

TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT	1
A. The Written Warnings	1
B. The Employee Meetings	2
C. The Handbilling Incident	2
II. STATEMENT OF THE CASE	3
A. The Written Warnings	3
B. The Employee Meetings	8
C. The Handbilling Incident	11
III. QUESTIONS INVOLVED	13
IV. ARGUMENT	14
A. Standard of Review	14
B. The ALJ’s Decision is not supported by a preponderance of the evidence and misapplies the law	15
1. The ALJ misstates and mischaracterizes the record	15
a. The Written Warnings	15
b. The Employee Meetings	20
c. The Handbilling Incident	25
2. The ALJ fails to include relevant and necessary portions of the record in the Decision	29
a. The Written Warnings	29
b. The Handbilling Incident	30
3. The ALJ makes improper credibility resolutions	31
a. The Written Warnings	31
b. The Employee Meetings	32
c. The Handbilling Incident	34
4. The ALJ applies a “double standard” when analyzing the evidence of Respondent versus the General Counsel	35
a. The Written Warnings	35
5. The ALJ fails to support her findings	36
a. The Written Warnings	36
b. The Employee Meetings	36

TABLE OF CONTENTS
(continued)

	Page
c. The Handbilling Incident	37
6. The ALJ misstates the law	38
a. The Written Warnings	38
b. The Employee Meetings	38
7. The ALJ misapplies the law	39
a. The Written Warnings	39
b. The Employee Meetings	43
c. The Handbilling Incident	48
V. CONCLUSION.....	48

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Greater Omaha Packing Co., Inc. v. NLRB</i> , 790 F.3d 816 (8th Cir. 2015)	38
<i>NLRB v. Burnup & Sims</i> , 379 U.S. 21 (1964)	38
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	38, 45
FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS	
29 C.F.R. § 102.46	1
29 C.F.R. § 102.48(c)	14
First Amendment	38
NLRB DECISIONS	
<i>American Tool & Engineering Co.</i> , 257 NLRB 608 (1981).....	46
<i>Arkema, Inc.</i> , 357 NLRB 1248 (2011)	41
<i>BJ's Wholesale Club ("BJ's")</i> , 318 NLRB 684 (1995)	40, 41
<i>Brandenburg Tel. Co.</i> , 164 NLRB 825 (1967).....	43, 44
<i>Chartwells, Compass Group, USA</i> , 342 NLRB 1155 (2004)	41
<i>Children's Services Int'l</i> , 347 NLRB 67 (2006).....	47
<i>Consolidated Diesel Co.</i> , 332 NLRB 1019 (2000).....	41, 40
<i>Cream of the Crop</i> , 300 NLRB 914 (1990).....	44, 45
<i>Daikichi Sushi</i> , 335 NLRB 622 (2001).....	31, 32, 35
<i>Echostar Technologies, LLC</i> , Case 27-CA-066720, 2012 NLRB LEXIS 627 (Sept. 20, 2012)	45
<i>Farm Fresh Co.</i> , 361 NLRB No. 83, 2014 NLRB LEXIS 830 (Oct. 30, 2014)	38
<i>Frazier Industrial Co.</i> , 328 NLRB 717 (1999), enf'd 213 F.3d 750 (D.C. Cir. 2000).....	40
<i>Fresh and Easy Neighborhood Market, Inc.</i> , 361 NLRB No. 12 (2014)	40

Health Care Management Corp., 295 NLRB 1144 (1989)43

Ideal Dyeing & Finishing Co., 300 NLRB 303 (1990), *aff'd*, Civ. No. 91-70103, 1992
U.S. App. LEXIS 4247 (9th Cir. 1992)42

K & M Electronics, 283 NLRB 279 (1987).....43

Labriola Baking, 361 NLRB No. 41 (2014).....44

Lancaster Fairfield Comm. Hosp., 311 NLRB 401 (1993).....46

Remington Lodging & Hospitality, LLC (Sheraton Anchorage), 363 NLRB No. 6 (2015)43

Riley Stoker Corp., 223 NLRB 1146 (1976)39

Roosevelt Mem'l Med. Ctr., 348 NLRB 1016 (2006).....39

Santa Fe Hotel, 331 NLRB 723 (2000).....27

Standard Dry Wall Products, Inc., 91 NLRB 544 (1950) 14

Stevens Creek Chrysler Jeep Dodge, Inc., 357 NLRB No. 57, 191 LRRM 1328 (2011) 14

Westinghouse Electric Corp., 277 NLRB 136 (1985).....43

**AQUA-ASTON HOSPITALITY, LLC D/B/A ASTON WAIKIKI BEACH
HOTEL AND HOTEL RENEW'S BRIEF IN SUPPORT OF
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew ("Respondent"), pursuant to 29 C.F.R. § 102.46, submits this Brief in support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") dated May 31, 2016 and modified June 17, 2016 ("Decision"). For the reasons stated below and in Respondent's accompanying Exceptions, the National Labor Relations Board ("NLRB" or "Board") should not adopt the ALJ's Decision.

I. SUMMARY OF ARGUMENT

A preponderance of the evidence does not support the Decision. The ALJ simply makes too many misstatements of the record and misapplications of the law for the Board to uphold her findings and conclusions.

A. The Written Warnings

A preponderance of the evidence does not support the ALJ's conclusion that Respondent's managers and officials did not hold an honest belief that Employees Edgar Guzman ("Guzman") and Santos a/ka Sonny Ragunjan ("Ragunjan") had engaged in misconduct justifying their written warnings. First, the ALJ misstates the record and mischaracterizes the testimony in such a way that minimizes the managers' and officials' honest belief that Guzman and Ragunjan had engaged in misconduct. The ALJ makes inaccurate findings based on these misstatements and mischaracterizations, especially with regard to conflicting testimony by Respondents' witnesses. Second, the ALJ makes credibility resolutions regarding Respondents' witnesses based on factors not included in the *Daikichi Sushi* test the ALJ purports to apply. Third, the ALJ applies a "double standard" when analyzing Employee Daniel Pajinag's

(“Pajinag”) testimony versus the General Counsel’s (“GC”) witnesses’ testimony. Finally, the ALJ misstates and misapplies the law with regard to the *Burnup & Sims* framework and the adverse inference principal to find that the written warnings violated the Act.

B. The Employee Meetings

A preponderance of the evidence does not support the ALJ’s conclusion that Respondent, by Executive Vice President of Operations Gary Ettinger (“Ettinger”), violated the Act. First, the ALJ misstates and mischaracterizes the record in such a way that leads the reader to erroneously believe that Ettinger *admitted* to using “outmoded, bookish phraseology” when speaking to the employees, that the GC’s witnesses testified *in unison* regarding what Ettinger told the employees, or even testified that Ettinger told the employees to “stop the rallies or you will lose work” and “stop bothering your coworkers about the Union or the police will be involved.” Second, the ALJ again makes credibility resolutions regarding Respondents’ witnesses based on factors not included in the *Daikichi Sushi* test, fails to discredit GC witness Lotuseini Kava (“Kava”) based on factors in the test, and discredits Ettinger based solely on demeanor despite the presence of corroboration. Third, the ALJ fails to support key findings, including why the “stop bothering your coworkers at home” comment violates the Act and how Ettinger allegedly “inviting” employees to apologize to him is the same as *telling* them to do so, as alleged. Finally, the ALJ misapplies the law regarding the test of whether a statement is unlawful, mistranslation of employer statements, and the reasonable employee standard.

C. The Handbilling Incident

A preponderance of the evidence does not support the ALJ’s conclusion that the “entrance area” to the lower lobby is a work area or the ALJ’s conclusion that independent Security Guard Andrew Smith’s (“Smith”) statements to Jonathan Ching (“Ching”) and Lakai Wolfgramm (“Wolfgramm”) constituted an implied threat of discipline or an unlawful threat of

future unspecified reprisals. The ALJ misstates the record and mischaracterizes the testimony in such a way that leads the reader to inaccurately believe that the lower lobby is indistinguishable from the areas found to be non-work areas in the *Santa Fe Hotel* case and its progeny and to an incorrect understanding of Smith's testimony about Respondent's trespass policy.

II. STATEMENT OF THE CASE

A. The Written Warnings

On May 22, 2015, recently hired AWBH Houseman Dany Pajinag ("Pajinag") made an unscheduled visit to his Department Manager, AWBH Executive Housekeeper Marissa Cacacho ("Cacacho"). *See* Tr. at 544:7-9, 546:13-16, 585:24-586:1-4. Pajinag told Cacacho that he could not perform his job duties because of repeated interruptions by pro-Union supporter Ragunjan, the most recent of which had occurred the previous day. *See* Tr. at 549:13-21, 551:4-25, 552:1-14, 554:5-22. Pajinag told Cacacho that Ragunjan had **repeatedly** confronted Pajinag while working because he wanted Pajinag to sign a Union authorization card and/or have his photograph taken for a pro-Union flyer. *See* Tr. at 547:9-11, 552:4-9, 554:11-22. Pajinag repeatedly told Ragunjan he was not interested in signing a Union card or having his photo taken for a Union flyer, but Ragunjan continued to interrupt him at work with repeated requests for him to sign a card and have his photo taken. *See* Tr. at 552:2-9, 554:5-22, 556:10-25, 556:9-25. Pajinag told Cacacho that he did not feel he could continue working at AWBH and asked for Cacacho's help in getting Ragunjan to stop interfering with his work. *See* Tr. at 556:10-25, 588:4-5. Pajinag hand-wrote a summary of his complaint on May 22, 2015, including a description of the most recent May 21, 2015 incident with Ragunjan, and gave it to Cacacho. *See* Tr. at 582:14-583:21, *see also* Respondent ("Resp't") Exh. 13. Cacacho reported Pajinag's complaint and request for assistance to General Manager Mark DeMello ("DeMello") and

Rooms Division Manager Jenine Webster (“Webster”) and provided them with a copy of Pajinag’s handwritten May 22, 2015 statement. Tr. at 473:1-11, 557:1-23, 809:4-25.

DeMello and Webster alerted Senior Vice President of Human Resources Velina Haines (“Haines”) and discussed with her whether to investigate further or wait and see if Pajinag reported any further interference with his work. *See* Tr. at 473:17-25. On June 9, 2015, Pajinag visited Cacacho and complained that another co-worker, Edgar Guzman (“Guzman”), was also continually interrupting him while he was working with requests for him to sign a Union authorization card and to take his picture for a Union flyer and had done so again that day. *See* Tr. at 597:2-598:16,-599:4. Pajinag told Cacacho that (1) on June 5, 2015, Guzman interrupted Pajinag at work to pressure Pajinag into letting Guzman take his photo because Pajinag’s was the only coworker’s photograph they were waiting for to unionize AWBH and (2) that on June 9, 2015, Guzman again interrupted Pajinag at work to ask to take his photograph and to sign a Union card. *See* Tr. at 560:5-561:25, 566:5-10, 598:1-19, 599:1-600:14. Pajinag had prepared a handwritten report of the two most recent June 5 and 9, 2015 disruptions which he gave to Cacacho. *See* Tr. at 558:10-559:6, 560:2-4, 560:15-17, 561:16-19, 566:11-21, 596:7-597:11; *see also* GC Exh. 13. Pajinag told Cacacho that he wanted her help to get Guzman and Rangunjan to stop bothering him because he was “fed up” with their repeated interruptions of his work. *See* Tr. at 598:16, 599:11-600:5.

Cacacho provided DeMello and Webster with a copy of Pajinag’s June 9, 2015 handwritten complaint and reported the new incidents, as well as Pajinag’s request for help to stop the disruptions. *See* Tr. at 566:22-25, 567:1-11, 568:2-8, 809:4-25, 810:1-7; GC Exh. 13. Based on Pajinag’s handwritten statements, DeMello and Webster believed that they were dealing with repeated interferences with Pajinag’s work by Guzman and Rangunjan and that an

investigation was warranted. *See* Tr. at 480:1-481:15, 810:8-19. Haines agreed with DeMello and Webster that they should investigate Pajinag's complaints about Guzman and Ragunjan given the repeated interruptions of Pajinag's work. *See* Tr. at 810:20-811:19.

