

findings of fact, conclusions of law, and remedies in the Decision:

I. THE WRITTEN WARNINGS

Respondent objects to the following mischaracterizations of evidence, misstatements of the record, misstatements of the law, misapplications of the law, findings, and conclusions in the Decision relating to the allegation that on June 30, 2015 Respondent violated Sections 8(a)(3) and (1) of the National Labor Relations Act (“the Act”) by issuing written warnings to Maintenance Engineer Edgar Guzman (“Guzman”) and Utility Housekeeper Santos a/k/a Sonny Ragunjan (“Ragunjan”):

1. Finding that Respondent’s managers and officials did not hold an honest belief that Guzman and Ragunjan had engaged in serious misconduct and therefore the conclusion that the written warnings violated the Act. *See* Decision at 3:21-23.
2. Characterizing the testimony of Executive Housekeeper Marissa Cacacho (“Cacacho”) as having stated that Ragunjan “invited” Utility Housekeeper Dany Pajinag (“Pajinag”) to have his picture taken and sign a union authorization card. *See* Decision at 4:8-10.
3. Finding that General Counsel’s Exhibit (“GC Exh.”) 13 indicates the incident with Guzman Pajinag reported on June 9, 2015 was not the first of its kind only because Pajinag wrote that Guzman “always bother[ed]” him. *See* Decision at 4:15-17.
4. Failing to characterize the testimony of Pajinag, who testified through an interpreter, the same way the Administrative Law Judge (“ALJ”) characterized the testimony of the General Counsel (“GC”)’s witnesses who testified through an interpreter. *Compare* Decision at 4:20-32, 5:28, 5:33, 6:1-2, fn.11 *with* Decision at 11:15-16, 12:18-19.
5. Characterizing Pajinag’s testimony that after counsel pointed out to him his written complaint dated May 22 referenced Ragunjan bothering him “again,” he changed his previous “story” that he had not told Cacacho about prior incidents with Ragunjan by stating, “I

cannot remember what I told [Cacacho].” *See* Decision at 4:24-26.

6. Misstating the record of Pajinag testifying, “I cannot remember *what* I told [Cacacho].” *See* Decision at 4:26 (emphasis added).

7. Characterizing Pajinag’s testimony that only *after* he was reminded of his statement that Guzman “always bothers me,” Pajinag “suddenly” recalled, “I told [Cacacho] that Edgar [Guzman] has not just bothered me once or twice.” *See* Decision at 4:29-30.

8. Applying a “double standard” when analyzing the testimony of GC’s witness Lotuseini Kava (“Kava”) versus the testimony of Respondent’s witness Pajinag. *Compare* Decision at 12:20-22, n.26 *with* Decision at 4:29-30.

9. Misstating the record regarding Pajinag’s testimony that when counsel asked him for “specifics” of what he told Cacacho about Guzman, his memory failed and he stated, “I don’t know. I forgot already.” *See* Decision at 4:30-32.

10. Misstating the record regarding Rooms Division Manager Jenine Webster’s (“Webster”) testimony that she and General Manager Mark DeMello (“DeMello”) decided to investigate because of “*their* belief” this “harassment or interference” *had* occurred numerous times. *See* Decision at 4:39-43 (emphasis added).

11. Misstating the record that “there [is] evidence that Respondent relied on any such [non-solicitation] policy in disciplining Guzman.” *See* Decision at 5:6 n.5.

12. Misstating the record that “[t]he testimony is unclear as to whether, at this point, Guzman acknowledged his wrongdoing referring to a workplace poster regarding non-solicitation.” *See* Decision at 5:6 n.5.

13. Misstating the record that Pajinag *only* told Webster and DeMello “what Ragunjan had said to him on May 21 and what Guzman had said to him on June 5 and June 9,”

but did not tell them that there had been additional incidents. *See* Decision at 5:29-31 (emphasis added).

