

**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM OM 14-48

April 10, 2014

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Additional Guidance Regarding Default Judgments

This memorandum makes changes and provides policy guidance regarding the removal or modification of default judgment language in settlements; language in pre-complaint settlements; the procedure for breach of cease and desist provisions; language in the complaint that will be the basis of a default judgment motion; and language in compliance stipulations. To provide a context for those changes and guidance, it reviews outstanding guidance regarding default judgments, briefly examines the Regions' experience with default judgments, and then discusses issues with obtaining default language, pre-complaint language, procedures in obtaining default judgments, and language in compliance stipulations.

I. OUTSTANDING GUIDANCE

In [GC Memorandum 11-04](#), Regions were instructed to routinely include default judgment language in all informal settlement agreements and all compliance settlement agreements. This language, which effectively allows Regions to seek default judgments in the event of uncured breaches of informal settlement agreements, continues to serve the dual objectives of ensuring that charged parties and respondents comply with these agreements and that, in the event of an uncured breach, the General Counsel is not put in the position of having to expend resources litigating a settled issue. Uncured breaches of informal settlement agreements in the absence of default language often necessitated preparing for trial twice, once before the agreement was reached and again after it was breached, the second instance frequently complicated by the passage of time.

Subsequently the instructions in GC 11-04 were clarified in [GC Memorandum 11-10](#) and my [March 31, 2011 email to Regional Directors](#). GC 11-10 revised the default judgment language with regard to seeking ex parte enforcement by a Court of Appeals and to make the default provision more succinct and clear, and provided language to distinguish between pre- and post-complaint informal settlements. The email gave Regional Directors discretion to negotiate changes to the default judgment language by agreeing to temporal or geographic limits on its enforcement. Specifically, it gave Regions the authority to agree to limit default judgment language to a particular location

where the unfair labor practice conduct occurred even though the charged party had multiple facilities, and to agree to limit the exercise of the General Counsel's rights under the default judgment language to a six-month period after closure of the case provided the Region was confident that the chances of default were low.

II. REGIONAL EXPERIENCE WITH DEFAULT JUDGMENTS

In the three years following the issuance of GC 11-04, some procedural issues and questions arose that led to the formation of a committee to examine these issues. The Committee¹ reviewed GC 11-04, GC 11-10, and the March 31, 2011 email, surveyed the Regions concerning their experience in seeking default judgment provisions in informal settlement agreements, and prepared a report to me with their recommendations. Additionally, the Office of the General Counsel solicited and received comments from some practitioners of the labor and management bar.

III. ISSUES

A. Removal or Modification of Default Judgment Language

It is the clear preference of the General Counsel to include default language in all informal settlements and compliance agreements. The use of default language is an effective and appropriate means to ensure that a charged party/respondent will comply with the affirmative provisions of the settlement agreement. The routine inclusion of default language in settlement agreements has resulted in a significant savings of Agency time and resources in cases in which the charged party/respondent has breached the terms of the settlement. Moreover, the inclusion of default language in informal settlement agreements and compliance agreements does not appear to have adversely impacted Regional office settlement rates or the success they enjoy in litigating cases they cannot settle.

As to settlements obtained prior to a Regional determination, an issue not specifically addressed in outstanding guidance, we recognize that there could be strong reasons for accepting a settlement without default judgment language in those circumstances. Since the settlement is being entered into voluntarily before the Region even seeks settlement, the likelihood of noncompliance may be very small. Thus, Regional Directors are allowed to exercise their discretion in deciding whether to approve a settlement without default language in a case in which there has been no Regional determination.

In cases where a Regional Director has determined that there were isolated instances of conduct by a non-recidivist, which requires only a cease and desist

¹ The Committee was composed of Richard Fox, Regional Attorney, Region 22; Joe Frankl, Regional Director, Region 20; Dan Halevy, Regional Attorney, Region 4; Chip Harrell, Regional Director, Region 10; Richard A. Bock, DAGC, Operations-Management; and Dottie Wilson, AGC, Operations-Management.

remedy, Regional Directors are allowed to exercise their discretion in deciding whether to approve a settlement without default language or with modified default language.

