FORM NLRB-505
(4-15)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
02-RC-319437	06/06/23

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position:	1c. Business Phone:	1e. Fax No.:
Icahn School of Medicine at Mount Sinai	See Auth'd Rep	Contact Auth'd Rep

1b. Address *(Street and number, city, state, and ZIP code):*	1d. Cell No.:	1f. e-Mail Address:
1 Gustave L. Levy Place New York, New York 10029-5674	See Auth'd Rep	Contact Auth'd Rep

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? ☒ Yes ☐ No
   (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? ☐ Yes ☒ No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. (*If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.*)
See attached rider.

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.
Added:
See attached rider.

Excluded:
See attached rider.

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.
See attached rider.

5. Is there a bar to conducting an election in this case? ☐ Yes ☒ No *If yes, state the basis for your position.*
There is no bar to an election, but the petition fails to raise a question concerning representation of employees--see attached rider.

6. Describe all other issues you intend to raise at the pre-election hearing.
See attached rider.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at
   http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015
   (a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
   (b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D)

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

8b. Date(s):	8c. Time(s):	8d. Location(s):
See attached rider.	See attached rider.	See attached rider.

8e. Eligibility Period (e.g. special eligibility formula):	8f. Last Payroll Period Ending Date:	8g. Length of payroll period
See attached rider.	See attached rider.	☐ Weekly ☐ Biweekly ☒ Other *(specify length)* See rider.

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative Adam M. Lupion	9b. Signature of authorized representative *Adam M. Lupion*	9c. Date 6/21/2023

9d. Address *(Street and number, city, state, and ZIP code)* Eleven Times Square, New York, NY 10036	9e. e-Mail Address alupion@proskauer.com

9f. Business Phone No.: 212-969-3358	9g. Fax No.: 212-969-2900	9h. Cell No.: 917-817-9369

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

3(a) – Basis for Contention That Proposed Unit is Inappropriate:

1.   There is no employment relationship between the Icahn School of Medicine at Mount Sinai ("ISMMS") and graduate students, including but not limited to PhD students in Biomedical Sciences and Neuroscience (including joint-degree MD/PhD students in ISMMS's Medical Scientist Training Program) (the "PhD Graduate Students"), based on research performed to fulfill academic degree requirements.

2.   The PhD Graduate Students Petitioner seeks to represent are not "employees" as defined in Section 2(3) of the NLRA.

3.   There is no employment relationship between ISMMS and graduate students who do not receive a stipend or other funding from ISMMS, including but not limited to students pursuing a Masters degree or a PhD degree in Clinical Research.

4.   To the extent the petitioned-for unit seeks to include PhD Graduate Students based on the performance of instructional services, including serving as a teaching assistant or tutor, such a unit is inappropriate because those students lack a community of interest with PhD Graduate Students performing research.

5.   To the extent the petitioned-for unit seeks to include graduate students other than PhD Graduate Students, such a unit is inappropriate because non-PhD Graduate Students lack a community of interest with PhD Graduate Students.

6.   See responses in Section 3(b) below for additional support that the petitioned-for unit is inappropriate.

3(b) – Other Employee Groupings that Must Be Added to or Excluded from the Proposed Unit to Make it an Appropriate Unit:

1.   *Added* – None

2.   *Excluded*[1] – Assuming, *arguendo*, that the PhD Graduate Students whom Petitioner seeks to represent are deemed to be "employees" within the meaning of Section 2(3) of the NLRA, the following "employees" must be *excluded* from any unit found appropriate by the Board:

- All graduate students serving in any instructional position, including as a teaching assistant or tutor, as they lack a community of interest with PhD Graduate Students who perform research.

- All graduate students receiving federal work-study funding as they are not "employees" within the meaning of Section 2(3) of the NLRA and lack a community of interest with PhD Graduate Students in the petitioned-for unit.

- All first-year PhD students in Biomedical Sciences or Neuroscience.

- All dual-degree MD/PhD students in the MD portion of their education.