DeMello and Webster met first with Guzman on June 10, 2015. *See* Tr. at 432:25-433:1, 811:22-24. DeMello asked Guzman if he had ever asked any employee to take a picture for a non-work related purpose, or to sign a Union card during the employee's work time. *See* Tr. at 482:11-13, 811:22-24. Guzman denied ever asking any employee to take such a picture or to sign a Union card during the employee's work time. *See* Tr. at 482:11-25, 811:22-24, 814:18-22. When DeMello refused to disclose Pajinag's name, Guzman claimed that he never asked to take anyone's photo because he had read the poster on the bulletin board and knew he could not do so. *See* Tr. at 483:1-2, 814:23-815:3.

DeMello and Webster next met with Pajinag on Monday, June 15, 2015. *See* Tr. 441:17-19, 447:4-6, 811:25-812:5, 812:19-25. Pajinag's interview was prompted by a report DeMello and Webster had received earlier that same day from Cacacho that Pajinag reported being confronted by Ragunjan late on the previous Saturday afternoon while Pajinag was working in the remote loading dock near the trash compactor area and that Ragunjan had threatened Pajinag in the Ilocano dialect. *See* Tr. at 569:7-25; 570:1, 14-18; Tr. at 812:19-813:4; Resp't Exh. 14. Although the actual Ilocano phrase is more threatening than the closest English translation, the threat Ragunjan issued to Pajinag roughly translates to: "Be careful and watch your back all the time." *See* Tr. at 569:7-14, 570:14-18, 571:4-9; Resp't Exh. 14.

Cacacho prepared a typed version of Pajinag's June 15, 2015 statement and provided it to DeMello and Webster. *See* Tr. at 568:10-23, 572:5-7, 813:1-18; Resp't Exh. 14. Cacacho also gave DeMello and Webster a brief report of her meeting with Pajinag and Ragunjan's threat to

Pajinag. *See* Tr. at 444:25-445:14, 811:25-812:5. DeMello and Webster met with Pajinag on June 15, 2015 and asked Pajinag about Guzman and Ragunjan's repeated interruptions of his work, Pajinag's written statements, and the alleged June 13, 2015 threat by Ragunjan. *See* Tr. at 433:17-25, 439:4-440:25, 441:17-442:4, 442:18-21. Pajinag appeared to be genuinely frightened when he discussed Ragunjan's threat. *See* Tr. at 439:4-8, 485:5-23, 488:16-23.

After meeting with Pajinag, DeMello and Webster met separately with Ragunjan and Guzman on June 19, 2015. *See* Tr. at 484:8-10, 812:6-7. In each meeting, DeMello and Webster asked Ragunjan and Guzman again if they had ever asked any coworker to sign a Union card or to take a photo while the coworker was working, and again both Guzman and Ragunjan denied ever doing so. *See* Tr. at 484:15-18, 812:6-18; Resp't Exh. 11. DeMello and Webster also asked Ragunjan if he had ever threatened anyone on the loading dock, and Ragunjan said he had not. *See* Tr. at 485:1-2, 812:19-813:4; Resp't Exh. 14. DeMello and Webster did not believe Ragunjan's denial because Ragunjan laughed, looked down, appeared nervous, and refused to look at DeMello. *See* Tr. at 488:2-10, 812:1-12.

DeMello and Webster completed their investigation on June 19, 2015 and required both Guzman and Ragunjan to submit written statements, which reiterated their denials of ever having asked any coworker to sign a Union card or to take a photo while the coworker was working. Ragunjan's written statement additionally reiterated his denial that he threatened a coworker at the loading dock. *See* Tr. at 443:17-25, 444:1-2; Resp't Exh. 11. There were no other witnesses available because all but one of the incidents between Guzman and Pajinag or Ragunjan and Pajinag occurred when no one else was present. And in the one exception, the other employee was busy cleaning a bathroom while Pajinag was cleaning the adjoining bedroom so that she would not have heard Guzman asking Pajinag to sign a Union card and have his photo taken.

See Tr. at 483:11-484:4, 815:16-816:2.

DeMello and Webster reported the results of their investigation to Haines and sent her the written statements from Guzman and Ragunjan, as well as the typed statement prepared for Pajinag by Cacacho about Ragunjan's June 13, 2015 threat. *See* Tr. at 390:5-20, 489:25-490:5, *see also* GC Exh. 13; Resp't Exhs. 11, 13, 14. DeMello and Webster told Haines that they believed Guzman and Ragunjan had repeatedly interfered with Pajinag's work performance with requests for Pajinag to sign a Union card and to take his photo for the Union, despite Pajinag telling them that he did not want to do so. *See* Tr. at 490:6-491:7, 817:1-12. DeMello and Webster also believed that Ragunjan had threatened Pajinag with physical harm on June 13, 2015 at the loading dock area as reported by Pajinag because Pajinag appeared genuinely scared when they interviewed him on June 15, 2015. *See* Tr. at 485:17-23, 817:1-12. Ultimately, DeMello and Webster felt Pajinag had nothing to gain, and in light of Ragunjan's threat, much to lose by reporting his coworkers to management. *See* Tr. at 488:11-25, 489:1-3.

Haines agreed with DeMello and Webster that Pajinag, not Guzman or Ragunjan, was telling the truth about Guzman and Ragunjan's repeated interference with Pajinag's work, that Ragunjan had threatened Pajinag with physical harm, and that disciplinary action was warranted. *See* Tr. at 714:15-715:9, 717:19-718:15. Accordingly, Haines, DeMello, and Webster prepared the summary "Corrective Action" forms for both Guzman and Ragunjan to which each contributed different portions. *See* Tr. at 421-28; GC Exhs. 10-11. Haines determined the level of discipline to impose and the Conduct Rules that were violated by Guzman and Ragunjan. *See* Tr. at 423:6-15, 427:21-428:9, 707-710, 712:8-24, 719:13-22. Haines believed that written warnings were needed to ensure that Guzman and Ragunjan ceased their repeated disruptions of Pajinag and to prevent any further threatening conduct. *See* Tr. at 715:1-9.

DeMello and AWBH Engineering Department Manager Bert Takahashi met with Guzman on June 30, 2015 and issued the Corrective Action form to him. *See* Tr. at 362-63, 817:23-818:4; *see also* GC Exh. 10. Guzman read and understood the Corrective Action form, again asked to speak with the person accusing him. *See* Tr. at 361-63, 367:10-16.

Webster and Cacacho met with Ragunjan also on June 30, 2015, and Webster read the Corrective Action form in its entirety to Ragunjan. *See* Tr. at 818:7-8; *see also* GC Exh. 11. Webster asked Ragunjan if he understood the Corrective Action form, and Ragunjan replied that he did but that he did not want to sign it. *See* Tr. at 818:8-25.

B. The Employee Meetings

The date of the employee meetings described in Paragraphs 6(a)-(d) of the Consolidated Complaint is in dispute. The original Unfair Labor Practice Charge wrongly identified May 26, 2015 as the date of the employee meeting at which Ettinger allegedly made unlawful coercive statements. GC Exh. 1(a). In addition, the GC's witnesses also wrongly identified the relevant employee meetings as having occurred on a variety of dates including March 26, 2015, "sometime in the summer of 2015," and May 26, 2015. *See* Tr. at 230:20-25, 237:12-17, 263:12-14, 299:20-22, 325:2-14. In contrast, Respondent's witnesses all identified the date of the employee meetings as May 19, 2015. *See* Tr. at 633:6-24, 683:8-11, 740:21-741:1, 788:16-20.

The May 19, 2015 employee meetings were part of a series of meetings after UNITE HERE! Local 5 (the "Union") announced its organizing campaign in a February 2015 letter to DeMello. *See* Tr. at 628:1, 629:14-16, 630:2-631:2. The May 19, 2015 meetings were conducted at 11:00 AM and 12:00 PM in the Lokahi Room at Respondent's jointly-managed AWBH. *See* Tr. at 637:11-15. Each meeting was attended by approximately thirty to thirty-five employees from all departments of AWBH and Hotel Renew ("Renew") (collectively referred to as "AWBH/Renew"), which Respondent also jointly manages. *See* Tr. at 637:1-24, 790:2-4,

790:9-23. Both May 19, 2015 meetings were attended by DeMello, Webster, and Haines in their entirety. *See* Tr. at 638:3-7; 789:17-23; 685:7-24.

A few days before the May 19, 2015 meetings, Ettinger prepared a list of what he planned to say to the employees. *See* Tr. at 638:21-25. Ettinger gave the same presentation at both meetings, and spoke to the employees in English. *See* Tr. at 639:10-16. Ettinger told the employees that the several-month Union campaign had caused arguments between employees at work and had led to complaints from employees about unwanted visits to their homes, as well as complaints from guests who were bothered by both the noise from the Union rallies and by Union protestors when entering or leaving AWBH. *See* Tr. at 640:5-16, 641:24-25, 642:1-11, 644:6-13. Ettinger told the employees they have the right not to answer their doors or to not let anyone into their homes. *See* Tr. at 644:6-19. He also told the employees the promises being made by the Union were subject to a bargaining process, and he explained that any negotiations would be a give-and-take process with no guarantees. *See* Tr. at 642:14-643:1.

Ettinger also spoke about the differences between the Union's pension plan and the Respondent's 401(k) plan. Ettinger said that pension plans can fail. Ettinger explained that his father, who had a Union pension, had intended for the benefits of that pension plan to pass to his widow upon his death, but instead all Union pension benefits ceased when his father died. *See* Tr. at 643:11-22. In contrast the funds in their 401(k) plan account would still be available to the family of the employee after the employee passed away. *See* Tr. at 643:4-25, 649:25-650:7.

Finally, Ettinger recalled reminding the employees about an unnamed employee who had gone on the radio to laud the benefits he had received when he worked at a Union hotel as compared to the benefits he received at AWBH. Ettinger simply suggested that employees ask why he left the Union hotel to work at a non-Union hotel. *See* Tr. at 649:17-24.

Ettinger denied telling the employees at the May 19, 2015 meetings to stop participating in Union rallies and to stop visiting coworkers' homes. *See* Tr. at 645:18-21. Ettinger further denied telling the employees that they were lucky to have their jobs and that the employees had to come to his office to apologize for participating in the Union's organizing campaign, or that he made any statements to that effect. *See* Tr. at 645:18-647:19. Finally, Ettinger denied telling employees that they would be disciplined if they continued participating in the Union's campaign or rallies, or if they continued visiting coworker's homes. *See id.*

Ettinger's recollection of what he said, and did not say, at the meetings was consistent with the pre-meeting notes he prepared, the notes taken at the meetings by DeMello and Webster, and the typed notes prepared by Haines and Webster after the meetings. *See* GC Exh. 16; Resp't Exhs. 16-19. In addition, DeMello's, Webster's, and Haines's descriptions of what Ettinger said at the meetings were consistent with Ettinger's recollection, and all three individuals were equally certain that Ettinger did not issue the directives described in the Consolidated Complaint or say anything that could reasonably be so construed. *See* Tr. at 688-693 (Haines), 742-750 (DeMello), 792-798 (Webster).

Similarly, the testimony of non-supervisory housekeeper Alona Afable ("Afable") also corroborated Ettinger's testimony that he did not tell them they had to stop banging on pots and pans at the Union rallies, that "it has to end," that he is "sick and tired," or that "enough is enough." *See* Tr. at 510:2-511:22. Afable recalled Ettinger's statements about pension plans and 401(k) plans and what happened when his father died; that employees were complaining to AWBH about Union representatives visiting their homes; and that it is the employees' choice whether to let visitors into their homes. *See* Tr. at 513:21-25, 514:1-2, 514:14-25, 515:1-516:17. Afable also denied hearing Ettinger tell employees they had to stop visiting their coworkers'

homes, that they were lucky to have their jobs, that they had to come to his office to apologize to him, and that he made any statements to that effect. *See* Tr. at 522-525.