In cases where a Regional Director has made a merit determination and a non-recidivist is willing to fully and expeditiously remedy the violations before the Region issues complaint, Regional Directors are allowed to exercise their discretion in deciding whether to approve a settlement without default language or with modified default language.

Further, Regional Directors will continue to have discretion to negotiate changes in default language which limits the enforcement: 1) to the particular location where the unfair labor practice occurred, even though a charged party may have multiple facilities or 2) to a minimum of a six-month period after approval of the settlement agreement if the Region is confident that the chances of default are low.²

In all other situations relating to default judgment language, Regional Directors must consult Operations-Management before approving a settlement.

B. Language in Pre-Complaint Informal Settlement Agreements

In pre-complaint cases, Regional practice varies in identifying the allegations being settled and thus subject to default language in the event of a breach. Some Regions draft informal settlement agreements that contain the same allegations as would have been pled in a complaint. These terms are either incorporated into the settlement agreement or attached as riders. Other Regions include only the key allegations.

To address our dual objectives of (1) ensuring that we can get an enforceable Board order without litigating issues other than the alleged breach and (2) not preparing an entire complaint if possible, we have decided to modify the Scope of the Agreement and the Performance sections in a pre-complaint settlement. The NxGen settlement template will be revised to reflect these changes.

In the Scope of Agreement section, the first sentence will be slightly modified to make reference to all allegations covered in the Notice to Employees or the Notice to Employees and Members. Specifically, it will state:

This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees (or Notice to Employees and Members) made part of this agreement, and does not settle any other case(s) or matters.

The Performance section of a pre-complaint settlement will be changed to make clear that the complaint issued after an uncured breach would include the allegations covered by the Notice to Employees (or Notice to Employees and Members), as

² We have decided that the six-month period may run from approval of the settlement agreement rather than closure of the case.

referred to in the Scope of the Agreement Section, “as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. This language, coupled with the existing language that says the charged party understands and agrees that all the allegations of the complaint would be deemed admitted and it waives its right to file an Answer, will be sufficient to obtain a Default Judgment on the complaint and preclude litigation of any issue.

The Performance language showing the changes is set forth below.

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a **Complaint** that ~~will~~ **includes** the allegations **covered by the Notice to Employees (or Notice to Employees and Members), as identified** ~~spelled out~~ above in the Scope of Agreement section, **as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices.** Thereafter, the General Counsel may file a **Motion** for **Default Judgment** with the Board on the allegations of the **Complaint**. The Charged Party understands and agrees that all of the allegations of the **Complaint** will be deemed admitted and **that** it will have waived its right to file an Answer to such **Complaint**. The only issue **that the Charged Party may raise** before the Board is **will be** whether ~~the Charged Party~~ **it** defaulted on the terms of this Settlement Agreement. **The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees (or Notice to Employees and Members).** The Board may then, without necessity of trial or any other proceeding, find all allegations of the **Complaint** to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an **Order** providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board **Order** ex parte, after service or attempted

service upon Charged Party at the last address provided to the General Counsel.

C. Procedures for Enforcing Default Settlement Agreements

The survey results indicated that there is some confusion regarding the procedures to be followed in obtaining a default judgment based on a breach of the settlement agreement. This is particularly so where the breach consists of a failure to cease and desist from the types of conduct specified in the agreement in one case (“Case 1”), since such failures also constitute new unfair labor practices that typically must be litigated in a different case (“Case 2”). The principal areas of confusion are: 1) *when* to file the motion to enforce the default language (e.g., with complaint, after complaint, or after ALJD on “breaching” conduct); and 2) *where* to file (with Division of Judges, with the ALJ hearing the “breach” case, or with the Board). A number of Regions reported confusion stemming from filing with the ALJ hearing Case 2, including one ALJ who neglected to refer the motion in Case 1 to the Board along with his decision finding the breaching ULP in Case 2. On the other hand, there is no clearly recognized procedure or avenue for filing to enforce a default settlement directly with the Board.

