

09-60327

In The
United States Court Of Appeals
For The Fifth Circuit

**OAKTREE CAPITAL MANAGEMENT, L.P.; TBR PROPERTY, L.L.C.,
D/B/A TURTLE BAY RESORTS; and
BENCHMARK HOSPITALITY, INC.,**

Petitioners and Cross-Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner.

On Petition for Review of a Decision of the National Labor Relations Board
Case Nos. 37-CA-6601-1; 37-CA-6642-1; 37-CA-6669-1; 37-CA-6691-1;
37-CA-6730-1; 37-CA-6753-1; 37-CA-6756-1; 37-CA-6768-1; 37-CA-6816-1;
37-CA-6826-1; 37-CA-6827-1; 37-CA-6835-1; 37-CA-6840-1; 37-CA-6875-1;
37-CA-6877-1; 37-CA-6878-1

**OPENING BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS
OAKTREE CAPITAL MANAGEMENT, L.P.;;
TBR PROPERTY, L.L.C. D/B/A TURTLE BAY RESORTS;
AND BENCHMARK HOSPITALITY, INC.**

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CERTIFICATE OF INTERESTED PERSONS OR ENTITIES

Petitioners and Cross-Respondents, pursuant to Fed. R. App. P. 26.1 and Fifth Circuit Rule 28.2.1, through its undersigned counsel of record, certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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8. Kuilima Resort Company	
9. Oaktree Holdings, Inc.; Oaktree Capital Group, LLC; Oaktree Capital Group Holdings, L.P.; Oaktree Capital Group Holdings, GP, LLC	
10. Burt Cabanas and Rita McClure, owners of Benchmark Hospitality, Inc.	
11. OCM Real Estate Opportunities Fund A, L.P. ¹	
12. OCM Real Estate Opportunities Fund B, L.P. ¹	
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¹ Counsel does not understand Rule 28.2.1 to require disclosure of the numerous investors in the funds, based on the Rule’s proviso that “individual listing is not necessary” where “a large group of persons or firms can be specified by a generic description.” Counsel nevertheless is prepared to submit under seal a supplemental list of those investors if the Court believes that information is needed to evaluate disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument may assist this Court because the administrative record in this case consumes thousands of pages, and the Court may have questions about that record.

I. PREFATORY STATEMENT

The threshold issue in this case is identifying who is — and who is not — a proper party. Whatever may be the disposition on the merits as to the other parties, Oaktree Capital Management, L.P. (“Oaktree”), should not be a part of this case. The National Labor Relations Board’s decision here ignored established law — the Board’s own prior decisions, and the cases of this Court — on what is (and what is not) a “single employer.”

Oaktree is an investment manager and advisor. Oaktree manages some 40 investment funds for clients such as university endowments, charitable trusts, and public and private pension funds. Three of the funds have indirect ownership interests in the Turtle Bay Resort on Oahu, Hawaii, the site of the alleged unfair labor practices now at issue.

The administrative law judge’s decision (largely adopted by the Board) reveals at its outset a key analytical error underpinning it. The ALJ, purporting to set forth the facts, wrote that “Oaktree purchased Turtle Bay” 353 N.L.R.B. No. 127, at 7 (Mar. 31, 2009). *Accord, e.g., id.* (“Oaktree . . . acquired ownership”); *id.* at 8 (“Oaktree” is “the ultimate owner of [the Turtle Bay] Property.”). That is simply false. *Oaktree itself* did not buy

the Turtle Bay Resort. Oaktree's *investment funds* indirectly did so. Yet the NLRB effectively held that because Oaktree's employees did what investment advisors/managers do, Oaktree became a single employer with the entities that actually own and manage the hotel.

That is not the law. Because Oaktree is not a single employer, the Board's order should be vacated as to Oaktree before even taking up the question of the merits as to any other party.

Turning to the merits, the Board imposed unfair labor practice liability without proof of the necessary elements. UNITE HERE! Local 5 ("Union") represented a bargaining unit of employees at the Turtle Bay Resort. In February 2004, the Union adopted aggressive tactics, including disrupting guest functions — in one instance, a wedding — with loud, intrusive rallies. The Union contends that its agents thereafter were denied access to the premises and to represented employees, and that this violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act.

With respect to section 8(a)(5), the ALJ and Board failed to hold the General Counsel to his burden of proving a material change from past practice. The General Counsel in some cases failed to present evidence of

what the relevant past practice *was*, and in other cases failed to show that any purported change was *material*. The undisputed evidence demonstrates that Union representatives continued to enjoy access to the Turtle Bay Resort, and continued to communicate with represented employees.

With respect to section 8(a)(1), the ALJ and Board likewise failed to hold the General Counsel to his proof burden. The General Counsel never demonstrated that the Resort acted based on anything other than reasonable concern for security when it purportedly restricted access to Union representatives. Moreover, the ALJ and Board again failed to demonstrate that any access limitation was material.

Finally, this Court should vacate the Board's decision for a threshold reason: The NLRB purported to decide this case when it had only two members. The NLRA requires a quorum of three.

II. STATEMENT OF JURISDICTION

This is a petition for review of a final NLRB order. This Court has jurisdiction under 29 U.S.C. section 160(e) & (f) and 28 U.S.C.

section 2112.² The NLRB had jurisdiction under 29 U.S.C. section 160.

III. QUESTIONS PRESENTED

As to petitioner Oaktree:

Whether an investment advisor, which manages investment funds as fiduciary to its clients, is liable as a “single employer” for its funds’ assets’ alleged employment-law violations.

As to all petitioners:

Whether the General Counsel meets his burden of proving that purported limitations on access constitute a violation of section 8(a)(5) of the Act without demonstrating (i) that the employer took actions inconsistent with past practice, and (ii) that any purported change from past practice was material.

² Although the resort property is in Hawaii, this Court has jurisdiction under 29 U.S.C. section 160(f) because petitioner Benchmark Hospitality, Inc. does business and in fact maintains its headquarters in The Woodlands, Texas. The Board in its cross-petition for enforcement agreed that jurisdiction exists in this Court.

Whether the General Counsel may meet his burden of proving that purported limitations on access constitute a violation of section 8(a)(1) of the Act without demonstrating (i) that the employer had no reasonable basis for restricting access, and (ii) that the interference with access, if any, was material.

Whether the National Labor Relations Board had jurisdiction to decide this case with only two members.

IV. STATEMENT OF FACTS, AND OF THE CASE

A. Oaktree Is An Investment Advisor And Manager.

Oaktree manages, as a fiduciary, some 40 investment funds for clients such as charitable trusts, state and local government employee pension funds, university endowments, and other groups.³

Three of those investment funds (collectively, the “Funds”) now

³ Oaktree’s investment-advisor registration, listing (among other things) the funds that it manages, is on file with the United States Securities and Exchange Commission and is publicly available at http://www.adviserinfo.sec.gov/IAPD/Content/iapdMain/iapd_sitemap.aspx by searching for “Oaktree” under the listed investment advisors.

are at issue (although none is identified in the decisions of the ALJ or the Board): the OCM Real Estate Opportunities Fund A, the OCM Real Estate Opportunities Fund B (“Fund A” and “Fund B,” respectively), and Gryphon Domestic VII, LLC (“Gryphon”). (RT 1603-04.)⁴

During the time period here relevant, Russ Bernard, an Oaktree employee, was portfolio manager for the Funds and other Oaktree real estate funds. (RT 1602-03.)

B. The Funds Bought The Entities That Indirectly Owned The Turtle Bay Resort.

In 1998, the Funds purchased entities that collectively owned (among other things) the Turtle Bay Resort. The Kuilima Resort Company (“Kuilima”), and its predecessor in interest, Kuilima Development Company, had owned the resort for decades. A partnership consisting of Asahi Plaza Hawaii, Inc., and A.J. Plaza Hawaii Co., Ltd., in turn owned Kuilima. The Funds purchased that partnership’s interests. Specifically, the Funds did so by

⁴ The Board’s General Counsel failed to prove that Oaktree *itself* even participated financially in the Funds; the record is silent on that issue. In fact Oaktree made only a nominal (two-tenths of one percent) contribution to the capital of Fund A and Fund B, and no contribution at all to Gryphon.

buying A.J. Plaza Hawaii Co., Ltd., through a new entity called Turtle Bay A.J. Plaza LLC, and the interest of Asahi Plaza Hawaii, Inc., through a new entity called Turtle Bay Holding LLC. (Respondent's Exhibit ("Resp. Ex.") 7; RT 1573-75, 1603-04.)

C. Professional Managers Operated The Resort.

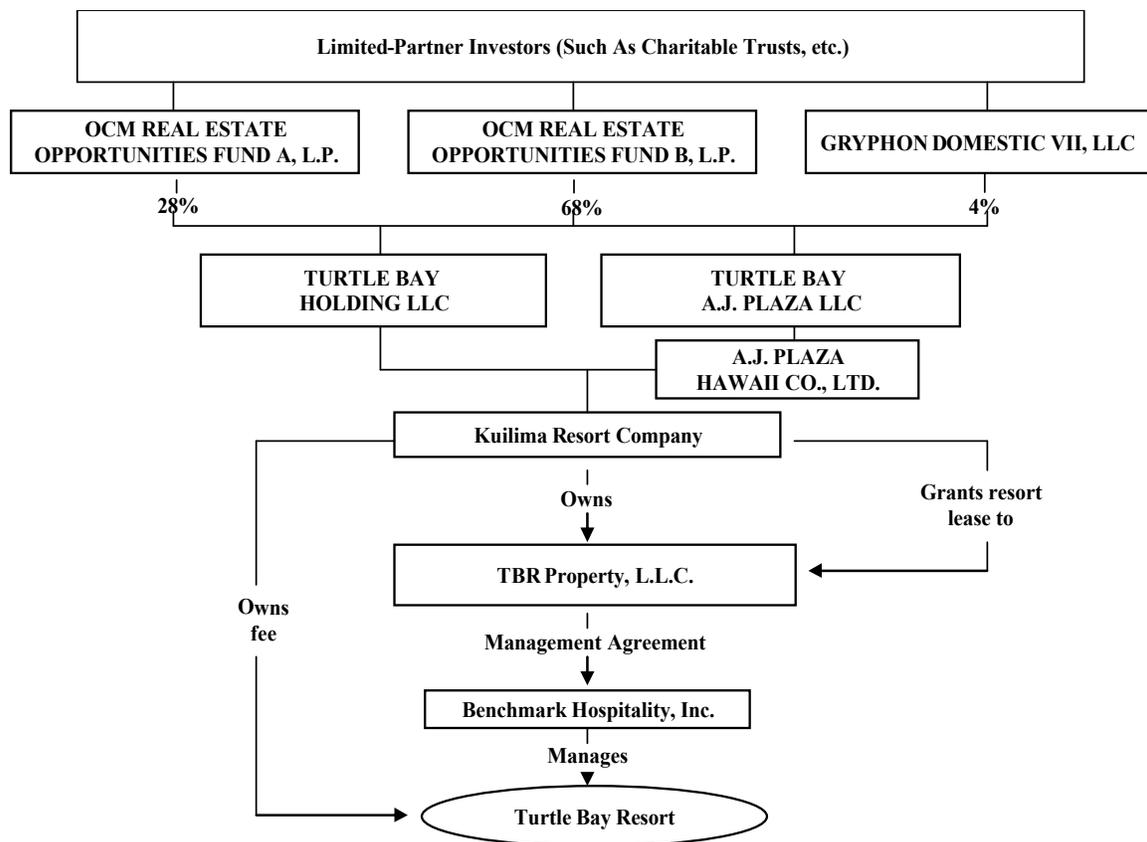
For about three years after the Funds' purchase, Hilton Hotels operated the resort under a management agreement with Kuilima.