C. The Handbilling Incident

AWBH is a resort hotel in the Waikiki Beach resort area on the island of Oahu, State of Hawaii. AWBH has 645 guest rooms, a split-level, open air Guest Lobby known as the Upper and Lower Lobbies, three food and beverage outlets, and a swimming pool. *See* Tr. at 753:17-25, 754:1-17. The Guest Lobby is split into two sections because AWBH is too small to contain all of its guest lobby services on one level. *See* Tr. at 753:17-25. AWBH has a driveway entrance from the public street – Paokalani Avenue – but offers only valet parking because it has no guest parking lot where guests can self-park. *See* Tr. at 754:11-15.

The Lower Lobby is on an elevated area separated from the driveway by a red-marked curb. *See* Tr. at 97:13-21, 122:13-17; Resp't Exhs. 1-7. The Lower Lobby contains a furnished lounge area and television for AWBH's daily guests to use so they may enjoy the open-air experience that drives tourists to Hawaii. *See* Tr. at 755:14-25, 756:1-5; Resp't Exhs. 1. The Lower Lobby is frequently full of guests enjoying the many services AWBH provides there. *See* Tr. at 100:1-101:12. AWBH's contracted security force patrols the Lower Lobby throughout the day and removes non-guests from the Lower Lobby's seating area. *See* Tr. at 127-128.

Also in the Lower Lobby are several informal food and beverage outlets – including the Ku'ai Mini-Mart, Wolfgang Puck Express, Subway, Cookie Corner, and Jamba Juice – which provide food and beverage services to AWBH guests. *See* Tr. at 754:20-755:13. Respondent specifically arranged for the outlets to provide its guests alternatives to the formal restaurant – Tiki's Bar & Grill – that is in the Upper Lobby. *See* Tr. at 60:7-10. At the time of the incident, AWBH operated a breakfast service known as "Breakfast on the Beach" for its guests in the Upper and Lower Lobbies. *See* Tr. at 755:3-7. Besides the furnished guest lounge area (where

guests can eat, socialize, read, watch television, and nap in the warm, open air) and the food and beverage outlets, the Lower Lobby also contains the Bell/Valet Desk, where guests can arrange for transportation, luggage services, and concierge services for dining/entertainment options available on Oahu. *See* Tr. 84:18-85:13, 86:18-87:1, 758:18-759:4. The Bell/Valet Desk also services large group check-ins by registering those guests, assigning them rooms and room keys, and delivering their luggage directly to their rooms. *See* Tr. at 756:6-25. The Lower Lobby is serviced by a variety of staff including a doorman, bell attendants, bell valets, bell captains, agents, housekeepers, housemen, and maintenance engineers. *See* Tr. at 101:13-23, 757:14-25. The Lower Lobby is an essential work area of AWBH. *See* Tr. at 753:15-16, 756:22-757:1.

On August 10, 2015, DeMello and Webster told Smith that they had been notified that Ching and one other individual were planning to hand out flyers in the Lower Lobby the next morning and that Ching needed to be told that he was not allowed to do so under AWBH's employee handbook rule proscribing distribution of materials in work areas. DeMello and Webster considered the Lower Guest Lobby to be a work area. *See* Tr. at 450:14-22, 752:18-753:16, 822:21-823:1 It is solely Smith's decision whether or not to issue a trespass notice. *See* Tr. at 53:21-54:11. Smith has never issued a trespass notice to an employee because an employee must return to work the next day, as opposed to a "vagrant" who need not return to the premises. *See* Tr. at 65:19-25. DeMello also testified that AWBH has never trespassed an employee, and if Smith did decide to trespass Ching, AWBH would then have to decide whether there was any basis for disciplinary action. *See* Tr. at 65:19-25, 451:2-18.

At approximately 6:30 AM on August 11, 2015, Ching and coworker Lakai Wolfgramm ("Wolfgramm") stationed themselves in the Lower Lobby holding what appeared to be pamphlets. *See* Tr. at 50:22-24. At that time, the Lower Lobby was already filled with guests

waiting for their vehicles, relaxing in the furnished lounge area, and purchasing and eating breakfast items from the Ku'ai Market and Wolfgang Puck Express. *See* Tr. at 123:13-124:5. Smith notified Front Office Manager Adam Miyasato ("Miyasato"), who told Smith he would meet him in the Lower Lobby. *See* Tr. at 50:18-51:-7. Smith and fellow Security Officer Paul Pagan ("Pagan") met Miyasato in the Lower Guest Lobby, and together they approached Ching, who was standing in front of a concrete pillar in the Lower Guest Lobby holding some materials while Wolfgramm was standing in front of an adjacent pillar. *See* Tr. at 51-52, 67-70. Smith told Ching, "I just wanted to advise you that you're not allowed to be passing out flyers in the lower lobby." *See* Tr. at 52:13-25, 71:12-15, 107:2-5. Smith told this to Ching because Ching was in the Lower Lobby, which Respondent considered a work area covered by AWBH's handbook rule prohibiting the distribution of materials in work areas. *See* Tr. at 109:19-110:6. Ching responded by asking Smith "What if I don't?" to which Smith responded that he would trespass him. *See* Tr. at 76:12-14. At that moment, Morgan Evans ("Evans"), a Union representative, approached Smith and stated that Ching and Wolfgramm had a right to be there. *See* Tr. at 75:2-11. Smith told Evans that she was trespassing and asked her to please leave the property. *See* Tr. at 75:14-22. Smith then told Ching and Wolfgramm it was up to them to decide what to do next. *See* Tr. at 73:10-16. Ching and Wolfgramm decided to leave the Lower Guest Lobby. *See* Tr. at 164:9-13, 209:15-210:1. During Smith's conversation with Ching, Wolfgramm, and Evans, AWBH guests were seated in the Lower Lobby directly behind the columns where Ching and Wolfgramm were posted. *See* Tr. at 77:9-23.

III. QUESTIONS INVOLVED

1. Whether a preponderance of evidence supports the ALJ's conclusion that Respondent's managers and officials did not in fact hold an honest belief that Guzman and Rangunjan had engaged in misconduct warranting their written warnings? *See* Exceptions 1-53.

2. Whether a preponderance of evidence supports the ALJ's conclusion that Respondent, by Ettinger violated the act by (a) directing employees to stop participating in union-organized rallies; (b) directing employees to stop visiting the homes of coworkers to engage in union and/or other protected concerted activities; (c) impliedly threatening employees with the loss of their jobs for engaging in union and/or protected concerted activities by telling them that they were lucky to have jobs; and (d) telling employees to apologize to Respondent for engaging in union and/or protected concerted activities? *See* Exceptions 54-98.
3. Whether a preponderance of evidence supports the ALJ's conclusion that the "entrance area" to the lower lobby is a work area? *See* Exceptions 99-117.
4. Whether a preponderance of evidence supports the ALJ's conclusion that Smith's statements to Ching and Wolfgramm constituted an implied threat of discipline or an unlawful threat of future unspecified reprisals? *See* Exceptions 118-119.

IV. **ARGUMENT**

A. **Standard of Review**

In reviewing Exceptions to an ALJ's decision, the Board is to evaluate whether findings of fact are contrary to the preponderance of the evidence. 29 C.F.R. §102.48(c). The Act "commits to the Board itself, not to the Board's ALJs, the power and responsibility of determining the facts as revealed by the preponderance of the evidence." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-545 (1950). Accordingly, the Board conducts a *de novo* review of the entire record, and is not bound by the ALJ's findings. While the Board attaches weight to an ALJ's credibility determinations that are based on demeanor, *see id.* at 545, "the Board has consistently held that where credibility resolutions are not based primarily upon demeanor the Board itself may proceed to an independent evaluation of credibility." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, 191 LRRM 1328, 1331-32 (2011) (internal quotations omitted). "Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Id.* at 1332.

B. The ALJ's Decision is not supported by a preponderance of the evidence and misapplies the law.

1. The ALJ misstates and mischaracterizes the record.

a. The Written Warnings

The ALJ's credibility findings regarding the written warnings issued to Guzman and Ragonjan are riddled with errors as shown by the following instances:

The ALJ mischaracterizes the testimony of Cacacho as having stated that Ragonjan "*invited*" Pajinag to have his picture taken and sign a union authorization card. *See* Decision at 4:8-10 (emphasis added); Exception 2. There was no such testimony.

The ALJ finds that Pajinag changed his previous "story" that he had not told Cacacho about prior incidents with Ragonjan by stating, "I cannot remember what I told [Cacacho]"; however, Pajinag explained his written statement: "I said 'again' because I'm really bothered and I cannot concentrate on my work." *See* Tr. at 593:4-5; Decision at 4:24-26; Exception 5.

The ALJ misstates the record that Pajinag testified, "I cannot remember *what* I told [Cacacho]"; whereas the record indicates that he testified, "I cannot remember I told Marissa." *See* Tr. at 594:23; Decision at 4:26 (emphasis added); Exception 6.

The ALJ mischaracterizes Pajinag's testimony that only *after* he was reminded that his statement said 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; Exception 7. However, the record indicates that Pajinag testified – *prior* to counsel reminding him about the "always bothers me" language – that, "There's one more [incident he told Cacacho about] but that's a different one." *See* Tr. at 598:20-22.

The ALJ misstates the record regarding Pajinag's testimony that when counsel asked him for "specifics" as to 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; Exception 9. However, the testimony indicates otherwise. See Appendix A at 1. Pajinag's testimony quoted by the ALJ was actually in response to whether he told Cacacho that Guzman "bothered" him more than five times, not a general statement that he forgot all the "specifics" he told to Cacacho.

The ALJ misstates the record regarding Webster's testimony that she and DeMello decided to investigate because of "*their* belief" that this "harassment or interference" *had* occurred numerous times. See Decision at 4:39-43 (emphasis added); Exception 10. However, the record indicates otherwise. See Appendix A at 1.

The ALJ misstates 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; Exception 11. There is *no* evidence that Respondent relied on its non-solicitation policy as shown by Guzman's Corrective Action, see GC Exh. 10, which indicates he was disciplined for violation of Conduct Rule 3. Rule 3 prohibits interference with others in the performance of their jobs. *Id.*

The ALJ misstates 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; Exception 12. However, Guzman denied discussing the poster with DeMello and Webster. See Tr. at 394:12-22 ("We did not talk anything like that.").

The ALJ misstates the record that Pajinag *only* told Webster and DeMello "what Rangunjan *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); Exceptions 13, 36, and 37. However, Pajinag told DeMello and Webster what was contained in his statements, including that he "can not [sic] concentrate doing may [sic] job" because of Guzman, see GC Exh. 13, that Pajinag "could not concentrate on [his] work" because

of Ragonjan, *see* Resp't Exh. 13, and that Guzman and Ragonjan had "again" and "always" interfered with Pajinag's work. *See* GC Exh. 13; Resp't Exh. 13; Appendix A at 1.

The ALJ misstates the record that "Webster and DeMello *again* interviewed Pajinag" on June 15. *See* Decision at 5:13 (emphasis added); Exception 15. Rather, June 15 was the *first* time Webster and DeMello interviewed Pajinag. *See* Tr. at 811:25; 812:1-5.

The ALJ misstates 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; Exception 16. However, the statement refers to the event occurring on June 13, not June 12. *See* Tr. at 574:3-10.

