

**No. 08-4849-ag**

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,  
IRON SHIP BUILDERS, BLACKSMITHS, FORGERS  
& HELPERS, AFL-CIO**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**BROWN & ROOT POWER & MANUFACTURING, INC.**

**Intervenor**

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**ON PETITION FOR REVIEW OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD**

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**FINAL BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO (“the Union”) to review a portion of the National Labor Relations Board’s (“the Board”) Supplemental Decision and Order, which issued on September 28, 2007, and is reported at 351 NLRB No. 20. Brown & Root Power and Manufacturing, Inc. (“the Company”) has intervened on the side of the Board. The Board’s Supplemental Decision and Order is final with respect to all parties.

The Board had subject matter jurisdiction over the unfair labor practice proceeding pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board respectfully renews its argument, advanced in its previous motion to dismiss, that this Court is without appellate jurisdiction to entertain the Union’s petition because the Union is not “aggrieved” by the Board’s Order within the meaning of Section 10(f) of the Act (29 U.S.C. § 160(f)), any claim of injury is pure conjecture, and the case is otherwise premature for review. On November 17, 2008, the Board filed a motion to dismiss the Union’s petition for review for lack of appellate jurisdiction. In an order issued on January 5, 2009, a three-judge motions panel of this Court denied the Board’s motion.

It is settled, however, that “[a] ruling by a motions panel of this Court indicating that the Court has appellate jurisdiction does not bar reconsideration of that issue by the merits panel.” *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999). *See also, United States v. Ecker*, 232 F.3d 348, 349 (2d Cir. 2000)(jurisdiction question may be revisited by merits panel). The Board respectfully renews its argument to the merits panel that jurisdiction is improper and relies on its previously filed motion to dismiss. (Motion of the National Labor Relations Board to Dismiss the Union’s Petition for Review for Lack of Appellate Jurisdiction, A 152-72.)<sup>1</sup>

Assuming that jurisdiction is proper, the Court has jurisdiction over this case under Section 10(f) of the Act; venue is proper because the Union transacts business in this Circuit. The Union’s petition for review filed on October 2, 2008,

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<sup>1</sup> “A” refers to the deferred joint appendix, which is scheduled to be filed by the Union on May 14, 2009. “D&O” refers to the Board’s Supplemental Decision and Order, reported at 351 NLRB No. 20, including the consecutively-paginated administrative law judge’s decision and supplemental decision. “Tr” refers to the transcript of the underlying unfair labor practice hearing. “GCX” and “CEX” refer to exhibits introduced by the General Counsel and the Company, respectively, at the hearing before the administrative law judge. References preceding a semicolon refer to the Board’s finding; those following are to the supporting evidence. “Br” refers to the Union’s brief.

was timely<sup>2</sup>; the Act imposes no time restrictions on the initiation of review proceedings.

### STATEMENT OF THE ISSUES

1. Whether the Board’s new policy articulated in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007) (“*Oil Capitol*”) for determining make-whole relief due in cases involving antiunion discrimination against union “salts”—that is, union organizers who apply for work with a nonunion employer in furtherance of a campaign to organize the employees—is consistent with the Act and adequately explained.<sup>3</sup>

2. Whether the Board reasonably determined that *Oil Capitol* is to be applied in the future compliance proceedings in this case.

### STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union and the Pipefitters Union, the Board’s General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to hire or refusing to consider for hire over 60 job applicants. The matter

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<sup>2</sup> The Union, along with another union, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229 (“Pipefitters Union”), were the charging parties in the underlying Board case. The Union is the only petitioner before this Court.

<sup>3</sup> The Board’s *Oil Capitol* decision is currently on review before the D.C. Circuit in *Sheet Metal Workers Int’l Assn. Local 270 v. NLRB*, Case No. 07-1479, in which argument was heard on February 17, 2009.

was heard before an administrative law judge, who took evidence in a hearing spanning several days. Following the hearing, the judge issued a decision finding merit to most of the General Counsel's complaint allegations. Specifically, the judge found that the Company unlawfully failed to hire or consider for hire over 50 job applicants. (D&O 8-22, A 12-26.) The Company filed exceptions to the judge's decision, and the General Counsel and the Union filed cross-exceptions. While the exceptions and cross-exceptions to the judge's decision were pending, the Board issued its decision in *FES*, 331 NLRB 9 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002), in which it set forth a revised framework of analysis for refusal to hire and refusal to consider allegations.<sup>4</sup> On June 7, 2000, the Board issued an order remanding the proceeding to the judge for further consideration in light of its decision in *FES*. (D&O 1, A 5.)

On May 10, 2001, the judge issued a supplemental decision in which he applied the *FES* framework and reaffirmed his findings that the Company violated the Act in part. (D&O 22-29, A 26-33.) The Company, the General Counsel, and the Union each filed exceptions to the judge's supplemental decision. (D&O 1, A 5.)

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<sup>4</sup> In *FES*, the Board modified its existing precedent for refusal-to-hire and refusal-to-consider cases, holding that the General Counsel must prove as part of his initial burden that the employer was hiring and that the unhired applicant had relevant experience or training for the job. 331 NLRB at 12-13.

While exceptions to the judge's supplemental decision were pending before the Board, the Board issued its decision in *Oil Capitol*, which articulated a new policy for determining remedial relief due in compliance proceedings in union "salting" cases.

The Board subsequently issued its Supplemental Decision and Order currently under review. The Board affirmed the judge's findings in part, and concluded that the Company unlawfully refused to hire or consider for hire more than 50 applicants. It also instructed that *Oil Capitol* was to be applied in determining the exact amounts of backpay, and whether reinstatement was subject to defeasance. (D&O 1-8, A 5-12.) Now before this Court, the Union challenges the Board's *Oil Capitol* decision, as well as the Board's determination that the standards of proof established in *Oil Capitol* are to be applied in future compliance proceedings in this case.

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. The Company, Which Is a Nonunion Construction Contractor, Performed General Maintenance Work at Stone Container's Paper Mill**

The Company is a nonunion construction contractor. (D&O 1, 8, A 5, 12; Tr 23, 165, 170, 211-12, A 439, 471-72, 475-76.) In the spring of 1994, it was the general contractor at a paper mill facility in Florida operated by Stone Container,

Inc. (“Stone Container”). In this capacity, the Company performed general maintenance work on a full-time, year-round basis. (D&O 1, 8, A 5, 12; Tr 27-30, 33, 709, A 442-45, 544.) It also served as the contractor for repairs occurring during outages, which were regularly-scheduled periods during which all or part of the facility was closed temporarily for repairs. (D&O 1, 8, 22, A 5, 12, 26; Tr 28, 33, A 443, 448.) The Company’s employees at the facility routinely included boilermakers, pipefitters, pipewelders, and iron workers, among others. (D&O 13, A 17; Tr 688.)

The Company’s project manager at the facility was Joe Bob Caperton. (D&O 1, 22, A 5, 26; Tr 26, 50-53, A 441, 454-57.) Caperton had overall responsibility for the project, and job requisitions, when necessary, went through him. (D&O 1-2, 8, & n.5, A 5-6, 12 & n.5; Tr 50-53, A 454-57.) Kara Hall was the Company’s senior craft recruiter. (D&O 1, 8, A 5, 12; Tr 23, 25, 157-58, A 439-40, 469-70.) Caperton and Hall were both on-site in the spring of 1994 to begin recruiting for the next regularly-scheduled outage. (D&O 1, 8, A 5, 12; Tr 25-28, 31, 46, 48, 771, A 440-43, 446, 452-53, 553.)

**B. Following an Accidental Explosion at the Paper Mill, Stone Container Selects the Company to Perform Rebuilding Work; the Company Determines that It Must Hire Hundreds of Additional Employees**

However, due to a devastating event, the scheduled outage did not occur. In April, an accidental explosion tore through the facility, killing three people and

causing extensive damage to important equipment. (D&O 1, 8, 22, A 5, 12, 26; Tr 32, 35, 50-51, 687, A 447, 449, 454-55, 541.) Stone Container subsequently decided to contract with the Company to rebuild portions of the damaged facility. (D&O 1, 8, A 5, 12; Tr 50, 54, A 454, 458) The project, which was a complex endeavor, consisted of clean-up, demolition, and rebuilding work. (D&O 1, A 5; Tr 32, 36, A 447.)