In 2001, a newly created Kuilima subsidiary, TBR Property, L.L.C. ("TBR Property"), leased the resort from Kuilima. (General Counsel Exhibit ("GC Ex.") 18.) TBR Property replaced Hilton with Benchmark Hospitality, Inc., an experienced hotel and resort manager ("Benchmark"), to run the resort day to day. A detailed Management Agreement set forth Benchmark's responsibilities. (GC Ex. 17.)

Turtle Bay employees were employed and paid by TBR Property. (RT 1668.) The ALJ correctly found that Benchmark personnel directed them day to day. As the ALJ noted, "TBR Property [issues] paychecks to employees and Benchmark [issues] paychecks to [the] Turtle Bay managers" who

supervise them. 353 N.L.R.B. No. 127, at 9 n.3 (Mar. 31, 2009).⁵

An abstract of Respondents' Exhibit 7 depicts the set of entities through which the Funds ultimately own the resort, and shows Benchmark's role running the resort on TBR Property's behalf:



⁵ TBR Property and Benchmark were held to be joint employers, a finding that is not disputed in this appeal. This brief therefore refers to TBR Property and Benchmark collectively as “the Resort.”

D. The Union's Personnel Overran Turtle Bay.

In 2003-04, a series of labor disputes arose at Turtle Bay in connection with collective bargaining negotiations between TBR Property and the Union. The Resort contended that the Union and its agents overran the property, intimidating guests and disrupting guest functions, including a wedding ceremony, with loud and intrusive sieges, noisemaking, protests, and mass gatherings. On February 12, 2004, for example, about 50 employees and 25 Union members from other hotels amassed outside the hotel, adjacent to a wedding ceremony for Turtle Bay guests. The protesters chanted, sang, and gave speeches, amplified by at least two bullhorns. (RT 897-99.)

The wedding's best man approached the protesters. He explained that his brother was getting married and pleaded that the Union wait until after the ceremony. The groom's father, who was upset, also approached the Union and asked them to leave. (RT 3408-09.) The Union ignored these requests, and tensions escalated to the point where witnesses feared that a fight would break out. (RT 729-31.) Security arrived, and the protesters relocated to another area adjacent to the hotel building. (RT 3401-02.)

The rally continued. Using their bullhorn, the protesters yelled,

among other things, “management are assholes,” loud enough for guests in the distant east wing of the hotel and at the pool area to hear. (RT 3406-07.) The police arrived and dispersed the crowd. (RT 734-736.)

The Resort filed unfair labor practice charges against the Union, which the NLRB’s General Counsel decided not to pursue.

E. The ALJ And Board Found That Unfair Labor Practices Had Occurred.

The Union contended that its agents thereafter were denied access to the premises and employees, and were retaliated against and threatened. The General Counsel litigated those unfair labor practice charges.⁶

After a lengthy evidentiary hearing, spanning July 19-29 and October 18-26, 2005, the ALJ found that the Resort had committed the bulk

⁶ The facts may be briefly stated for two reasons. First, not all of the issues in the Board’s decision are presented for this Court’s review. Partial settlements have mooted several issues, and (mindful of the deferential standard of review applicable to witness-credibility determinations) petitioners have elected not to seek review of issues that depend on such determinations. Second, petitioners principally argue here about what is *not* in the record: what the General Counsel *failed* to prove. The specific facts of record are addressed in the legal argument that follows.

of the unfair labor practices alleged. Relevant to this appeal, it found violations of sections 8(a)(5) and 8(a)(1) by purported interference with the Union's access to the property and Turtle Bay employees.

The Board — consisting, then, of only two members (Wilma B. Liebman and Peter C. Schaumber) — adopted the ALJ's findings in relevant part in its March 31, 2009 Decision and Order. 353 N.L.R.B. No. 127, at 1-3 (2009).

Oaktree and the Resort timely petitioned for this Court's review, and the Board cross-petitioned for enforcement.

V. SUMMARY OF ARGUMENT

A. Summary As To Oaktree.

Well-established legal principles control this appeal. No single-employer relationship will be found unless the alleged single employer (i) *actually* (not merely potentially), (ii) exercised common control of *day-to-day* labor relations, (iii) with respect to the *particular employment decision or practice* at issue in the case. The Board did not apply that test, and no facts

would support a single-employer finding under it. Oaktree personnel did not control day-to-day labor relations at the resort at all, and certainly not with respect to the issues underlying the instant unfair labor practice charges.

The other factors relevant to the single-employer inquiry also do not exist here. There was no common ownership because *Oaktree* did not own the resort; *Kuilima* did, and the Funds indirectly owned *Kuilima*. There was no integration of operations, either, as Oaktree (an investment firm) manifestly does not integrate its operations with those of a resort property.

The Board's decision erroneously focused on the fact that some Oaktree employees wore two hats, owing some responsibilities to TBR Property. Such persons lawfully change their hats, this Court's cases teach; the individuals can act on behalf of one entity without obligating the other. The Board failed to apply (and indeed ignored) that rule here. The investment managers at issue here held specific management positions with (indeed, officerships at) TBR Property. The Board treated that fact as an indicium of single-employer status. In fact it is probative of nothing, as this Court has expressly held. When those investment managers took any actions with respect to the resort, they wore their hats as officers of the Turtle Bay entities, not Oaktree, and as a result no single-employer finding is possible.

B. Summary As To All Petitioners.

The ALJ committed two pervasive errors, and the Board let those errors stand uncorrected.

First, the ALJ and Board failed to hold the General Counsel to his burden of proving a section 8(a)(5) violation. Specifically, they found a violation without requiring the General Counsel to demonstrate that the Resort effected a material change from past practice on the issue of Union access to Turtle Bay.

Second, they likewise failed to hold the General Counsel to his burden of proving a section 8(a)(1) violation. In particular, they found a violation even without proof by the General Counsel (i) that the Resort was motivated by anything other than reasonable security concerns when it purportedly restricted Union representatives' access, and (ii) that any such restriction was material.

The decision also should be vacated because the Board purported to decide this case when it had only two members. This violated section 3(b) of the Act, because the Board lacked the necessary quorum of three.

**VI. OAKTREE CAPITAL MANAGEMENT IS NOT A SINGLE
EMPLOYER WITH TBR PROPERTY**

This case begins and ends as to Oaktree on the single-employer issue. Under this Court's settled law (and indeed under prior NLRB cases that the Board and ALJ did not cite),⁷ Oaktree is not liable for the unfair labor practices alleged here.⁸

⁷ The Board's unexplained deviation from its own precedents is a separate and sufficient ground to reject the Board's holding here. Unexplained inconsistency, such as that shown here, reveals arbitrary and capricious decisionmaking. *E.g.*, *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983); *see, e.g.*, *Emery Worldwide, A.C.F. Co. v. NLRB*, 966 F.2d 1003, 1005 (5th Cir. 1992) (the Board may depart from its own precedents only where it "adequately explicate[s] the basis of its [new] interpretation") (citation omitted; second alteration in original).

⁸ This Court reviews the NLRB's legal conclusions *de novo* and will not affirm unless the Board gives a "reasonably defensible" construction of a statute. *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 428 (5th Cir. 2008); *NLRB v. U.S. Postal Serv.*, 477 F.3d 263, 266-67 (5th Cir. 2007) ("[W]e will generally defer to the Board's remedial decisions where it acts within its statutory authority, though we will review the Board's orders to ensure that it does not exceed that statutory authority."), *citing May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 392 (1945) ("While the Board has been delegated initially the exclusive authority to prevent unfair labor practices, courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether, on the evidence, they go so beyond the authority of the Board as to require modification as a matter of law before enforcement.") (footnote omitted). If the Board has applied a correct legal standard, the Court then considers whether, considering the record as a whole, substantial evidence
(Continued . . .)

A. **The Law Normally Respects The Separateness Of Corporate Entities.**

“The law allows businesses to incorporate to limit liability and isolate liabilities among separate entities. . . . The doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary’s employees, and the courts have found otherwise only in extraordinary circumstances.” *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (citations omitted).

This Court has held similarly. *E.g.*, *Lusk v. FoxMeyer Health Corp.*, 129 F.3d 773, 778, 777 n.3 (5th Cir. 1997) (rejecting a single-employer contention, and describing as “deficient” any “approaches to piercing the corporate veil which fail to recognize the[] important public policy considerations underlying the doctrine [of limited liability]”) (citation and internal quotation marks omitted).

exists to support a single-employer finding. 29 U.S.C. § 160(f); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (the reviewing court considers the record in its entirety, including “whatever in the record fairly detracts from its weight”). *Compare, e.g., Newspaper Prod. Co. v. NLRB*, 503 F.2d 821, 827-28 (5th Cir. 1974) (finding substantial evidence) *with, e.g., NLRB v. Transcontinental Transcon. Theaters, Inc.*, 568 F.2d 125, 130 (9th Cir. 1978) (finding no substantial evidence).

