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ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW

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

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

Respondent,

and

UNITE HERE! LOCAL 5,

Charging Party.

CASE NOs. 20-CA-145717
20-CA-145720
20-CA-145725
20-CA-146582
20-CA-146583
20-CA-148013

**RESPONDENT AQUA-ASTON
HOSPITALITY, LLC D/B/A ASTON
WAIKIKI BEACH HOTEL AND HOTEL
RENEW'S MEMORANDUM IN
OPPOSITION TO COUNSEL FOR THE
GENERAL COUNSEL'S MOTION TO
CONSOLIDATE CASES, TO TRANSFER
CASES TO THE BOARD, AND FOR
DEFAULT JUDGMENT PURSUANT TO
BREACH OF SETTLEMENT
AGREEMENT FILED JULY 15, 2016;
APPENDICES "A" - "G"; CERTIFICATE
OF SERVICE**

**RESPONDENT AQUA-ASTON HOSPITALITY, LLC D/B/A ASTON WAIKIKI
BEACH HOTEL AND HOTEL RENEW'S MEMORANDUM IN OPPOSITION TO
COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO CONSOLIDATE CASES,
TO TRANSFER CASES TO THE BOARD, AND FOR DEFAULT JUDGMENT
PURSUANT TO BREACH OF SETTLEMENT AGREEMENT FILED JULY 15, 2016**

Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew ("Respondent"), pursuant to 29 C.F.R. § 102.24, submits this Memorandum in Opposition to Counsel for the General Counsel's Motion to Consolidate Cases, to Transfer Cases to the Board, and for Default Judgment Pursuant to Breach of Settlement Agreement dated July 15, 2016 ("GC's Motion" or "Motion for Default Judgment"). Because the General Counsel ("GC") waived its right to rely on the alleged default by litigating the merits of the second Case, the GC's Motion is time barred and premature, and Respondent did not default on the Settlement Agreement terms, the National Labor Relations Board ("NLRB" or "Board") should deny the GC's Motion.

I. ARGUMENT

A. The GC's Motion for Default Judgment Is Time Barred.

The Settlement Agreement states:

PERFORMANCE ...

... [t]he General Counsel may **file** a Motion for Default Judgment with the Board on the allegations of the Complaint.

...

Notwithstanding the provisions of this paragraph, **no default shall be asserted** based on this paragraph after six (6) months from the Regional Director's approval of the Settlement Agreement assuming that the Charging Party has entered into the Agreement.

GC Motion Exh. 7 (emphasis added).

Since the Charging Party entered the Settlement Agreement (*id.*), and the Regional Director approved the Settlement Agreement on April 29, 2015 (*id.*), the GC should have asserted the default by filing a Motion for Default Judgment on or before October 29, 2015, six

months from the Regional Director's approval of the Settlement Agreement. However, the GC filed his Motion for Default Judgment on July 15, 2016, *over eight months late!*

1. By applying the rules of contract interpretation to the Settlement Agreement, it is clear the GC failed to assert default in the time prescribed.

The GC appears to argue that it "asserted" default through its October 15, 2015 letter, when he notified Respondent of his intent to seek default, and through the 2015 Consolidated Complaint, in which he alleged violations supposedly similar to those covered by the Settlement Agreement. GC Motion at 11-12; GC Motion Exhibit ("Exh.") 10; GC Exh. 1(w). However, providing notice of an intent to seek default and alleging violations is not the same as having filed a Motion for Default Judgment.

a. The Plain Meaning Rule

The Settlement Agreement is a contract, and the Board must interpret its terms by the customary rules of contract interpretation. The Board follows the "Plain Meaning Rule" of contract interpretation and gives each word and phrase its plain, ordinary, commonplace meaning when doing so would not cause a result that is contrary to the clearly manifested intention of the parties. *See (Int'l Bhd. of Teamsters, Local No. 439, 196 NLRB 971, 971 (1972)* (applying the Plain Meaning Rule to a written contract incorporating a collective bargaining agreement and explaining that "[i]f no ambiguity or uncertainty is asserted, and the writing has a clear meaning on its face, parol evidence is not admissible to interpret it."); *NLRB v. Hospital Inst'l Workers Union, 577 F.2d 649, 50-51 (9th Cir. 1978)* (applying the Plain Meaning Rule to a collective bargaining agreement section even though the language was susceptible to different interpretations); *see also Murphy Oil USA, Inc., 361 NLRB No. 72, slip op. at 19, 2015 NLRB LEXIS 820, at **84, 88 (Oct. 28, 2014)* (holding that the employer's arbitration agreement violates the Act because of "the plain meaning" of the Agreement's provisions).

The plain meaning of the word “assert” is “to declare,” not to provide notice of an *intent* to declare. *See Ballentine’s Law Dictionary*, “assert,” Lexis Nexis 2010 ed. Thus, according to the Settlement Agreement, in order to assert a default, the GC must declare default, not just provide notice of an intent to declare default. In addition, as the entire Performance section must construed together so as to give force and effect to each clause (*see Assurance Co. of Am. v. Wall Assocs. of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004); Restatement 2d of Contracts, § 202 (2d ed. 1981) (“A writing is interpreted as a whole...”)), that section indicates that the way to declare default is through filing a Motion for Default Judgment. *See GC Motion Exh. 7*

(“**PERFORMANCE** [T]he General Counsel may **file** a Motion for Default Judgment with the Board on the allegations of the Complaint.”) (emphasis added). The foregoing plain meaning definition of “assert” is consistent with the NLRB’s rules for filing a Charge. To comply with Section 10(b), a party must *file* and serve an unfair labor practice Charge within six months of the event or conduct which is the subject of that Charge, not simply give *notice* of an intent to file a Charge. Appendix A (NLRB Instructions for Filing a Charge). This definition is also consistent with the Federal Rules of Civil Procedure in that a party must “assert” claims or defenses by actually filing pleadings, not just stating its intent to do so. Fed. R. Civ. P. 8; *see also* Restatement 2d of Contracts, § 202 (2d. ed. 1981) (“[W]here language has a generally prevailing meaning, it is interpreted in accordance with that meaning[.]”).