To complete these tasks, the Company determined that it needed to hire hundreds of employees in various construction trades, including pipefitters, structural welders, pipewelders, electricians, and ironworkers. (D&O 1, A 5; Tr 53-54, 688, A 457-58.) Boilermakers, who typically possess a variety of skills, were also qualified to perform structural welding work as part of the rebuilding project. (D&O 2-3, A 6-7; Tr 94-95, 98-99, 134, 366, 582-83, 690-91, A 461-64, 466, 524, 528-29, 542-43.) Caperton directed Hall to recruit approximately 200 workers. (D&O 2, 8, A 6, 12; Tr 55, 58, A 459-60.) Hall used a variety of mechanisms for recruiting applicants, and, in April, he started taking applications for positions. (D&O 1, 13, A 5, 17; Tr 42-43, 135-36, A 450-51, 467-68.) The Company gave preferential treatment to three categories of employees: its former employees; applicants referred by its supervisors; and applicants referred by Stone Container. (D&O 2, A 6; Tr 765, A 552.)

**C. Unions Target the Company for Organizing;  
As Part of that Effort, Numerous Union Members  
Apply for Positions with the Company, and Identify  
Themselves as Voluntary Union Organizers or Active  
Union Members; the Company Refuses to Hire or  
Consider Union Applicants**

The Union, along with other unions, including the Pipefitters Union, learned that the Company was hiring workers for the rebuilding project at the facility. (D&O 1, A 5; Tr 211, 735, 743, A 475, 546, 549.) The unions were disappointed that Stone Container had selected a nonunion company to perform the rebuilding work. (D&O 1, A 5; Tr 235, A 487.)

The Union and the Pipefitters Union targeted the Company for union organizing campaigns. (Order Denying Motions for Reconsideration at n.4, D&O 22, A 26; Tr 211-12, 233, 236-37, 270-71, 327, 330, 648-49, A 475-76, 486, 488-89, 498-99, 514, 516, 538-39.) The goal was to unionize the Company. Although the organizing campaigns were separate, the two unions exchanged information with other. (Tr 330, A 516.)

Paid union organizers led the campaigns. Greg Boggs directed the Pipefitters Union's effort. (Tr 240, 253, 328, A 490, 496, 515.) Boggs, who served as the Pipefitters Union's business manager/financial secretary and organizing director, had significant experience with "salting" campaigns, and had "salted" union members onto jobs before. (Tr 204, 209, 211, 227, 230, 232-33, 235, 243, 253, 262, A 473-75, 483-87, 492, 496-97.) In order to organize the

Company from the inside, Boggs encouraged Pipefitters Union members to apply for positions with the Company. (Tr 211, 213, 233, 235, 237, 239, 249, A 475, 477, 489, 495.) Once the union members obtained jobs with the Company, Boggs would instruct them on how to organize, including how to obtain union authorization cards. (Tr 237, 249, A 489, 495.) Boggs also told union members to identify themselves on their applications as voluntary union organizers or active union members. (Tr 242-44, 246-47, A 491-94.) More than 30 members of the Pipefitters Union applied for positions with the Company. (Tr 213, A 477.) Boggs kept track of the applications. (Tr 240, A 490.)

Around the same time that Boggs began his union's organizing campaign, the Union also targeted the Company for organizing from the "inside." (Tr 343, A 519.) Dennis King, an International Union Representative whose duties included organizing, was in charge of the organizing effort. (D&O 4, A 8; Tr 295-96, 303-04, 313, 318-19, 336, A 500-03, 506-08, 518, CEX 1, 4, A 365-67, 406-17.) Other paid union organizers assisted him. (D&O 4 & n.16, A 8 & n.16; Tr 331, 611, 633, 642, 646-50, 732, 738, 743-45, A 517, 531, 534-40, 545, 547, 549-51.) King, who reported to the Union's director of organizing, had extensive organizing experience with the Union's "Fight Back Program." (Tr 304-05, 313, 322-24, A 503-04, 506, 509-11.) That program described the Union's multiphase plans to increase its membership by, among other things, organizing nonunion employers. (Tr 304-05,

323-24, CEX 2-3, A 503-04, 510-11, 368-405.) Phase one of the program involved targeting a nonunion employer for organization; determining the employer's hiring procedures; securing job applications; and gaining employment. (Tr 304-05, CEX 2-3, A 503-04, 368-405.) This phase included preparing applications and telling applicants to accept work if offered. (Tr 304-05, 742, A 503-04, 548, CEX 2-3, A 368-405.) Additional phases were entitled "Job Site Action" and "U[nfair] L[abor] P[ractice] Legal Actions." (CEX 3, Tr 324, A 393-405, 511.) King instructed union members about utilizing the Fight Back Program at the Company. (Tr 325, A 512.)

After he targeted the Company for organization from the "inside," King encouraged Union members to apply for work with the Company and to accept work if offered. (Tr 325, 331, 343, 354, A 512, 517, 519, 523.) He requested that Union members who were hired assist in organizing the Company. (Tr 325, 352-54, A 512, 521-23.) He also encouraged applicants to identify themselves as voluntary union organizers or active union members. (Tr 309, 325-26, 442-43, 742, A 505, 512-13, 526-27, 548.) King kept track of the applications, and sometimes delivered groups of applications. (D&O 4, A 8; Tr 336, 345, A 518, 520.)

Pursuant to the organizing campaigns, union members applied for positions. (D&O 1-3, 22, 25, A 5-7, 26, 29; GCX 10(a)-(z), 11(c)-(i), (k)-(dd), (ff)-(gg), 14,

A 250-98, 299-360, Tr 442-43, A 525-26.) During the periods in which the union members applied, the Company was hiring. (D&O 2-3, A 6-7; Tr 560, 602, 622, 624, GCX 10-11, A 527, 530, 532-33, 250-358.) On May 2, the Company became aware of the union organizing campaign when Gerald Motley stated on his application that he was a union organizer. (D&O 3, 26, A 7, 30; GCX 10(r), A 281-82.) On May 5 and 6, the Union and the Pipefitters Union picketed the facility to encourage the Company to hire local workers for local jobs. (D&O 1, 22, 26, A 5, 26, 30; Tr 129, 213-14, A 465, 477-78.)

The next month, Boggs complained to Project Manager Caperton that, although over 30 of his members had applied, not one had been hired. Caperton told Boggs that Pipefitters Union applicants “had wr[itten] union organizer on their application[s] and . . . [Boggs] didn’t have any qualified people that actually wanted to go to work.” (D&O 1, 11, A 5, 15; Tr 218-21, A 479-82.) Boggs replied that the applicants had an average of 15 years of experience. Caperton then stated, “you don’t have one qualified man who wants to come down here and go to work.” (D&O 1, A 5; Tr 220-21, A 481-82.) Caperton further stated that he would hire anyone brought by the Pipefitters Union who was qualified. Boggs responded that he would bring in 30 union applicants the next morning. In response to Boggs’ offer, Caperton said, “[O]h no, no, no [,] don’t do that. We’re not hiring now.” (D&O 1, A 5; Tr 220-21, A 481-82.)

The Company subsequently hired a number of nonunion workers—including pipefitters, pipe welders, and structural welders—who did not fit within any non-preferential hiring category, instead of hiring union-affiliated applicants. (D&O 1, A 5.) With just one exception, the Company did not hire, or consider for hire, any applicant who identified himself as or was identified by the Union as a volunteer union organizer or active union member.<sup>5</sup> (D&O 1-4, 14, 16-17, 22, A 5-9, 18, 20-21, 26; Tr 213, A 477.)

## **II. PROCEDURAL HISTORY**

### **A. The Board's Remand and the Judge's Supplemental Decision**

In his initial decision, the administrative law judge found that the Company unlawfully refused to hire or consider for hire over 50 job applicants. (D&O 8-22, A 12-26.) While exceptions to the judge's initial decision were pending, the Board issued its decision in *FES*, 331 NLRB 9 (200), *enforced*, 301 F.3d 83 (3d Cir. 2002), in which it set forth a revised framework of analysis for refusal to hire and refusal to consider allegations. On June 7, 2000, the Board issued an order remanding the case to the judge for further consideration in light of *FES*. The

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<sup>5</sup> The one exception was union member Tony Mack. Mack's first job application contained a reference to the organizing campaign, and the Company did not hire him. Two months later, he submitted an application that did not contain any references to the union organizing campaign, and he was hired. (D&O 2 & n.7, A 6 & n.7; Tr 804-05, A 554-55, GCX 19-20, A 361-64.)

judge issued a supplemental decision reaffirming his findings that the Company violated the Act in part. (D&O 22-29, A 26-33.)