14. Failing to recount Pajinag’s testimony about his meeting with Cacacho on June 15, let alone mention he testified about it at all, in the “Pajinag’s June 15 interview” section of the Decision. *See* Decision at 5:11-21.

15. Misstating the record that “Webster and DeMello *again* interviewed Pajinag” on June 15. *See* Decision at 5:13 (emphasis added).

16. Misstating the record that “Cacacho’s typewritten statement refers to the event occurring on June 12, not June 13.” *See* Decision at 5:21 n.7.

17. Finding that “[o]verall, Pajinag’s demeanor while testifying about the meeting [with Webster and DeMello] was relatively blasé, considering that, according to Respondent, he was describing reporting a then-recent death threat.” *See* Decision at 5:28 n.9. Failing to consider Pajinag’s testimony about his meeting with Webster and DeMello being relatively short compared to his testimony about his meetings with Cacacho during which he explained in greater detail the incidents he reported, including the incident during which Rangunjan threatened him. *See id.*

18. Characterizing Pajinag’s testimony that “his version of the interview [with Webster and DeMello] did not include any specific mention of the alleged ‘death threat’ Respondent claimed precipitated the meeting,” *see* Decision at 5:32-33, and misstating the record that “[w]hat he told Webster and DeMello, Pajinag testified, was the information contained within his two handwritten statements (GC Exh. 13, R. Exh. 13), *not* Cacacho’s typewritten notes.” *See* Decision at 5:33 n.10 (emphasis in original).

19. Misstating the record that Pajinag testified “that the ‘watch your back’ threat had

occurred *prior to* his first complaint to Cacacho on March 22,” *see* Decision at 5:33; 6:1-2, based on the characterization of Pajinag’s testimony that he “clearly testified, after being asked whether there was anything else he recalled about the May 21 incident, that there was ‘one thing before’ and then described the watch your back incident.” *See* Decision at 6:2 n.11.

20. Characterizing Pajinag’s testimony as his “claim[ing] he could not recall when” the “watch your back” incident occurred. *See* Decision at 6:2 n.11.

21. Finding the “watch your back” incident Pajinag described happened before May 22, not on the Saturday prior to June 15. *See* Decision at 6:2 n.11.

22. Mischaracterizing the record that “[t]here is no credible evidence that, following [the June 15] interview [with Webster and DeMello], Respondent took any interim steps to prevent a further confrontation between Pajinag and either Ragunjan or Guzman.” *See* Decision at 6:8-10.

23. Not crediting DeMello’s testimony that he and Webster instructed Cacacho to monitor Pajinag while he was working and to keep a “close eye” on the situation because DeMello’s testimony went uncorroborated and had a “self-serving ring to it.” *See* Decision at 6:10 n.13.

24. Failing to include a discussion regarding the adverse inference raised by Ragunjan not testifying. The only reference to this is one footnote in which the ALJ indicates “Ragunjan did not testify.” *See* Decision at 6:23 n.14.

25. Misstating the record that “[Webster] made no mention of confronting Ragunjan with the alleged threat but instead testified he was simply asked was [sic] whether he had ever requested that someone take a picture for a non-work related purpose.” *See* Decision at 6:28-30.

26. Misstating the law, under the *Burnup & Sims* framework, the burden is on the

employer to show it held an honest belief that the employee engaged in “*serious misconduct*” (Decision at 7:32, 34-35; 8:4, 11, 21; 9:13; 10:3) (emphasis added).

27. Misapplying the law through an analogy to *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 5 (2014) and *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999), enf’d 213 F.3d 750 (D.C. Cir. 2000) for the proposition that an “employee’s Section 7 activity does not lose protection merely because it makes [a] fellow employee uncomfortable.” See Decision at 7:38-41.

28. Misapplying the law through the analogy to *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) for the proposition that “[l]egitimate managerial concerns to prevent harassment do not justify ... discipline on the basis of the subjective reactions of others to [employees’] protected activity.” See Decision at 7:41; 8:1-2.