- All students at ISMMS enrolled in a degree, joint-degree, or certificate program *other* than a PhD in Biomedical Sciences or Neuroscience—including but not limited to students enrolled in the following at ISMMS: (i) the PhD program in Clinical Research; (ii) the Masters of Science in Clinical Research program; (iii) the certificate-

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[1] As set forth in Section 3(a), supra, no students in the petitioned-for unit are "employees" and therefore all such students should be excluded. Attachment D to ISMMS' Statement of Position, identifying individuals that must be excluded from the petitioned-for-unit, identifies only those graduate students that must be excluded *if* the Region determines that PhD Graduate Students are "employees" within the meaning of the Act. To do otherwise would render Attachment D coextensive with Attachment B. Attachment D does not list all PhD Graduate Students, but we make clear here that ISMMS' position is that all PhD Graduate Students in the petitioned-for-unit are not "employees" under the Act and therefore the petitioned-for-unit is inappropriate in its entirety.

granting Clinical Research Training Program; (iv) the Masters of Science in Biomedical Sciences program; (v) the Masters of Science in Biomedical Data Science program; (vi) the Masters of Science in Biostatistics program; (vii) the Masters of Science in Genetic Counseling program; (viii) the Masters of Science in Healthcare Delivery Leadership program; (ix) the Masters in Health Administration program; (x) the Master of Public Health program; (xi) the Master of Science in Epidemiology program; (xii) the Advanced Certificate in Public Health program; and (xiii) the Medical School (*i.e.*, ISMMS's MD-granting program), including those in the medical residency program.

- All students enrolled in a post-baccalaureate program, including ISMMS' Post-Baccalaureate Research Education Program (PREP).

- All students enrolled in a certificate-granting (*i.e.*, non-degree-granting) program within ISMMS.

- All masters students.

- All graduate students who do not perform instructional services or research services.

- All graduate students who do not receive compensation from ISMMS.

- All graduate students funded by external fellowship or grants.

- All graduate students who are self-funded.

- All other students.

- All other employees.

- All office clericals, supervisors, managers or guards as defined by the Act and relevant case law.

4 – Other Individuals Whose Eligibility is Contested:

1. In addition to the exclusions identified in section 3(b) above, ISMMS contests the voter eligibility of all graduate students encompassed by the petition on the ground that none of the petitioned-for graduate students is an "employee" within the meaning of Section 2(3) of the NLRA.

2. Should an election be ordered in this case, any graduate student who did not perform instructional or research services in the pay period immediately preceding a Decision and Direction of Election, or ceased to perform instructional or research services as of the date of the election, should not be eligible to vote.

3. ISMMS contests the voter eligibility of individuals on a leave of absence as of the eligibility date.

6 – Other Issues That ISMMS Intends to Raise at the Pre-Election Hearing

1. *Columbia University*, 364 NLRB 1080 (2016) was wrongly decided; *Brown University*, 342 NLRB 483 (2004) was wrongly overruled.

2. The graduate students whom Petitioner seeks to represent are non-employees based on the NLRB's holding in *Brown University*.

3. While ISMMS submits that *Columbia* was wrongly decided, it recognizes that *Columbia* represents current Board law. However, even if *Columbia* is applied to ISMMS' graduate school programs, certain graduate students here are not employees under Section 2(3) of the Act due to a number of material factual distinctions between *Columbia* and the facts at issue here, as will be shown in our Offer of Proof, which will be presented at the first day of the hearing. *See Massachusetts Institute of Technology*, Case No. 01-RC-30402 (March 13, 2023).

4.   The issues raised by this Statement of Position cannot be addressed administratively without a hearing. Given the fluctuating and nuanced nature of the law concerning the employee status of graduate students, the far-reaching legal and policy consequences of finding the graduate students here to be employees, and the new Final Rule (88 FR 14908) recently promulgated on March 10, 2023 affecting election procedures, a complete factual record is necessary in order to apply the current law, as well as for consideration as to whether *Columbia* should be reversed.

5.   ISMMS contends that the Board should apply the voter eligibility formula identified in 8(e) below.

6.   ISMMS contends that the Board should require each graduate student to produce their student ID to vote in the manual election.

8(a) – Election Details

Should an election be ordered in this case, it should be a manual election.

8(b) – Date(s)

Should an election be ordered in this case, it should be scheduled for no sooner than 25 days after the issuance of the DDE. ISMMS reserves the right to amend its position once the parties know if and when a DDE is issued.

8(c) – Time(s)

Should an election be ordered in this case, manual balloting should take place on one day from 10:00 am – 2:00 pm and 3:00 pm – 7:00 pm. ISMMS reserves the right to amend its position once the parties know if and when a DDE is issued.

8(d) – Election Polling Locations

Should an election be ordered in this case, ISMMS proposes the following election polling location: Patricia and Robert Levinson Student Center. ISMMS reserves the right to amend its position once the parties know if and when a DDE is issued.

8(e) – Eligibility Period

ISMMS proposes the Standard Eligibility Formula.

8(f) – Last Payroll Period Ending Date

June 17, 2023 is the last payroll period ending date prior to the filing of this Statement of Position.

8(g) – Length of Payroll Period

Graduate students receive their stipend on a bi-weekly basis. Certain graduate students who receive other support hourly are on a weekly payroll period.