The ALJ's decision took a different approach. The ALJ's single-employer analysis began with the assertion that, after "Oaktree" bought the resort, it "then attempted to separate itself from . . . direct control of the resort." 353 N.L.R.B. No. 127, at 7. The ALJ in that single sentence made two factual misstatements and a legal error on top.

The ALJ's factual misstatements pertain to Oaktree. Even if *the Funds* (erroneously) could be said to be a single employer with TBR Property, *Oaktree itself* cannot be. The ALJ's factual misstatements are that (i) "Oaktree" bought the resort (incorrect; *the Funds* indirectly did so); and (ii) Oaktree "separate[d] itself" from day-to-day management by creating a web of subsidiary entities between it and the resort property (also incorrect; the core ownership structure — Kuilima and the partnership that had owned it — was in place long before the Funds entered the picture).

The ALJ's *legal error* is reflected in his suggestion that "separat[ing] [Oaktree] from . . . direct control of the resort" somehow was (i) improper, and (ii) an indicium of single-employer status. It is neither. First, as the cases above uniformly teach, there is nothing improper about the Funds' use of the corporate form to hold assets in subsidiaries, whether that be for tax reasons, to isolate potential liabilities out of an abundance of caution, for

reasons of management efficiency, or for other reasons. Nothing in the law says that the Funds must commingle their investment assets in a single corporate entity. Second, according to the ALJ, the “separat[ion]” meant that Oaktree lacked “direct control of the resort.” That finding does not *prove* single-employer status; it *disproves* it. The General Counsel was required to prove direct and day-to-day control, and (as shown below) the ALJ’s finding to the contrary undermines rather than supports the Board’s decision.

B. The Single-Employer Doctrine Does Not Apply Here.

For more than 25 years this Court has applied a four-factor test in single-employer cases. “Factors considered in determining whether distinct entities constitute an integrated enterprise are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.” *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983), *citing* (among other cases) *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv.*, 380 U.S. 255, 257 (1965).⁹ As shown below, under that test Oaktree as a matter of law

⁹ *Radio Union* articulated the single-employer test in the context of a labor-management dispute. This Court has held that the same test applies in labor cases as in other contexts, such as employment discrimination claims. *E.g.*,
(Continued . . .)

is not a single employer.

1. Common ownership does not exist.

Oaktree did not own TBR Property; *Kuilima* did, and the Funds indirectly owned *Kuilima*. The ALJ’s decision, adopted by the Board, simply misstated the facts. 353 N.L.R.B. No. 127, at 7 (“*Oaktree* purchased Turtle Bay”; “*Oaktree* . . . acquired ownership”); *see also id.* at 8 (“*Oaktree*” is “the ultimate owner”). None of that is true. *See supra* note 4.

2. Operations were not interrelated.

Oaktree is an investment advisor and manager. Turtle Bay is a hotel and resort. Companies in vastly different industries hardly can be said to have interrelated operations. *See, e.g., Engelhardt v. S.P. Richards Co.*, 472 F.3d 1, 7 (1st Cir. 2006) (“The nature of their businesses is also distinct — *GPC* is in the auto-parts retailing business whereas *SPR* is in the office-supply

Trevino, 701 F.2d at 403 (“[N]umerous courts have drawn upon theories and rules developed in the related area of labor relations in determining when separate business entities are sufficiently interrelated for . . . Title VII [purposes].”).

wholesaling business.”); *Vogt v. Greenmarine Holding, LLC*, 318 F. Supp. 2d 136, 143 (S.D.N.Y. 2004) (“The defendant entities are investment companies, not manufacturers of marine motors or indeed, anything at all.”).¹⁰

3. **There was no common control of labor relations.**
 - a. **Single-employer status cannot exist unless the alleged single employer controlled day-to-day labor relations for an affiliate with respect to the alleged wrong at issue.**

In single-employer cases, “Courts . . . focus[] on the . . . factor [of] centralized control of labor relations.” *Trevino*, 701 F.2d at 404.¹¹ The ALJ

¹⁰ The ALJ did not even discuss the interrelationship of Oaktree’s *operations* with those of TBR Property, but the use of some common *personnel*. 353 N.L.R.B. No. 127, at 8. That issue is discussed in section VI.B.4 below.

¹¹ Common ownership and common management, even where they exist, are given little weight. *See, e.g., Lusk*, 129 F.3d at 778 (“Common management and ownership are ordinary aspects of a parent-subsidary relationship. A parent corporation’s possession of a controlling interest in its subsidiary entitles the parent to the normal incidents of stock ownership . . . without forfeiting the protection of limited liability.”), *citing Baker v. Raymond Int’l, Inc.*, 656 F.2d 173, 180-81 (5th Cir. 1981). The interrelation-of-operations element similarly plays little role even where it exists, unless “the parent actually exercised a degree of control beyond that found in the typical parent-subsidary relationship.” *Lusk*, 129 F.3d at 778 (multiple citations omitted).

(Continued . . .)

and Board here were vague, even dismissive, on this point, 353 N.L.R.B. No. 127, at 8 (“Not all of these criteria must be present to establish single-employer status.”), but this Court’s cases (and indeed the Board’s own prior decisions)¹² hold that one criterion is a *sine qua non*: centralized control of labor relations. *E.g.*, *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 765 (5th Cir. 1997) (reversing a jury verdict because the trial court focused on “unimportant” facts rather than what is “central to finding a single employer relationship, namely involvement in the daily employment decisions of [the subsidiary]”); *Lusk*, 129 F.3d at 777 & n.3 (“[A]ll four factors are examined only as they bear on this precise issue”); *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 617 (5th Cir. 1999) (“Traditionally, [common control over labor relations] has been considered the most important, such that courts have focused almost exclusively on [it].”).

“‘Attention to detail,’ not general oversight, is the hallmark of interrelated operations.” *Id.*, citing *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 982 (4th Cir. 1987).

¹² See, e.g., *In re Mercy Hosp. of Buffalo*, 336 N.L.R.B. 1282, 1284 (2001) (the most critical factor in determining whether a single employer relationship exists is centralized control over labor relations); *AG Commc’ns Sys. Corp.*, 350 N.L.R.B. 168, 169 (2007) (same); *Beverly Enters., Inc.*, 341 N.L.R.B. 296, 306 (2004) (“The Board has held that this factor [centralized control of labor relations] is particularly significant in deciding single-employer status.”); *Grass Valley Grocery Outlet*, 332 N.L.R.B. 1449, 1449 (2000) (same); *RBE Elecs. of S.D., Inc.*, 320 N.L.R.B. 80, 80 (1995) (same); *Western Union Corp.*, 224 N.L.R.B. 274, 276 (1976) (same).

Three distinct elements comprise the analysis. First, *actual* control, not merely *potential* control, must exist. *E.g.*, *Lusk*, 129 F.3d at 778 (focusing on whether the parent company “*actually exercised*” control) (emphasis in original); *NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125, 128 (9th Cir. 1977) (denying enforcement of an NLRB order; the Board had relied on a provision of a “sublease allow[ing] the respondent to maintain close and substantial control over Cynatron’s day to day operations,” but that right of control was not exercised).¹³ The Board itself in prior cases has emphasized that actual, and not merely potential, control must be shown.¹⁴

¹³ *See also Walker v. Toolpushers Supply Co.*, 955 F. Supp. 1377, 1383 (D. Wyo. 1997) (“[I]t is not the *ability* to control day-to-day operations, but the *actual* control over such operations that is determinative”) (emphasis added); *Herman v. Blockbuster Entm’t Group*, 18 F. Supp. 2d 304, 310 (S.D.N.Y. 1998) (granting summary judgment; “Although Plaintiffs point to the language of the [contract] to establish Blockbuster’s theoretical control over Discovery Zone’s operations, Plaintiffs put forth no evidence to contradict . . . that most operations remained separate and distinct in practice.”), *aff’d*, 182 F.3d 899 (2d Cir. 1999); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 727 (N.D. Ala. 1981) (dismissing case against alleged single employer; “[T]he ‘control’ required . . . is not potential control, but rather actual and active control of day-to-day labor practices.”), *aff’d*, 664 F.2d 295 (11th Cir. 1981), *and cited by this Court in Trevino*, 701 F.2d at 404.

¹⁴ *See, e.g., Mercy Hospital*, 336 N.L.R.B. at 1284 (“A single-employer relationship will be found only if one of the entities exercises actual or active control”); *Beverly Enterprises*, 341 N.L.R.B. at 306 (“[I]t is the actual or active control . . . that is significant.”); *Dow Chem. Co.*, 326 N.L.R.B. 288, 288 (1998) (same); *Gerace Constr., Inc.*, 193 N.L.R.B. 645, 645 (1971) (same).