29. Finding that Respondent failed to meet its *Burnup & Sims* burden. See Decision at 8:22.

30. Finding that much of the testimony offered by Respondent’s witnesses regarding the events leading to the June 30 written warnings “appeared rehearsed.” See Decision at 8:24-25.

31. Finding that Cacacho had “trouble” remembering which employee Pajinag had complained about and when. See Decision at 8:25-26.

32. Finding that DeMello and Webster “struggled” to recite convoluted questions they “claim” to have asked when interviewing the discriminatees. See Decision at 8:27-28.

33. Finding that Cacacho, Webster and DeMello each “parsed” their answers in a manner that did not suggest forthrightness. See Decision at 8:28-29.

34. Finding that “[u]ltimately” Respondent’s management witnesses could not agree

on a consistent version of the facts and contradicted each other on significant details, such as whether Ragunjan had ever been confronted with the alleged death threat. *See* Decision at 8:29-32.

35. Crediting Pajinag’s “more unvarnished” version of events, which “departed from Respondent’s script” in key respects. *See* Decision at 8:34-35.

36. Misstating the record that Pajinag testified that his specific complaints regarding Guzman were based on “two” conversations with Guzman four days apart. *See* Decision at 8:35-37.

37. Finding that Pajinag reported “at most” a single incident with Ragunjan on May 21 and an allegedly threatening comment by Ragunjan occurring some time before that. *See* Decision at 8:37; 9:1.

38. Concluding that this case significantly differs from *BJ’s Wholesale Club*, 318 NLRB 684 (1995). *See* Decision at 9:1-3.

39. Finding that Pajinag denied complaining about Guzman and Ragunjan “interfering with him getting his work done” but rather “clearly testified that he just wanted his coworkers to stop ‘bothering’ him about the Union.” *See* Decision at 9:7-9.

40. Misapplying the law by analogizing to *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004) and *Consolidated Diesel Co.*, 332 NLRB at 1020 (2000) for the proposition an employer may not lawfully discipline an employee for making pro-union statements merely causing another employee to feel uncomfortable. *See* Decision at 9:9-12.

41. Concluding that Guzman and Ragunjan’s behavior about which Pajinag complained “falls far short” of the Board’s standard for “‘serious misconduct’” in the course of protected activity. *See* Decision at 9:12-13.

42. Concluding that Respondent's investigation into Pajinag's complaints further suggests it did not honestly believe either Guzman and or Ragunjan's solicitations for a photograph and/or union authorization card interrupted Pajinag's work or otherwise lost the Act's protection. *See* Decision at 9:15-17.

43. Finding that instead of responding to Pajinag's complaints with interim action, Respondent's managers focused on amassing documentation of the alleged misconduct. *See* Decision at 9:18-19.

44. Concluding that Respondent's failure to interview an identified witness (based solely on Pajinag's speculation about that individual's hearing range) and refusal to inform Ragunjan or Guzman of the identity of their accuser reflects prejudgment of the situation inconsistent with a good-faith investigation. *See* Decision at 9:19-23.

45. Despite mentioning that a witness was identified, *see* Decision at 9:20, failing to draw an adverse inference based on the GC's failure to call Vilma, the housekeeper Guzman referred to in his testimony as a witness to the third interaction he had with Pajinag on the 25th floor.

46. Concluding that it is appropriate to analogize to *Arkema, Inc.*, 357 NLRB 1248, 1248-49 (2011) for the proposition that failing to allow an employee to refute an allegation indicates a lack of honest belief in misconduct. *See* Decision at 9:23-24.

47. Characterizing Respondent's response to Pajinag's complaint that Ragunjan recently physically threatened him as "languid and tepid." *See* Decision at 9:29-30.

48. Finding that Respondent's response to Pajinag's complaint that Ragunjan threatened him was not consistent with the actions of a concerned employer seeking to ascertain the truth of the matter, or to otherwise respond to such a serious allegation. *See* Decision at 9:29-

32.

