

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

AQUA-ASTON HOSPITALITY, LLC f/k/a
ASTON HOTELS AND RESORTS, LLC d/b/a
ASTON WAIKIKI BEACH HOTEL and
HOTEL RENEW

Respondent

and

Cases 20-CA-145717
20-CA-145720
20-CA-145725
20-CA-146582
20-CA-146583
20-CA-148013

UNITE HERE! LOCAL 5

Charging Party

GENERAL COUNSEL'S REPLY TO RESPONDENT'S MEMORANDUM IN
OPPOSITION TO GENERAL COUNSEL'S MOTION TO CONSOLIDATE CASES,
TO TRANSFER CASES TO THE BOARD, AND FOR DEFAULT JUDGMENT
PURSUANT TO BREACH OF SETTLEMENT AGREEMENT

Counsel for the General Counsel (General Counsel) respectfully submits this Reply to Respondent Aqua-Aston Hospitality, LLC's Memorandum in Opposition (Respondent's Opposition) to General Counsel's Motion to Consolidate Cases, to Transfer Cases to the Board, and for Default Judgment Pursuant to Breach of Settlement Agreement (Motion). See *D.L. Baker, Inc.*, 330 NLRB 521, fn. 4 (2000) (noting Board's practice of allowing a moving party to file a reply).

1. General Counsel's Motion is Timely

Respondent claims that General Counsel's Motion is untimely because it was not filed on or before October 29, 2015.¹ Respondent's Opposition at 2-7. Respondent reads the "Performance" provision of the Settlement Agreement (Settlement) too restrictively. Respondent would revise the language of the "Performance" provision to read that "no motion for default judgment shall be filed based on this paragraph after six (6) months from the Regional Director's approval of the Settlement Agreement." In reality, the Settlement states that "no default shall be asserted based on this paragraph after six (6) months from the Regional Director's approval of the Settlement Agreement." Contrary to Respondent's interpretation, the plain meaning of the Settlement's terms support General Counsel's position that the Motion was timely because "default" was "asserted" prior to October 29.²

In his letter to Respondent, dated October 15, the Acting Regional Director asserted without equivocation that Respondent had defaulted on the Settlement's terms by its actions in post-Settlement Cases 20-CA-154749 and 20-CA-157769. See Motion Exhibit 10. On October 28, the Regional Director then alleged that Respondent's conduct in Cases 20-CA-154749 and 20-CA-157769, among others, violated Section 8(a)(1). See GC Exhibit 1(w) in the record before the Board in Cases 20-CA-154749, et al. The Regional Director therefore asserted that Respondent defaulted on the terms of the Settlement by its actions in the post-Settlement cases, and further confirmed this assertion by issuing the 2015 Consolidated Complaint in those post-Settlement cases.

¹ All dates refer to 2015 unless otherwise specified.

² Respondent's comparison to Section 10(b) of the Act is inapt. See Respondent's Opposition at 4. Section 10(b) expressly requires the "filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

See GC Exhibit 1(w) in the record before the Board in Cases 20-CA-154749, et al.

Consequently, and in accordance with the Settlement's actual language, default was asserted before October 29 and General Counsel's Motion is therefore not untimely.

2. General Counsel Did Not Waive Any Right to Seek Default Judgment By Issuing the 2015 Consolidated Complaint

Respondent apparently claims that General Counsel waived the right to file the Motion by issuing and litigating the 2015 Consolidated Complaint. Respondent's Opposition at 5-6. Respondent's argument is incorrect, as General Counsel has followed the process described in *Conagra Foods, Inc.*, 361 NLRB No. 113 (2014), enf. denied and remanded 813 F.3d 1079 (8th Cir. 2016). There, the charging party and respondent entered into an agreement to settle three unfair labor practice cases. The regional director approved the settlement on November 30, 2011. The *Conagra* settlement's non-compliance provisions were similar to those in the instant case.³ On September 18 and October 5, 2012, the charging party filed two post-settlement charges against the respondent. On December 18, 2012, the regional director notified the respondent that it was in noncompliance with the settlement agreement by engaging in the conduct alleged in the two post-settlement charges. On January 17, 2013, General Counsel issued a consolidated complaint against the respondent in the two post-settlement unfair labor practice charges and subsequently litigated those cases before an administrative law judge (ALJ). The ALJ issued his decision on May 9, 2013, finding that the respondent had violated the Act in the post-settlement cases. On May 17, 2013, General Counsel filed a motion to consolidate the three settled cases with the two post-

³ Two differences are the limitations in the instant Settlement as discussed in General Counsel's Motion. Motion at 11-12.

settlement cases and a motion for default judgment in the three settled cases based on the ALJ's finding of post-settlement violations. On November 21, 2014, the Board consolidated the three settled cases with the two post-settlement cases. The Board then granted the default judgment motion in the three settled cases based on its affirmance of the ALJ's findings in the post-settlement cases.