Second, proof of general oversight of labor relations, or involvement in certain high-level decision affecting labor relations, is not enough. Rather, the alleged single employer must be actively involved in *day-to-day* management of labor relations. *E.g., Lusk*, 129 F.3d at 777 n.3 (“[W]e and other courts have focused on . . . whether the parent corporation was so involved in the *daily* employment decisions of the subsidiary . . .”) (emphasis added); *Schweitzer*, 104 F.3d at 765 (“involvement in the daily employment decisions of [the subsidiary]” must be shown). Here again, the NLRB in other cases has so held.¹⁵

Third, proof of control over labor relations *in general* is not sufficient. As this Court repeatedly has said, “the critical question to be

¹⁵ In *Frank N. Smith*, 194 N.L.R.B. 212 (1971), for example, two companies under common ownership, and with common officers, were alleged to be a single employer. The Board rejected the single-employer allegation even though two of the common owner/officers handled “[l]abor relations at the higher level” for the two companies. *Id.* at 213. “[D]ay-to-day” problems [were] handled by the respective job superintendents of each [company],” however, *id.*, so the requirement of common control of labor relations was not met, *id.* at 218. *See also Mercy Hospital*, 336 N.L.R.B. at 1284 (requiring “actual or active control over the *day-to-day* operations or labor relations”) (emphasis added); *Beverly Enterprises*, 341 N.L.R.B. at 306 (same); *Dow Chemical*, 326 N.L.R.B. at 288 (same); *Western Union Corp.*, 224 N.L.R.B. 274, 276 (1976) (reversing an ALJ’s single-employer determination even though the companies had officers and directors in common; “day-to-day management responsibilities and decisions are handled at a level far below the two [Western Union] officials serving as the subsidiaries’ board chairmen”).

answered . . . is: What entity made the final decisions regarding employment matters *related to the [substantive claim at issue]?*” *Trevino*, 701 F.2d at 404 (citation omitted; emphasis added); *accord Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 735 (5th Cir. 1986) (the single-employer test “boil[s] down to an inquiry of ‘what entity made the final decisions regarding employment matters related to the person [making the] claim[.]’”) (quoting *Trevino*); *Guillory v. Rainbow Chrysler Dodge Jeep, LLC*, 158 Fed. Appx. 536, 538 n.2 (5th Cir. 2005) (same); *Vance v. Union Planters Corp.*, 279 F.3d 295, 301 (5th Cir. 2002) (same; reversing as a matter of law a single-employer finding); *Johnson v. Crown Enters., Inc.*, 398 F.3d 339, 344 (5th Cir. 2005) (affirming summary judgment; “. . . Johnson fails to present any evidence that Crown actually made any of Dixie’s labor decisions, including decisions regarding the renewal of the driver contracts [here at issue].”); *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 617 (5th Cir. 1999) (reversing as a matter of law a judgment against an alleged single employer; the defendant was involved in some day-to-day labor-relations decisionmaking, but not on the issue pertaining to the plaintiff); *see also Papa v. Katy Indus., Inc.*, 166 F.3d 937, 942 (7th Cir. 1999) (no liability even though the alleged single employer made the decision to conduct the layoffs at issue; the alleged single employer did not select the *specific persons* to be laid off).

b. **Oaktree did not control day-to-day labor relations at all, let alone with respect to the claims at issue in the litigation.**

No evidence suggested that anyone at Oaktree actually exercised day-to-day control of any aspect of the resort's labor relations, and certainly not with respect to the alleged unfair labor practices.

(1) **Oaktree, an investment advisor and manager, focused on high-level asset-management decisions.**

Oaktree's Marc Porosoff testified without contradiction what Oaktree does (and does not do), and what the role of Oaktree's personnel is (and is not). Porosoff and Russ Bernard worked for Oaktree in New York, where they each owed responsibilities for oversight of numerous Oaktree funds' investment assets. (RT 1598, 1602-05.) Oaktree "is an investment manager and an asset manager," a fiduciary to its investors. (RT 1576-77.) Oaktree employs portfolio and asset managers to protect its investors' money:

An asset manager [like Oaktree's Bernard] would make a large decision with respect to an asset with respect to the property; for example, whether to finance the property or

to renovate the property or make an addition to the property or sell the property

Id. at 1678-79; *accord id.* at 1634 (Bernard’s duties “would have comprised overseeing major issues with respect to the property such as whether we’re going to make an addition to it or finance it or something of that nature”).¹⁶

¹⁶ Oaktree’s relationship with its funds’ investments is typical in the world of investment advice and management. *See, e.g., Martin v. Safeguard Scientifics, Inc.*, 17 F. Supp. 2d 357, 360, 367 (E.D. Pa. 1998) (granting summary judgment on the single-employer issue because there was no involvement in the “day to day employment decisions of the subsidiary”; “As part of SSI’s oversight of its substantial investment in [IMV], SSI officers assumed positions on IMV’s board. In addition, SSI provided a portfolio of services to IMV such as administrative support, tax advice and legal services.”; “Given its sizeable investment, SSI took an active interest in the operation and activities of IMV,” but “[a]t most what has been shown is that a majority stockholder and sole investor took an active interest in getting its investment off the ground.”) (citation and internal quotation marks omitted).

(2) **Benchmark management and resort personnel — not Oaktree — were responsible for day-to-day labor relations at Turtle Bay, including all decisions at issue in the underlying unfair labor practice charges.**

No evidence links Oaktree’s personnel to any day-to-day *employment* decision at the resort, let alone to any decision underlying the unfair labor practices found. *See id.* at 1679 (“Oaktree has no day-to-day control over the employees. It’s Benchmark that has day-to-day control.”); *accord id.* at 1575 (“[Oaktree] has no day-to-day control.”), 1678-79 (“[W]e have a property manager . . . who operates the property on a day-to-day basis. In this case with respect to Turtle Bay, that would be Benchmark.”), 1634 (Bernard “would not be . . . exercising any day-to-day control over the employees because that’s the function of Benchmark as the manager under the management agreement”).¹⁷

¹⁷ The ALJ’s opinion, adopted by the Board in relevant part, in places erroneously appeared to conflate the analysis of the relevant issue (whether Oaktree was a single employer with TBR Property) with an irrelevant
(Continued . . .)

A proper analysis focuses on the unfair labor practices found, and who supposedly perpetrated them. According to the ALJ's decision, affirmed in relevant part by the Board:

- Nancy Ramos, Turtle Bay's Director of Human Resources, allegedly failed to give the Union legally required compensation information. 353 N.L.R.B. No. 127, at 28-29. Ramos, like all other resort employees, is not an Oaktree employee; she worked for Benchmark. (RT 138-39, 1656.)
- Benchmark issued the resort's rules-and-regulations handbook and the staff handbook that contained allegedly unlawful property-access rules. 353 N.L.R.B. No. 127, at 8. Oaktree did not do so, and indeed Oaktree has a different employee handbook for its own employees. (RT 1571.)
- Thomas Dougher, Turtle Bay's Chief of Security (and other resort

one (whether TBR Property was a joint employer with Benchmark in operating the resort day to day). *See, e.g.*, 353 N.L.R.B. No. 127, at 8 ("TBR Property[, LLC] has the right to control and it does control the labor relations of the resort."). Whether *Benchmark* is a *joint* employer with TBR Property (something that is not disputed here) has nothing to do with whether *Oaktree* is a *single* employer with TBR Property.

security guards) allegedly restricted Union access to the property and allegedly engaged in unlawful surveillance. 353 N.L.R.B. No. 127, at 11-12, 36. Dougher and resort security personnel also allegedly made threatening comments to Union representative Kimberly Harmon. *Id.* at 37-38. Neither Dougher nor any security guard was an Oaktree employee; they worked for TBR Property. (RT 1656, 3360.)

- Abid Butt, Turtle Bay's General Manager, issued a memorandum to employees that (according to the NLRB) illegally threatened to close the resort. 353 N.L.R.B. No. 127, at 20. Butt was not an Oaktree employee; he was Vice President of Benchmark. (RT 1656, 2576.)
- John Dutson and Joseph Maher, managers at a Turtle Bay restaurant, disciplined Jeannie Martinson, and Ramos discharged Mark Feltman, each allegedly in violation of the NLRA. 353 N.L.R.B. No. 127, at 23, 26. Neither Dutson, Maher nor Ramos worked for Oaktree; Dutson and Maher worked for TBR Property, and Ramos worked for Benchmark. (RT 139, 330, 343, 355, 360-61, 1656.)

These were the alleged NLRA violations. Oaktree personnel committed none of them.

(3) **The Board’s likely contentions are without merit.**

(a) **Hy Adelman’s role does not support a finding of common control of day-to-day labor relations.**

The ALJ noted that a man named Hy Adelman approved equipment leases and oversaw housekeeping supplies for the resort (RT 2631; GC Ex. 72, 73). A single-employer finding does not result from that.

As a threshold matter the ALJ’s decision misstates who Adelman even worked for; he was not even an Oaktree employee.¹⁸

¹⁸ The record was muddled as to exactly who Adelman was. Porosoff testified unequivocally that Adelman was *not* an Oaktree employee. (RT 1656, 1657; *accord id.* at 1656 (“[T]here are no Oaktree employees at the Turtle Bay Resort.”).) In fact Adelman worked for a Hawaiian employment-services agency named ALTRES, Inc., which provided some personnel to the resort. However, Abid Butt and Nancy Ramos, who work for Benchmark, had the
(Continued . . .)

And even if the Board were correct that Adelman worked for Oaktree (he didn't), that would not prove that Adelman exercised (i) actual, (ii) day-to-day control over labor relations at all, let alone (iii) with respect to the unfair labor practices now at issue. The only *specifics* shown in the record are that Adelman approved some equipment leases and oversaw and approved housekeeping supplies. (RT 2631; GC Ex. 72, 73.) Those issues have nothing to do with labor relations.¹⁹

impression that Adelman worked for Oaktree. (RT 143, 2593.) As this Court has recognized, lay witness confusion about individuals' reporting responsibilities is not uncommon in cases of this sort. *See Lusk*, 129 F.3d at 779 n.5 (rejecting as a matter of law a single-employer claim; "Numerous passages in the record . . . create ambiguity as to which entity they refer."; witnesses used "loose references" in identifying the employer of various persons; "[The claimants] appear to rely on such vagaries to implicate [the parent company as a single employer]. Such citations do little to boost [claimants'] credibility or arguments before this court."). In any event, the discrepancy in testimony here is not material, as Adelman was not linked to any issue of labor relations at the resort, let alone to the ones now at issue.

¹⁹ That Butt of Benchmark may have perceived Adelman as a person of some authority (RT 2596) does not make Adelman or Oaktree a joint employer. "To hold otherwise would mean that there would always be a material factual dispute . . . because the top officer of a subsidiary is, at some point, always held accountable to an officer of the parent" *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) — even assuming that Adelman was such an officer (which he was not, *see supra* note 18). *Accord Martin v. Safeguard Scientifics, Inc.*, 17 F. Supp. 2d 357, 367 (E.D. Pa. 1998) ("Plaintiff claims that Mr. Andes 'answered to' SSI, but this too would not demonstrate a degree of interrelationship sufficient to pierce the corporate veil, for 'the power to control comes with ownership.'"), *quoting Rogers v. Sugar Tree Prods., Inc.*, 7 F.3d

(Continued . . .)

(b) **Bernard’s consultation in collective bargaining, on the issue of subcontracting, does not support a finding of common control of day-to-day labor relations.**

The Board may contend that Bernard once played some oversight role in approving one collective bargaining proposal. (GC Ex. 63, sub-ex. 5A.) There are multiple responses, each dispositive.