### **B. The Intervening *Oil Capitol* Decision**

While exceptions to the supplemental decision were pending before the Board, the Board issued its decision in *Oil Capitol*, 349 NLRB 1348 (2007), in which it announced a new policy for determining the relief in cases involving discrimination against union “salts”—that is, union organizers, paid or unpaid, who apply for work with a nonunion employer in furtherance of a campaign to organize employees. Prior to *Oil Capitol*, the Board applied in all cases calculating the relief due to victims of discrimination—including those who were union salts—a rebuttable presumption that those individuals would have remained in the job indefinitely. *See Dean General Contractors*, 285 NLRB 573, 574-75 (1987); *see also NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 431-32 (2d Cir. 2001)(approving the Board’s presumption of continued employment in cases involving union salts).

In *Oil Capitol*, however, the Board concluded that, in cases involving discrimination against union salts, a rebuttable presumption of continued employment was no longer warranted. *Oil Capitol*, 349 NLRB at 1348-55. Instead, the Board determined that the General Counsel, in compliance proceedings involving the calculation of make-whole relief for discrimination against union salts, will be required to affirmatively support the request for

backpay and reinstatement with evidence establishing the period a salt would have remained on the job. *Id.* at 1353-54.

In short, the Board's rationale for crafting the new policy was that, because a salt's duration of employment is largely dictated by the union's objectives, the most probative evidence of the duration of employment would be more readily available to the union salt or salt-discriminatee. *Id.* at 1352. The Board also concluded that applying the traditional presumption of continued employment could, and often did, result in awards that were more punitive than remedial. *Id.* (citing *Aneco Inc. v. NLRB*, 285 F.3d 326, 332-33 (4th Cir. 2002)). The Board declared that these new standards for salting cases would be applied "in the present case and in all future cases where the issue arises." *Id.* at 1349.

### **C. The Board's Supplemental Decision and Order**

In its Supplemental Decision and Order, the Board (Chairman Battista and Members Liebman and Kirsanow) affirmed the judge's findings in part, and concluded that the Company unlawfully refused to hire or consider for hire over 50 applicants. (D&O 1-8, A 5-12.) The Board ordered the Company to cease and desist from engaging in the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board ordered the Company to offer reinstatement to the applicants it discriminatorily refused to hire, to make them

whole for any losses they suffered as a result of the discrimination against them, and to consider the remaining discriminatees for hire in accord with nondiscriminatory criteria. (D&O 5-6, A 9-10.) The Board instructed that the evidentiary standards set forth in *Oil Capitol* be applied in determining instatement and backpay duration issues at the compliance stage of the proceeding. (D&O 5, A 9.)

#### **D. Motions for Reconsideration**

After the Board issued its Supplemental Decision and Order, the General Counsel and the Union filed separate motions for reconsideration. In its motion, the Union argued, among other things, that *Oil Capitol* was wrongly decided, that it should not be retroactively applied, and that it had not been established that the discriminatees are “salts.” Order Denying Motions for Reconsideration at 2, A 103. The Board denied the motions in an unpublished order issued on August 29, 2008. Order Denying Motions for Reconsideration 1-4, A 102-04.<sup>6</sup>

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<sup>6</sup> The Board’s Supplemental Decision and Order was issued by a three-member panel of the Board. Its subsequently-issued Order Denying Motions for Reconsideration was issued by a two-member quorum. In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See Quorum Requirements, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the

## SUMMARY OF ARGUMENT

The Act's protections against antiunion discrimination extend to union salts who apply for jobs with the objective of inducing unionization. When the Board finds that discrimination has occurred, it issues a general remedial order and defers more specific calculations of the actual relief due. In the compliance proceeding, the Board assesses a discriminatee's entitlement to backpay and a job offer by determining the amount of time the victim of the discrimination would have continued to work for the employer absent the unlawful discrimination. Prior to its decision in *Oil Capitol*, the Board applied in all cases calculating the relief due to victims of discrimination—including those who were union salts—a rebuttable presumption that those individuals would have remained in the job indefinitely. In *Oil Capitol*, the Board announced a new policy under which the General Counsel, in salting cases, will be required to affirmatively support his request for backpay and reinstatement with evidence establishing the period a salt would have remained on the job. In the present case, the Board instructed that the evidentiary standards set forth in *Oil Capitol* be applied in determining reinstatement and backpay duration issues at the compliance stage of the proceeding.

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authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB*, \_\_ F.3d \_\_, 2009 WL 638248 (1st Cir. 2009).

The issue has been briefed before this Court in *Snell Island SNF LLC v. NLRB* (2d Cir. Nos. 08-3822-ag and 08-4336-ag), which is scheduled for oral argument on April 15, 2009.

Before this Court, the Union challenges the Board's *Oil Capitol* decision, as well as the Board's determination that the standards of proof established in *Oil Capitol* are to be applied in future compliance proceedings in this case. The Union's arguments are without merit

At the outset, the Board renews its argument, advanced in its motion to dismiss the Union's petition for lack of jurisdiction, that the Court is without jurisdiction to entertain the Union's petition. Even assuming that jurisdiction is established, however, the Union's petition must fail on the merits, because the Board's new policy is consistent with the Act and adequately explained in the Board's *Oil Capitol* decision. The Board's new policy is solidly grounded in Section 10(c) of the Act, which gives the Board broad discretion to devise remedies for violations of the Act. In crafting the new policy, the Board reasonably determined that, because a salt's duration of employment is largely dictated by the union's objectives, the most probative evidence of the duration of employment would be more readily available to the union. In addition, the Board reasonably concluded that applying the traditional presumption of continued employment could result in backpay awards that are more punitive than remedial. Thus, the Board's ultimate conclusion—not to apply the presumption of continued employment in compliance proceedings involving discrimination against union

salts—is a permissible means of ensuring the proper administration of the Act’s remedies.

The Union’s challenges to the Board’s new policy are all unavailing. First, the Board’s new policy makes permissible distinctions between union salts and ordinary job applicants, and does not place unwarranted burdens on employees’ protected activities. Second, the Board’s new policy does not allow employers to freely violate the Act by discriminating against union salts. Third, because the Board’s new policy requires that a salt’s entitlement to relief be based on evidence adduced in a compliance proceeding, it will not yield results that are unduly speculative; and, contrary to the Union’s suggestion, the Board is not forbidden from inquiring into the parties’ conduct in a labor dispute to devise a backpay and reinstatement remedy that restores the status quo ante. Fourth, there is no merit to the Union’s argument that applying *Oil Capitol* to a subsequent compliance proceeding in the present case would result in “manifest injustice.” The Board’s decision to apply its new policy to all cases where the discriminatees are union salts was entirely justified under settled precedent. Finally, there is no merit to the Union’s claim that the discriminatees in the present case are not salts. In advancing this argument, the Union ignores the Board’s finding that the discriminatees fit squarely within the definition of salts described in *Oil Capitol*.

## ARGUMENT

An employer violates Section 8(a)(3) and (1) of the Act by engaging in antiunion discrimination against its employees.<sup>7</sup> The protections afforded by Section 8(a)(3) and (1) extend to union salts who are job applicants sent in “ostensibly to obtain employment but with the objective of inducing union organization.” *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 547 (D.C. Cir. 2006) (citations and quotation marks omitted); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995).

The instant appeal does not challenge the Board’s well-supported conclusion that the Company unlawfully discriminated against numerous union salts by refusing to hire or consider them for hire because of their union or other protected concerted activities. Nor is there any dispute that the Board has appropriately enjoined the Company from committing similar unfair labor practices in the future and mandated the posting of a remedial notice informing employees both of the unlawful conduct and of their right to be free of such antiunion discrimination.

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<sup>7</sup> Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment . . . to . . . discourage membership in any labor organization[.]” Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7, which in turn assures the right of employees to “self-organization” and “to form, join, or assist labor organizations.” Discrimination that violates Section 8(a)(3) constitutes a derivative violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1984).