In cases involving a breach of the cease and desist provision where the Region seeks a default judgment, nothing needs to be litigated before an ALJ apart from the conduct constituting the breach and any remedy flowing from that conduct. Thus, in cases where the Region has issued complaint alleging conduct that breaches the cease and desist provision (Case 2), once the ALJ has found a violation in Case 2, a breach of the settlement agreement in Case 1 is *prima facie* established. Thereafter, apart from any further review of the merits of the violation in Case 2, the only issues for the Board to consider would be any defenses that Respondent might assert as to why the violation in Case 2 does not constitute a breach in Case 1. For example, it might argue that the conduct in Case 2 is not of a type encompassed within the scope of the cease and desist language, or that the conduct in Case 2 is not sufficiently significant to constitute a breach. These are pure legal issues, which should be committed exclusively to the Board’s consideration. Of course, if the Board finds that there are factual issues warranting examination by the ALJ, the Board would be free to remand the case. Accordingly, in such cases, Regions should *not* file anything regarding Case 1 with the ALJ in Case 2.³ However, to avoid surprising Respondent by a subsequent motion for default judgment in Case 1, upon issuing complaint in Case 2 Regions should send Respondent a letter notifying Respondent of the Region’s intent to seek default judgment in Case 1 upon obtaining a favorable ALJD in Case 2.

³ One situation where it might be desirable to place the default agreement in Case 1 before the ALJ hearing Case 2 is where the GC is seeking enhanced remedies in Case 2 that depend on a finding of a violation in Case 1. In such a situation, the ALJ would need to have the default agreement in Case 1 before him or her in Case 2 in order to evaluate the General Counsel’s request. While the choice of remedy is ultimately up to the Board, generally it would be less cumbersome to have the entire remedial picture presented to the ALJ in the first instance.

This raises the questions of when, where, and how a Region should file an action seeking enforcement of the default language in Case 1. Once a breach has been established by the ALJ's finding of a subsequent ULP (or by an unanswered complaint or an admission) in Case 2, the process of obtaining a default judgment is analogous to that of obtaining a default in a no-answer case, or summary judgment in a no-issue "technical" 8(a)(5) case, or a Board order based on a formal settlement stipulation. First, the Region should issue a complaint in Case 1 that does not include a Notice of Hearing or require filing an Answer. To explain why no answer is required, the complaint should include the following paragraph:

Because Respondent has previously agreed that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to the Complaint, no Answer is required and no hearing is necessary.

Following issuance of complaint in Case 1, the Region should wait until the time for filing exceptions in Case 2 has expired before filing for default judgment in Case 1. If no exceptions are filed to the conduct that is the basis for seeking a default judgment, the Region should file a motion for default judgment with the Board, without moving to consolidate Case 1 and Case 2. If exceptions are filed to the conduct that provides the basis for the default judgment, the Region should file a motion for default judgment and move to consolidate Case 1 and Case 2. Thereafter, the Executive Secretary will likely issue a notice to show cause and, depending on the response, the Board would issue a decision and order or, if there is a factual issue to be resolved, refer the case to an ALJ.

In the first paragraph of the motion seeking a default judgment in Case 1, the Region should mention that Case 2 (which is pending before the Board) is related to Case 1. The motion should also indicate that the Respondent was made aware in Case 2 that it would be used as a basis for demonstrating a settlement breach in Case 1. Since the settlement agreement provides that, in the event of an unremedied breach, the Board may issue an order providing for a "full remedy," the Region should specify in the motion for default judgment the precise remedy it is seeking. The Region can either seek a "full remedy" on the reissued complaint allegations, or it can choose to request that the Board enforce the settlement provisions that have not been complied with. In addition, in either situation, the Region should also specify the affirmative provisions of the settlement that have been satisfactorily complied with. The Board can then either order compliance with the remaining aspects of the settlement agreement, or issue a cease and desist order on those provisions, but omit those affirmative provisions based on the satisfactory compliance.