First, such approval is perfectly consistent with the high-level (as opposed to day-to-day) oversight that an investment advisor/manager would customarily provide. The Board itself has differentiated between “[l]abor relations at the higher level” and the management of “day-to-day [labor relations] problems.” *Frank N. Smith Assocs., Inc.*, 194 N.L.R.B. 212, 213 (1971) (refusing to find a single-employer relationship even though the two companies had common owners and officers); *see also Florida Marble*

577, 582 (7th Cir. 1993); *Kirshner v. First Data Corp.*, 2000 U.S. Dist. LEXIS 17519, at *19 (N.D. Tex. Nov. 30, 2000) (granting summary judgment even though “officers of a subsidiary eventually report, through several intermediate steps in the chain of command, to an officer of the parent”; this “is the corporate norm, rather than a ‘significant departure from’” it) (citing *Lusk*).

Polishers Health & Welfare Trust Fund v. Green, 653 F.2d 972, 974 (5th Cir. 1981) (rejecting as a matter of law a single-employer claim, even though the ultimate owner “was concerned with consultation on financial matters”); *NLRB v. Transcon. Theaters, Inc.*, 568 F.2d 125, 131 (9th Cir. 1977) (denying enforcement of NLRB order; the alleged single employer’s power over the theater’s operating expenditures was “too remote” from “meaningful control over Cynatron’s labor relations policies”); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 765 (5th Cir. 1997) (reversing a single-employer finding; the trial court had permitted factors such as “stock control” and “common financing” to obscure the proper focus on “involvement in the daily employment decisions” of the subsidiary); *Lusk*, 129 F.3d at 778 (requiring “nexus to the subsidiary’s *daily* employment decisions”) (emphasis added).

Second, even if the General Counsel were correct that some link to Oaktree and the Funds could be drawn from Bernard’s consultation on a collective bargaining issue, the proof still falls short. The collective bargaining proposal Bernard supposedly approved concerned the issue of *subcontracting*. (GC Ex. 63, sub-ex. 5A.) Subcontracting has nothing to do with the unfair labor practices the Board found.

4. **That entities have officers or managers in common does not prove single-employer status.**

The ALJ and Board thought that single-employer status was buttressed, and perhaps conclusively established, because Porosoff and Bernard (in addition to being Oaktree employees) held titles as officers of TBR Property (which had the leasehold on the resort), and that Bernard was general partner of Kuilima (which owned it). 353 N.L.R.B. No. 127, at 8. In fact, however, this Court's cases show that the dual roles of Porosoff and Bernard (if anything) defeat single-employer status rather than establish it.

a. **Individuals lawfully may wear multiple hats, discharging responsibilities to more than one entity.**

Lusk v. FoxMeyer Health Corp., 129 F.3d 773 (5th Cir. 1997), is this Court's most-analogous case. Eight former employees of FoxMeyer Drug Company sued for age discrimination. They sued their actual employer (FoxMeyer Drug), its corporate parent (FoxMeyer Corp.), and that company's parent (National Intergroup, Inc., which later changed its name to that of the company in the case's caption above). FoxMeyer Drug and FoxMeyer Corp.

filed for bankruptcy, so plaintiffs litigated solely against the ultimate parent, National Intergroup.

National Intergroup moved for summary judgment. Plaintiffs resisted, contending that National Intergroup was a single employer with its now-bankrupt subsidiaries. Plaintiffs presented the following evidence in support of that theory, evidence that is analogous in many respects to that relied upon by the NLRB here:

- FoxMeyer Corp. was a holding company with no employees. *Id.* at 775.
- FoxMeyer Corp. shared the same board of directors and executive officers as FoxMeyer Drug. *Id.*
- National Intergroup was a holding company, with only 15 employees. *Id.*
- National Intergroup shared its corporate headquarters and telephone number with FoxMeyer Drug and FoxMeyer Corp. *Id.* at 775, 779.

- Melvyn Estrin and Abbey Butler were co-chairs and co-CEOs of all three companies. A third individual, Thomas Anderson, was President and Chief Operating Officer of all three companies. *Id.* at 775 & n.2.
- Estrin and Butler discussed with FoxMeyer Drug’s sales-and-marketing executive the need to be more efficient and productive. FoxMeyer Drug then planned a reduction-in-force, with the approval of Estrin, Butler and Anderson. *Id.* at 776.
- The eight plaintiffs were among those laid off, allegedly because of age. *Id.* at 776.
- Because of the bankruptcy, plaintiffs would have no remedy unless National Intergroup were held to be a single employer.

The district court granted summary judgment to National Intergroup, and this Court (per Jolly, J.) unanimously affirmed. There was no triable question of single-employer status, the Court held. The Court explained (as many cases have, before and since) that the “analysis ultimately focuses on the question whether the parent corporation was [i] a final decision-maker

[ii] in connection with the employment matters underlying the litigation.” *Id.* at 777, citing *Trevino*, 701 F.2d at 404.

The *Lusk* plaintiffs argued that this was established because Butler, Estrin and Anderson — National Intergroup’s co-chairs, co-CEOs, and President and Chief Operating Officer — approved FoxMeyer Drug’s layoff plan. This Court rejected the argument, for reasons that are directly applicable here. It is true that National Intergroup’s executives approved the layoff. What plaintiffs overlooked, this Court explained, was that *those individuals also held formal management positions at the subsidiaries*. It is a “well established principle that directors and officers holding positions with a parent and its subsidiary can and do ‘change hats’ to represent the two corporations separately, despite their common ownership.” *Id.* at 779, citing *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (Goldberg, J.) (“[O]ur cases are clear that one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for . . . pierc[ing] the corporate veil.”; “[A]n officer or director of both corporations can change hats and represent the two corporations separately . . .”).

In *Lusk*, this Court found no evidence that Anderson, Butler or Estrin were acting on *National Intergroup*’s behalf in approving the

FoxMeyer Drug RIF plan. “It is true that Anderson, Butler, and Estrin approved the plan, but that unadorned fact tells us nothing more than that they were acting as the three highest ranking executives *at FoxMeyer Drug.*” 129 F.3d at 780 (emphasis added). As a result, the Court said, the plaintiffs lacked “the type of evidence from which a reasonable jury could infer that Anderson, Butler, and Estrin were acting for [National Intergroup] when they approved the RIF plan.” *Id.* at 780.

Vance v. Union Planters Corp., 279 F.3d 295 (5th Cir. 2002), is to the same effect. That case held as a matter of law that there was no single-employer relationship. The relevant decisionmaker held responsibilities for multiple entities in the corporate family. In making the decision at issue, he was acting for the actual employer, not the affiliates, so the affiliates could not be linked through the single-employer theory. *Id.* at 301.

The Supreme Court has cited *Lusk*'s reasoning with approval. In *United States v. Bestfoods*, 524 U.S. 51, 69-70 (1998), the Court said: “[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary. . . . Since courts generally presume that the directors are wearing their ‘subsidiary hats’ and not their ‘parent hats’ when acting for the subsidiary, it cannot be enough to establish liability . . . that dual officers and

directors made policy decisions and supervised activities at the [subsidiary].” (Citing *Lusk*; some internal quotations omitted.) See also *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 943 (7th Cir. 1999) (Posner, J.) (rejecting as a matter of law an attempt to link two affiliated companies; “The plaintiffs seem to think that unless a corporate group erects a Chinese wall between affiliates, each affiliate is responsible for the other’s debts. That is nonsense.”).²⁰

²⁰ See also *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243, 254 (S.D.N.Y. 2007) (granting summary judgment even though “there has been an overlap of up to three officers to represent the two corporations separately”; “officers holding positions with a parent and its subsidiary can and do change hats”) (citations omitted); *Hegre v. Alberto-Culver USA, Inc.*, 485 F. Supp. 2d 1367, 1375 (S.D. Ga. 2007) (granting summary judgment even “[t]hough Messrs. Renzulli and Biggerstaff are officers of both SBC and BSG, thus linking the companies at the ‘very top’”); *Martin v. Maselle & Assocs., Inc.*, 2007 U.S. Dist. LEXIS 47931, at *21 (S.D. Miss. July 2, 2007) (granting summary judgment even though “Doug Maselle is the President of both [entities, and that] he was in charge of hiring and firing for both”; “officers holding positions in two corporations ‘can and do “change hats” to represent two corporations separately’”) (quoting *Lusk*); *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 552 F. Supp. 2d 867, 888-89 & n.19 (D. Minn. 2008) (same; granting summary judgment and quoting *Lusk*); *EEOC v. Cooper Aerobics CRT*, 1998 U.S. Dist. LEXIS 5836, at *12 (N.D. Tex. Apr. 15, 1998) (granting summary judgment; “[E]ven if Sterling works for both CIAR and CAE, his decision to terminate Austen was made in his capacity as a CIAR employee.”); *Herman v. Blockbuster Entm’t Group*, 18 F. Supp. 2d 304, 312-13 (S.D.N.Y. 1998) (citing *Lusk* and granting summary judgment even though “two of Blockbuster’s upper management served similar roles at Discovery Zone”), *aff’d*, 182 F.3d 899 (2d Cir. 1999); *Meng v. Ipanema Shoe Co.*, 73 F. Supp. 2d 392, 404 (S.D.N.Y. 1999) (granting summary judgment and citing *Lusk*; “Although it is clear that the Sumitomo employees loaned to Ipanema . . . did
(Continued . . .)

The teaching in those cases applies here. The ALJ and Board operated under the assumption that single-employer status existed largely because three Oaktree employees held titles as officers of TBR Property, one of the Funds' assets. *See* 353 N.L.R.B. No. 127, at 7, 8. In fact, however, as the foregoing authorities demonstrate, the individuals' dual roles actually undermine rather than support a single-employer theory.

b. The Board's likely arguments fail to heed the teaching in *Lusk* and the other cases.

(1) The letter from a Union representative to Bernard does not show single-employer status.

A Union representative wrote one letter to Bernard to “outline the open [collective bargaining] issues” between the Union and TBR Property.

in fact control many, if not all, of the aspects of plaintiff's employment, there is no evidence that these officers acted . . . in any capacity other than as Ipanema officers”); *Tribble v. Levingston's Furniture Co.*, 2000 U.S. Dist. LEXIS 16687, at *7 (N.D. Miss. Aug. 3, 2000) (granting summary judgment even though “Jon Levingston serves as the president of both companies, and as such, he oversees the overall management of both companies.”; officers “can ‘change hats’”).