Rather, the Union exclusively challenges the presumptions and burdens of proof the Board has outlined for determining the discriminatees' backpay and instatement rights in a subsequent compliance proceeding. The Union's petition must fail. Even if the Union can overcome the jurisdictional hurdle to the Court's entertaining its petition, its petition fails on the merits because the Board's new policy is reasonable and adequately explained in the Board's *Oil Capitol* decision.

**I. THE BOARD'S NEW POLICY ARTICULATED IN *OIL CAPITOL* FOR DETERMINING MAKE-WHOLE RELIEF DUE IN CASES INVOLVING ANTIUNION DISCRIMINATION AGAINST UNION SALTS IS CONSISTENT WITH THE ACT AND ADEQUATELY EXPLAINED**

Even assuming the Union satisfies this Court of its standing to challenge the Board's new policy (*see pp. 2-3*), its petition fails on the merits. The Union plainly disagrees with the wisdom of the Board's exercise of its policymaking authority, but it cannot demonstrate that the new policy is anything other than "a reasonable choice within a gap left open by Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). *Accord Local 812 v. NLRB*, 947 F.2d 1034, 1039-40 (2d Cir. 1991).

It is settled that the Board "has the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). That principle holds especially true where the Board exercises its remedial authority under the Act, for which it "draws on a fund of

knowledge and expertise all its own.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Deference to the Board’s policy judgments remains in force even where the Board decides to overrule its prior decisions. The Board’s precedent, like any agency’s initial interpretation of a statute it is authorized to administer, “is not instantly carved in stone.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations and quotation marks omitted); *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975); *WPIX, Inc. v. NLRB*, 870 F.2d 858, 866 (2d Cir. 1989). On the contrary, the Board can reconsider the wisdom of its policies on a continuing basis. *Brand X Internet Servs.*, 545 U.S. at 981.

In harmony with these core principles, this Court will uphold a change in the Board’s policies if the new policy is consistent with the statute; supported by a reasoned analysis; and applies to all litigants. *Torrington Extend-a-Care Employee Ass’n v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994). At bottom, the Board’s new policy “must be upheld” if the Board “arrived at [a] reasonable resolution of the problem in a meaningful manner,” regardless “of how [the courts] might have decided the matter in the first instance[.]” *Id.*; *see also United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240, 245 (D.C. Cir. 1993)(a change in Board policy will be upheld so long as it rests on a permissible reading of the Act, and the Board gives a reasoned analysis for changing its course); *Epilepsy Found. of N.E.*

*Ohio v. NLRB*, 268 F.3d 1095, 1099-1102 (D.C. Cir 2001)(a challenge to an agency’s reasonable choice within a gap left open by Congress must fail). Here, there is no question that the Board has crafted a new policy that overrules its prior precedent. And, although the now-overruled policy previously received judicial approval (*see NLRB v. Ferguson Electric*, 242 F.3d 426 (2d Cir. 2001); *Tualatin Elec. v. NLRB*, 253 F.3d 714, 717-18 (D.C. Cir. 2001)), the new policy is equally permissible because it is consistent with the Act, fully explicated by the Board in *Oil Capitol*, and applies to all litigants within the category covered by the rule.<sup>8</sup>

**A. The Board’s New Policy Is Authorized by the Provisions of the Act Granting the Board Broad Discretion To Fashion Remedies for Unfair Labor Practices**

The Board has, as part of its responsibility for developing and applying national labor policy, “the authority to formulate rules to fill the interstices of the [Act’s] broad statutory provisions.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). Its new policy in *Oil Capitol* is a permissible exercise of that authority that is consistent with both the language and purpose of the Act. At the outset, the

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<sup>8</sup> In *Oil Capitol*, the Board stated that the new standards for salting cases would be applied “in the present case and in all future cases where the issue arises.” 349 NLRB at 1349. Thus, the new policy enunciated in that case applies equally to all litigants within the category covered by the policy. *See NLRB v. Niagara Mach. & Tool Works*, 746 F.2d 143, 148 (2d Cir. 1984)(citing Ralph K. Winter, Jr. *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup.Ct.Rev. 53, 63-64). The Union does not claim—nor could it claim—that the Board’s enunciation of its new policy in *Oil Capitol* was an exercise in “ad hoc” decision-making. *See Winter* at 63.

Board's new policy certainly does not "conflict with the statute" (*Steelworkers Local 14534*, 983 F.2d at 244), for there is nothing in the Act that expressly dictates what presumptions, if any, should be applied when determining the extent of make-whole relief awarded to salts in discrimination cases. Further, the new policy is solidly grounded in Section 10(c) of the Act, which provides that the Board may remedy unfair labor practices by ordering the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and *broad discretion* to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (emphasis added); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy").

Indeed, when the D.C. Circuit earlier approved the Board's decision to apply the traditional presumption of continued employment to union salts in *Tualatin Electric*, 253 F.3d 714 (D.C. Cir. 2001), it did so, not on the ground that the

Board's then-existing policy was *required* by the Act, but because the policy was not "arbitrary or contrary to law." 253 F.3d at 717-18. Similarly, in approving the Board's traditional presumption of continued employment in cases of union salts, this Court did not suggest that the Board's then-existing policy was *required* by the Act.<sup>9</sup> *NLRB v. Ferguson Electric*, 242 F.2d 426 (2001). Indeed, the *Ferguson* Court recognized that "[t]he Board has broad discretionary powers to fashion remedies for violations of the Act, and is entitled to deference in its choice of remedy as a result of its unique expertise in labor disputes." *Id.* at 431. Similarly, when the Supreme Court reviewed the Board's decision to treat salts as statutory employees in *Town & Country*, it "put the question in terms of the Board's lawful authority" because the Board "possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." *NLRB v. Town & Country Elec.*, 516 U.S. 85, 89-90 (1995). Thus, the Board's decision to remove the presumption

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<sup>9</sup> The *Ferguson* Court observed that there was an absence of record evidence regarding whether the discriminatee would have stayed at the job, and that "the mere possibility that an employee *might* have left [his job at the employer] sooner is insufficient to shorten the [backpay] period . . . ." 242 F.3d at 432. (Emphasis in original.) However, the *Ferguson* Court also recognized that "[a] backpay award must be sufficiently tailored to remedy only the actual consequences of an unfair labor practice, and should not address purely speculative damages." *Id.* *Oil Capitol* does just that by requiring the General Counsel to affirmatively support his request for backpay and reinstatement with *evidence* establishing the period a salt would have remained on the job.

of continued employment in the context of salting is consistent with its authority under the provisions of the Act granting it broad discretion to devise and administer remedies for unfair labor practices.

**B. The Board’s New Policy Is Supported by a Reasoned Explanation Grounded in Well-Established Remedial Principles, as Well as Basic Distinctions Between Ordinary Job Applicants and Union Salts**

The Board’s extensive discussion detailing the reasons for its new policy more than satisfies the obligation to provide a reasoned explanation for its action. The Board’s analysis flowed from first principles guiding the exercise of its remedial authority, as well as from its assessment of the fundamental differences between salting and the ordinary employment relationship. The Board’s explanation demonstrates that its resulting policy decision—which requires only that salts’ instatement rights and backpay period be proven by evidence—is a permissible exercise of its remedial authority under the Act.

Thus, the Board declared that its approach to fashioning its new policy would be “guided by well-established remedial principles.” *Oil Capitol*, 349 NLRB at 1351. To that end, the Board acknowledged that the primary purposes of its make-whole remedies are to compensate employees for “losses suffered on account of an unfair labor practice” (*id.* (quoting *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952))), and to restore “the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination” (*id.* (quoting *Phelps*

*Dodge*, 313 U.S. at 194)). The Board also observed that fulfilling those remedial objectives requires an approach that is ““adapted to the [specific] situation which calls for redress”” (*id.* (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938)), thus ensuring that the remedy is ““tailored to expunge only the actual, and not merely speculative consequences of the unfair labor practices”” (*id.* (quoting *Sure-Tan*, 467 U.S. at 900)). The Board approached its resolution of this issue mindful of the Supreme Court’s admonition that “[t]he Act is essentially remedial.” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). In sum, the *Oil Capitol* remedy, by its terms, is aimed at restoring the status quo that would have obtained but for the unfair labor practices. It clearly “vindicate[s] the public policy” of the Act to compensate salts for their actual losses “suffered on account of [the] unfair labor practice[s].” *Nathanson v. NLRB*, 344 U.S. at 27.