To summarize, the steps that Regions should follow when a ULP that is the subject of a complaint also constitutes a breach of default language in an earlier case are:

1. Issue complaint in new ULP case (Case 2).
2. Send letter in Case 1 (settlement case) saying it is the Region's intent upon obtaining a favorable ALJD in Case 2 to file for Default Judgment in Case 1.

3. Litigate Case 2 to favorable ALJD.
4. Issue complaint in Case 1 without a notice of hearing or language about filing an Answer.
5. After the time for filing exceptions in Case 2 has expired, file a motion for default judgment with the Board in Case 1, following the template of a technical 8(a)(5) case. If exceptions are filed to the conduct in Case 2 that is the basis for seeking a default judgment in Case 1, the motion for default judgment should include a motion to consolidate Cases 1 and 2.
6. In the motion for default judgment, the Region should:
 - a. Mention that Case 2 is related to Case 1, which is pending before the Board.
 - b. Indicate that the Respondent was made aware in Case 2 that it would be used as a basis for demonstrating a settlement breach in Case 1.
 - c. Specify the precise remedy the Region is seeking (either a “full remedy” on the reissued complaint allegations, or enforcement of the settlement provisions that have not been complied with).
 - d. Specify the affirmative provisions of the settlement that have been satisfactorily complied with.

D. Language in Compliance Agreements

Appendix 16 of the Compliance manual has a sample Compliance Stipulation that contains default language for pre- and post- compliance specification situations. That Stipulation has been modified to be consistent with this memorandum. The modified stipulation is attached.

IV. SUMMARY

In summary, the changes and policy guidance regarding default judgments covered by this memorandum are as follows:

- *Removal or Modification of Language in Settlements Prior to a Regional Determination, After a Regional Determination of Isolated Conduct, or Prior to Complaint Issuance* -- If a charged party seeks to eliminate or modify the default judgment language in a settlement *prior* to a Regional determination, after Regional determination of non-recidivist isolated conduct with only a cease and desist remedy, or prior to complaint issuance where the non-recidivist agrees to fully and efficiently remedy the violations, the Region may exercise its discretion in deciding whether to approve such a settlement.
- *Geographic and Temporal Limits on Default Language* -- Regional Directors continue to have discretion to place certain limits on the default judgment language in the following situations:
 - Geographic limits – where the charged party has more than one facility, limiting the exercise of the default judgment provision to

subsequent alleged breaches that arise in the particular location where the initial unfair labor practice occurred;

- Temporal limits – where the Region is confident the chances of default are low, limiting the right to pursue default judgment to a minimum of a six-month period after approval of the settlement agreement.
- *Pre-Complaint Settlement Language* – As described above, the scope of agreement section of pre-complaint settlements should provide that the agreement settled all allegations covered by the attached Notice to Employees (or Notice to Employees and Members) and the Performance section of a pre-complaint settlement agreement should clarify that the complaint will include the allegations set forth in the Scope of Agreement section, that is those allegations covered by the Notice to Employees (or Notice to Employees and Members), as well as jurisdiction, labor organization status, appropriate bargaining unit if applicable and any other allegations as would normally be pled. That language coupled with the language stating that the charged party is waiving its right to file an answer to such allegations, will ensure a Board order without litigating anything other than non-compliance and will alleviate the need to draft an entire complaint.
- *Procedure for Breaches of Cease and Desist Provisions* – As described above, the process leading to a default judgment would be changed so that a Default Judgment Motion for noncompliance with cease and desist provisions would be filed after obtaining an ALJ decision in a new case finding the Respondent engaged in conduct covered by the cease and desist language of a settlement in a prior case. The Pleadings Manual will be revised to delete or modify Section 101.9 which consolidates cases for hearing where there was a failure to comply with the cease and desist provisions of a settlement.
- *Complaint to Obtain Default Judgment on Settlement Agreement* – The Pleadings Manual will be revised to add language for a complaint that will be the basis for a Default Judgment motion. That language will make clear that, by the terms of the settlement agreement, Respondent waived its right to file an answer so no hearing is needed. That language will be used instead of the standard language requiring an answer to the complaint and notifying the parties of a hearing.