49. The Administrative Law Judge contradicting herself by finding that Respondent over-reacted to Pajinag's complaints about Ragunjan by issuing Ragunjan a written warning, *see* Decision at 10:4, but at the same time under-reacted by not contacting law enforcement or suspending Ragunjan, *see* Decision at 9:33-24.

50. Finding that DeMello and Webster failed to confront Ragunjan about the loading dock incident. *See* Decision at 9:35-36.

51. Misapplying the law by relying on *Remington Lodging & Hospitality, LLC* (*Sheraton Anchorage*), 363 NLRB No. 6, 16 (2015) and *K & M Electronics*, 283 NLRB 279, 291 n.45 (1987) for the proposition that the failure to elicit an accused employee's version of events is inconsistent with a good-faith investigation. *See* Decision at 9:37-39.

52. Concluding that Respondent failed to establish that it disciplined Guzman and Ragunjan based on an honestly held belief that they had engaged in serious misconduct in the course of protected activity. *See* Decision at 10:2-4.

53. Concluding that the written warnings violated the Act. *See* Decision at 10:4.

II. THE EMPLOYEE MEETINGS

Respondent objects to the following mischaracterizations of evidence, misstatements of the record, misstatements of the law, misapplications of the law, findings, and conclusions in the Decision relating to the allegation that on May 19, 2015 Respondent, by Executive Vice President of Operations Gary Ettinger ("Ettinger"), violated Section 8(a)(1) of the Act by having (a) directed employees to stop participating in Union-organized rallies; (b) directed employees to stop visiting the homes of coworkers to engage in Union and/or other protected concerted activities; (c) impliedly threatened employees with losing their jobs for engaging in Union and/or protected concerted activities by telling them that they were lucky to have jobs; and (d) told

employees to apologize to Respondent for engaging in Union and/or protected concerted activities.

54. Finding that Respondent, by Ettinger, violated the Act as alleged. *See* Decision at 10:22.

55. Misstating the record that “Ettinger spoke from prepared bullet points,” *see* Decision at 10:36, and “[u]nder Fed. R. Evid. 611(c) examination, Ettinger adopted his typed bullet points as an accurate reflection of what he said.” *See* Decision at 10:36 n.22.

56. Characterizing counsel as “attempt[ing] to have Ettinger backtrack on this point [about the bullet points].” *See* Decision at 10:36 n.22.

57. Misstating the record that Ettinger “said [at the meetings] that guests were complaining about the rallies, and that, going into the Hotel’s busy season, he was concerned that this conduct would drive away business and reduce work opportunities” and “that the noisy rallies were ‘disturbing guests,’ creating an environment not ‘conducive’ to guests enjoying their vacations and ‘having a deleterious impact on business.’” *See* Decision at 11:5-7.

58. Misstating the record that “[n]ext [Ettinger] said that certain employees had complained about being bothered, at home and at work, by pro-Union employees” and “[t]his conduct, he said was causing ‘acrimony’ and ‘discomfort’ among the employees.” *See* Decision at 11:9-11.

59. Misstating the record that “General Counsel’s witnesses, none of whom speak English as a primary language, testified, to the best of their ability, as to what Ettinger said in English.” *See* Decision at 11:15-16.

60. Misstating the record that “Kava testified that Ettinger said *the rallies* needed to end.” *See* Decision at 11:20-21 (emphasis added).

61. Misstating the record that “DeMello confirmed that Ettinger used terminology such as ... ‘in-fighting’ and ‘dissention’ when describing the atmosphere the Union created.” The ALJ relied on Respondent’s Exhibit 17 for this statement. *See* Decision at 11:11 n.23.

62. Misstating the record that “Fabro *and* Daniels testified that Ettinger told the employees to stop banging pots and pans.” *See* Decision at 11:19.

63. Misstating the record that “Fabro *and* Daniels testified that Ettinger told the employees ... to stop bothering their coworkers at home.” *See* Decision at 11:19-20 (emphasis added).