Allowing the GC to proceed with its untimely Motion for Default Judgment based on its issuance of a notice of an *intent* to declare default is not only inconsistent with the Board’s Rules and Regulations - including 29 C.F.R. § 102.24 - which make no mention of issuing a notice of an *intent* to file a Motion for Default Judgment, but also would enable the GC to theoretically

grant himself an indefinite extension of time for filing a Motion for Default Judgment. This is contrary to the plain meaning of the Settlement Agreement.

(1) Extrinsic Evidence

The GC aims to maneuver around his failure to timely move for default by pointing to extrinsic evidence, namely that in the October 2015 letter, the Regional Director “*asserted that he would seek* default judgment,” (see GC Motion at 11-12) (emphasis added), but the Settlement Agreement says that “no default judgment shall be asserted ... after 6 months,” *not* “no notice of intent to seek default judgment shall be asserted ... after six months.”

The GC also urges the Board to consider the extrinsic evidence of the 2015 Consolidated Complaint as an assertion of default. GC Motion at 12. However, that Complaint does not assert default nor does it even state that the Regional Director would be *seeking* to assert default judgment in Cases 20-CA-145717, et al. if the allegations in Cases 20-CA-154749, et al. were proven. In fact, there is no mention of the Settlement Agreement or of Cases 20-CA-145717, et al. in the 2015 Consolidated Complaint.

If the 2015 Consolidated Complaint is relevant at all, then it is as a waiver. The GC was aware that the Union filed the Charges and Amended Charges in the second Case (Cases 20-CA-154749 et al.) that implicated the three cease-and-desist provisions of the Notice with which the GC now alleges Respondent failed to comply. See GC Motion at 10. The Union filed those Charges and Amended Charges (20-CA-154749 and 20-CA-157769) on June 23, August 11, September 24, and October 20, 2015 – all within six months from the date of the Regional Director’s approval of the Settlement Agreement. GC Exh. 1(w). At any point after June 23, 2015 but before October 29, 2015, the GC could have filed a Motion for Default Judgment and requested the Board delay ruling on the Motion until the Administrative Law Judge (“ALJ”) issued her decision in the second Case. Not only did the GC fail to do this, but he instead began

to litigate those Charges by filing the 2015 Consolidated Complaint on October 28, 2015 – still within the Settlement Agreement’s six month period.

Just as Respondent waived its right to file an Answer to a Complaint in the first Case when it agreed to the default judgment language in the Settlement Agreement (*see* GC Motion Exh. 7 at “PERFORMANCE” Section), by choosing to litigate the merits rather than filing a Motion for Default Judgment, the GC waived his right to rely on the alleged default. This is especially true given that the Settlement Agreement indicates that once the GC files a Motion for Default Judgment, “[t]he Board may then, **without necessity of trial or any other proceeding**, find all allegations of the Complaint to be true....” *Id.* (emphasis added); *c.f. Father & Sons Lumber & Bldg. Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1094, 1097 (6th Cir. 1991) (refusing to permit the arguing of the merits where the NLRB had entered default orders).

Further, if the Board were to consider any extrinsic evidence, it should consider the communications between the parties leading to the final Settlement Agreement. The original Settlement Agreement proposed by the Regional Director did not contain the six month limitation language quoted above in Section I.A. *See* Appendix B (April 16, 2015 DRAFT Settlement Agreement). During the negotiation process, Respondent proposed eliminating the default language entirely. The Regional Director initially rejected this proposal. *See* Appendix C (April 23, 2015 e-mail from Regional Counsel) (“[W]e reject the Employer’s proposal to delete the default judgment language....”). However, four days later, in an effort to induce Respondent to settle, the Regional Director agreed to limit the time for filing a default judgment to six months from the date of the Regional Director’s approval of the Settlement Agreement. *See* Appendix D (April 27, 2015 e-mail from Regional Counsel). This did in fact induce Respondent to settle because it determined it was fair to give up its right to contest the Charges

in exchange for the six month limitation on asserting default. As such, it is abundantly clear that the intention of the parties was to create a six month limitation for the *filing* of the Motion for Default Judgment. Furthermore, given the Board's policy of encouraging informal settlement as a means of preserving Board assets, permitting the GC to move forward with his untimely Motion for Default Judgment will significantly reduce any future incentive derived from including the six month limitation language in a settlement agreement.

b. Expressio Unius Est Exclusio Alterius

The term “[n]otwithstanding” in the sentence at issue in the Settlement Agreement signals that the sentence is in spite of, or an exception to, the previous language in the Performance section. The GC does not provide any reason for reading an additional exception into the contract that would allow for filing of a Motion for Default Judgment later than six months from the date of the Regional Director's approval of the Settlement Agreement. Thus, the Board should apply the “Expressio Unius Est Exclusio Alterius” (Exclude Similar Things Not Specified) rule of contract interpretation and not read another exception into the contract for when the expiration time for filing exceptions to a second relevant Case is more than six months after the Regional Director approved the Settlement Agreement. *See Local 1640, AFL-CIO (Children's Home of Detroit)*, 344 NLRB 441, 446 (2005) (applying Expressio Unius to interpretation of a collective bargaining agreement); *Computer Sciences Raytheon*, 318 NLRB 966, 969 (2001) (applying Expressio Unius to an agreement between the United States and the governments of the islands of Antigua and Ascension).

Accordingly, the language of the Settlement Agreement is clear: The GC was required to file a Motion for Default Judgment no later than six months after the Regional Director approved the settlement; yet, the GC failed to do so.