The Board also acknowledged that its remedial decisions should be guided by well-established principles concerning the allocation of burdens of proof in its proceedings. Specifically, the Board noted (*Oil Capitol*, 349 NLRB at 1351) that, although the General Counsel may sometimes enjoy the benefit of a favorable presumption, he bears the ultimate burden of proof in establishing the backpay period. *See Nordstrom v. NLRB*, 984 F.2d 478, 481 (D.C. Cir. 1993). The Board also observed that, as a general matter, fairness and efficiency are served when the party with superior access to evidence bears the burden of going forward on a

particular issue. *Oil Capitol*, 349 NLRB at 1351. See *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) (“the burden of going forward normally falls on the party having knowledge of the facts involved”); *Canadian Commercial Corp. v. Dep’t of Air Force*, 514 F.3d 37, 42 (D.C. Cir. 2008); McCormick on Evidence §337 p.564 (6th ed. 2006)(“A doctrine often repeated by the courts is that where the facts with respect to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.”)

The Board reaffirmed that, in the context of ordinary applicants for employment, all of these considerations continue to support the general presumption of continued employment. As the Board noted, “most job applicants seek employment of an indefinite duration.” *Oil Capitol*, 349 NLRB at 1348. And, “because the employer controls the job and is in the best position to establish how long it would have retained the discriminatee . . . , it is appropriate, as an evidentiary matter, to place the burden on the employer to produce evidence showing whether or when the discriminatee’s employment would have terminated for nondiscriminatory reasons.” *Id.*

The Board reasonably concluded, however, that the relative valence of these considerations changes when the discriminatee at issue is a union salt. In contrast to ordinary job applicants, salts often do not seek indefinite employment for an indefinite period. Rather, the Board stated that experience demonstrates that many

“salts remain or intend to remain with the targeted employer only until the union’s defined objectives are achieved or abandoned.” *Id.* at 1348-49.

The Board concluded for a number of reasons that the traditional presumption of continued employment is not warranted in salting cases. First, the Board reasonably determined that adherence to the traditional presumption would require employers to adduce evidence that is difficult to obtain. *Id.* at 1349-55. Because the salt’s duration of employment is largely dictated by the union’s objectives, much of the pertinent evidence of the duration of employment would include “information relating to the union’s organizing objectives, plans, anticipated deployment of personnel, and employment histories of its salts in similar salting campaigns.” *Id.* at 1352. Such evidence would not be readily available to the employer; instead, it is likely to be “in the possession of the union, as the campaign’s progenitor and director, and of the salt participant in th[at] campaign.” *Id.*

Second, the Board reasonably concluded that applying the traditional presumption of continued employment could—and, in some instances, did—result “in backpay awards that are more punitive than remedial.” *Id.* To illustrate that concern, the Board pointed (*id.* at 1351-52) to *Aneco, Inc.*, 333 NLRB 691 (2001), *enforcement denied in relevant part*, 285 F.3d 326 (4th Cir. 2002). There, the Board utilized its traditional presumption of continued employment and found that

a union salt who was denied employment should receive a backpay award covering a period of 5 years. *Aneco, Inc.* at 691-92. The Fourth Circuit, however, found that the backpay award was punitive and refused to enforce it. *Aneco, Inc. v. NLRB*, 285 F.3d 326, 332-33 (4th Cir. 2002). The court deemed “indefensible” the Board’s assumption that the salt would have worked for Aneco for 5 years—particularly in light of the salt’s status as a paid union organizer, the absence of any evidence that other salts had worked for target employers for such prolonged periods, and the fact that the salt worked for only 5 weeks after accepting a later remedial job offer. *Id.* at 332. The court therefore remanded the case to the Board “to fashion a remedy that will restore [the salt], as nearly as possible, to the circumstances that he would have enjoyed but for [the employer’s] illegal discrimination.” *Id.* at 333.

In light of the foregoing considerations, the Board concluded that the traditional presumption of continued employment “is suspect in the case of a union salt.” *Oil Capitol*, 349 NLRB at 1352-53. It determined that the better policy in such cases is to require the General Counsel to “present affirmative evidence to meet his burden of proving the reasonableness of the claimed backpay period.” *Id.* at 1353. As a corollary to its new policy, the Board further determined that a salt’s entitlement to an offer of employment is subject to defeasance if, at the compliance

stage, the General Counsel cannot prove that the salt would still be working for the employer but for the unlawful discrimination. *Id.* at 1355.

The Board's new policy, in addition to being adequately explained, is eminently reasonable.<sup>10</sup> Many of the concerns that motivated the Board's adoption of the new policy had already become an obstacle to the enforcement of the Board's orders in court. As already noted, the Fourth Circuit denied enforcement of the Board's order in *Aneco* because it found that application of the traditional presumption in a salting case resulted in a punitive backpay calculation. Similarly, in *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999) ("*Starcon I*"), the Seventh Circuit denied enforcement of the Board's remedial order in a salting case and remanded the case to the Board for the General Counsel to prove how many of the salts the employer "would have hired had it not been actuated by hostility to unionization." *Id.* at 951-52. After the Board awarded relief to the only two salts (out of the more than a hundred) who testified they would have accepted a job offer, the case returned to the Seventh Circuit. *See Starcon, Inc. v. NLRB*, 450

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<sup>10</sup> Admittedly, the Board's new policy does not adhere to the general principle that "the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages." *Tualatin Elec.*, 253 F.3d at 718; *see also NLRB v. Ferguson Electric Co.*, 242 F.3d at 432. But that is just "one of several" considerations the Board takes into account. *Tualatin Elec.*, 253 F.3d at 718; *see also Phelps Dodge*, 313 U.S. at 198 (noting that the Board, in crafting its remedial policies, must strike a balance "taking fair account . . . of every socially desirable factor"). In formulating its new policy, the Board permissibly concluded that other factors simply weighed more heavily in the balance.

F.3d 276 (7th Cir. 2006) (“*Starcon II*”). Once there, the union argued that the General Counsel should not have to prove that salts who were qualified would have accepted a job offer. *Id.* at 278. The court, however, reaffirmed its earlier conclusion that the burden of establishing the backpay period in salting cases was properly placed on the General Counsel. *Id.* In particular, the court expressed concern that applying the Board’s traditional presumption of continued employment in salting cases could require the employer to produce difficult-to-obtain evidence,<sup>11</sup> that it could result in punitive remedies,<sup>12</sup> and that it could mandate reinstatement where none was warranted.<sup>13</sup>

In the end, the Board changed its policies based on legitimate concerns about the proper administration of the Act’s remedies. The mechanism it chose to address those concerns—the removal of a single rebuttable presumption in a small class of compliance proceedings—was a minor but well-calibrated shift in existing precedent. Further, the Board’s decision announcing the new policy gave the

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<sup>11</sup> *Starcon II*, 450 F.3d at 279 (“It is easier for each employee to produce evidence of what he would have done had he been offered a job than for the employer to produce evidence of what each of the employees would not have done.”).

<sup>12</sup> *Id.* at 278 (“The National Labor Relations Act is not a penal statute, and windfall remedies—remedies that give the victim of the defendant’s wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal.”).

<sup>13</sup> *Id.* (“[A] worker cannot get relief predicated on his being denied a job if he would have spurned the job had it been offered to him.”).

parties, the public, and the courts a transparent and cogent explanation for its actions. The Board's decision is therefore entitled to respect as an exercise of its considerable discretion in administering remedies under the Act.

**C. The Union's Challenges to the Board's New Policy Are All Without Merit**

The Union advances a farrago of arguments claiming the Board lacks the authority to establish its new policy. Common to all is a series of basic misconceptions about the effect of the Board's new policy, the application of the now-overruled policy that preceded it, and the meaning of key Supreme Court precedent. Cumulatively, the Union's misconceptions lead it to request a form of relief for salts that was never permitted by previous decisions and, indeed, could not be authorized by the Act. As a result, the Union fails to cast any doubt on the permissibility of the Board's new policy.

**1. The Board's new policy does not impermissibly "discriminate" against salts, or against certain forms of protected activity**

At the outset, there is no merit to the Union's contention (Br 19-25) that the Board's new policy must be struck down because it impermissibly discriminates against salting as a form of protected activity, and treats salts as a "subclass" of disfavored employees. Much of the Union's argument in this regard rests on its claim that the Board's new policy conflicts with the Supreme Court's decision in

*NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). No such conflict exists.