64. Crediting Webster’s meeting notes regarding Ettinger’s remarks set forth in Exception 12 because “Ettinger related a gentler version.” *See* Decision at 12:5 n.12.

65. Misstating the record that “[*a*]ll three witnesses testified that Ettinger said – in *simple* English – they were lucky to have jobs.” *See* Decision at 12:6-7 (emphasis added).

66. Misstating the record that, “according to Fabro and Daniels, [Ettinger] ... said they could stop by his office and apologize to him.” *See* Decision at 12:8-9.

67. Failing to find any significance in the fact that Kava did not testify that Ettinger said anything about the employees apologizing to him or to stop bothering coworkers in their homes and thus did not corroborate Fabro and Daniels’ testimony on these two points. *See* Decision at 11:19-20; 12:8-9.

68. Crediting the GC’s witnesses regarding Ettinger’s statements. *See* Decision at 12:16.

69. Finding Fabro was “especially credible” because “he listened carefully to questions and maintained the same demeanor regardless of who was examining him.” *See* Decision at 12:16-18.

70. Finding Daniels was credible because she was “certain of what she understood Ettinger to have said” and recounted it in English. *See* Decision at 12:18-20.

71. Finding that although “Kava’s recollection was not as complete as the two others [sic],” Kava was credible because “her demeanor was composed and steady, and she struck [the ALJ] as committed to speaking the truth.” *See* Decision at 12:20-22.

72. Finding that Ettinger’s testimony was “less than fully credible,” *see* Decision at 12:28, because “[h]is dismissive denials, sometimes accompanied by laughter, struck [the ALJ] as a sign of nervousness and discomfort, particularly regarding the specific statements the GC’s witnesses attributed to him.” *See* Decision at 12:28-30.

73. Finding that “Respondent’s remaining witnesses gave guarded testimony that presented as less than forthright.” *See* Decision at 12:31.

74. Finding that “[b]oth DeMello and Afable appeared nervous while testifying, as if unsure which of Ettinger’s remarks might damage Respondent’s case.” *See* Decision at 12:32-33.

75. Finding that Haines “appeared uncomfortable testifying about the meetings; she was only able to recall vague portions of the meeting and then simply stated denials in response to leading questions.” *See* Decision at 12:36.

76. Misstating the record that Haines “claimed to have typed [her notes of the meeting (Resp. Exh. 16)] based on her contemporaneous handwritten notes.” *See* Decision at 12:36 n.27.

77. Finding Webster only “slightly” more credible than Respondent’s other witnesses. *See* Decision at 12:36; 13:1-2.

78. Misstating the law that “[t]he test of whether a statement is unlawful is whether

the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *See* Decision at 13:17-19 (internal quotations and citation omitted).

79. Misstating the law that *NLRB v. Gissel Packing Co.*, 395 U.S. 575,620 (1969) stands for the proposition that “[a]n employer will be held accountable for misleading or confusing statements that would reasonably tend to chill an employee’s protected activity.” *See* Decision at 13:22-33.

80. Misapplying the law through the analogy to *Brandenburg Tel. Co.*, 164 NLRB 825, 831-32 (1967) for the proposition “[a] high ranking employer official who peppers his remarks with provocative phrases ‘skillfully chosen to obscure their definitive meaning or to create a double entendre’ may violate the Act where those remarks effectively instill fear of economic jeopardy in the minds of the employees listening.” *See* Decision at 13:41-47.

81. Relying on *Labriola Baking*, 361 NLRB No. 41, 2, 4 (2014) for support in finding Ettinger’s comments at the meeting violated Section 8(a)(1) “where the coercion took the form of a mistranslation unwittingly sanctioned.” *See* Decision at 14:8-10.

82. Relying on *Cream of the Crop*, 300 NLRB 914, 917 (1990) for support in finding that Ettinger’s comments at the meeting violated Section 8(a)(1) “where the coercion took the form of a mistranslation unwittingly sanctioned.” *See* Decision at 14:8-10.