B. The GC's Motion for Default Judgment Is Premature.

Waiting to file for default judgment, in a case with a settlement agreement, until the time has expired for filing exceptions in a second Case with similar violations does not make sense here, where the expiration time for filing exceptions in the second Case (Cases 20-CA-154749, et al.) was more than six months after the Regional Director approved the Settlement Agreement (exceptions were due June 28, 2016; the Regional Director approved the Settlement Agreement April 29, 2015), Respondent filed exceptions in the second Case, and they are pending before the Board. As such, the ALJ's decision in the second Case is not final, making the Motion for Default Judgment premature.

C. Respondent Did Not Default on the Terms of the Settlement Agreement.

As the GC indicates, the Settlement Agreement required Respondent to post a Notice to Employees for sixty consecutive days and comply with all the terms of the Settlement Agreement. GC Motion Exh 7. Respondent posted the notice for eighty-five consecutive days (from May 4, 2015 through July 28, 2015). GC Motion Exh. 9. In addition, Respondent complied with all the terms of the Settlement Agreement. For the reasons stated more fully in Appendices E-G filed herewith, Respondent did not violate Section 8(a)(1) contrary to the findings and conclusions by ALJ Mara-Louise Anzalone: Respondent did not threaten employees with discharge for engaging in union and/or protected activity or threaten off-duty employees with unspecified reprisals for handbilling in a nonwork area. *See* Appendix E (Respondent's Exceptions to ALJ's Decision); Appendix F (Respondent's Brief in Support of Exceptions); Appendix G (Respondent's Reply in Support of Exceptions to ALJ's Decision). As

such, Respondent did not violate the three cease-and-desist provisions of the Notice¹ referenced by the GC. GC Motion at 10-11.

II. CONCLUSION

For the reasons stated above, a genuine issue exists, and the Board should deny the GC's Motion.

DATED: Honolulu, Hawai'i, August 2, 2016.

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



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

¹ Respondent notes that the GC closed Case Nos. 20-CA-145772 and 20-CA-149639 on compliance. By this closure, the GC admits that Respondent did not violate two of the cease-and-desist provisions of the Notice: "WE WILL NOT unlawfully direct you to remove union buttons from your uniforms" and "WE WILL NOT promulgate and maintain ... overly broad [work rules]."

Please Review the Following
Important Information
Before Filling Out a Charge Form!

- Please call an Information Officer in the Regional Office nearest you for assistance in filing a charge. The Information Officer will be happy to answer your questions about the charge form or to draft the charge on your behalf. Seeking assistance from an Information Officer may help you to avoid having the processing of your charge delayed or your charge dismissed because of mistakes made in completing the form.
- Please be advised that not every workplace action that you may view as unfair constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Act (NLRA). Please click on the Help Desk button for more information on matters covered by the NLRA.
- The section of the charge form called, "Basis of Charge," seeks only a brief description of the alleged unfair labor practice. You should **NOT** include a detailed recounting of the evidence in support of the charge or a list of the names and telephone numbers of witnesses.
- After completing the charge form, be sure to sign and date the charge and mail or deliver the completed form to the appropriate Regional Office.
- A charge should be filed with the Regional Office which has jurisdiction over the geographic area of the United States where the unfair labor practice occurred. For example, an unfair labor practice charge alleging that an employer unlawfully discharged an employee would usually be filed with the Regional Office having jurisdiction over the worksite where the employee was employed prior to his/her discharge. An Information Officer will be pleased to assist you in locating the appropriate Regional Office in which to file your charge.
- The NLRB's Rules and Regulations state that it is the responsibility of the individual, employer or union filing a charge to timely and properly serve a copy of the charge on the person, employer or union against whom such charge is made.
- By statute, only charges filed and served within **six (6) months** of the date of the event or conduct, which is the subject of that charge, will be processed by the NLRB.

APPENDIX "A"

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

DRAFT
4/16/15

IN THE MATTER OF

**Aston Hotels & Resorts, LLC d/b/a Aston Waikiki Beach Hotel and
Hotel Renew**

**Cases 20-CA-145717
20-CA-145720
20-CA-145725
20-CA-145772
20-CA-146582
20-CA-146583
20-CA-148013
20-CA-149639**

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in prominent places around both its facilities located at 2570 Kalakaua Avenue, Honolulu, Hawaii 96815 and 129 Paoakalani Avenue, Honolulu, Hawaii 96815, including all places where the Charged Party normally posts notices to employees. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

INTRANET POSTING - The Charged Party will also post a copy of the Notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, on its intranet at www._____, and keep it continuously posted there for 60 consecutive days from the date it was originally posted. The Charged Party will submit a paper copy of the intranet or website posting to the Region's Compliance Officer when it submits the Certification of Posting and provide a password for a password protected intranet site in the event it is necessary to check the electronic posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION CLAUSE – By entering into this Settlement Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the

APPENDIX "B"

undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____ No _____
 Initials Initials

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

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

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party Aston Hotels & Resorts, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew		Charging Party UNITE HERE! Local 5	
By: Name and Title	Date	By: Name and Title	Date
Recommended By:	Date	Approved By:	Date
Trent K. Kakuda, Field Attorney		Regional Director, Region 20	

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT interrogate you about your union membership, activities, and sympathies.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT direct you to remove union buttons from your uniforms.

WE WILL NOT encourage or solicit you to sign any documents withdrawing support from a union.

WE WILL NOT threaten you with adverse job consequences if you engage in union or other protected concerted activities

WE WILL NOT impliedly threaten to discipline or terminate off-duty employees for engaging in activities protected by Section 7 of the Act in nonwork areas of our premises.

WE WILL NOT promulgate and maintain an overly broad "Computer Use Policy" that unlawfully interferes with your use of our email system for Section 7 activities.