(GC Ex. 63, sub-ex. 4.) Bernard was President of TBR Property, which had the contractual authority (under the Benchmark Management Agreement) to approve collective bargaining proposals before Benchmark accepted them.

(GC Ex. 17, § 5.02(d).) To the extent that Bernard even considered, let alone acted upon, the Union's letter (the record is silent as to whether he did), he simply was doing what the Benchmark Management Agreement permitted TBR Property to do, and what the President of TBR Property would do on its behalf. Thus, if Bernard in response to the letter did anything at all, he acted (as in *Lusk* and the other cases) wearing the hat of an officer of TBR Property, not Oaktree. The Union's letter has no significance on the single-employer issue for that reason, and for another as well: The letter had nothing to do with the unfair labor practices found.

(2) **One e-mail message reporting some salary information does not show single-employer status.**

The ALJ asserted that "Turtle Bay is required to keep Oaktree informed of the resort's employees and their salaries." 353 N.L.R.B. No. 127, at 8. That assertion (i) egregiously misrepresented the record, and (ii) is beside the point in any event, based on the teaching of *Lusk* and the other cases.

As a threshold matter, no record evidence supports the ALJ's assertion. The closest thing to evidence is one witness' statement that, once, she "sen[t] [Bernard] an email about staff bodies or salaries." (RT 407-08.) That constitutes no evidence of control over labor relations, let alone *day-to-day* control.

Moreover, here again Bernard was an officer of TBR Property. The ALJ erroneously imputed, to Oaktree, Bernard's acts while wearing his TBR Property hat. *Lusk* and the other cases teach that this is error.

(3) Signing corporate documents does not show single-employer status.

The ALJ made the same essential error in other ways as well. He asserted:

Bernard and Porosoff, *as the principal and senior vice president of Oaktree*, respectively, executed the lease between Kuilima and TBR Property.

353 N.L.R.B. No. 127, at 7 (emphasis added). And:

Bernard and Porosoff, *as the principal and senior*

vice president of Oaktree, respectively, executed the management agreement between TBR Property and Benchmark.

Id. (emphasis added).

The two documents on their face refute the italicized language.

The ALJ was correct that Bernard and Porosoff signed the documents (GC Ex. 18 and 17, respectively). But the ALJ mischaracterized the capacity in which the two men acted. Each document was signed for TBR Property, LLC, in the capacity of “its Manager,” not for Oaktree in its own right. *Cf. Velez*, 244 F.R.D. at 253 (rejecting as a matter of law a single-employer contention; “[T]hat [the parent company’s] deputy general counsel keeps custody of [the subsidiary’s] minute books . . . establishes that the parent company is keeping track of the operations of its subsidiary, but not that it exercises any control over [the subsidiary’s] operations.”). If anything, Bernard’s and Porosoff’s scrupulous attention to detail reveals that the two respected in every way the corporate form and the capacities in which they acted.



In sum, the Board ignored the law that single-employer status is not shown simply because individuals wear multiple hats. Oaktree is not a

single employer by virtue of acts done by Oaktree employees who simultaneously held titles as officers of TBR Property.

The Court for the foregoing reasons need not reach, with respect to Oaktree, the merits of the unfair labor practice allegations.

VII. THE UNFAIR LABOR PRACTICE FINDINGS SHOULD BE VACATED ON THE MERITS AS TO ALL PARTIES

The ALJ and Board here failed to hold the General Counsel to his burden of establishing violations of sections 8(a)(5) and 8(a)(1).

A. The ALJ And Board Failed To Hold The General Counsel To His Burden Of Establishing A Violation Of Section 8(a)(5).

1. The Union alleged that the Resort violated section 8(a)(5) by unilaterally and materially restricting its access to the Resort.

An employer violates section 8(a)(5) by unilaterally and without notice making a material, substantial, and significant change in a contractual premises-access provision. *Peerless Food Prods.*, 236 N.L.R.B. 161, 161

(1978) (“While we do not minimize the value of employee access to union business representatives, the change effected here . . . does not materially, substantially, or significantly reduce that value. We shall, therefore, dismiss the complaint.”).²¹

As shown below, the Board here dispensed with one element or the other, and in some cases both, for each of the incidents in question.²²

2. **The ALJ and Board erred by failing to require the General Counsel to demonstrate in every case that a “change” — a departure from past practice — occurred.**

The General Counsel bears the burden under section 8(a)(5) of

²¹ Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), provides that it shall be an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of employees.”

²² Petitioners disagree with (but, as noted above, do not here appeal) the ALJ’s credibility determinations and most of his factual findings. Accordingly, petitioners assume to be true the ALJ’s characterization of the events of February 12, 14 and 18, 2004; May 4 and 24, 2004; June 2, 7, 11, 12, 15, 17, and 22, 2004; and January 27, 2005. The finding of an 8(a)(5) violation rests on the events of February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, and January 27. 353 N.L.R.B. No. 127, at 33. Accordingly, this brief limits its analysis to those dates.

establishing a change — *i.e.*, a departure from past practice. *ICH Corp.*, 2000 N.L.R.B. LEXIS 550, at *97 (Aug. 23, 2000) (ALJ decision) (“Before the General Counsel can prevail, he must establish that a change did in fact occur.”); *Southern California Edison Co.*, 284 N.L.R.B. 1205, 1213 n.1 (1987) (“A change is measured by the extent to which it departs from the existing terms and conditions affecting employees.”), *enf’d mem.*, 852 F.2d 572 (9th Cir. 1988).

Here, however, the ALJ *recited* that a “change” had occurred without *proof* in each case of the *status quo ante*. The ALJ, and Board later, thus failed to hold the General Counsel to his burden.²³

²³ *Frontier Hotel & Casino*, 309 N.L.R.B. 761 (1992), *enf’d sub nom. NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995), the primary case relied upon by the ALJ, thus is inapposite because the General Counsel in that case *did* establish a past practice of permitting access to certain areas of the employer’s property, as well as a change to that practice. *Id.* at 764. The Ninth Circuit affirmed that there was “substantial evidence” that union representatives, by remaining in those areas, “were operating within the terms of the [collective bargaining agreement].” 71 F.3d at 1438. *ATC/Vancom of Cal., L.P.*, 338 N.L.R.B. 1166 (2003), *aff’d*, 370 F.3d 692 (7th Cir. 2004), likewise is inapplicable. There, the ALJ found that the employer violated section 8(a)(5) by denying union access to a bulletin board, but only after establishing that the union previously had enjoyed access. *See* 338 N.L.R.B. at 1168 (citing letter to employees forbidding use of bulletin board, “including those previously utilized by any union or labor organization”).

a. **The General Counsel failed to establish past practice for rallies on Turtle Bay property (May 4, 2004).**

On May 4, 2004, Claire Shimabukuro held a rally involving 50 Union retirees on resort property. The rally involved a speech and applause in a restaurant used by guests, and chanting through the hotel lobby. *Id.* at 15. Union Business Agent Mariann Marsh joined the group in the restaurant. *Id.* In response, the Resort issued trespass notices to Marsh and Shimabukuro, and escorted them off the property. *Id.* at 16.

The ALJ recited that these actions “represented a significant change from the Respondents’ previous practice and from the access provision of the collective-bargaining agreement.” 353 N.L.R.B. No. 127, at 33. But the ALJ reached this finding without requiring any showing that the Resort had any past practice of permitting rallies on Resort property. The record contains no such evidence. Absent such evidence, the General Counsel did not demonstrate that any departure from past practice occurred.

b. The General Counsel failed to establish past practice for early morning entry (June 11, 2004).

On June 11, 2004, Marsh arrived at the resort between 6:15 a.m. and 6:30 a.m. She was told that Turtle Bay was having a private function for the employees, and that she should not return until 8:00 a.m. When Marsh did not leave, Thomas Dougher, Chief of Security at Turtle Bay, issued a trespass notice, on the ground that Marsh was visiting at an improper time.

353 N.L.R.B. No. 127, at 17. Marsh still did not leave. A security guard observed her for the remainder of the day. *Id.* at 17-18.

The ALJ, in analyzing these events, focused exclusively on his view of the strength of the explanations for issuing the trespass notice and observing Marsh. For example, regarding the trespass notice, he stated: “Dougher’s ‘improper time’ allegation or charge was based on his belief that union representatives could only be at the resort during the time the resort’s personnel office was open. He did not consult with [Benchmark Human Resources Director Nancy] Ramos or other management personnel in forming his belief or before issuing the trespass notice.” 353 N.L.R.B. No. 127, at 17.

The ALJ improperly reversed the burden of proof. The Resort did

not need to establish that Marsh’s early arrival was *unreasonable*. Instead, the General Counsel was required to — and did not — prove that forbidding an early morning entry *materially deviated from past practice*. See *Yellow Freight Sys., Inc.*, 1993 N.L.R.B. LEXIS 135, at *111 (1993) (ALJ decision) (“[T]he testimony was completely lacking in specificity; [the union representative] did not give one example of another occasion when he visited the terminal, without objection, between 7 and 8 a.m. . . . [T]here is a lack of evidence to support the General Counsel’s contention that [the] conduct was consistent with his past practice.”; dismissal of complaint affirmed).

The ALJ failed to hold the General Counsel to his burden of demonstrating past practice. He even ignored Marsh’s own testimony that her early morning arrival *departed from past practice*. (RT 934 (“I usually — usually get there sometime around 10:00, a little bit before.”).)

c. **The General Counsel failed to establish past practice for the use of guest elevators (January 27, 2005).**

On January 27, 2005, Marsh sought entry through the hotel’s lobby because, she said, back pain left her unable to climb the stairs at the

loading dock. When Dougher informed her that she was not allowed in the lobby, she walked to an elevator that would take her to the cafeteria. A guest entered and pushed the button to ascend to a guest floor, where (the Union concedes) its representatives are not permitted. Dougher asked Marsh to leave the elevator, and summoned a police officer, who asked Marsh to leave the property. When Marsh said she needed to rest, the police officer left. Marsh then entered the elevator and went to the employee cafeteria. 353 N.L.R.B. No. 127, at 21.