83. Concluding that “where the employer fails to take reasonable steps to ensure that its antiunion message is accurately understood by its multilingual workforce, ... it should be held accountable for the results.” *See* Decision at 14:11-14.

84. Failing to properly apply the reasonable employee standard when evaluating whether Ettinger’s comments violated the Act. *See* Decision at 14-15.

85. Finding that Ettinger’s comments violated the Act. *See* Decision at 14:16.

86. Finding that because Ettinger's speech was "peppered with outmoded, bookish phraseology, such as 'deleterious impact' and 'acrimony,' critical portions of Ettinger's remarks were virtually ensured to be understood in only the most basic terms by those in attendance." *See* Decision at 14:16-19.

87. Finding that "Ettinger apparently considered the subtlety of his message to require the use of such ornate language...." *See* Decision at 14:19 n.28.

88. Misstating the record that "[a]ccording to the GC's witnesses, those basic terms [understood by the attendees] were: (a) stop the rallies or you will lose work, and (b) stop bothering your coworkers about the Union or the police will be involved¹." *See* Decision at 14:19-21.

89. Failing to explain which of Ettinger's comments, even those the GC's witnesses testified he said, contained a threat of reprisal or force or promise of benefit. *See* Decision at 14:16.

90. Finding "[f]rankly, mentally "editing" out Ettinger's antiquated verbiage from his own admitted account of the meeting leaves [the ALJ] with very much the same impression." *See* Decision at 14:21 n.29.

91. Relying on *Lancaster Fairfield Comm. Hosp.*, 311 NLRB 401, 401 (1993) to support the finding that a reasonable employee would have understood that Ettinger was telling them to stop their union organizing and noisy protests. *See* Decision at 14:30-33.

92. Relying on *American Tool & Engineering Co.*, 257 NLRB 608, 608 (1981) to support the finding that a reasonable employee would have understood that Ettinger was telling them to stop their union organizing and noisy protests. *See* Decision at 14:27-30, 33-35.

¹ This repackaging of the testimony by the ALJ is particularly alarming since it suggests that the GC's witnesses testified that Ettinger said that *Respondent* would call the police if the employees continued to "bother" their coworkers about the Union.

93. Finding that Ettinger’s remarks did not refer to the overall job market. *See* Decision at 14:38 n.30.

94. Finding that Ettinger’s remarks – which the ALJ found did not refer to the assembled employees’ skill level or the overall job market – effectively linked the employee’s ability to remain “lucky” (i.e., employed) with their compliance with his directive that they cease their protected conduct. *See* Decision at 14:38 n.30.

95. Relying on *Children’s Services Int’l*, 347 NLRB 67 (2006) to support the conclusion that Ettinger’s remarks constituted a threat of reprisal of losing their jobs if they did not stop engaging in protected conduct. *See* Decision at 14:38 n.30.

96. Failing to address specifically why the alleged comment about “stop bothering your coworkers at home” violates the Act. *See* Decision at 13:4-47; 14:12-38; 15:2-9.

97. Failing to explain why Ettinger violated the Act as alleged regarding the allegation that he “told employees to apologize to Respondent for engaging in union and/or protected concerted activities.” *See* Decision at 10:15-16, 22.

98. Failing to address the adverse inference drawn from, or even mentioning that, Daniels, a GC witness, admitted she took notes of what Ettinger said at the meeting on her cell phone which she still possessed, but neither the GC nor the Charging Party offered Daniels’ notes into evidence. *See* Tr. at 330:20-25, 331:1-15.

III. THE HANDBILLING INCIDENT

Respondent objects to the following mischaracterizations of evidence, misstatements of the record, misstatements of the law, misapplications of the law, findings, and conclusions in the Decision relating to the allegation that on August 11, 2015 Respondent, by Universal Protection Services Security Site Supervisor Andrew Smith (“Smith”), violated Section 8(a)(1) of the Act by impliedly threatening off-duty employees with discipline for engaging in Union and/or

protected concerted activities in non-work areas.