The question before the Supreme Court in *Town & Country* was whether “the Board may lawfully interpret [the Act’s definition of ‘employee’] to include . . . workers who are also paid union organizers.” *Id.* at 89. The Court agreed that such a construction of the Act was within the “degree of legal leeway” the Board enjoys “when it interprets its governing statute.” *Id.* But, contrary to the Union’s suggestion, the *Town & Country* Court did *not* hold that the Board must treat salts identically for all purposes of the Act’s administration. Indeed, the opposite is true: the Court expressly stated that the Board need not treat “paid union organizers like other company employees in every labor law context.” *Id.* at 97. By way of example, the Court approvingly noted that the Board has held that “a paid organizer may not share a sufficient ‘community of interest’ with other employees . . . to warrant inclusion in the same bargaining unit.”<sup>14</sup> *Id.* Thus, the Board’s new policy—which continues to treat salts as statutory “employees” and does nothing more than eliminate the presumption of continued employment in

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<sup>14</sup> Thus, the Board has excluded salts from a bargaining unit because their employment was solely for the purpose of union organizing and was therefore temporary in nature. *299 Lincoln Street*, 292 NLRB 172, 180 (1988). To take another example, the Board’s rule that an employer may lawfully refuse to hire a union salt during a strike has been approvingly cited. *See Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1198 (D.C. Cir. 2003).

compliance proceedings involving salts—remains consistent with *Town & Country*.

The Union’s claim that application of *Oil Capitol* discriminates against salts or creates a “second-class status” for salts is premised on the mistaken notion that the Board’s new policy withholds the Act’s remedies from salts. The Board’s authority to remedy antiunion discrimination under Section 10(c) is constrained by the requirements that its remedies “be tailored to the unfair labor practice it is intended to redress,” *Sure-Tan, Inc.*, 467 U.S. at 900, and that they be designed to “restor[e] the economic status quo that would have obtained but for the company’s wrongful [action].” *NLRB v. J.H. Rutter-Rex*, 396 U.S. 258, 263. Remedies that are punitive or based on pure speculation are impermissible. *Capitol Cleaning Contractors, Inc., v. NLRB*, 147 F.3d 999, 1009-10 (D.C. Cir. 1998).

Separate and apart from the instatement and backpay remedies, the Board’s Order contains other remedial relief. The Order has a cease-and-desist provision that enjoins the Company from committing “like or related” violations of the Act, and requires the Company to conspicuously post a notice to employees detailing the prior unfair labor practices and setting forth the employees’ rights under the Act. If the Company fails to comply with these requirements, it could be subject to contempt proceedings. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (citing *NLRB v. Warren Co.*, 350 U.S. 107, 112-13 (1955)). The

Supreme Court therefore has recognized that “[t]his threat of contempt sanctions . . . provides a significant deterrent against future violations of the Act.” *Sure-Tan*, 467 U.S. at 904 n.13. In other words, those remedies are “sufficient to effectuate national labor policy regardless of whether the spur and catalyst of backpay accompanies them.” *Hoffman Plastic*, 535 U.S. at 152 (citations and quotation marks omitted).

Moreover, the Board’s new policy does not withhold from salts any remedy to which other employees are entitled. Indeed, the Union’s argument highlights the conjectural nature of its claim here. The Board’s “standard” instatement order would not guarantee an offer of employment to the discriminatees, nor does the Board’s new policy deprive them of one. At this stage of the proceeding, the Union can only speculate that the Board’s change in policy would affect the discriminatees’ instatement rights. Even where the Board has applied its traditional presumption of continued employment, it has long recognized that a discriminatee’s ultimate right to a job offer is a factual question resolved during the compliance proceeding. *See Dean General Contractors*, 295 NLRB 573, 573-74 (1987). And, if the evidence in that proceeding establishes that the discriminatee would no longer be employed, the employer is relieved of the obligation to make a job offer. *See id.* at 575; *see also Tualatin Elec.*, 253 F.3d at 718 (recognizing employer’s “right to seek out and to present evidence that the salt would not have”

continued working for the employer “whether by reason of the union’s policies or its own),”

Likewise, in terms of the backpay owed, depending on the evidence adduced at a compliance proceeding, a salt-applicant may receive the maximum amount of backpay covering the entire period from the date of the violation, while another non-salt applicant may be denied any monetary relief when the presumption of continued employment has been rebutted. Thus, it is simply wrong to posit that the salts’ rights have been—and highly conjectural to state that they will be—adversely affected by the Board’s Order. *See Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995). All that the Board’s new policy requires is that make-whole relief for a salt be based on actual evidence that the salt would have remained in the job for the claimed period of backpay.

Further, there is no merit to the Union’s related complaint (Br 21) that the Board’s new policy imposes a “burden” on the exercise of activities protected by Section 7 of the Act or “discourages participation in concerted union activities” (Br 22). The Union offers no support whatsoever for this assertion. Moreover, on its face, the Board’s Order does not enjoin the discriminatees from doing anything, thus leaving them free from official restraint to engage in whatever protected activities they choose.

**2. The Board's new policy does not conflict with  
with the Supreme Court's decision in *H.K. Porter***

The Union argues (Br 29-32) that the Board's new policy violates a rule—supposedly set forth in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)—broadly forbidding the Board from speculating about, or reconstructing, events that would have occurred in a labor dispute. According to the Union, the Board's new policy runs afoul of that rule by mandating an inquiry into the amount of time a salt would have remained on the job but for the employer's unlawful discrimination.<sup>15</sup> (Br. 33, 35, 42, 45.)

The Union misreads *H.K. Porter* and, in so doing, ignores Supreme Court precedent that thoroughly undermines its argument. In *H.K. Porter*, the Board found that the employer's failure to agree to a union proposal for union dues check-off was not in good faith, and it ordered the employer to grant the union's request. 397 U.S. at 100-01. The Supreme Court, however, held that while the Board has the power “to require employers and employees to negotiate, it is

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<sup>15</sup> It is worth noting that the Union does not even acknowledge that, under the former rule, backpay and reinstatement could be limited if an employer adduced evidence sufficient to rebut the presumption of continued employment. In *Tualatin Electric*, the D.C. Circuit expressly recognized an employer's “right to seek out and to present evidence that the salt would not have” continued working for the employer “by reason of the union's policies or of its own.” 253 F.3d at 718. Thus, the *Tualatin Electric* Court permitted the Board to conduct the inquiry the Union now claims is forbidden. Similarly, in *Ferguson Electric Co.*, 242 F.3d at 432, the Court explicitly recognized that evidence showing that the salt would have left his or her job would shorten the backpay period.

without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.” *Id.* at 102.

Instrumental to the Court’s conclusion was its reading of Section 8(d) of the Act, which provides that an employer’s statutory obligation to bargain in good faith with a union representing its employees “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). As the Court reasoned, “it would be anomalous indeed to hold that while [Section] 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute.” 397 U.S. at 108.

By its own terms, then, *H.K. Porter* only prevents the Board from compelling an employer “to agree to any substantive contractual provision” in a collective-bargaining agreement. 397 U.S. at 102. That decision says nothing about how the Board should reach an evidence-based conclusion on the degree of make-whole relief due to a salt discriminatee. And, unlike *H.K. Porter*, where the Court determined that the Board’s remedial authority was expressly limited by a provision of the Act, the Board’s new policy requiring the General Counsel to support its claim for make-whole relief with affirmative evidence is consistent with

Section 10(c), which allows the Board to award backpay and reinstatement in a manner that “will effectuate the policies of [the Act].” 29 U.S.C. § 160(c).<sup>16</sup>

The Union’s arguments on the meaning of *H.K. Porter* reveal that it “misconceive[s] the role of the Board.” *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). It simply does not follow from cases holding that the Board may *not* award particular remedies that, in other cases, the Board *must* award a particular remedy. The Board’s power to order make-whole relief “is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices.” *Automobile Workers v. Russell*, 356 U.S. 634, 642-43 (1958). There is “nothing in the language or structure of the Act that *requires* the Board to reflexively order that

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<sup>16</sup> Much the same can be said of the Union’s reliance on *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), where the D.C. Circuit held that the Board lacks the authority to issue a bargaining order in the absence of a concrete manifestation of a majority of employees’ assent to union representation. 721 F.2d at 1383-84. The *Conair* Court concluded that such a remedy would conflict directly with the provisions of the Act ensuring employees a right to a majority-chosen bargaining representative, *id.* at 1381-82 (discussing 29 U.S.C. §§ 157, 159(a)), and would conflict implicitly with the Act’s limitation of non-majority bargaining representatives to certain industries and circumstances, *id.* at 1382-83 (discussing 29 U.S.C. § 158(f)). In contrast, there is nothing in the Act that conflicts—either explicitly or implicitly—with the Board’s decision here to apply no presumption of continued employment in cases involving discrimination against union salts. Instead, Section 10(c) expressly authorizes the Board to award backpay and reinstatement in a manner that “will effectuate the policies of [the Act].” 29 U.S.C. § 160(c).

which a complaining party may regard as ‘complete relief’ for every unfair labor practice.” *Shepard*, 459 U.S. at 351 (emphasis added).