WE WILL NOT promulgate and maintain an overly broad provision in our "Non-Interference and Confidentiality Agreement" that you would reasonably construe to interfere with your right to engage in a boycott or other public demonstration in support of a labor dispute.

WE WILL NOT promulgate and maintain in our employee handbook overly broad rules that: (1) bar you from our premises 30 minutes before your shift or requires you to leave within 30 minutes after your shift, enforced by a property pass rule; (2) forbid you from "[l]oitering or unauthorized presence while on the job or anywhere on Hotel premises"; (3) prohibit you from discussing or otherwise disclosing information regarding wages, benefits, and other terms and conditions of employment; (4) prohibit or restrict your wearing of union buttons; (5) forbid solicitation or distribution of materials during nonworking time in "areas open to the public"; and (6) prohibit "[d]iscourtesy in any form or disrespect to employees."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the overly broad employee handbook rules referenced above, overly broad "Computer Use Policy," and overly broad provision of our "Non-Interference and Confidentiality Agreement."

WE WILL furnish all of you with inserts for the current edition of the employee handbook, "Computer Use Policy," and "Non-Interference and Confidentiality Agreement" that (1) advise that the unlawful provisions, above, have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised employee handbook, "Computer Use Policy," and "Non-Interference and Confidentiality Agreement" that (1) do not contain the unlawful provisions, or (2) provides the language of lawful provisions.

**Aston Hotels & Resorts, LLC d/b/a Aston Waikiki
Beach Hotel and Hotel Renew**

(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

300 Ala Moana Boulevard, Rm. 7-245
Honolulu, Hawaii 96850

Telephone: (808) 541-2814
Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

Katz, Robert S.

From: Kakuda, Trent K [mailto:Trent.Kakuda@nrb.gov]
Sent: Thursday, April 23, 2015 9:37 AM
To: Katz, Robert S.
Subject: Aston Proposed Settlement

Dear Bob,

After careful review of the Employer's proposed settlement agreement, our position is as follows:

APPENDIX "C"

First, in accordance with the Employer's proposal, at this point we are agreeable to deleting the paragraph in the settlement agreement pertaining to intranet posting of the notice to employees.

Second, we reject the Employer's proposal to delete the default judgment language of the settlement agreement in light of the numerous meritorious determinations made by the Region. On this point, I have been told there is no discretion. Accordingly, I have inserted the language back into the settlement agreement.

Third, with respect to the notice to employees, we have considered the Employer's desire to shorten the notice and consolidate items. However, the notice must also be clear and easily readable to employees. Balancing these two considerations, we are agreeable to consolidating the paragraphs referencing interrogation and surveillance, and also consolidating the paragraphs involving maintenance of unlawful rules. We are also agreeable to deleting in its entirety the portion of the notice which reads "WE WILL NOT do anything to prevent you from exercising the above rights."

Fourth, with respect to individual changes made to certain portions of the notice, we have attempted to meet some of the Employer's concerns, as follows: (1) we are amenable to adding "unlawful" in the paragraph pertaining to union buttons to add some limitation; (2) similarly, in the portion of the notice pertaining to the overly broad rule limiting union insignia, we are amenable to adding the following limiting language – "in an unlawful manner"; (3) in the portion of the notice pertaining to the 30-minute rule enforced by a property pass, we have added the term "entire" to clarify that the rule was overly broad because it initially applied to all areas, not just interior ones; (4) in the portion of the notice addressing the no solicitation/no distribution rule, we are amenable to adding the phrase "without exception" to further clarify why the rule was overly broad.

We are unable to agree to the other proposed changes. With respect to the Employer's proposed language in the notice regarding the "[l]oitering" and "[d]iscourtesy" rules, the Region found those specific rules unlawful, which is why they were quoted in the notice. As they appear to have been subsequently modified, we believe adding further verbiage to a quoted rule that is no longer in effect in its quoted form will serve no purpose and create confusion. With respect to the notice language pertaining to the confidentiality rule, adding further wording will be confusing. Further, the notice already states that the Employer will not maintain "overly broad" rules of that sort so it has a built-in limitation if that is the Employer's concern.

With respect to the Employer's proposed modification to the affirmative "WE WILL ..." portions of the notice pertaining to the rules, we believe the language we use is standard and it should not be altered. E.g. *2 Sisters Food Group*, 357 NLRB No. 168 (2011). To the extent the Employer has already taken those actions necessary to remedy unlawful rules, it need not repeat them. But it will need to take those affirmative actions to address the Region's findings that the current no solicitation/no distribution policy and dress code are still unlawfully over broad. I also note that the Employer must still make clear to employees that it has rescinded the old Computer Use Policy (or at least inform them where the new one is located) and the unlawful language in the Non-Interference and Confidentiality Agreement.

Please review the attached draft settlement agreement and give me a call to discuss. I remain committed to settling these cases, but I do not have much more flexibility at this point. Thank you for your continuing efforts.

Trent K. Kakuda
National Labor Relations Board
Subregion 37
300 Ala Moana Boulevard, Room 7-245
P.O. Box 50208
Honolulu, HI 96850
Ph: (808) 541-3193
Fax: (808) 541-2818

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Katz, Robert S.

From: Kakuda, Trent K [<mailto:Trent.Kakuda@nlr.gov>]
Sent: Monday, April 27, 2015 3:44 PM
To: Katz, Robert S.
Subject: Aston Settlement Agreement

Dear Bob,

Attached is the latest version of the settlement agreement, which incorporates language limiting the default judgment provision of the agreement along the terms you requested. If the agreement is acceptable, please initial the bottom corner of each page, sign and date the agreement where indicated, and send the agreement back to me via email or fax. After I receive the executed copy from the Employer, please wait for me to notify you whether the Union will also enter into the agreement, and also when the Regional Director approves the final agreement. Thank you for your efforts to reach a settlement in these cases.