The ALJ mischaracterizes Pajinag's testimony that "his version of the interview [with Webster and DeMello] did not include any specific mention of the alleged 'death threat,'" *see* Decision at 5:32-33, and misstates the record that "[w]hat he told Webster and DeMello... was the information contained within his two handwritten statements ..., *not* Cacacho's typewritten notes." *See* Decision at 5:33 n.10 (emphasis in original); Exception 18. Rather, Pajinag testified that he recalled telling Webster and DeMello "about the incidents *and* what was written in his written statement regarding Ragonjan and Guzman." *See* Tr. at Tr. at 601:8-24, 602:1-4, 602:15-17, 603:8-25, 604:2-11, 604:25, 605:1-7, 608:19-22. Prior to asking Pajinag whether he remembered telling Webster and DeMello about "the incidents," Respondent's counsel grouped *all* of the incidents together, including the "alleged death threat" incident. *See* Tr. at 605:8-9, 605:18-21. In addition, due to the fact that Pajinag's testimony was translated by an interpreter, Pajinag used the phrase "statement of" interchangeably to mean both his written statement *and* the words spoken to him by Ragonjan, including the threat. *Compare* Tr. at 604:4-7 *with* Tr. at 607:25, 608. Accordingly, there is nothing in the record that indicates that Pajinag did *not* mention the death threat incident with Ragonjan to Webster and DeMello.

The ALJ misstates the record that Pajinag testified “that the ‘watch your back’ threat” occurred *prior to* his first complaint on March 22.” *See* Decision at 5:33, 6:1-2; Exceptions 19 and 37. Pajinag first complained to Cacacho on May 22, not March 22. Resp’t Exh. 13; Tr. at 583:13-15, 584:8-14. Secondly, Pajinag said that there was “one thing *more* before,” not “one thing before.” *See* Tr. at 590:8 (emphasis added). Third, Pajinag did not “clearly” testify the watch your back incident occurred prior to May 22. *See* Appendix A at 2; Exception 21.

In addition, the ALJ does not extend the same consideration to Pajinag that she extends to the GC’s witnesses, who, like Pajinag, also 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; Exception 4.

The ALJ mischaracterizes Pajinag’s testimony that he “claimed he could not recall when” the “watch your back” incident occurred. *See* Decision at 6:2 n.11; Exception 20. Pajinag testified that he *could* recall on which day of the week the incident occurred, but simply could not recall during his testimony the month it occurred. *See* Appendix A at 2.

The ALJ also erred in finding that Respondent did not take any interim steps to prevent further interference with Pajinag’s work. *See* Decision at 6:8-10; Exception 22. As soon as Respondent completed its investigation of Pajinag’s complaints and determined that Guzman and Ragunjan had violated its policy, it issued Corrective Actions to Ragunjan and Guzman to prevent any further confrontations. *See* GC Exhs. 10, 11.

The ALJ again erred in stating that “[Webster] made no mention of confronting Ragunjan with the alleged threat to Pajinag. *See* Decision at 6:28-30; Exception 25. The record shows that Webster did ask Ragunjan about the reported threat. *See* Appendix A at 2-3.

The ALJ again misstates the record that Cacacho had “trouble” remembering which employee Pajinag had complained about and when. *See* Decision at 8:25-26; Exception 31. The

record shows that Cacacho easily remembered, testifying that on May 22 and June 15, 2015, Pajinag complained to her about Ragunjan and on June 19, 2015 about Guzman. *See* Tr. at 547:3-11, 559:25, 560:1-10, 568:20-23, 569:8-9.

The ALJ misstates the record that DeMello and Webster “struggled” to recite the convoluted questions they “claim” to have asked when interviewing the discriminatees. *See* Decision at 8:27-28; Exception 32. DeMello testified he asked Guzman “if he had ever ... asked someone to take a picture for any non-work-related purposes during work hours and work time, and he stated no.” Tr. at 482:11-13. DeMello asked Ragunjan “if he had ever asked anyone to take a picture for non-related work purposes during work time” and “if he had ever threatened anyone on the loading dock.” Tr. at 484:15-18, 485:1-2. Webster similarly testified that “[w]e interviewed Edgar Guzman and asked him if he had ever asked an employee to take a photo for non-work related purposes,” Tr. at 811:22-24, and “we asked Sonny if you have ever asked someone to take a picture or [sic] someone something [sic] for a non-work related purposes,” Tr. at 812:8-9. As the transcript clearly demonstrates, neither DeMello nor Webster “struggled.”

The ALJ mischaracterizes the record that “instead of responding to Pajinag’s complaints with interim action, Respondent’s managers focused on amassing documentation.” *See* Decision at 9:18-19; Exception 43. Instead, the record indicates that, rather than focusing on “amassing documents,” DeMello and Webster properly took a reasonable amount of time to interview Guzman, Ragunjan, Pajinag, and Cacacho to determine whether any misconduct had occurred and to obtain written statements. *See* Tr. at 432:25-433:1, 443:17-25, 444:1-2, 444:17-19, 484:8-10, 447:4-6, 811:22-812:25; Resp’t Exh. 11.

The ALJ mischaracterizes Respondent’s response to Pajinag’s complaint that Ragunjan physically threatened him as “languid and tepid.” *See* Decision at 9:29-30; Exceptions 47 and

48. Instead, Respondent took the complaint seriously: DeMello and Webster interviewed Pajinag and Ragunjan, issued a written warning to Ragunjan, and told Cacacho “to try to monitor [Pajinag] when he was working and to immediately let us know if she heard of anything.” *See* Tr. at 423:25-433:1, 433:17-25, 439:4-440:25, 441:17-442:4, 442:18-21, 447:4-6, 467:5-8, 482:11-13, 484:15-18, 421-28, 818:7-8; *see also* GC Exh. 11.

The ALJ misstates the record that DeMello and Webster failed to confront Ragunjan about the loading dock incident. *See* Decision at 9:35-36; Exception 50. Instead, both DeMello and Webster testified that they questioned Ragunjan about the incident. *See* Tr. at 485:1-2 (DeMello); 813:5-18 (Webster).

b. The Employee Meetings

The ALJ misstates the record that “Ettinger spoke from prepared bullet points,” *see* Decision at 10:36, and adopted his typed bullet points as an accurate reflection of what he said, *see* Decision at 10:36 n.22; Exceptions 55 and 56. Instead, the record indicates that Ettinger testified that he “*discuss[ed]* all these bullet points.” Tr. at 656:3-5. Nowhere in the record did Ettinger say that he adopted his typed bullet points as an accurate reflection of what he said nor did Respondent’s counsel attempt to get Ettinger to do so. *See* Tr. at 657:8-12.

The ALJ misstates the record that Ettinger *told the employees* “that guests were complaining about the rallies, and that ... 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; Exception 57. In this quote, Ettinger provided a general summary of his statements at the employee meeting – not a word for word account of the words he used when speaking to the employees. *See* Tr. at 641:5-16. In fact, Ettinger began his testimony about what he said at the meetings by using the phrase “[g]enerally

speaking.” Tr. at 640:5. This is supported by the ALJ’s own finding that “[n]ot surprisingly,” GC’s witnesses did not testify that Ettinger used the word “deleterious.” Decision at 11:16-17.

The ALJ misstates the record that “[Ettinger] said that certain employees had complained about being bothered, at home and at work, by pro-Union employees and “[t]his conduct was causing ‘acrimony’ and ‘discomfort’ among the employees.” See Decision at 11:9-11; Exception 58. Ettinger only testified that employees had complained about home visits but not about “being bothered ... at work[] by pro-Union employees. See Tr. at 640:6-16, 644:8-13. Neither Ettinger or anyone else testified to using the words “acrimony” and “discomfort” at the meetings. See Tr. at 644:8-13. This is supported by the ALJ’s finding that “[n]ot surprisingly,” GC’s witnesses did not testify that Ettinger used the word “acrimony.” Decision at 11:16-17.

The ALJ misstates 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; Exception 59. There is nothing on the record that *all*, or even one, of the GC’s witnesses do not speak English as a primary language. Not all of GC’s witnesses testified through an interpreter: while Cecile Daniels (“Daniels”) testified through an interpreter, see Tr. at 295:13-16, Kava and Faustino Fabro (“Fabro”) did not. See Tr. at 213:4-6; 259:21-23. Perhaps the ALJ assumes that Daniels does not speak English as a primary language because she testified through an interpreter or that Fabro does not speak English as a primary language because he spoke with an accent; however, this was never established on the record.

The ALJ misstates the record that “Kava testified that Ettinger said *the rallies* needed to end.” See Decision at 11:20-21 (emphasis added); Exception 60. Rather, Kava testified that Ettinger said “*it* has to end,” and that he was referring to the banging of the pots and yelling on

the microphone.¹ See Tr. at 219:24-25, 223:25, 237:23-25, 238:21-22, 239:20-25, 240:1-2. The ALJ even clarified this point during the hearing when she asked, “Do you remember him saying the Union has to end or the banging of the pots has to end?” to which Kava replied, “I recall he said *it* has to end after said all the banging and – the pots.” See Tr. at 239:18-23 (emphasis added). To further clarify, the ALJ asked, “So he just said *it* – has to end,” to which Kava responded, “*It* has to end....That’s all.” See Tr. at 239:24-240:4 (emphasis added).

The ALJ misstates the record that “DeMello confirmed that Ettinger used terminology such as ... ‘in-fighting’ and ‘dissention.’” See Decision at 11:11 n.23 (relying on Resp’t Exh. 17); Exception 61. While DeMello did testify that Respondent Exhibit 17 is a copy of his notes of the meeting, and while the notes do contain the words “in-fighting” and “dissension” [sic], DeMello did *not* confirm that Ettinger actually used those words at the meeting. See Tr. at 750:22-25, 751:1-5.

The ALJ misstates the record in finding that “Fabro *and* Daniels testified that Ettinger told the employees to stop banging pots and pans.” See Decision at 11:19; Exception 62. Instead, Daniels initially simply provided generalized testimony about employees making noise at rallies by hitting cans and only after prompting by counsel did Daniels say that Ettinger told the employees he was tired of the noise and the flyers put under guest doors. See Appendix A at 3.

The ALJ misstates 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); Exception 63. Instead, Fabro only claimed that Ettinger said to stop bothering workers

¹ Towards the end of her testimony on cross examination by Respondent’s counsel, Kava testified, “He said the union, I recall was – had to end because that’s why it’s causing rallies outside of the door, and that’s what’s waking people up at the hotel.” (Tr. at 239:5-7). However, when counsel asked her, “Are you now testifying that he said specifically the union has to end or did was he –,” Kava replied, “I can’t recall.” (Tr. at 239:8-10).

when they are working,” *see* Tr. at 270:21-24, while Daniels testified that Ettinger said to stop *badgering* your coworker, their house or calling them at home or talking to them at work....” *See* Tr. at 306:23-25, 307:1. It was only after Counsel for the GC (“CGC”) used the word “bothering” that Daniels used that term. *See* Tr. at 307:8-14.

The ALJ misstates 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); Exception 65. Rather, Fabro testified that Ettinger merely said that “we’re lucky to have work.” *See* Tr. at 265:12-14. In fact, when the ALJ asked Fabro, “Did he say, you’re lucky to have a place to work?,” Fabro replied, “No, ma’am.... You have work.” *See* Tr. at 266:2-6.

The ALJ misstates 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; Exception 66. Instead, Fabro first testified that Ettinger said “if we wanted to stop by his office and apology.” *See* Tr. at 274:7-8. Only after being prompted by CGC did Fabro claim that Ettinger used the word apologize, not apology. *See* Tr. at 274:9-11. The record also indicates that Daniels did not testify that Ettinger used the word apologize, or even apology, but rather testified that Ettinger only said, “ if you guys want to stop by -- to my office and say sorry.” Tr. at 309:21-25.