At no point on January 27 was Marsh evicted from the property; she was only restricted from the lobby and guest elevators. The ALJ concluded that Marsh's treatment on January 27 constituted a "change" for purposes of a section 8(a)(5) violation — even though there was no evidence in the record that Marsh previously had been permitted access to the lobby entrance or guest elevators. To the contrary, the ALJ acknowledged that the loading dock, not the lobby, was Marsh's "usual entrance into the hotel." *Id.* at 21. Moreover, as noted, the Resort introduced undisputed evidence that Union representatives were not permitted in guest areas. (RT 2113.)

The General Counsel here again defaulted in his proof; he failed to proffer evidence that the Resort deviated from past practice.

d. **The General Counsel failed to establish past practice for dues collection at the Resort (May 24, 2004 and June 22, 2004).**

On May 24, 2004, two Union representatives came to Turtle Bay carrying a cash box, ostensibly to collect Union dues. Dougher told them they were not permitted to do so, and asked them to leave. They complied.

353 N.L.R.B. No. 127, at 15-16. On June 22, 2004, Shimabukuro was at Turtle Bay to collect dues, and Dougher again informed her that she was not permitted to do that. A police officer asked her to leave the premises. *Id.* at 18.

The ALJ found that “there is no evidence that the Union’s collection of dues at Turtle Bay interfered with the resort’s normal conduct of business.” 353 N.L.R.B. No. 127, at 16. But this was not the legally relevant inquiry. To demonstrate a *change*, the burden was on the General Counsel to prove *what had occurred before*. The ALJ and Board once again failed to require the General Counsel to prove a departure from past practice with respect to collecting dues on Turtle Bay premises.

- e. **The ALJ compounded his error by excluding from evidence the Resort's proffered evidence of past practice.**

The Resort sought to introduce testimony from Arlene Ilae, a former Union business agent, but the ALJ refused to hear it (RT 2945), despite a detailed offer of proof (RT 2946-48). The ALJ said: "I'm not prepared to sit here through all of the testimony that will be required to establish that pattern or practice" (RT 2945.)

That was error; where, as here, a collective bargaining agreement remains in place through a transition in ownership, the past practices of the predecessor are highly relevant. *See ICH Corp.*, 2000 N.L.R.B. LEXIS 550, at *84-85 ("Respondent [as successor] is in essentially the same condition as though it had adopted the collective bargaining agreement."); "[I]f the successor has merely continued an existing practice, it cannot be said that it has made a unilateral change which requires bargaining."); *Appelbaum Indus., Inc.*, 294 N.L.R.B. 981, 983 (1989) ("[As a successor,] the Respondent was required to continue adhering to the preestablished terms and conditions of employment that included . . . permitting union representatives to meet with employees in the production areas").

Had the ALJ properly permitted Ilae to testify, the Resort would have shown the past practice — under the same collective bargaining agreement — was that Union business agents visited the Resort only during business hours, and only for the purpose of investigating or otherwise meeting with human resources representatives. Union agents never previously disrupted business, and never interfered with guests. This evidence would have demonstrated that it was the Union — not the Resort — that departed from past practice.

3. **Even where, *arguendo*, a departure from past practice was shown, the ALJ and Board failed to hold the General Counsel to his burden of establishing that the purported change was material.**

The ALJ assumed — without any analysis — that any changes from the Resort's (supposed) previous access practices was material, substantial, and significant. This was error. The General Counsel was required to, and did not, prove *materiality*.

In fact, as shown below, the undisputed record evidence shows that the Resort did *not* materially impair the Union's ability to communicate

with and represent its employees.

a. **Minor changes in access rules are not material.**

“[N]ot every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to ‘a material, substantial, and a significant’ one.” *Peerless Food Prods.*, 236 N.L.R.B. at 161 (citation omitted).

Complete exclusion from the employer’s property may qualify as a material change in access, thus triggering section 8(a)(5). *Fashion Furniture Mfg., Inc.*, 279 N.L.R.B. 705, 715 (1986) (finding a material violation where the employer effected a “complete denial” of access with no “other reasonable means” of access). By contrast, lesser restrictions — those that do not adversely impact a union’s representation — do not violate the Act. *See BASF Wyandotte Corp.*, 278 N.L.R.B. 173, 180 (1986) (restrictions on locations were not material, because union representatives “were able to meet employees and stewards in the cafeteria during their union time”; there was “no adverse impact on ability of the union . . . to represent the employees”); *National Sea Prods., Inc.*, 260 N.L.R.B. 3, 6 (1982) (restricting access to the plant to certain times and under conditions of escort were not material changes).

b. The Resort never deprived Union representatives of access to employees.

The ALJ cited 12 dates on which the Resort purportedly changed their practices by “interfer[ing] with the Union’s access to the resort and to the employees.” As shown below, however, on the bulk of these dates the General Counsel failed to demonstrate that the Resort actually restricted Union representatives. When the Resort did so, there was no evidence that the restrictions had any significant consequences.

(1) The Resort took no action of any consequence against Union representatives on the majority of the dates cited by the ALJ.

On February 18, May 24, and June 2, 2004, the Resort did not even issue a trespass notice. Whatever occurred had no impact on Union access at all. *See, e.g.*, 353 N.L.R.B. No. 127, at 17 (the police officer “asked Marsh to accompany him to his vehicle. Marsh declined. . . . The police officer left for the ostensible purpose of completing forms. However, he never returned, and a trespass notice was not issued on that day to Marsh or the other

union employees”).

On June 11, 12, and 15, 2004, and January 27, 2005, the Resort issued trespass notices, but the Union representatives remained on the premises anyway. On each of these dates, then, the Union was free to — and did in fact — successfully communicate with represented employees. Other minor restrictions imposed on June 11, 2004 — preventing visitation at the early hour of 6:30 a.m., and assigning a security escort, 353 N.L.R.B. No. 127, at 17 — do not rise to the level of a “material” change (even assuming *arguendo* that they were a change at all). *See National Sea Prods.*, 260 N.L.R.B. at 6 (dismissing complaint because restricting access to the plant to certain times and under conditions of escort were not material changes).

(2) **Union representatives routinely returned to the Resort without incident.**

The restrictions that the Union challenged were isolated exceptions to a general pattern of permissive access. The ALJ ignored undisputed evidence that Union representatives routinely visited the Resort without incident. (RT 701 (Marsh visited Resort “about twice a week”; “When I would go, I would usually stay there all day.”); RT 1442 (Union

representative Kimberly Harman visited the Resort “[t]hree — on average three times a week. Sometimes four.”.) There was no material change in overall access. *See Nynex Corp.*, 338 N.L.R.B. 659, 662 (2002) (reversing ALJ and finding no material restriction; access restrictions did not result “in the Union’s being denied access to any unit employees at the workplace”).

In sum, the ALJ repeatedly assumed — without evidence from the General Counsel, and in some instances despite evidence from the Resort — that “material changes” in access privileges had occurred. This improperly excused the General Counsel from his burden of proof.

B. The ALJ And Board Failed To Hold The General Counsel To His Burden Of Establishing A Violation Of Section 8(a)(1).

Section 8(a)(1) of the Act, 29 U.S.C. § 158(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.” The ALJ determined that the Resort violated section 8(a)(1) by restricting Union representatives’ access to Turtle Bay, and thus restraining the Union in

communicating with its membership.²⁴

That determination is flawed in two crucial respects, as shown below.

1. **The ALJ and Board failed to hold the General Counsel to his burden of showing that the Resort lacked a reasonable basis for evicting demonstrators.**

The question in an access dispute is not whether, with the benefit of 20-20 hindsight, the Union's agents acted lawfully. Section 8(a)(1) requires proof that the employer acted without any reasonable basis, based on anti-union animus. As a result, deference must be accorded to an employer's on-the-spot reasonable belief — even if it later proves to be mistaken — that police involvement is necessary. Accordingly, the Board has required the General Counsel to demonstrate, not merely that the Union acted lawfully, but rather that the employer had *no reasonable basis* for believing that the activity

²⁴ In affirming the finding that the Resort violated section 8(a)(1), the Board relied “only on the judge’s analysis of the events of February 14 and 18, 2004,” and on “the analysis of the events of February 12, 2004.” 353 N.L.R.B. No. 127, at 1-2, n.6. The ALJ found that, of these dates, the Resort violated the access provision only on the 14th and 18th. This brief circumscribes its analysis accordingly.

was unlawful. As the Board itself put it in an earlier case:

It is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests. *So long as the employer is acting on the basis of a reasonable concern*, Section 8(a)(1) is not violated merely because the police decide that under all the circumstances, taking action against the pickets is unwarranted.

Nations Rent, Inc., 342 N.L.R.B. 179, 181 (2004) (emphasis added).

The ALJ failed to hold the General Counsel to his burden. Rather than requiring the General Counsel to demonstrate that the Resort was not motivated by a reasonable concern about property rights or public safety, the ALJ's analysis stopped with a determination that the Union did not, in fact, violate property rights or endanger public safety. This error requires reversal.

The alleged violations took place on February 14 and 18, 2004, *see supra* note 24, but the events of those dates must be evaluated in light of what had occurred just days before, on February 12. That day Union protesters — including Marsh and Shimabukuro — disrupted the wedding ceremony of Turtle Bay guests. The ALJ focused on whether the Union protesters that day

were or were not actually on Turtle Bay property. The ALJ found that because *the Resort* did not prove a property right, no trespass had occurred: “[T]he Respondents did not produce a copy of the certification or any other evidence to corroborate Dougher’s statement of Hawaii’s alleged certification. I do not accept that Turtle Bay’s property line extended into an area that under State law is public property without some corroboration of such a claim.” 353 N.L.R.B. No. 127, at 11. Here again, the ALJ misplaced the proof burden.

Separate and apart from the Resort’s belief that Marsh and Shimabukuro were trespassing on February 12, the Resort had a separate reasonable basis for summoning the police and evicting the protesters: Their presence was creating a potentially dangerous situation. “[T]he noise from the demonstration disturbed persons who were part of a wedding party at the resort. The groom and the best man came down from the resort’s pool area where the wedding party was congregating and confronted the group on the beach. The groom and the best man were quite belligerent and threatening.” *Id.* at 11. Even if the Union’s activities were lawful with the benefit of hindsight, the Resort cannot be faulted for acting based on an overriding

concern for public safety.²⁵

The alleged 8(a)(1) violations occurred days later, on February 14 and 18. The ALJ ignored the fact that Marsh and Shimabukuro on February 12 had engaged in the disruptive protest that, from the Resort's perspective, "interfere[d] with the normal conduct of business" in derogation of the collective bargaining agreement. *Id.* at 35 (citing CBA access provision).