/s/

A.P.

cc: NLRBU

APPENDIX 16

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION _____

Thorn Corporation

Case ____-CA-_____

and

Rose Gardener, an Individual

COMPLIANCE STIPULATION

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN Thorn Corporation (Respondent) and Rose Gardener (Gardener) and Region _____ of the National Labor Relations Board [Region _____], that:

1. On _____, 20____, the National Labor Relations Board (the Board), issued an Order adopting the Administrative Law Judge's recommended Decision in the above-captioned case. The Board Order directed Respondent, inter alia, to make Rose Gardener whole for any loss of earnings as a result of her being denied a full-time job on the second shift in October 20____.
2. Following issuance of the Board Order, Respondent, Gardener, and Region _____, reached agreement on the amount of backpay due and owing under the terms of the Order. That agreement has been reduced to writing in this Compliance Stipulation and based upon it the backpay obligation of Respondent will be discharged by payment to Gardener of the sum of \$93,633.00. This sum is comprised of \$80,188.00 in backpay and \$13,445.00 in expenses, excess tax liability reimbursement, and interest.
3. Within 14 days after receiving notice that this Stipulation has been approved by the Regional Director, Respondent will submit to Region _____ two checks, payable to Gardener, one in the amount of \$80,188.00 with normal Federal and state tax withholding, and one in the amount of \$13,445.00 without any withholdings. At the appropriate time, Respondent will issue Gardener an IRS Form W-2 for the backpay and an IRS Form 1099 for the expenses, excess tax liability reimbursement, and interest.
4. All parties agree that the backpay amounts specified above are correct and constitute the full backpay due pursuant to the Board's Order. All parties, therefore, hereby waive any right to a hearing or any other legal proceeding to dispute the accuracy of the amounts described above, or the findings of the Board and the Administrative Law Judge.
5. **Precompliance specification:**

The Respondent agrees that if it does not comply with any of the terms of this Compliance Stipulation, and after 14 days notice from the Regional Director of Region ____ the National Labor Relations Board of such noncompliance without remedy by the Respondent, the Regional Director will issue a compliance specification that will include the allegations that the backpay owed under the Board Order is (*Enter 100% amount*) through (*enter date of calculation of the 100% amount*). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the

compliance specification. The Respondent understands and agrees that all of the allegations of that compliance specification will be deemed admitted and it will have waived its right to file an Answer to that compliance specification. The only issue that may be raised before the Board is whether the Respondent defaulted on the terms of this Compliance Stipulation. The Board may then, without necessity of trial or any other proceeding, find all allegations of the compliance specification to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Respondent on all issues raised by the pleadings. The Board may then issue an order requiring Respondent to pay the amount set forth in the compliance specification. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Respondent/Respondent at the last address provided to the General Counsel.

Postcompliance specification:

The Respondent agrees that if it does not comply with any of the terms of this Compliance Stipulation, and after 14 days notice from the Regional Director of Region ___ of the National Labor Relations Board of such noncompliance without remedy by the Respondent, the Regional Director will reissue the compliance specification previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the compliance specification. The Respondent understands and agrees that the allegations of the compliance specification will be deemed admitted and its Answer to such compliance specification will be considered withdrawn. The only issue that may be raised before the Board is whether the Respondent defaulted on the terms of this Compliance Stipulation. The Board may then, without necessity of trial or any other proceeding, find all allegations of the compliance specification to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Respondent on all issues raised by the pleadings. The Board may then issue an order requiring Respondent to pay the amount set forth in the compliance specification. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Respondent/Respondent at the last address provided to the General Counsel.

6. This Stipulation contains the entire agreement between the parties concerning the backpay owed pursuant to the Board Order, there being no agreement of any kind, verbal or otherwise, that varies, alters, or adds to it.

Thorn Corporation

Rose Gardener, an Individual

By: _____

By: _____

Date: _____

Date: _____

Recommended:

Compliance Officer, NLRB

Date: _____

Approved:

Regional Director, Region _____

Date: _____