The ALJ misstates the record that Haines claimed to have typed her notes of the meeting, *see* Resp’t Exh. 16, based on her handwritten notes. *See* Decision at 12:36 n.27; Exception 76. Instead, Haines testified that she used her handwritten notes as well as “Gary Ettinger’s talking points,” GC Exh. 16, and her memory to prepare the notes. Tr. at 698:3-6, 779:22-25, 780:1-3.

The ALJ misstates the record that according 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 involved². *See* Decision at 14:19-21; Exception 88. None of the GC’s witnesses testified to any such understanding. Regarding (a), Fabro and Daniels testified that Ettinger said to stop banging on pots and pans, *see* Tr. at 266:15, 306:17, and Kava testified that Ettinger said “it has to end” and that he was referring to the banging of the pots and yelling on the microphone. *See* Tr. at 219:24-25, 223:25, 237:23-25, 238:21-22, 239:20-25, 240:1-2. In addition, although the GC’s witnesses testified something to the effect that Ettinger said they are lucky to have jobs, none of them tied that comment to the stop banging on pots and pans comments. Regarding (b), Fabro did not reference the police, *see* Tr. at 270:23-24; Daniels testified Ettinger only said that the employees have the right to call police, *see* Tr. at 306:24-25, 307:1-4; and Kava did not testify that Ettinger made any comments even closely resembling “bothering your coworkers” or the police.

The ALJ mischaracterizes the record that Ettinger’s speech was “peppered with outmoded, bookish phraseology, such as ‘deleterious impact’ and ‘acrimony.’” *See* Decision at 14:16-19; Exception 86. Ettinger’s testimony here is a general explanation of what he told the employees but not a word-for-word recount of what he actually said. *See* Tr. at 641:5-8 (I also wanted them to know), 644:8-13 (“that was one of the points I made”). This is supported by the ALJ’s finding that “[n]ot surprisingly,” GC’s witnesses did not testify that Ettinger used the word “acrimony” or “deleterious.” *See* Decision at 11:16-17.

The ALJ mischaracterizes the testimony that Ettinger’s remarks did not refer to the overall job market, *see* Decision at 14:38 n.30; Exception 93, and 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; Exception 94. According to

² 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.

Kava, Ettinger *did* refer to the overall job market when he explained that most hotels in the local job market are reducing their staff. *See* Appendix A at 5. In addition, the ALJ does not explain *how* Ettinger’s remarks linked the remarks.

c. The Handbilling Incident

The ALJ misstates the record that the GC alleges that, on August 11, Respondent, by Smith, unlawfully threatened employees with discipline. *See* Decision at 15:13-15; Exception 99. The Consolidated Complaint does not allege that Smith “unlawfully threatened” but rather “impliedly threaten[ed]” employees with discipline. *See* GC Exh. 1w at 5.

The ALJ misstates the record that “the lower lobby acts [sic] a main entrance for the Hotel....” *See* Decision at 15:21; Exception 100. Instead, the record indicates that the lower lobby is the *only* entrance for the Hotel, not just the *main* entrance. *See* Tr. at 754:20-22.

The ALJ misstates the record that guests do not regularly check-in at the lower lobby and it is *relatively uncommon* for large groups to check in there. *See* Decision at 15:21-22 n.31; Exception 101. Rather, the record shows that large groups regularly check in at the lower lobby throughout the year and more often during the spring and fall. *See* Appendix A at 3-4.

The ALJ misstates the record that the lower lobby is open to the public. *See* Decision at 15:32-33; Exception 103. Although DeMello testified that members of the public can enter the lower lobby, *see* Tr. at 768:25, 769:1-2, Smith, whose testimony the ALJ credits, *see* Decision at 16:25-26, 17:2-3, testified otherwise. *See* Appendix A at 4.

The ALJ misstates the record that the, “*upper* lobby area ... contains a large restaurant run by the Hotel.” *See* Decision at 15:37-38 (emphasis in original); Exception 105. Although DeMello testified that Wolfgang Puck’s Express, Subway, and Ku’ai Market, located in the lower lobby, lease the commercial space from the Hotel and are not managed by the Hotel, *see* Tr. at 768:1-12, 772:20-25, 773:1-5, 22-25, there is nothing in the record that indicates that the

large restaurant is “run” by the Hotel. In fact, *all* of the restaurants and convenience store (in both the upper *and* lower lobbies) are contracted by the Hotel to provide food and beverage services for the Hotel’s guests. *See* Appendix A at 4. Thus, the distinction drawn by the ALJ between the upper and lower lobbies on the basis of who “runs” the restaurants is clearly erroneous.

The ALJ misstates 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; Exception 106. Ettinger testified that, “[w]e also have a breakfast-on-the-beach program where guests were outside on the pool deck.” Tr. at 648:25, 649:1-3. Thus, Ettinger did not testify that “the event was held in the upper lobby” but rather that guests enjoying the event were on the pool deck.

The ALJ misstates the record that the “bell and valet stand [is] situated *far* to one side of the entrance area³” in the lower lobby. *See* Decision at 16:4-5; Exception 108. The use of the word “far” is misleading. The record indicates that the bell/valet stand is located approximately 10 feet from the pillar in the lower lobby where Ching was standing at the time in question on August 11. *See* Tr. at 92:12-25, 93:1, 98:20-25, 99:1-7; Resp’t Exh. 3, 5.

The ALJ misstates 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; Exception 110. Instead, the actual testimony of Smith, who was the only witness to testify on the subject, is that he has never trespassed an employee and that the trespassing definition quoted by the ALJ here applies only to non-

³ The ALJ explained that she “will refer to the tiled area containing the pillars abutting the driveway as the lobby’s ‘entrance area.’” (Decision at 15:28-19).

employees. Smith was not able to state what a trespass notice to an employee would mean because he had never done one. *See* Appendix A at 4-5.

The ALJ misstates the record that Smith told Ching, “you’re not allowed to pass out pamphlets on property.” *See* Decision at 16:34; Exception 111. The transcript shows that Smith read from his NLRB Affidavit that he told Ching that “Ching *was* allowed to be passing *our* [sic] pamphlets on property.” *See* Tr. at 108:17-18 (emphasis added).

The ALJ misstates 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; Exception 113. There is no such testimony in the record on the transcript pages cited to by the ALJ in support of this finding.

The ALJ misstates 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; Exception 114. Rather, Smith specifically testified that the trespass procedure referenced by the ALJ is for *non-employees*, that he has *never* trespassed an employee, and that when he used the term “verbal warning,” “[i]t was just a verbal warning to stop passing out flyers.” *See* Tr. at 64:16-25, 65:1-14, 19-21.

The ALJ misstates 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). The ALJ states that Respondent merely argued 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 this standard” because “the primary function of Respondent’s hotel differs from that of a traditional casino hotel like the Santa Fe Hotel in that it includes providing ‘outdoor lounging and food and

beverage services to its guests'" See Decision at 18:27-31; Exception 115. However, Respondent argues that there are *four* major factual differences between the facts of this case and those in *Santa Fe Hotel* and its progeny: (1) the location of the attempted distribution; (2) Respondent's employees have alternative non-work areas where they can distribute literature, whereas the *Santa Fe Hotel* employees did not; (3) the hotels' primary functions are warm weather outdoor activities; and (4) the activities that occur in the areas where the employees attempted literature distribution. See Resp't Br. at 34-40.

The ALJ erroneously finds that "the entrance area" as the ALJ defined it is a nonwork area and therefore that Smith unlawfully threatened Ching and Wolfgramm with unspecified reprisals. See Decision at 19:21-23; Exception 118. The ALJ inappropriately narrowed the area in which Ching and Wolfgramm stood to only a portion of the lower lobby, contrary to the testimony from both GC and Respondent's witnesses that Ching and Wolfgramm stood in the lower lobby, not in the entrance area. See Tr. at 50:22-24, 51:4-5, 176:4-6, 176:12-14, 176:16-20, 204:25-205:4, 450:14-18, 670:14-17, 671:11-13, 672:13-16, 752:6-8, 759:9-11, 821:10-822:1-6, 824:17-18. Further, the allegation is not that Smith threatened the employees with *unspecified reprisals* but rather impliedly threatened them with *discipline*. See GC Exh. 1w.

The ALJ mistakenly concludes that, "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, as 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 (emphasis

added); Exception 119. This conclusion is based on a false finding that Smith “threatened to ‘trespass’ [Ching and Wolfgramm] if they did not leave the Hotel property.”

Although the ALJ states that she “credit[s] Smith’s version of events,” *see* Decision at 17:3, she repackaged his testimony to create this finding. Smith *did* testify that “a member of management” on an unspecified date asked him “to warn an employee that if they do not leave the premises they will be trespassed,” *see* Tr. at 47:12-15, that on August 10, DeMello gave him *instructions* to tell Ching that he couldn’t pass out pamphlets and if he refused to leave issue him a trespass, *see* Tr. at 62:12-16, and that Webster told Smith to give Ching a verbal warning for passing out flyers in the lower lobby. *See* Tr. at 62:24-25. However, **at no point during his testimony did Smith state or acknowledge that he threatened to “trespass” Ching and/or Wolfgramm if they did not leave the Hotel property.** *See* Appendix A at 5-6. Thus, the distinction the ALJ draws between the property and the lobby is irrelevant, and if the area in which the employees stood were found to be a work area, Smith’s “order” would be lawful.

2. The ALJ fails to include relevant and necessary portions of the record in the Decision.

a. The Written Warnings

The ALJ finds GC’s Exh. 13 to indicate that the incident with Guzman that Pajinag reported on June 9, 2015 was not the first of its kind by the fact that Pajinag wrote that Guzman “always bother[ed]” him but failed to mention that GC Exh. 13 also states that Guzman “again” asked him to take a picture for the Union. *See* Decision at 4:15-17; Exception 3.

The ALJ fails to recount Pajinag’s testimony about his meeting with Cacacho on June 15, let alone mention that he testified about it at all. *See* Decision at 5:11-21; Tr. at 603:18-25, 604:1-25, 605:1-7; Exception 14. This failure coupled with the mischaracterization of Pajinag’s testimony as described in Exception 18 - 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, leads the reader of the Decision to believe that Pajinag did not testify about his reporting of Rangunjan’s threat.

In 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; Exception 17, the ALJ fails to consider that Pajinag’s testimony about this meeting was 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.

b. The Handbilling Incident

The ALJ fails to note that although Smith testified that maintenance employees are “not regularly assigned” to the lower lobby, *see* Decision at 16:9-11, they work there when they are called to fix something and Smith has “seen them there for about a period of five hours sometimes.” *See* Tr. at 120:2-14; Exception 109.

The ALJ fails to note that Smith testified that he does not have authority to issue discipline at the Hotel and that he did not understand Webster’s instruction to him as an instruction to issue discipline to either Ching or Wolfgramm. *See* Tr. at 103:8-15. The ALJ also fails to refer to Smith’s clarification of a “verbal warning.” *See* Decision at 16:33-34; Exception 112. *See* Appendix A at 6.

Although the ALJ states 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,’” *see* Decision at 18:21-24, the ALJ fails to mention that Respondent provides more than just security, maintenance and valet parking in its lower lobby. Exception 116. The record

undisputedly indicates that in the lower lobby Respondent also welcomes guests with a greeter/doorman; provides bell, concierge, and food service; checks in large groups; and assigns two housemen/housekeepers who each work eight hour shifts there. *See* Resp't Br. at 34-40.