Trent K. Kakuda
National Labor Relations Board
Subregion 37
300 Ala Moana Boulevard, Room 7-245
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APPENDIX "D"

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

I. THE WRITTEN WARNINGS

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

1. Finding that Respondent’s managers and officials did not hold an honest belief that Guzman and Ragunjan had engaged in serious misconduct and therefore the conclusion that the written warnings violated the Act. *See* Decision at 3:21-23.

2. Characterizing the testimony of Executive Housekeeper Marissa Cacacho (“Cacacho”) as having stated that Ragunjan “invited” Utility Housekeeper Dany Pajinag (“Pajinag”) to have his picture taken and sign a union authorization card. *See* Decision at 4:8-10.

3. Finding that General Counsel’s Exhibit (“GC Exh.”) 13 indicates the incident with Guzman Pajinag reported on June 9, 2015 was not the first of its kind only because Pajinag wrote that Guzman “always bother[ed]” him. *See* Decision at 4:15-17.

4. Failing to characterize the testimony of Pajinag, who testified through an interpreter, the same way the Administrative Law Judge (“ALJ”) characterized the testimony of the General Counsel (“GC”)’s witnesses who testified through an interpreter. *Compare* Decision at 4:20-32, 5:28, 5:33, 6:1-2, fn.11 *with* Decision at 11:15-16, 12:18-19.

5. Characterizing Pajinag’s testimony that after counsel pointed out to him his written complaint dated May 22 referenced Ragunjan bothering him “again,” he changed his previous “story” that he had not told Cacacho about prior incidents with Ragunjan by stating, “I

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

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

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

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

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

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

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

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

13. Misstating the record that Pajinag *only* told Webster and DeMello “what 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32.

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

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

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

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

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

II. THE EMPLOYEE MEETINGS

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

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

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

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

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

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

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

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

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

61. Misstating the record that “DeMello confirmed that Ettinger used terminology such as ... ‘in-fighting’ and ‘dissention’ when describing the atmosphere the Union created.”

The ALJ relied on Respondent’s Exhibit 17 for this statement. *See* Decision at 11:11 n.23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE HANDBILLING INCIDENT

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

protected concerted activities in non-work areas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19:21-23.

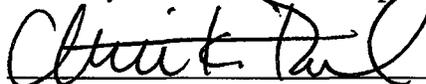
119. Concluding, “even were the area where Ching and Wolfgramm stood found to be a working area, Smith’s order would be unlawful, in that – based on his explicit instructions from Hotel management – he threatened to ‘trespass’ them if they did not leave the Hotel property, not just the lower lobby;”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

IV. REMEDY

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

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

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

UNITE HERE LOCAL 5,
Charging Party,

v.

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

Respondent.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

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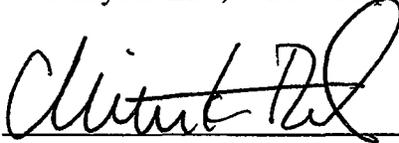
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A handwritten signature in black ink, appearing to read "Robert S. Katz", is written over a horizontal line.

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**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 Ragunjan 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 Ragunjan 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 Ragunjan are riddled with errors as shown by the following instances:

The ALJ mischaracterizes the testimony of Cacacho as having stated that Ragunjan "*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 Ragunjan 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 Rangunjan, *see* Resp't Exh. 13, and that Guzman and Rangunjan 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 Rangunjan 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 Rangunjan, 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 Rangunjan 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 Rangunjan had violated its policy, it issued Corrective Actions to Rangunjan 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 Rangunjan with the alleged threat to Pajinag. See Decision at 6:28-30; Exception 25. The record shows that Webster did ask Rangunjan 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 Rangunjan, issued a written warning to Rangunjan, 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 Rangunjan about the loading dock incident. *See* Decision at 9:35-36; Exception 50. Instead, both DeMello and Webster testified that they questioned Rangunjan 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 Ragunjan’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 Ragunjan 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 Afafe 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 “Ragunjan 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), enfd 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 "[i]llegitimate 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

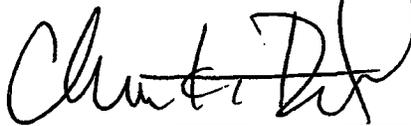
The ALJ finds that Smith's testimony that only guests were permitted to sit in the lobby lacked foundation because he merely claimed to inform anyone he *identified* as a non-guest that the seating was for guests only. See Decision at 15:33 n.32 (emphasis in original); Exception 104. Whether Smith identifies 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
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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:

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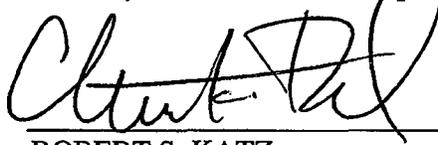
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A handwritten signature in black ink, appearing to read "Robert S. Katz", written over a horizontal line.

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On June 28, 2016, Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (“Respondent”) filed its Brief in Support of Exceptions to Administrative Law Judge’s Decision (“the Brief”). This Errata corrects the following errors in the Brief:

Page 2, paragraph 2 states: “A preponderance of the evidence does not support the ALJ’s conclusion that the “entrance area” to the lower lobby is a work area” It should read: “A preponderance of the evidence does not support the ALJ’s conclusion that the “entrance area” to the lower lobby is a non-work area”

Page 14, paragraph 2 states: “Whether a preponderance of evidence supports the ALJ’s conclusion that the “entrance area” to the lower lobby is a work area?” It should read: “Whether a preponderance of evidence supports the ALJ’s conclusion that the “entrance area” to the lower lobby is a non-work area?”

Page 18, paragraph 1 states: “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.” It should read: “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, based on the mischaracterization of Pajinag’s testimony that he “clearly testified, after being asked whether there was anything else he recalled about the May 21 incident, that there was ‘one thing before” and then described the watch your back incident,” *see* Decision at 6:2 n.11. Exceptions 19 and 37.”

