporter and are thus not reflected in the record. The following excerpts should be included in the record:

On page 118, line 15 of the transcript:

Q You knew throughout your relationship with Velox that you were an independent contractor, didn't you?
A Yes.
Q And you don't dispute that?
A I do not dispute it.

On page 145, lime 21 of the transcript:

Q Did you give them everything you thought was relevant to your claim?
A I did.
Q Did they – did you give them everything they asked for?
A Yes.
Q You're not holding anything back that you have; correct?
A No.

On page 150, line 9 of the transcript:

Q Do you believe that that is what – "some of you were hired by John Willis, some were hired by me. If you work the Memphis office, Little

Rock, Arkansas, Jackson, Tennessee or Jackson, Mississippi, you are part of the Memphis branch and should report directly to me. Not John Willis and not Jim Gibson. Any pay issues, complaints, concerns, requesting days off or calling out of work should go through me. No one else. I do not personally do your payroll by I am the go between if things are not correct."

A Alright, that whole thing puts it in a whole different aspect. That was the clarification of who answered to who, and who handled what for us. So where we were talking to John about our pay issues and some people had started going straight to Larry because they couldn't get it straightened out anywhere else, that was clarifying the hierarchy so that we know who handled what.

On page 157, line 1 of the transcript:

Q Were you aware that Velox had to get special permission to hire the former Lab Express drivers by PathGroup?

A Yes.

Q Let's kind of sort of the relationships here. So PathGroup is whose customer?

A PathGroup is the boss, like my people that were contracted to me are their boss. PathGroup is the one that will set their guidelines.

Q So PathGroup can dictate certain protocols; is that correct?

A Yes, they can.

Q And PathGroup can dictate what time something is to be picked up?

A Yes, they can.

And PathGroup can dictate how it's going to be picked up?

A Yes.

Q When PathGroup makes that mandate or that requirement, that would be directed to Velox; is that correct?

A Yes.

Q So Velox could then pass through those same mandates or dictate to the independent contractor drivers; is that correct?

A Yes, they would.

Q And that's appropriate, isn't it?

A Yes, it is.

V. CONCLUSION

Under the undisputed record evidence, Velox's medical courier drivers are independent contractors and not employees, and Velox did not violate the National Labor Relations Act. Accordingly, Velox requests that the Board dismiss the Complaint in its entirety.

Dated: October 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, I caused a copy of the foregoing document to be electronically served upon the following counsel of record:

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