3. The ALJ makes improper credibility resolutions.

The ALJ purports to “have based [her] credibility resolutions on considerations of a witness’ opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness’ testimony; the quality of the witness’ recollection; testimonial consistency; corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; witness demeanor while testifying; and the form of questions eliciting responses.” *Daikichi Sushi*, 335 NLRB 622, 622 (2001). Nevertheless, the ALJ makes credibility resolutions based on highly subjective factors not included in the test.

a. The Written Warnings

The ALJ makes the following credibility resolutions based on factors not included in the *Daikichi Sushi* test: she does not credit DeMello’s testimony that he and Webster instructed Cacacho to monitor Pajinag while 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; Exception 23; 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; Exception 30; Cacacho, Webster, and DeMello each “parsed” their answers in a manner that did not suggest forthrightness, *see* Decision at 8:28-29; Exception 33; and she credits Pajinag’s “more unvarnished” version of events, which “departed from Respondent’s script” in key respects. *See* Decision at 8:34-35; Exception 35.

b. The Employee Meetings

The ALJ credits Webster's meeting notes regarding Ettinger's remarks because "Ettinger related a gentler version." *See* Decision at 12:5 n.12; Exception 64. However, that reason is not one of the factors in the *Daikichi Sushi* test the ALJ purports to apply.

Despite corroboration being a factor in the *Daikichi Sushi* test, the ALJ failed to find any significance in the fact that Kava did not corroborate Fabro and Daniels' testimony on at least two points. *See* Decision at 11:19-20, 12:8-9; Exception 67.

The ALJ credits the GC's witnesses with respect to Ettinger's statements. *See* Decision at 12:16; Exception 68. However, this "blanket" credibility finding is based on three individual credibility findings drawn from factors not included in the *Daikichi Sushi* test: First, the ALJ found Fabro to be "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; Exception 69. Whether a witness listens carefully to questions and maintains the same demeanor are not factors that lead to a positive credibility finding, even under *Daikichi Sushi*, 335 NLRB 622, 622 (2001) as apparently relied upon by the ALJ. *See* Decision at 3:20 n.4. Second, the ALJ found that 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; Exception 70. Whether a witness is certain of what he or she understood the speaker to have said and recounts it in the language in which the speaker spoke are not factors that lead to a positive credibility finding, even under *Daikichi Sushi*.

Third, the ALJ finds 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; Exception 71. The ALJ claims to base her credibility resolutions on considerations such as "the quality of the

witness' recollection" and "the presence or absence of corroboration" under the *Daikichi Sushi* test. However, the ALJ ignores the fact that Kava admitted that she has "a vague, general, fuzzy notion of what happened and ... what was said at [the] meeting," *see* Tr. at 233:2-5, and that much of her recollection went uncorroborated by Fabro and Daniels, including Kava's testimony that Ettinger told the employees "it has to end." It is inappropriate to find credible a witness whose recollection is "vague, general, and fuzzy" and whose testimony goes uncorroborated just because the witness appeared "composed and steady."

The ALJ finds 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; Exception 72. The ALJ bases her credibility determination solely on demeanor and fails to consider that Ettinger's testimony was corroborated by DeMello, Webster, Haines, and Afable; his testimony was consistent; and his recollection was clear. Furthermore, the ALJ failed to recognize that Ettinger's laughter was not a sign of nervousness but rather a sign of his reaction to the ridiculousness of the allegations.

The ALJ finds that "Respondent's remaining witnesses [DeMello, Afable, Haines, and Webster] gave guarded testimony that presented as less than forthright." *See* Decision at 12:31; Exception 73. This credibility finding is based on three faulty findings. First, the ALJ finds 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; Exception 74. The ALJ applied a double standard with respect to nervousness while testifying: she found Daniels, a GC witness, credible - although she "appeared somewhat nervous" - because she was "certain of what she understood Ettinger to have said," *see* Decision at 12:18-20, however the ALJ found

DeMello and Afable incredible because of their apparent nervousness although they both were certain about what they understood Ettinger to have said, *see* Decision at 12:32-33.

Second, the ALJ finds 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; Exception 75. There was nothing “vague” about Haines testimony: she explained what she remembered Ettinger having said at the meetings without any prompting by counsel for *46 lines*⁴ of the transcript during which she explained what Ettinger said about the effect of the Union’s organizing efforts, guest complaints about noise from the rallies, employee complaints about home visits, promises versus guarantees, a pension plan versus a 401(k), situations with Aloha Airlines and Hilton Hawaiian Village, the busy summer season, and individual opinions. *See* Tr. at 688:15-22, 689:2-25, 690:1-14. In addition, Haines’ denials were in response to leading questions about what Ettinger did *not* say at the meetings. Respondent’s counsel did not ask Haines to testify as to what she remembers Ettinger saying and *not* saying at the meetings, but rather what she remembers Ettinger saying at the meetings. *See* Tr. at 688:9-11.

Third, the ALJ finds Webster only “slightly” more credible than Respondent’s other witnesses without any explanation why she was not credible other than that she was present for the hearing. *See* Decision at 12:36, 13:1-2; Exception 77.

c. The Handbilling Incident

The ALJ finds that DeMello’s testimony that guests would often eat their “breakfast on the beach” meal in the lower lobby was “less than convincing” because “he was quite focused on ‘selling’ the open-air experience of the lower lobby.” *See* Decision at 2 n.33; Exception 107. Just because DeMello was trying to convey to the judge the open-air experience offered by the

⁴ Each page of the transcript contains up to 25 lines.

Hotel does not mean that he was not credible. In addition, there was nothing about DeMello's testimony on this subject that suggested he was not credible according to the ALJ's proffered credibility test set forth by *Daikichi Sushi*, 335 NLRB 622, 622 (2001). See Decision at 3:20 n.4. Moreover, Ettinger's testimony that some guests participated in the breakfast on the beach event on the pool deck does not conflict with DeMello's testimony that oftentimes guests ate their breakfast in the lower lobby due to a lack of space upstairs. The ALJ conveniently did not include the reason DeMello stated for guests bringing their breakfast to the lower lobby (i.e., "because we have limited seating because of the limited footprint upstairs.") Tr. at 755:6-7.

4. The ALJ applies a "double standard" when analyzing the evidence of Respondent versus the General Counsel.

a. The Written Warnings

The ALJ fails to characterize the testimony of Pajinag, who testified through an interpreter, in the same way that the ALJ characterized the testimony of the 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; Exception 4. The ALJ did not even mention that Pajinag testified through an interpreter, whereas she noted that none of the GC's witnesses who testified regarding the Employee Meetings speak English as a primary language and that Daniels testified through an interpreter. In addition, the ALJ treated Pajinag's testimony as if he had testified in English: when describing his testimony, she used phrases including "he adamantly denied" and "stated unequivocally" – despite the fact that the interpreter seemed to have difficulty understanding what Pajinag said in Ilocano. Not surprisingly, the ALJ failed to mention this in the Decision.

The ALJ applies a "double standard" when analyzing the testimony of the GC's witness Kava versus the testimony of Respondent's witness Pajinag: the ALJ found that Kava did not

commit perjury when she denied that her memory had been improperly refreshed because “it is quite common for a witness whose recollection is refreshed on one portion of a conversation to then recall subsequent portions.” *See* Decision at 12:20-22, n.26; yet the ALJ chose not to believe Pajinag’s testimony that he told Cacacho that Guzman approached him more than just the two times indicated in his written statement after counsel refreshed his memory of the words contained in his written statement. *See* Decision at 4:29-30; Exception 8.

Finally, the ALJ contradictorily finds that Respondent overreacted to Pajinag’s complaints about Ragunjan by issuing a written warning, *see* Decision at 10:4, but at the same time under-reacted by not contacting the police or suspending Ragunjan. *See* Decision at 9:33-24; Exception 49.

5. The ALJ fails to support her findings.

a. The Written Warnings

The ALJ reaches the following findings without citing to any portion of the record in support: The finding that Respondent’s managers and officials did not in fact hold an honest belief that Guzman and Ragunjan had engaged in serious misconduct and therefore that the written warnings violated the Act. *See* Decision at 3:21-23; Exception 1.

b. The Employee Meetings

The ALJ finds that “Ettinger apparently considered the subtlety of his message to require the use of such ornate language....” *See* Decision at 14:19 n.28; Exception 87. However, the ALJ fails to explain this finding or cite to the record in support of this finding, and there is no evidence that Ettinger considered “the subtlety of his message.”

The ALJ fails to address 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; Exception 96.

The ALJ fails to explain why Ettinger violated the Act as alleged with respect to 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, 10:22; Exception 97. The ALJ finds and concludes that Ettinger “welcomed” and “invited” the employees to apologize, *see* Decision at 14:23-24, 15:2, but does not find that he *told* them that they must apologize, as alleged.

c. The Handbilling Incident

The ALJ fails to explain what support she relies on for 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; Exception 102. There is no testimony nor any documentary evidence that suggests that a distinction should be drawn between the area in front of the pillars abutting the driveway to the area behind the pillars especially since the tiled area extends all the way around the wooden floor area and because there is testimony from both GC’s and Respondent’s witnesses that the lower lobby begins at the red line along the curb without any mention of an “entrance area.” *See* Tr. at 97:13-21, 176:4-6, 176:12-14, 176:16-20, 204:25-205:4; Resp’t Exh. 3.

The ALJ finds that 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; *see* Exception 117. The ALJ fails to explain which “operations” she found to be carried out in the area. Thus, it appears that the ALJ finds that it is irrelevant that in the lower lobby, Respondent provides security, maintenance, and valet parking, welcomes guests with a greeter/doorman; provides bell, concierge, and food service, checks in large groups, and assigns two housemen/housekeepers who each work eight hour shifts. *See* Tr. at 60:7-10, 84:18-85:13, 86:18-87:1, 101:13-23, 127-128, 754:20-755:13, 756:6-25, 757:14-25, 758:18-759:4.

6. The ALJ misstates the law.

a. The Written Warnings

The Burnup & Sims Framework

The ALJ fails to support her assertion that, under the *Burnup & Sims* framework, the burden is on the employer to show that it held an honest belief that the employee engaged in “serious misconduct” as opposed to “misconduct,” as neither *Burnup & Sims* or any of the cases cited by the ALJ stand for that proposition. See Decision at 7:32, 34-35; 8:4, 8:11, 8:21, 9:13, 10:3 (emphasis added); Exception 26; *NLRB v. Burnup & Sims*, 379 U.S. 21, 23-24 (1964).

b. The Employee Meetings

The ALJ misstates 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); Exception 78. Because Section 8(c) “implements the First Amendment” such that “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board,” the correct test is whether the statement *contains* a threat of reprisal or force or promise of benefit *and* does not address consequences beyond an employer’s control. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580, 617 (1969); *see also Greater Omaha Packing Co., Inc. v. NLRB*, 790 F.3d 816, 822 (8th Cir. 2015) (“**not all displeased communications from an employer to an employee are coercive ... to violate Section 8(a)(1), a statement must contain a threat of reprisal or force or promise of benefit**”); *Farm Fresh Co.*, 361 NLRB No. 83, 2014 NLRB LEXIS 830, at *81 (Oct. 30, 2014).

The ALJ again misapplies *Gissel Packing Co.* by stating that it 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; Exception

79. The portion of the decision cited by the ALJ as support for this says no such thing but rather states that an employer can express his views without engaging in “brinkmanship.”

7. The ALJ misapplies the law.

a. The Written Warnings

The Adverse Inference Standard

The ALJ fails to apply the adverse inference standard with respect to testimony or lack of testimony by the GC’s witnesses. First, and most importantly, the ALJ fails to draw an adverse inference based on the GC’s failure to call Ragunjan, the alleged discriminatee, as a witness. The only reference to this omission is one footnote in which the ALJ indicates “Ragjunjan did not testify.” *See* Decision at 6:23 n.14; Exception 24. Where the employer contends that the alleged discriminatee was discharged or disciplined because of misconduct, poor work performance, or any other reason which would require the alleged discriminatee’s testimony, then an adverse inference should be drawn. *Riley Stoker Corp.*, 223 NLRB 1146, 1147 (1976); *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1022 (2006) (explaining that “[i]t is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party.”). By failing to testify, Ragunjan leaves uncontested the testimony of Respondent’s witnesses that he was questioned about Pajinag’s claim that Ragunjan threatened him, a point which the ALJ stressed. *See* Decision at 8:29-32; Exception 34.