Page 45, paragraph 1 states: “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.” It should

read: “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 comments under the totality of the relevant circumstances.”

Pages 5-6 of Appendix A state:

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.

It should read:

Exception 119

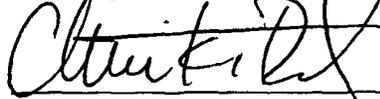
The following is the entirety of Smith’s testimony regarding what he actually told Ching and/or Wolfgramm:

- “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.

DATED: Honolulu, Hawai`i, July 1, 2016.

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HOTEL RENEW

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

UNITE HERE LOCAL 5,

Charging Party,

v.

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

Respondent.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a copy of the foregoing Errata To 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 Filed On June 28, 2016 was electronically filed with the National Labor Relations Board Division of Judges and served via e-mail upon:

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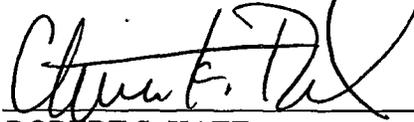
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Applying correct law to the facts found by the Administrative Law Judge (“ALJ”) and conceded by General Counsel (“GC”), the Board will easily conclude Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (“Respondent”) did not violate the Act. Correcting evidentiary errors made by the ALJ, the Board will without difficulty determine Respondent’s full compliance was manifest.

I. ARGUMENT

A. The Written Warnings Did Not Violate the Act.

The facts found by the ALJ and conceded by GC were:

On May 22, 2015, Utility Housekeeper Dany Pajinag complained to Executive Housekeeper Marissa Cacacho. He reported Santos “Sonny” Ragunjan approached him the day before while he was working, asked him to have his picture taken and sign a union authorization card *again*, and because of this, Pajinag could not concentrate on his work. Tr. at 546:14; Decision at 4:7-10; Respondent Exhibit. (“Resp. Exh.”) 13.

On June 9, 2015, Pajinag complained to Cacacho that on June 5 and June 9 Maintenance Engineer Edgardo Guzman asked him to sign a union authorization card and to have his picture taken and that because Guzman *always* bothers him, he cannot concentrate on his work. Tr. at 597:2-14; GC Exhibit (“GC Exh.”) 13.

On June 10, 2015, Respondent’s General Manager Mark DeMello and Rooms Division Manager Jenine Webster interviewed Guzman regarding Pajinag’s complaint. Decision at 5:3-9.

On or around June 15, 2015, Pajinag complained to Cacacho that Ragunjan threatened him. Decision at 9:1 n.19; Counsel for the General Counsel Answering Brief (“GC Ans. Brief”) at 4.

On June 15, 2015, Cacacho typed a written statement reciting Ragunjan’s threat to Pajinag and provided it to Webster and DeMello, telling them the statement was more threatening in Ilocano and Pajinag was afraid to leave his house. Decision at 5:19-21; Resp. Exh. 14.

On June 15, 2015, DeMello and Webster interviewed Pajinag. Decision at 5:13-33; 6:1-2.

On June 19, 2015, DeMello and Webster re-interviewed Guzman and interviewed Ragunjan regarding Pajinag's complaints. Decision at 6:14-32.

On June 30, 2015, Respondent issued written warnings to Guzman and Ragunjan for repeatedly interfering with Pajinag being able to do his work, in violation of Respondent's non-interference rule, and for Ragunjan additionally violating Respondent's anti-threatening rule. Decision at 7:10-13.

These undisputed facts show Respondent's managers did not violate the Act by warning Guzman and Ragunjan based on their honest belief the two interfered with Pajinag's work concentration and threatened him. Exceptions 52 and 53; *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). The misconduct the managers honestly believed occurred need not be more "serious" or "egregious" than that. Exception 26. None of the cases cited to by the ALJ to support her version of the *Burnup & Sims* standard use the word "serious" to modify "misconduct." In addition, all cases cited by Respondent do not contain the word "serious" in the explanations of the standard. Resp. Brief at 43-44. GC agrees. GC Ans. Brief at 15.

GC aims to maneuver around the applicable precedent by noting that *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) stands for the proposition where an employee engages in misconduct in the course of protected activity, that misconduct must be "egregious" or "offensive" to lose its protection under the Act; the GC implies that "serious" is the same as "egregious." GC Ans. Brief at 16, 18. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) neither involved nor modified the fifty two year old *Burnup & Sims* test. See *Alta Bates Summit Med. Cntr.*, 357 NLRB No. 31, slip op. at 1-2 (2011) (no mention of *Consolidated Diesel Co.* in discussion of *Burnup & Sims* test). Nor was any particular investigation required to arrive at an honest belief. Exceptions 42, 44, and 51; Resp. Brief at 42-43.

The ALJ:

Completely ignored Pajinag's testimony that he talked to Cacacho

about his May 22 written statement concerning Ragunjan (Tr. at 584:20-22); which said he could not concentrate on his work because of Ragunjan's conduct (Resp. Exh. 13).

Completely ignored Pajinag's testimony that he provided Cacacho his June 9 written statement concerning Guzman (Tr. at 597:12-14), which said he could not concentrate on his work because of Guzman's conduct (GC Exh. 13).

Failed to draw necessary adverse inferences against General Counsel for not calling Ragunjan to deny he interfered with Pajinag's work or threatened him and for not calling Vilma to deny Guzman interfered with Pajinag's work, as their testimony goes to GC's burden to prove that the misconduct did not occur – and especially given that GC fails to explain why it did not call these witnesses. Exceptions 24 and 45; GC Ans. Brief at 16; *Martin Luther King, Sr. Nursing Cntr.*, 231 NLRB 15, 15 n.1 (1977); NLRB Bench Book § 16-611.5. (Because Ragunjan did not testify, there is no testimony contradicting Pajinag's testimony that Ragunjan threatened him with physical harm.)