In any event, the Union’s expansive reading of *H.K. Porter* is impracticable. If the Board is to award any relief at all, there is *no* calculation of make-whole relief that would avoid “reconstructing” the labor dispute in the sense the Union opposes. The Union’s own proposed solution—to mandate an infeasible right to reinstatement and a backpay period spanning more than 10 years for over 50 discriminatees—simply reconstructs the labor dispute by deeming that the discriminatees would have remained in the Company’s employ for the entire period, regardless of the Union’s objectives or organizing plans. The only difference between the Board’s policy and the outcome sought by the Union is that the former will ultimately be based on evidence concerning the discriminatees’ actual losses, while the latter will not.

Indeed, under the Union’s reasoning, it is difficult to discern how the Board could adjudicate unfair labor practices, much less devise remedies for such practices, without examining the effect of the parties’ actions on a labor dispute. Fortunately, the Supreme Court has repeatedly affirmed that the touchstone of the Board’s remedial authority is the restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice. *See, e.g., Sure-Tan*, 467 U.S. at 900; *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188-89

(1973); *J.H. Rutter-Rex*, 396 U.S. at 263; *Phelps Dodge*, 313 U.S. at 194. Thus, there is nothing in *H.K. Porter*, *Conair*, or any other case relied upon by the Union that prevents the Board from conducting remedial inquiries simply because the relevant events necessarily involve an ongoing labor dispute.

### **3. The Board's new policy does not conflict with the Supreme Court's decision in *Sure-Tan***

The Union also asserts (Br 31), in a related argument, that the Board's new policy conflicts with the Supreme Court's decision in *Sure-Tan* because any backpay award determined pursuant to the new policy would be impermissibly based on "the Board's views as to what 'probably' would have happened but for the employer's unfair labor practice." The Union's argument represents a complete inversion of *Sure-Tan*'s central premise.

In *Sure-Tan*, the Board found that the employer violated the Act by reporting its employees to immigration authorities in retaliation for their union activities, which resulted in the employees fleeing the country. 467 U.S. at 889. The Board ordered its conventional remedy of reinstatement with backpay and left for subsequent compliance proceedings the determination whether the employees were available for work so as not to toll the employer's backpay liability. *Id.* On appeal, the Seventh Circuit enforced the Board's finding of a violation, but modified its remedial order by setting a minimum backpay period of 6 months. *Id.* at 890. The lower court reasoned that "it would better effectuate the policies of the

Act to set a minimum amount of backpay which the employer must pay in any event.” *Id.* (citation and quotation marks omitted).

The Supreme Court reversed the lower court’s modifications to the Board’s order, holding that the 6-month minimum backpay period was unduly speculative. *Id.* at 899-900. The Court concluded that the “main deficiency” in the lower court’s modification of the remedy was that it was developed “in the total absence of any record evidence as to the circumstances of the individual employees.” *Id.* at 899 n.9. Drawing a contrast with the Board’s permissible practice of “appl[ying] to particular facts a reasonable formula for determining the probable length of employment,” the Court found that the lower court’s estimate of a backpay period was faulty because it was made “without any evidence whatsoever as to the period of time these particular employees might have continued working . . . and without affording [the employer] any opportunity to provide mitigating evidence.” *Id.* at 901 n.11. That being so, the lower court’s order impermissibly resulted in a backpay award made “without regard to the employees’ actual economic losses.” *Id.* at 904.

*Sure-Tan* clearly poses no obstacle to the Board’s new policy. Unlike the minimum backpay award struck down there, the Board’s new policy requires that a salt’s entitlement to relief be based on evidence adduced in a compliance proceeding. Indeed, the *Sure-Tan* Court specifically approved of remedial

approaches that, like the Board’s new policy, “appl[y] to particular facts a reasonable formula for determining the probable length of employment.” *Id.* at 901 n.11.

To be sure, the Board cannot know for certain how events would have unfolded in the absence of an unfair labor practice, but that is not what *Sure-Tan* requires. All that *Sure-Tan* forbids is the establishment of a backpay award “in the total absence of any record evidence as to the circumstances of the individual employees” and that bears no relation to “the employees’ actual economic losses.” 467 U.S. at 899 n.9, 904. Because the Board’s new policy specifically requires supporting evidence for a remedial award in salting cases, it fully comports with the holding of *Sure-Tan*.

**II. THE BOARD REASONABLY DETERMINED THAT  
*OIL CAPITOL* IS TO BE APPLIED IN THE  
FUTURE COMPLIANCE PROCEEDING IN THIS  
CASE**

**A. Contrary to the Union’s Claim, Retroactive Application  
of *Oil Capitol* Is Not Manifestly Unjust**

In *Oil Capitol*, the Board stated that it would apply the new evidentiary requirement “in all cases where the discriminatee is a union salt.” 349 NLRB at 1353. The Union challenges (Br 33-40) the Board’s remedial determination to apply *Oil Capitol* in future compliance proceedings in this case, claiming (Br 37) “the inequity of applying the *Oil Capitol* rule to the facts of this case far

outweigh[s] the interest that might be furthered if it was applied.” In particular, the Union contends that retroactive application will cause a “manifest injustice.”

Ruling on the Union’s motion for reconsideration in this case, the Board reasonably rejected the Union’s “manifest injustice” claim for the same reasons it was rejected in *McBurney Corp.*, 352 NLRB 241. (See Order Denying Motions for Reconsideration, A 102-04) As the Board explained, its determination is consistent with existing precedent, under which “the Board has routinely applied *Oil Capitol* in appropriate pending cases, all of which,” like this case, “were instituted well before *Oil Capitol* was decided.” *McBurney Corp.*, 352 NLRB at 242. The Board’s conclusion is both reasonable and consistent with law.

A decision that changes existing law is generally given retroactive effect unless retroactive application would cause manifest injustice. See, e.g., *SNE Enterprises*, 344 NLRB 673, 673 (2005); *NLRB v. Bufco Corp.*, 899 F.2d 608, 611 (7th Cir. 1990). “Absent some manifest injustice,” the Court will defer to the Board’s retroactive application determination. See, e.g., *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983).<sup>17</sup> By definition, retroactive

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<sup>17</sup> This Court has stated that, in determining whether to give retroactive effect to an agency decision, it will weigh the following five factors: “(1) whether the particular case is one of first impression, (2) whether the new rule presents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a

application is not manifestly unjust if the complaining party fails to show that it relied on the prior rule and that the new rule severely penalizes it. *See NLRB v. Bufo Corp.*, 899 F.2d at 611-12.

The Union fails to show that retroactive application of the *Oil Capitol* policy constitutes a manifest injustice. Significantly, the Union does not claim that it relied on the pre-*Oil Capitol* presumption in taking the actions which led to this litigation. Indeed, no evidence would remotely support such an assertion. *See Local 900, Int'l Union of Electrical, etc. v. NLRB*, 727 F.2d 1184, 1195 (D.C. Cir. 1984) (rejecting union's retroactivity challenge where union failed to show that it relied on prior law in fashioning challenged clause).<sup>18</sup> Further, the Union cannot claim that the Board's Order imposes a penalty on it, because the Union is not required to pay any damages under the Board's Order. *See SNE Enterprises*, 344

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new rule despite the reliance of a party on the old standard.” *WPIX, Inc. v. NLRB*, 870 F.2d 858, 866 (2d Cir. 1989). The touchstone of this analysis, though, is whether retroactive application would result in manifest injustice. *See NLRB v. Semco Printing Center*, 721 F.2d at 892.