In addition, despite mentioning that a witness was identified, *see* Decision at 9:20, the ALJ failed 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. *See* Tr. at 347:11-14; Exception 45; *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016 (2006) (explaining that “[i]t is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party”). Had Guzman

been telling the truth, Vilma could have corroborated Guzman's testimony regarding the particulars of the interaction as well as Guzman's assertion that Vilma told him, "I will take care of Dany [in terms of helping to get his picture for the Union]." *See* Tr. at 351:6-7, 352:2-4. Furthermore, even if the ALJ considers Vilma a "bystander witness," the ALJ should weigh the GC's failure to call her as a factor in determining whether the GC has established by a preponderance of the evidence that a violation has occurred. *See* NLRB Bench Book § 16-611.5.

The Burnup & Sims Standard

The ALJ erroneously found that Respondent failed to meet its *Burnup & Sims* burden, *see* Exception 29, by misapplying the law through inappropriate analogies and distinctions. First, the ALJ inappropriately analogizes 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; Exception 27. However, here, Pajinag testified that Guzman and Rangunjan's behavior towards him did far more than make him uncomfortable; it made him unable to perform his work duties. *See* Tr. at 593:4-5, 605:24-25, 608:19-22; GC Exh.13; Resp't Exh. 13; Exception 39.

Second, the ALJ inappropriately analogized 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." Decision at 7:41, 8:1-2; Exception 28. Respondent *was* concerned about Pajinag not being able to perform his work duties, not just about preventing harassment. Tr. at 479:13-15.

Third, the ALJ inappropriately distinguishes *BJ's Wholesale Club* ("*BJ's*"), 318 NLRB 684, 685 (1995) based on the fact that the interferences in *BJ's* occurred in a single day whereas,

here, the interferences occurred over several days. *See* Decision at 9:1-5; Exception 38.

However, in *BJ's* the Board found the discipline lawful because the interferences were *repeated*, not because they occurred on a single day. 318 NLRB at 686.

Fourth, the ALJ wrongly applies *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004) and *Consolidated Diesel Co.*, 332 NLRB at 1020 for the proposition that an employer may not discipline an employee for pro-union statements that merely cause another employee to feel uncomfortable. Decision at 9:9-12; Exception 40. Pajinag complained not only that he was bothered by Guzman and Ragunjan's repeated interruptions and by Ragunjan's threat, but also that he could not do his work. *See* Tr. at 561:5-7, 593:4-5, 605:24-25.

Fourth, the ALJ inappropriately analogizes to *Arkema, Inc.*, 357 NLRB 1248, 1248-49 (2011) for the proposition that the failure to allow an employee to refute an allegation indicates a lack of honest belief in misconduct. *See* Decision at 9:23-24; Exception 46. Here, both Guzman and Ragunjan repeatedly denied to DeMello and Webster in two separate interviews ever asking **any** working co-worker to sign a card or to take their photograph. Specifically naming Pajinag, in light of Ragunjan's reported physical threat, would have been both futile and possibly endangering to Pajinag. *See* Tr. at 482:3-483:14, 483:25-485:2, 811:22-24, 812:6-15.

Even if the *Burnup & Sims* standard requires the employer to show that it held an honest belief that the employee engaged in *serious* misconduct, which it does not, Guzman and Ragunjan's behavior about which Pajinag complained meets the test for serious misconduct as set forth in the Decision, contrary to the ALJ's conclusion that it does not. *See* Decision at 9:12-13; Exception 41. The ALJ's self-created test "is whether the employee's activity is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate coworkers." Decision at 7:36-37. Here, Pajinag testified that he complained about not being able to

concentrate on his work because of both Guzman and Ragunjan's repeated interruptions including Ragunjan's threat which was not denied by testimony from Ragunjan. *See* Tr. at 593:4-5, 605:24-25. Not being able to concentrate on his work and feeling threatened indicates that the conduct of both Guzman and Ragunjan reasonably tended to intimidate Pajinag.

The ALJ misapplies the law with respect to whether Respondent's investigation into Pajinag's complaints suggests that it did not honestly believe that either Guzman and or Ragunjan's solicitations had actually interrupted Pajinag's work or otherwise lost the Act's protection. *See* Decision at 9:15-17; Exception 42. In *Sutter E. Bay Hosps. v. NLRB*, the Court of Appeals for the District of Columbia Circuit addressed whether the NLRB's conclusion that an employer's "failure to engage in even a cursory investigation of the [alleged misconduct] defeats any claim that [the employer] actually believed the misconduct occurred or that it acted on that belief." 687 F.3d 424, 435 (D.C. Cir. 2012). The D.C. Cir. explained that, in fact, "**an employer is not required to investigate in any particular manner**" and that the Board and the ALJ misapplied the law. *Id.* at 436-37 (emphasis added). Although the Board and the D.C. Cir. analyzed whether the employer had a good faith belief that the employee misconduct occurred under the *Wright Line* test, the *Sutter E. Bay Hosps.* decision is applicable here under the *Burnup & Sims* analysis because where the evidence is disputed regarding the disciplined employee's underlying conduct, both tests require the trier of fact to determine whether the employer had a good faith or honest belief that the misconduct occurred. *See id.* at 435; *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 319 (1990), *aff'd*, Civ. No. 91-70103, 1992 U.S. App. LEXIS 4247 (9th Cir. 1992). Thus, the ALJ here improperly concluded that Respondent did not honestly believe that Guzman and Ragunjan had engaged in serious misconduct because "Respondent's managers focused on amassing documentation," "fail[ed] to interview an

identified witness,” and “refus[ed] to inform Ragunjan and Guzman of the identity of their accuser.” See Decision at 9:15-23; Exceptions 43 and 44. The ALJ inserted her own belief as to what constitutes a “proper investigation” even though the applicable legal tests do not require the employer to investigate in any particular manner but only to actually investigate the alleged misconduct. See *Sutter E. Bay Hosps.*, 687 F.3d at 436; *Health Care Management Corp.*, 295 NLRB 1144, 1159 (1989) (explaining that the Board in *Westinghouse Electric Corp.*, 277 NLRB 136 (1985) held that a failure to provide the employee charged with misconduct the names of his accusers was not evidence of a failure to conduct a good-faith).

The ALJ misapplies 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 surrounding an alleged threat is inconsistent with a good-faith investigation. See Decision at 9:37-39; Exception 51. However, the record indicates that Webster and DeMello *did* confront Ragunjan regarding the loading dock incident. See Tr. at 485:1-2 (DeMello), 813:5-18 (Webster).

Thus, by misapplying the *Burnup & Sims* standard, the ALJ clearly reached an erroneous conclusion. Namely, that Respondent failed to establish that it disciplined Guzman and Ragunjan based on an honestly held belief that they had engaged in unprotected misconduct in the course of protected activity, see Decision at 10:2-4; Exception 52, and that the written warnings violated the Act. See Decision at 10:4; Exception 53.

b. The Employee Meetings

The ALJ misapplies the law through the analogy to *Brandenburg Tel. Co.*, 164 NLRB 825, 831-32 (1967) for the proposition that “[a] high ranking employer official who peppers his remarks with provocative phrases ‘skillfully chose 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; Exception 80. In *Brandenburg*, the Vice President gave a speech to employees in which he impliedly threatened economic jeopardy should they support the union. The Vice President stated that the employer "would have just as much right to demand that employee benefits be reduced as the Union would have to demand that they be increased," that the employer "had [a] legal right" to hire replacements for striking workers, and "they can be permanently replaced . . . and consequently lose their jobs." 164 NLRB at 831. By contrast, there is no evidence Ettinger impliedly "resort[ed] to threats of reprisals or force or promises of benefits" by using words such as "deleterious," "conducive," or "acrimony," or that he used those words with the intent of "obscuring their definitive meaning or to creat[ing] a double entendre." *Id.* at 832.

The ALJ misapplies the law by relying on *Labriola Baking*, 361 NLRB No. 41, 2, 4 (2014) 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." Decision at 14:8-10; Exception 81. The Board in *Labriola Baking* found that a mistranslation is "objectionable conduct warranting *a new election*," not a Section 8(a)(1) violation. *Id.* (emphasis added). Thus, *Labriola Baking* is inapplicable here.

The ALJ misapplies the law by relying on *Cream of the Crop*, 300 NLRB 914, 917 (1990) in finding that Ettinger's comments violated Section 8(a)(1) "where the coercion took the form of a mistranslation unwittingly sanctioned." *See* Decision at 14:8-10; Exception 82. The *Cream of the Crop* Board held that while the chief authority figure at an employee meeting "did not go beyond setting the context and alluding to his problem(s) as an employer, he effectively commissioned [another person] to interpret his remarks and is bound by her version as given in a

language he does not understand.” *Id.* at 917. The employer violated Section 8(a)(1) *because of the way the interpreter translated the words. Id.* That case is inapplicable here because Ettinger did not commission another person to interpret his remarks but rather if there was any mistranslation it was by some employees for whom English may not be their primary language.

The ALJ fails to properly apply the reasonable employee standard when evaluating whether Ettinger’s comments violated the Act. *See* Decision at 14-15; Exceptions 83 and 84. As stated in Respondent’s Post-Hearing Brief (pp. 28-29), the test the ALJ should have applied here is whether the generic, reasonable employee would have felt threatened by Ettinger’s under the totality of the relevant circumstances. Here, the generic, reasonable employee understands English, understands all words uttered by Ettinger during the May 19th meetings, is accurate and truthful in his or her memory of what Ettinger stated, and is neither a highly partisan union supporter nor a highly partisan union opponent.

The ALJ fails to explain *which* of Ettinger’s comments, even those that the GC’s witnesses testified he said, contained a threat of reprisal or force or promise of benefit. *See* Exception 89. That is what is required for finding an Section 8(a)(1) violation. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580, 617 (1969).

The ALJ misapplies the law in her comment that “[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; Exception 90. The ALJ’s “impression” of what Ettinger said at the meetings is irrelevant: the test is not what the ALJ’s impression was but rather how the generic, reasonable employee would have interpreted Ettinger’s actual comments. *Echostar Technologies, LLC*, Case 27-CA-066720, 2012 NLRB LEXIS 627, at *29-30 (Sept. 20, 2012), *adopted by Board*, Case 27-CA-066726, 2012 NLRB

LEXIS 758 (Nov. 1, 2012) (“[T]he employees ... involved in the contested events are not asked if they felt threatened by particular conduct, but rather **the test applied is whether or not a generic or typical employee would be threatened by the conduct.**”) (emphasis added).

The ALJ misapplies the law by relying on *Lancaster Fairfield Comm. Hosp.*, 311 NLRB 401, 401 (1993) in support of her finding that a reasonable employee would have understood that Ettinger told them to stop their union organizing and noisy protests. *See* Decision at 14:30-33; Exception 91. *Lancaster Fairfield Comm. Hosp.* stands for the proposition that directing an employee to “discontinue this disruptive behavior [complaining about work conditions] *immediately*” constitutes a threat of future reprisal for engaging in such conduct; however, there is nothing in the record that indicates that Ettinger told employees or that the witnesses interpreted Ettinger to have said to stop participating in Union-organized rallies *immediately*.

The ALJ misapplies the law by relying on *American Tool & Engineering Co.*, 257 NLRB 608, 608 (1981) in support of her 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, 14:33-35; Exception 92. *American Tool* stands for the proposition that “ordering employees to stop wearing union insignia and distributing union literature violates Section 8(a)(1).” *See* Decision at 14:33-35. Yet, the record does not indicate that Ettinger ordered employees to stop participating in the rallies; rather there is some testimony that Ettinger told the employees to *stop banging on pots and pans*. Unlike wearing union insignia and distributing literature, banging on pots and pans is not protected activity. The protected activity is participating in the rallies, and there is *no* testimony that Ettinger told the employees to stop participating in the rallies.