Erroneously discredited DeMello, Webster and Cacacho for reasons having nothing to do with their demeanor¹, saying their testimony had a “self-serving ring to it,” “appeared rehearsed,” and they “parsed their answers”. Exceptions 23, 30, and 33; Resp. Brief at 31.

When the Board accounts for Pajinag's written statements and testimony, draws necessary adverse inferences against GC and conducts the independent credibility analysis appropriate when the resolutions are not based on demeanor (Resp. Brief 14), DeMello, Webster and Cacacho's honest belief for issuing the written warnings will be obvious.

B. The Statements at the Employee Meetings Did Not Violate the Act.

The testimony of GC's witnesses about Respondent's Executive Vice President of Operations Gary Ettinger's meeting statements was:

¹ Demeanor involves appearance, attitude, and manner, none of which the ALJ considered in making the credibility resolutions addressed in Exceptions 23, 30, 33, 64, 70, and 107. See James P. Timony, *Demeanor Credibility*, 49 Cath. U. L. Rev. 903, 904-05 (2000).

Allegation→	1. Stop participating in union-organized rallies	2. Stop visiting the homes of coworkers to engage in union and/or other protected concerted activities	3. Impliedly threatened employees with discharge by telling them they were lucky to have jobs	4. Apologize for engaging in union and/or protected concerted activities
Cecile Daniels→	“It’s about our doing the rally....It’s about us making noise outside....The way we hit cans outside.” Resp. Brief at 22.	“[S]top badgering (or bothering, see Resp. Brief at 23) your coworker, their house or calling them at home or talking to them at workif you are home that the Union going to bothering you as your worker, you have the right to call police.” Tr. at 306:24-25; 307:1-4.	“[Y]ou guys so lucky you guys have a job.” Tr. at 308:6.	“[I]f you guys want to stop by – to my office and say sorry.” Resp. Brief at 23.
Faustino Fabro→	“[S]top banging pots and pans.” Tr. at 266:15 (corrected by ALJ’s Errata).	“[S]top bothering workers at their home when they are working.” Tr. at 270:23-24. <i>No testimony regarding police.</i>	“[You]’re lucky to have work.” Resp. Brief at 23.	“If [you] wanted to stop by [my] office and apology (or apologize).” Resp. Brief at 23.
Lotuseini Kava→	“It has to end,” referring to the banging of the pots and yelling on the microphone. Resp. Brief at 21-22.	<i>No testimony on this or police.</i> Resp. Brief at 24.		<i>No testimony on this.</i>

None of the statements the witnesses testified about contained a threat of reprisal or force or promise of benefit. Exception 78; Resp. Brief at 38; *Farm Fresh Co.*, 361 NLRB No. 83,

2014 NLRB LEXIS 830, at *81 (Oct. 30, 2014). No reasonable employee would have felt threatened by the statements under the totality of the circumstances (Resp. Brief at 45). Thus, Ettinger's statements did not violate the Act. Exceptions 54 and 85.

None of Ettinger's statements told employees:

To stop participating in rallies, rather than - at most - to stop banging pots and pans (Exception 92; Resp. Brief at 46);

Police would be involved, rather than the employees had the right to call the police (Resp. Brief at 24);

They could be discharged, rather than they were lucky to have jobs given the overall job market (Exception 93; Resp. Brief at 24-25);
or

To apologize for protected activities or disclose union sentiments, rather than they could stop by the office and apologize, if they wanted to (Exception 97; Resp. Brief at 37).

No *witness* testified about any statements directing the employees to “(a) stop the rallies or you will lose work, and (b) stop bothering your coworkers about the union or the police will be involved,” contrary to the finding in the Decision at 14:19-21. Exception 88 and Resp. Brief at 23-24; *Contra* GC Ans. Brief at 23.

The ALJ:

Failed to draw a necessary adverse inference against GC for not offering Daniels' contemporaneous notes of the May 2015 meeting to compare to testimony by Daniels, Kava and Fabro - and especially given that GC fails to explain why it did not call these witnesses. Exception 98; Resp. Brief at 39; *Roosevelt Mem'l Med. Ctr.*, 348 NLRB 1016 (2006); *Martin Luther King, Sr. Nursing Cntr.*, 231 NLRB 15, 15 n.1 (1977); NLRB Bench Book § 16-611.5.

Erroneously discredited Ettinger for a reason having nothing to do with demeanor (*see* n. 1), saying that he “related a gentler version.” Exception 64; Resp. Brief at 32.

Erroneously credited Daniels for a reason having nothing to do with demeanor (*see* n. 1), saying she was “certain of what she understood Ettinger to have said”

and recounted it in English. Exception 70; Resp. Brief at 32.

When the Board draws the necessary adverse inference against GC and conducts the independent credibility analysis appropriate when the resolutions are not based on demeanor (Resp. Brief 14), it will be apparent that Ettinger's meeting statements did not contain threats or promises.

C. Remarks About Handbilling Did Not Violate Act.

All witnesses testified that Jonathan Ching and Lakai Wolfgramm distributed handbills in the lower lobby, not in an "entrance area" (contrary to the finding in the Decision at 15:28-29, 16:28-31) or "near the lower lobby" (contrary to the allegation recounted in the Decision at 15:13-15). Exception 102 and Resp. Brief at 28. The first time there was any mention of a separate "entrance area" was in the Decision. Since the evidence established the lower lobby is a work area and the ALJ did not conclude it was not, Respondent did not violate the Act by restricting distribution of literature there. At the hearing, there was no evidence of business activities Respondent conducted specifically in an "entrance area" or "near the lower lobby" or whether any distribution was restricted there, much less any basis for limiting the analysis to those smaller areas. Exception 118. The Decision provides no analysis regarding why specifically the "entrance area" or "near the lower lobby" is a non-work area. Exception 117; Resp. Brief at 37.