The prior disruption changed the rules when the two appeared again on the 14th and 18th. The ALJ's decision in effect assumed that the Resort needed to forgive and forget what Marsh and Shimabukuro had done on the 12th, rather than taking precautions in case what's past turned out to be prologue. Specifically, the ALJ found that the Resort would only be permitted to evict a Union representative if that representative interfered with business *on*

²⁵ The only case cited by the ALJ in support of its holding, *Venetian Casino Resort, LLC*, 345 N.L.R.B. 1061 (2005), does not state otherwise. There the Board held that an employer violated section 8(a)(1) by summoning the police to clear a protest on the sidewalk in front of the Venetian Casino Resort. In *Venetian*, the resort had no reasonable basis to believe that the protesters were trespassing. The County had granted the Union a permit to demonstrate there, and both the police department and the district attorney, upon inquiry from the Venetian, advised that the demonstrators there would *not* be trespassing. *Id.* at 20-21. *Venetian* further differs from this case because there, unlike here, there was no possible threat to public safety.

the same day as the eviction. 353 N.L.R.B. No. 127, at 34 (emphasis added).

That is not the law; an employer may restrict access based upon prior disruptions. *See National Sea Prods.*, 260 N.L.R.B. at 6 (it was reasonable for an employer to limit access, even in light of a contractual access provision, because union representative “in the past, had interfered with production”; complaint dismissed); *Nynex Corp.*, 338 N.L.R.B. 659, 662 (2002) (no 8(a)(1) violation for cancelling a union representative’s magnetic access cards in response to an earlier disruption).

The relevant question regarding past practice was not whether Union representatives had enjoyed access privileges when they behaved themselves. The relevant question is whether the Resort needed to give similar privileges to individuals who, just days before, had disrupted Resort business — and guests. It was the General Counsel’s burden to demonstrate such a change by showing *relevant* evidence of past practice, and he did not.

2. **The ALJ and Board failed to hold the General Counsel to his burden of proving a *material* interference with access.**

The ALJ and Board found that the Resort violated section 8(a)(1) by refusing Marsh and Shimabukuro access on February 14 and February 18, 2004. But the ALJ did not require the General Counsel to discharge its burden of demonstrating a *material* interference with the access provision, and ignored undisputed evidence of immateriality.

a. **No unfair labor practice exists without proof of a *material* infringement on access.**

Even if Marsh and Shimabukuro did have a right to access Resort property on February 14 and 18, the General Counsel could prove a section 8(a)(1) violation only by showing that the Resort *materially* interfered with that right. *See Peerless Food Prods.*, 236 N.L.R.B. at 161 (“While we do not minimize the value of employee access to union business representatives, the change effected here . . . does not materially, substantially, or significantly reduce that value . . .”). The central question is whether an employer’s restrictions impose barriers that stand in the way of effective communication.

Where the union has “other reasonable means of communicating its organizational message to the employees,” no section 8(a)(1) violation exists. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992).

b. No material infringement of access exists here.

The ALJ did not hold the General Counsel to his burden of establishing material interference with access. Marsh and Shimabukuro successfully returned to Turtle Bay and carried out their Union duties many times thereafter. Moreover, the Union sent *other* representatives to Turtle Bay, all without objection or restriction, so the Union as an institution at all times had access to employees. As shown below, at no point was the Union’s access materially limited.

(1) Marsh and Shimabukuro remained on Resort property, and returned frequently, even after they were issued trespass notices.

On February 14, just two days after the disruptive protest, the Resort requested that Marsh leave the property, and she did. But she and

Shimabukuro returned just four days later — on February 18 — and remained on the property without restriction:

Q. And did you stay there at the property then?

A. Yes, I was with Claire that day, Claire Shimabukuro, and we stayed the rest of the day.

(RT 932-33; *see also* RT 755.)

Marsh and Shimabukuro returned regularly thereafter, and remained on the property to carry out their duties. (RT 701 (Marsh visited Resort “about twice a week”; “When I would go, I would usually stay there all day.”).) Marsh herself testified that she continued to visit the Resort and conduct Union business, expressly referencing visits in April (RT 1147-48), May (*id.* 760-73, 934-43), June (*id.* 773-76, 779-98, 943-49, 958-69, 1091-95), July (*id.* 1124-29, 1130-31, 1184), November (*id.* 1129-30), and December 2004 (*id.* 1131-32, 1170-71), as well as January 2005 (*id.* 798-811, 1109-21, 1184-86, 1192-93). To the extent that there was *any* interference with their access to the Resort, it was *de minimis*.

(2) **The Union sent other representatives to the Resort.**

Moreover, issuing trespass notices to Marsh and Shimabukuro in no way interfered with the purpose of the access provision, which was to provide *the Union* — the institution, not any particular business agent — the opportunity to communicate with Resort employees. The Resort placed no restrictions on the Union generally, but instead focused on Marsh and Shimabukuro: the two who just days earlier had disrupted the wedding ceremony involving Turtle Bay guests. Other Union representatives, including Nate Santa Maria, Kimberly Harman, Daniel Kerwin, Eric Gill, and Laura Moye, continued to visit the property. (*E.g.*, RT 593 (Santa Maria visited the Resort “two to three times a month” from “May 2004 to October 2004”); *id.* 1442 (Harman visited the Resort “[t]hree — on average three times a week. Sometimes four.”); *id.* 2120-29, 2834-36, 3016-19, 3251-55, 3549-57, 3725-26 (Kerwin visited on April 10, October 18, October 28, and December 21, 2004, and January 13, January 27, and April 21, 2005); *id.* 2656-57 (Gill visited on May 13, 2005); *id.* 2838-46, 3341-46, 3545-49, 3677-80, 3746-49 (Moye visited on January 19, May 17, and June 28, 2005).) *See Lechmere*, 502 U.S. at 535 (no Section 8(a)(1) violation where “other reasonable means of

communicating its organizational message to the employees” remain).

As with the 8(a)(5) finding, the 8(a)(1) finding rested on legal error. The General Counsel was required to show (i) that the Resort’s concern about property rights or public safety had no reasonable basis, and (ii) that any interference was material. The General Counsel defaulted in his proof on both of these points. The findings of section 8(a)(5) and 8(a)(1) violations should be reversed.

C. The Board’s Decision Should Be Vacated Because The Board Lacked A Quorum.

The NLRB purported to decide this case when it had but two members. This violated section 3(b) of the National Labor Relations Act because the Board lacked a quorum of three. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).²⁶

²⁶ Other circuits have analyzed the issue differently. *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, Aug. 18, 2009; *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *petition* (Continued . . .)

Section 3(b) of the National Labor Relations Act states, in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b). Based on that language, as shown below, the Board is powerless to act when the Board has three vacant seats.

Section 3(b) contains four provisions. The *vacancy* provision says that “[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board.” The *Board-quorum* provision requires “three members of the Board” to comprise “at all times” “a quorum of the Board.” The *delegation* provision allows “[t]he Board . . . to

for cert. filed, May 22, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009). Because this issue likely will be resolved in another case by this Court, or by the Supreme Court, well before oral argument in this case, this brief addresses the issue only briefly.

delegate to any group of three or more members any or all of the powers which it may itself exercise.” (In *Laurel Baye*, the D.C. Circuit called this the “delegee” group provision. 564 F.3d at 471.) The final provision is the *group-quorum* provision, which allows “two members [to] constitute a quorum of any group [of three or more members] designated pursuant to the [delegation provision].”

The vacancy, Board-quorum, and delegation provisions, taken together, make clear that the Board need not be fully constituted at five members. The Board may delegate authority to panels of three, which “at all times” comprises a Board quorum. *Id.*

At issue here is the group-quorum provision, which allows a delegated panel of three further to delegate to a quorum of two. The Board takes the position that, if five can delegate to three, and three can delegate to two, then it follows that two can act for the entire Board. That is incorrect. The two-member group-quorum provision applies only to a “group designated pursuant to the [delegation provision],” and that provision permits delegation only to a “group of three or more.” Where, as here, the entire Board numbers fewer than three, the group-quorum provision never comes into play, because no valid delegation to a “group of three or more” continues to exist.

The NLRB's three-member Board quorum ceased to exist when Member Kirsanow's term expired. Any authority of the remaining two members ceased at the same time, because the two-member group lost its authority to act when a delegation to a group of sufficient size expired. *See* 2 William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 504 (2008). Stated another way, “[i]f a principal that is not an individual loses capacity to do an act, its agent’s actual authority to do the act is terminated.” RESTATEMENT (THIRD), AGENCY § 3.08 (2006). As the D.C. Circuit stated in *Laurel Baye*: “In the context of a board-like entity, a delegee’s authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board’s membership below a quorum.” 564 F.3d at 473.

Under section 3(b), the Board must have — and maintain — a quorum of three members in order to delegate to two members the authority to act. Section 3(b) does not permit a two-member Board to issue decisions and orders such as the one Member Liebman and Member Schaumber rendered here.

VIII. CONCLUSION

Oaktree is not a single employer with the other parties to this case. Whatever may be the proper disposition as to those other parties, the NLRB's order as to Oaktree itself should be vacated.

Additionally, the NLRB's judgment should be vacated on the merits as to all petitioners on each of the issues addressed above. The Board failed to hold the General Counsel to his burden of proving an 8(a)(5) or 8(a)(1) violation.

Finally, the Board's decision should be vacated because it was improperly decided by a two-member panel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

*Oaktree Capital Management, L.P., et al. v. National Labor Relations Board
U.S. Court of Appeals, Fifth Circuit Case No. 09-60327*

I am a citizen of the United States and am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105-3441. I hereby certify that on October 20, 2009, I filed the original and 7 paper copies of the following documents with the Clerk of the Court for the United States Court of Appeals, Fifth Circuit via UPS Overnight Delivery, and served true and correct copies of the foregoing document(s) described as:

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OAKTREE CAPITAL MANAGEMENT, L.P.; TBR PROPERTY, L.L.C.
D/B/A TURTLE BAY RESORTS; AND BENCHMARK HOSPITALITY,
INC.**

on the interested parties by placing true and correct copies thereof in an envelope addressed as follows:

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Alice F. Brown