99. Misstating the record that the GC alleges, on August 11, Respondent, by Smith, unlawfully threatened employees with discipline for distributing union literature near the lower lobby of the Hotel. *See* Decision at 15:13-15. The Consolidated Complaint does not allege Smith “unlawfully threatened” but rather “impliedly threaten[ed]” employees with discipline. *See* GC Exh. 1w at 5.

100. Misstating the record that the “lower lobby acts [sic] a main entrance for the Hotel...” *See* Decision at 15:21.

101. Misstating the record that the lower lobby is “not where guests regularly check in” and “[w]hile large groups may check in at the lower lobby, this is *relatively uncommon*” *See* Decision at 15:21-22 n.31 (emphasis added).

102. Finding that the “entrance area” to the lower lobby is “the tiled area containing the pillars abutting the driveway.” *See* Decision at 15:28-29.

103. Misstating the record that the lobby is open to the public. *See* Decision at 15: 32-33.

104. Finding Smith’s testimony that only Hotel guests – not members of the public – were permitted to actually sit in the lobby lacked foundation because he merely claimed to inform anyone he *identified* as a non-guest the seating was for Hotel guests only. *See* Decision at 15:33 n.32 (emphasis in original).

105. Misstating the record that the “*upper* lobby area ... contains a large restaurant run by the Hotel.” *See* Decision at 15:37-38 (emphasis in original).

106. Misstating the record that “Ettinger testified that this [‘breakfast on the beach’] event was held in the upper lobby.” *See* Decision at 16:1-2; 2 n.33.

107. Finding DeMello's testimony that "due to a lack of space, guests would 'oftentimes' bring their breakfast meal down to the lower lobby and eat it in the lobby seating area" was "less than convincing" because "it was apparent that he was quite focused on 'selling' the open-air experience of the lower lobby." *See* Decision at 2 n.33.

108. Misstating the record that the "bell and valet stand [is] situated *far* to one side of the entrance area" in the lower lobby. *See* Decision at 16:4-5.

109. Failing to note that although Smith testified that maintenance employees are "not regularly assigned" to the lower lobby, they work there when called to fix something and Smith has "seen them there for about a period of five hours sometimes." *See* Tr. at 120:2-14.

110. Misstating the record that "[t]respassing' means barring an unwanted person from the Hotel property for a year with the threat that, should they return within that year, they would risk arrest." *See* Decision at 16:21-23.

111. Misstating the record that Smith told Jonathan Ching ("Ching"), "you're not allowed to pass out pamphlets on property." *See* Decision at 16:34.

112. Failing to mention that Smith testified he does not have authority to issue discipline at the Hotel and he did not understand Webster's instruction to him regarding the verbal warning as an instruction to issue discipline to either Ching or Lakai Wolfgramm ("Wolfgramm"). The ALJ also failed to refer to Smith's clarification of what he meant by a "verbal warning." *See* Decision at 16:33-34.

113. Misstating the record that "Smith again told Ching he would 'trespass' him unless he refused to stop handbilling and left the property (which they did). (Id. at 72-74)." *See* Decision at 17:1-2.

114. Misstating the record that "Smith (as instructed) specifically invoked the

‘trespass’ procedure – which was known to involve an automatic one-year penalty from the Hotel.” *See* Decision 18:7-8.

115. Misstating Respondent’s argument (from Respondent’s Post-Hearing Brief) regarding why the Hotel’s lower lobby differs from the areas in which the employees attempted to distribute literature in *Santa Fe Hotel*, 331 NLRB 723 (2000) and its progeny. The ALJ states, “Respondent argues that, due to the lower lobby’s open air-design, the refusal to allow Ching and Wolfgramm [sic] distribute handbills on August 11 should not be judged by [the *Santa Fe Hotel*] standard. Specifically, according to Respondent, the Hotel operation’s primary function differs from that of a traditional hotel or casino in that it includes providing ‘outdoor lounging and food and beverage services to its guests’” *See* Decision at 18:27-31.