<sup>18</sup> The Union nonetheless claims (Br 39), oddly, that “in the compliance proceeding, the General Counsel and [the Union] relied upon existing Board precedent . . . .” It is unclear what the Union means by this. The compliance proceeding in the present case has *not yet occurred*.

The Union does not advance its cause by citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). In that case, the Board decided not to apply its new objective test announced in the case because of the employer's clear reliance on the subjective test. The Union cannot make the same argument here.

NLRB 673, 673-74 (2005)(retroactive application not manifestly unjust because Board's order does not require complaining party to pay any damages); *Cf. Local 900*, 727 F.2d at 1195 (retroactive application would not cause great hardship because of limited backpay liability under Board's order).

Moreover, contrary to the Union's contention (Br 37), there have been numerous "warnings" that the remedial policies related to salts were undergoing analysis by the courts and the Board itself. The Union surely has been on notice that there was some growing dissatisfaction with evidentiary presumptions in compliance cases. Indeed, concerns about the Board's previous evidentiary presumption had percolated for years. As described above, the Board's then-existing evidentiary presumption came under judicial scrutiny and criticism. *See, e.g., Aneco, Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002); *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1111 (7th Cir. 2002). The issue was also the subject of repeated dissents in Board decisions. *See, e.g., Wolfe Elec. Co.*, 336 NLRB 684, 684 n.4 (2001)(Chairman Hurtgen dissenting); *Kamtech, Inc.*, 333 NLRB 242, 243 n. 7 (2001) (Member Hurtgen dissenting); *3D Enters. Contracting Corp.*, 334 NLRB 57, 58-59 (2001)(Chairman Hurtgen dissenting); *Ferguson Electric Co.*, 330 NLRB 514 (2000)(Member Hurtgen dissenting), *enforced*, 242 F.3d 426 (2d Cir. 2001); *Tualatin Electric, Inc.*, 331 NLRB 36 (2000)(Member Hurtgen dissenting), *enforced*, 253 F.3d 714 (D.C. Cir. 2001). In

short, the Union's claim (Br 38) that the Board did not sound an "adequate warning" heralding the arrival of the policy enunciated in *Oil Capitol* rings hollow.

Nor is there merit to the Union's argument (Br 39) that retroactive application of the Board's new *Oil Capitol* rule—which requires the General Counsel to present affirmative evidence that the salt would have worked for the employer throughout the claimed backpay period—is manifestly unjust because it imposes on the General Counsel and the Union the “daunting , if not altogether impossible, burden” (Br 39) of reconstructing its salting plans and the personal histories of the discriminatees. Once again, the Union's argument demonstrates the speculative nature of the claim presented to this Court. At this stage of the case, it is unclear whether the General Counsel will seek to satisfy his *Oil Capitol* burden by reliance on salting plans or even the precise evidence that may be required in this case. Moreover, the Union has cited no evidence that such salting plans are unavailable, and simply suggests that such evidence may be unavailable. In any event, the Union has been on notice for the past 8 years that such records could be relevant at the compliance stage. *See Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714 (D.C. Cir. 2001).<sup>19</sup>

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<sup>19</sup> The Union's claimed reliance (Br 39) on *F.W. Woolworth Co.*, 90 NLRB 289 (1950), when litigating this case is inapposite. As the Board explained in *McBurney Corp., F.W. Woolworth Co.* has no application to the issue of the duration of the backpay period because that case only “holds that backpay must be calculated quarterly,” and therefore no inconsistency would result from applying

**B. There Is No Merit to the Union's Claim that the Discriminatees Are Not Salts**

The Union's argument (Br 40-42) that the more than 50 discriminatees in the present case are not "salts" is founded on a misunderstanding of the Board's definitions of "salting" and "salts." Moreover, the unchallenged evidence presented at the unfair labor practice hearing established that the discriminatees fell squarely within the definition of "salts."

The Union's claim (Br 40) that, in *Oil Capitol*, the Board provided "no clear guidance as to what it understands by the terms 'salting'" is simply wrong. In *Oil Capitol*, the Board explained that "salting" is "the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Oil Capitol*, 349 NLRB at 1348 n. 5(citing *Tualatin Electric*, 312 NLRB 129, 130 n.3, *enforced* 84 F.3d 1202, 1203 n.1 (9th Cir. 1996). It defined "salts," in turn, as "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign." *Oil Capitol*, 349 NLRB at 1348 n.5.

Contrary to the Union's further claim (Br 40-42), the question of the discriminatees' status as salts was fully litigated and conclusively established at the

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both *F.W. Woolworth Co.* and *Oil Capitol* in the same compliance proceeding. *McBurney Corp.*, 352 NLRB at 241 n.4.

unfair labor practice hearing.<sup>20</sup> In rejecting the Union’s claim that the discriminatees were not salts, the Board found, “the Unions targeted [the Company] for organization and numerous applicants, when seeking employment pursuant to the salting campaign, identified themselves either as voluntary union organizers or as active union members.” *See* Order Denying Motions for Reconsideration n.4, A 103-04 n.4; GCX 10(a), (d)-(p), (r)-(x), (z), (aa), 11, A 250-51, 254-98, 299-358.)

Ample evidence—which the Union does not challenge—supports these findings. Greg Boggs, who led the Pipefitters Union’s organizing effort at the Company, testified that the Pipefitters Union targeted the Company for organization. Boggs testified that his union had “salted people on jobs before,” and that the goal of “salting” was to get members on a nonunion employer’s payroll in order to organize the employer from the inside. (Tr 233, 235, 237, A 486-87, 489.) As part of the Pipefitters Union’s effort to organize the Company, Boggs encouraged members to apply for jobs. He also told union members who applied to identify themselves as union members or voluntary organizers on their applications. (Tr 242-43, A 491-92.) Numerous Pipefitters Union members

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<sup>20</sup> As the Board stated in *Oil Capitol*, while a discriminatee’s status as a salt will often be established in the unfair labor practice stage of the litigation, “if not litigated there [the employer] may introduce evidence on this point during the compliance proceeding.” *Oil Capitol*, 349 NLRB at 1353 n.22.

applied for jobs at the Company as part of the effort to organize the Company. Boggs kept track of their applications, and he discussed the status of the applications with the Company's project manager. (Tr 235, 240-42, A 487, 490-91.) Once the union members were on the inside, Boggs would instruct them about how to carry out the organizing effort, which included, among other things, obtaining union authorization cards from employees. (Tr 249, A 495.)

The Union's organizer, Dennis King, led a nearly identical organizing campaign at the Company. King, who had taken part in dozens of organizing campaigns, candidly testified that the Union sought to organize the Company as part of the Union's "Fight Back Program." (CEX 2-3, A 368-405.) The purpose of this program was to organize nonunion employers. To achieve this end, the program utilized both paid and unpaid organizers to organize nonunion employers from the "inside." (Tr 305, 343, CEX 2-3, 7, A 368-405, 418-20.) King used this approach with respect to organizing the Company. He encouraged Union members to apply for jobs with the Company in order to carry out the Union's organizational goals. As part of the effort, numerous Union members applied for positions with the Company. King instructed those applicants to identify themselves as union members or voluntary union organizers. (Tr 324, 326, A 511, 513.) As the Board noted, King and other union officials directly submitted applications of some

applicants seeking to organize pursuant to the salting campaign. Order Denying Motions for Reconsideration n.4, A 103-04 n.4.

In sum, the Board reasonably found that the discriminatees fit the definition of salts.<sup>21</sup>

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<sup>21</sup> As a final stab at unsettling the Board's finding, the Union asserts (Br 42), oddly, that the issue of whether the discriminatees were salts was "not properly before the Board." As shown above, however, undisputed evidence presented at the unfair labor practice hearing established the existence of the salting campaign and the discriminatees' role in that campaign. Moreover, the Union itself brought the matter directly to the Board by filing a motion for reconsideration of the Board's Supplemental Decision and Order. In its motion, the Union argued that the discriminatees were not salts. Accordingly, there is no merit to its claim.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court dismiss or, in the alternative, deny the Union's petition for review.

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May 2009



**ANTI-VIRUS CERTIFICATION FORM**

*See Second Circuit Interim Local Rule 25(a)6.*

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