In addition, the ALJ erroneously discredits DeMello's testimony regarding the lower lobby functions for a reason having nothing to do with his demeanor (*see* n. 1); saying "he was quite focused on 'selling' the open air experience." Exception 107; Resp. Brief at 34. When the Board conducts the independent credibility analysis appropriate when the resolutions are not based on demeanor (*see* Resp. Brief 14), the work area status of the lower lobby will be beyond dispute.

The ALJ incorrectly finds Security Guard Andrew Smith threatened Ching and

Wolfgramm with unspecified reprisals if they handbilled in the entrance area because Smith specifically invoked the trespass procedure, which involves an automatic one year penalty from the Hotel. Decision at 18:7-9; 19:22-23. First, “unspecified reprisals” differ from “discipline,” as GC alleged. Second, Smith, whose testimony the ALJ credits (Decision at 17:3-4) did not specifically invoke the trespass procedure on Ching and Wolfgramm. Exception 114. Smith testified that the trespass procedure referenced in the Decision is for non-employees *only*. Resp. Brief at 27.

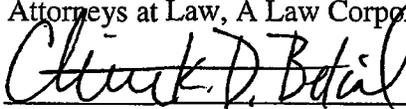
Finally, the ALJ mistakenly finds that Smith’s order would be unlawful even if the entrance area were a work area because “he threatened to ‘trespass’ the employees if they did not leave the Hotel property, not just the lower lobby.” Decision at 19:24-26. However, Smith testified while he, Ching, and Wolfgramm were standing in the lower lobby, he told them “they would be trespassed if they didn’t leave,” not that they would be trespassed if they didn’t leave the Hotel property. Resp. Brief at 28-29. There is no evidence Smith banned their distribution in non-work areas elsewhere on Respondent’s property, and GC did not even make such an allegation. Exception 119.

II. CONCLUSION

For the reasons stated above as well as those stated in Respondent's Brief in Support of Exceptions, Respondent's Exceptions should be sustained, and the Board should find and conclude that Respondent did not violate the Act.²

DATED: Honolulu, Hawai'i, July 26, 2016.

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² Respondent requests leave to incorporate the transcript citations, but not the corresponding quotes, from Appendix A into its Brief in Support of Exceptions. This will not increase the length of the Brief by more than two pages so it will be 50 pages or less.

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

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I HEREBY CERTIFY that on July 26, 2016 a copy of *Aqua-Aston Hospitality, LLC D/B/A Aston Waikiki Beach Hotel And Hotel Renew's Reply in Support of Exceptions to Administrative Law Judge's Decision* was electronically filed with the National Labor Relations Office of the Executive Secretary and served via e-mail upon:

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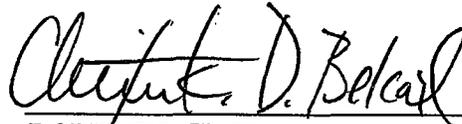
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UNITED STATES OF AMERICA

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CASE NOs. 20-CA-154749
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**ERRATA TO AQUA-ASTON
HOSPITALITY, LLC D/B/A ASTON
WAIKIKI BEACH HOTEL AND HOTEL
RENEW'S REPLY IN SUPPORT OF
EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION;
CERTIFICATE OF SERVICE**

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

On July 26, 2016, Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach
Hotel and Hotel Renew ("Respondent") filed its Reply in Support of Exceptions to

Administrative Law Judge's Decision ("the Reply"). This Errata corrects the following errors in the Reply:

Page 2, paragraph 2 states: "Respondent Exhibit. ("Resp. Exh.") 13." It should read: "Respondent Exhibit ("Resp. Exh.") 13."

Page 4, paragraph 1 states: "(Tr. at 584:20-22); which...." It should read: "(Tr. at 584:20-22), which...."

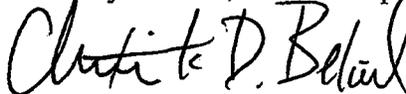
Page 4, paragraph 3 states: "against General Counsel...." It should read: "against GC...."

Page 5, the section of the chart associated with Kava under "Impliedly threatened employees with discharge by telling them they were lucky to have jobs" is blank. It should read: "[You] [a]re lucky to have [your] jobs at Hotel Renew and Aston Waikiki Beach.... Because most hotels are cutting back on employment. But Hotel Renew and Aston Waikiki Beach provided jobs and to [sic] help employees.' Tr. at 224:3-4, 8-10."

Page 7, heading "C" states: "Remarks About Handbilling Did Not Violate Act." It should read: "The Remarks About Handbilling Did Not Violate the Act."

DATED: Honolulu, Hawai'i, July 27, 2016.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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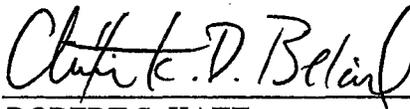
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DATED: Honolulu, Hawaii, July 27, 2016.

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UNITED STATES OF AMERICA
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and

UNITE HERE! LOCAL 5,

Charging Party.

CASE NOS. 20-CA-145717
20-CA-145720
20-CA-145725
20-CA-146582
20-CA-146583
20-CA-148013

CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on August 2, 2016 a copy of *Aqua-Aston Hospitality, LLC D/B/A Aston Waikiki Beach Hotel And Hotel Renew's Memorandum in Opposition to Counsel for the General Counsel's Motion to Consolidate Cases, to Transfer Cases to the Board, and for Default Judgment Pursuant to Breach of Settlement Agreement dated July 15, 2016* was electronically filed with the National Labor Relations Board Office of the Executive Secretary and served via e-mail upon:

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DATED: Honolulu, Hawai`i, August 2, 2016.

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