116. Although stating that “[t]he Board law is clear that activities such as security, maintenance and valet parking, which typically occur in a hotel lobby, are incidental to a hotel’s primary function, and thus insufficient to transform a hotel’s front entrance area into a ‘work area’ where an employer may lawfully ban employee distributions,” *see* Decision at 18:21-24, failing to mention that Respondent provides more than just security, maintenance and valet parking in its lower lobby.

117. Finding that “[b]ut for the lack of structural façade, [Ching and Wolfgramm] were positioned similarly to the employees in the Board’s prior hotel handbilling cases, and as in those cases, in an area where the only operations carried out are incidental to the Hotel’s main function.” *See* Decision at 16-19.

118. Finding “that the entrance area, as [the ALJ] defined it above, constitutes a nonwork area of the Hotel, and therefore ... that Respondent, by Smith, unlawfully threatened Ching and Wolfgramm with unspecified reprisals if they handbilled there.” *See* Decision at

19:21-23.

119. Concluding, “even were the area where Ching and Wolfgramm stood found to be a working area, Smith’s order would be unlawful, in that – based on his explicit instructions from Hotel management – he threatened to ‘trespass’ them if they did not leave the Hotel property, not just the lower lobby;” and, “[a]s such, to the extent that his order acted to ban the employees from handbilling anywhere on Respondent’s property, it was unlawful regardless of where they stood when Smith issued it.” *See* Decision at 19:23-28.

IV. REMEDY

Respondent objects to the remedy recommended in the Decision, *see* Decision at 20, the Order, *see* Decision at 20-21, and the Appendix Notice to Employees as unwarranted based on the above Exceptions.

DATED: Honolulu, Hawai`i, June 28, 2016.

TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
Attorneys at Law, A Law Corporation



ROBERT S. KATZ
CHRISTINE K. DAVID
Attorneys for Respondent
AQUA-ASTON HOSPITALITY, LLC D/B/A
ASTON WAIKIKI BEACH HOTEL AND
HOTEL RENEW

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

UNITE HERE LOCAL 5,
Charging Party,

v.

AQUA-ASTON HOSPITALITY, LLC D/B/A
ASTON WAIKIKI BEACH HOTEL AND
HOTEL RENEW,

Respondent.

CASE NOs. 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 28, 2016 a copy of *Aqua-Aston Hospitality, LLC D/B/A Aston Waikiki Beach Hotel And Hotel Renew's Exceptions to Administrative Law Judge's Decision* was electronically filed with the National Labor Relations Board Division of Judges and served via e-mail upon:

Scott Hovey, Counsel for General Counsel
National Labor Relations Board
Sub-Region 37
300 Ala Moana Blvd., Rm. 7-245
P. O. Box 50208
Honolulu, Hawai`i 96850-7245
Scott.HoveyJr@nlrb.gov

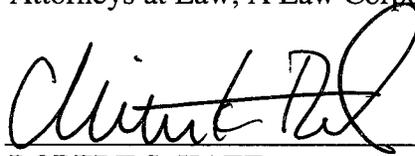
Dale Yashiki, Officer-in-Charge
National Labor Relations Board
Sub-Region 37
300 Ala Moana Blvd., Rm. 7-245
P.O. Box 50208
Honolulu, Hawaii 96850-7245
Dale.Yashiki@nlrb.gov

Jill H. Coffman, Acting Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735
Jill.Coffman@nlrb.gov

Jennifer Cynn, Esq.
UNITE HERE! Local 5
1516 South King Street
Honolulu, Hawai'i 96850
Jcynn@unitehere5.org

DATED: Honolulu, Hawaii, June 28, 2016.

TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
Attorneys at Law, A Law Corporation



ROBERT S. KATZ
CHRISTINE K. DAVID
Attorneys for Respondent
AQUA-ASTON HOSPITALITY, LLC D/B/A
ASTON WAIKIKI BEACH HOTEL AND
HOTEL RENEW