The ALJ misapplies the law by relying on *Children's Services Int'l*, 347 NLRB 67 (2006) to conclude 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; Exception 95. The Board in *Children's Services Int'l* found that the comment that the employees "were lucky to have their jobs"⁵ did *not* violate Section 8(a)(1) because the employer representative "was expressing her opinion that, given the employees' skill levels and the job market, these employees were fortunate to have their jobs" and because the employer representative "did not say, or even imply, that these jobs would come to an end." *Id.* at 68. Thus, *Children's Services* supports the conclusion that even if a reasonable employee would have understood Ettinger to have told the employees that they were lucky to have their jobs, that comment was not unlawful because Ettinger was expressing his opinion that given the local hotel job market, the employees were fortunate to have their jobs and because Ettinger did not say that these jobs would come to an end. As explained above, that is exactly what GC witness Kava testified to.

Finally, and most significantly, the ALJ fails to address the adverse inference that she should have drawn from the undisputed fact that GC witness Daniels admitted that she recorded on her cell phone what Ettinger said at the meeting which she still possessed, but neither the GC nor the Charging Party offered it into evidence. *See* Tr. at 330:20-25, 331:1-15; Exception 98.

Due to her numerous misstatements of the record testimony, failure to draw a compelling adverse inference, and misapplication of the law, the ALJ erroneously concludes that Ettinger violated the Act by his statements at the meetings. *See* Decision at 10:22; Exceptions 54 and 85.

⁵ Specifically, the employer representative "told employees that she had been through their personnel files, knew they were uneducated, and believed that working for the Respondent was the best job they were ever going to have and that they were lucky to have those jobs." *Id.* at 67.

c. The Handbilling Incident

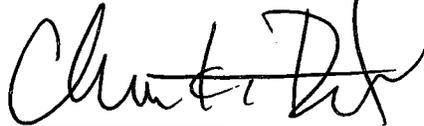
The ALJ finds that Smith's testimony that only guests were permitted to sit in the lobby lacked foundation because he merely claimed to inform anyone he *identified* as a non-guest that the seating was for guests only. *See* Decision at 15:33 n.32 (emphasis in original); Exception 104. Whether Smith identifies a person as a guest is irrelevant as to whether the Hotel has a rule that only guests may sit in the lower lobby. What is significant is Smith's understanding that only Hotel guests may use the lower lobby. As Respondent's agent, Smith clearly was qualified to testify that Respondent forbids non-guests from using the Hotel's lower lobby.

V. CONCLUSION

For the foregoing reasons the Board should render a decision finding and concluding that Respondent did not violate the Act.

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

APPENDIX A

Exception 9

Pajinag testified as follows:

Q Did you explain to Marissa what you meant by “always bothers me”?

A Yes.

Q What did you tell her?

A I told Marissa that Edgar has not just bothered me once or twice; that’s the reason why I wrote the statement.

...

Q How many times did you tell Marissa that Edgar bothered you, besides what’s written in the report?

A It’s not just four times nor five times.

Q Is it more than five times?

A I don’t know. I forgot already.

Tr. at 599:21-25; 600:1, 12-16.

Exception 10

Webster testified as follows:

Q And what, if anything, did *Velina Haines* say to you and Mark at that point?

A That we should start an investigation because it seems like this – the harassment or interference *is continuing*....

Tr. at 811:13-16 (emphasis added).

Exceptions 13, 36, and 37

Pajinag testified as follows:

Q Have you ever had a meeting [with] J[e]nine Webster and Mark DeMello?

A Yes, a long time.

Q Do you remember approximately when it was?

A No. Months ago.

Q Do you remember what you told them?

A Yes. The statement of – yes, I remember, the statement of Sonny and Edgar. That’s all that I told them.

...

Q Do you recall telling them about the incidents *and* what was written in your written statement regarding Sonny and Edgar?

A Yes.

Tr. at 607:20-25; 608:1-2, 19-22 (emphasis added).

Exceptions 19 and 37

Pajinag testified as follows:

Q Okay. And can you remember anything else about what happened on May 21 when Sonny approached you?

A No more, just this one.

Q Sorry?

A No more, just this one.

Judge Anzalone: What are you talking about this one?

A *There was one thing more before.*

Q What was the one thing more?

A When I was by the compactor he came to talk to me and told me – he told me watch your back when you go home.

Q Okay. Do you remember when that happen[ed]? Did that happen before or after the May 21 incident?

A After.

Q Do you remember which month it happened in?

A I need to look at the paper.

Tr. at 590:2-16.

Exception 20

Pajinag testified as follows:

Q Do you remember which month it happened in?

A I need to look at the paper.

Judge Anzalone: You don't remember?

A Somewhat.

Q Do you remember what month it was in?

A That was on a Saturday.

Tr. at 590:15-20.

Exception 25

Webster testified as follows:

Q Okay. Let me show you what I've marked as Respondent's Exhibit 14, a one-page typewritten document, the date June 15, 2015, appears on it. Do you recognize this document?

A Yes.

Q What is it?

A It is the typed statement that we received indicating what happened on the loading dock by the trash compactor?

Q Who did you receive this document from?

A Marissa [Cacacho].

Q And this is what she told you she had been told by Dany?

A Yes.

Q And this is the incident that you asked Sonny about when you met with him later that – later on?

A Yes.

Tr. at 813:5-18 (emphasis added).

Exception 57

Ettinger testified as follows:

And at the same time, *I also wanted them to know* that the activities that were going on outside the hotel, the banging of the – the banging of the pots and pans, were disturbing guests and were actually having a deleterious impact on the business. We were getting complaints at the front desk. We were getting complaints from the Marriott across the street. We were getting – having to give refunds. In some cases, one or two guests actually left the hotel because of it. And *I wanted to make sure* that everybody was aware that these kinds of behaviors are conducive to a vacation. People don't fly thousands of miles to be awakened at 6:00 in the morning to people singing and – banging pots and pans and everything.

Tr. at 641:5-16 (emphasis added).

Exception 62

Daniels testified as follows:

Q What did Mr. Ettinger discuss about the Union at that meeting?

A It's about our doing the rally.

Q And what about the rallies did he discuss?

A It's about us making noise outside.

Q And what types of noises was – did he discuss?

A The way we hit cans outside.

Tr. at 304:1-7.

Exception 101

DeMello testified as follows:

Q Do you provide any guest check-in services in the lower lobby?

A Yes, we do. Again because of our footprint and a limited front desk, considering the size of the hotel, when we have a large group arrival – and that is normally in excess of 75 rooms – we have, we set up a remote check-in area for them in the lower lobby. That allows us to sort of bypass the front desk [so as not to] overwhelm the employees that are working there at the time.

Q And how often throughout the year do you have large guests check-in?

A It really varies season to season, but typically we'll see our larger groups during what we call shoulder seasons, which are spring and fall.

Q And this is an ongoing situation, every year?

A Definitely.

Tr. at 756:6-21.

Exception 103

Smith testified as follows:

Q ... So any member of the general public can go into the lower lobby, correct?

A No, sir.

Q Okay. So they can go to Wolfgang Puck, but they can't go to the lower lobby. The general public can go to Wolfgang Puck, but not to the lower lobby.

A That's correct. If I see someone that isn't a guest seated in the lower lobby area, I'll inform them that the seating area is solely for hotel guests only.

Q Okay. So if someone, say, is waiting for a time to go to – waiting for a table to open at Wolfgang Puck, and they sit in these seats in the lower lobby and you see them, you will tell them that they can't sit there, correct?

A Correct.

Tr. at 115:23 – 116:1-8.

Exception 105

DeMello testified as follows:

[DeMello]: So the owners own the building, the facility, the actual asset. We manage the asset for the owner. Part of that management responsibility is to ensure the leasing of the commercial space.

Q BY MR. KATZ: And so my question is, you have the choice of who you're going to lease that space to; is that correct?

A That's correct.

Q And in this case, you chose to lease it to operators who were providing food services; is that correct?

A The company chose so, yes.

Tr. at 773:22-25; 774:11-13.

Exception 110

Smith testified as follows:

Q BY MR. HOVEY: Mr. Smith, what does it mean to trespass someone at the hotel?

A *It depends. If I'm trespassing someone that is not a hotel employee*, someone that is a vagrant that came off the streets, I would issue them a trespass. First, I would issue a verbal warning. I'll allow that individual to walk off the property and I would advise them not to come back. I will then take his photograph and I will generate a flyer stating that that person was verbally trespassed. Not to be confused with he was trespassed from the property.

Once that person is given a verbal warning not to return to the property, if he did return to the property he would then be officially trespassed. To officially be trespassed, I would contact the Honolulu Police Department. They, in turn, would be there with me to witness my trespassing the individual and they would generate an incident report number for trespass on that specific individual.

The specific individual would then be escorted off property by the Honolulu Police Department and would not be allowed to return to the property for a period of one year. If, in fact, that individual did return to the premises of the property within and before that one year, we, security would contact HPD and that individual would then be trespassed in the second degree and then, arrested.

...

Q BY MR. HOVEY: And what would the difference be if it was an employee being trespassed?

A I have never trespassed an employee.

Tr. at 64:16-25; 65:1-14, 19-21.

Exception 93

Kava testified as follows:

A ... He said that we were lucky to have our jobs at Hotel Renew and Aston Waikiki Beach.

Q Did he discuss why you were lucky to have jobs?

A He just said we were lucky.

Q Okay.

A Because most hotels are cutting back on employment. But Hotel Renew and Aston Waikiki Beach provided jobs and to help employees.

Tr. at 224:3-10.

Exception 119

The following is the entirety of Smith's testimony regarding what he actually told Ching and/or Wolfgramm:

- "I told [Ching] good morning and advised him – and gave him a verbal warning not to be passing out flyers on the property." (Tr. at 70:20-23).
- "Good morning. I just wanted to advise you [Ching] that you're not allowed to be passing out flyers in the lower lobby." (Tr. at 71:14-15).
- "I advised him [Ching] that the hotel policy, I reminded him of the hotel policy stated that you cannot be passing out flyers or literature on property in the lower lobby.... I said on property [not lower lobby]." (Tr. at 71:23-25; 72:2).
- "I said essentially it was up to the both of them [Ching and Wolfgramm] to decide what they were going to do next. I gave the verbal warning and I stated it was up to you what you guys are going to do next." (Tr. at 14-16).
- "I stated that I represent management and that I speak on their behalf." (Tr. at 74:9-10).

- “Yes, sir. (Response to “Did you tell Ms. Wolfgramm or Mr. Ching that they would be trespassed if they didn’t leave?”).” (Tr. at 76:12-14).
- “When I spoke to Jonathan Ching, I told him I was giving him a verbal warning to stop passing out flyers in the lower lobby.” (Tr. at 106:17-19).
- Reading from Smith’s NLRB Affidavit: “I informed him [Ching] that he was allowed to be passing our [sic] pamphlets on property.”

Tr. at 108:17-18.

Exception 112

Smith testified as follows:

Q ... And when you said verbal warning, did you mean a disciplinary warning or a trespass warning?

A A verbal warning.

Q Okay. Is that a verbal trespass warning or a verbal disciplinary warning?

A Neither. It was just a verbal warning to stop passing out flyers.

Q So it was more like just cautioning them?

A Yes, ma’am.

Tr. at 106:22-25; 107:1-5.

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 Brief in Support of 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

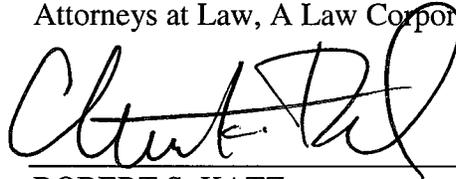
Jill H. Coffman, Acting Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400

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

A handwritten signature in black ink, appearing to read "Robert S. Katz", written over a horizontal line.

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