As the foregoing indicates, when the General Counsel issues a complaint and litigates post-settlement cases before filing a default judgment motion in settled cases, he does not waive any right to seek default judgment when the respondent has been warned that it defaulted by engaging in actions alleged in post-settlement charges.

3. General Counsel's Motion is Not Premature

Respondent also appears to be arguing that the Motion is premature because it was filed before the Board has issued a final decision in post-Settlement Cases 20-CA-154749, et al. Respondent's Opposition at 8. This argument is without merit. As indicated previously, the Board has consolidated and simultaneously considered post-settlement unfair labor practice cases with default judgment motions predicated on those post-settlement cases. See *Conagra Foods, Inc.*, 361 NLRB No. 113.

In addition, Respondent seemingly claims that the Motion is both too late and too early. If Respondent's interpretation is adopted, the General Counsel must file a default judgment motion within six months of the approval of the Settlement (Respondent's Opposition at 2-7), and no default judgment motion based on breach of the Settlement's cease-and-desist provisions could ever be filed until after the Board issues a decision finding a post-Settlement violation of the Act (Respondent's Opposition at 8). Under the latter interpretation, the six-month window for filing a default judgment motion based

upon breach of the Settlement's cease-and-desist terms would almost certainly expire before the Board's final determination on the merits of post-Settlement unfair labor practices. This would render the "Performance" provision nugatory if Respondent defaulted on cease-and-desist requirements, leading to an unreasonable result at best.

4. Respondent Defaulted on the Settlement's Terms

Citing to its exceptions and briefs in Cases 20-CA-154749, et al., Respondent contends that its post-Settlement misconduct did not violate the Act and, consequently, it did not default on the Settlement's terms. Respondent's Opposition at 8-9. For the cogent reasons set forth in ALJ Mara-Louise Anzalone's decision, Respondent's contention is unworthy of further consideration. See Motion Exhibit 11 at pp. 10-20.

5. Respondent Confuses Closed Cases 20-CA-145772 and 20-CA-149639 With Case 20-CA-146583

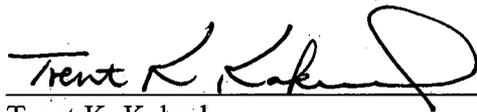
In a footnote, Respondent confuses closed Cases 20-CA-145772 and 20-CA-149639 with Case 20-CA-146583. See Respondent's Opposition at 9, fn. 1. The two closed cases involved allegations of unlawful maintenance/promulgation of overly broad rules, which included handbook dress code policies unlawfully restricting employees' Section 7 right to wear union buttons. However, they did not cover supervisors' separate, unlawful direction that employees remove their union insignia, which Case 20-CA-146583 encompassed separately. See Motion Exhibit 5; Motion Exhibit 12, ¶10. Accordingly, in closing Cases 20-CA-145772 and 20-CA-149639, General Counsel determined only that Respondent complied with one cease-and-desist provision of the Settlement's Notice stating "**WE WILL NOT** promulgate and maintain overly broad rules in our employee handbook that prohibit or restrict, in an unlawful manner, your wearing of union buttons." See Motion Exhibit 7, Notice to Employees. As

explained in the Motion, General Counsel also additionally found that Respondent had complied with the Notice's affirmative provision stating that "WE WILL rescind the overly broad employee handbook rules referenced above and WE WILL either (1) furnish you with inserts for the current edition of the employee handbook that (a) advise that the unlawful provisions, above, have been rescinded, or (b) provide the language of lawful provisions." See Motion at 14, fn.7; Motion Exhibit 7; Notice to Employees.

CONCLUSION

For all the foregoing reasons, General Counsel respectfully requests that the Board reject Respondent's arguments in its Opposition and grant the General Counsel's Motion.

DATED AT Honolulu, Hawaii, this 9th day of August, 2016



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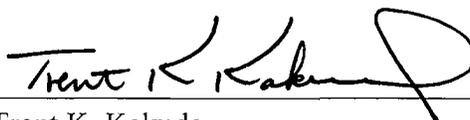
CERTIFICATE OF SERVICE

The undersigned hereby certifies that General Counsel's Reply to Respondent's Memorandum in Opposition to General Counsel's Motion to Consolidate Cases, to Transfer Cases to the Board, and for Default Judgment Pursuant to Breach of Settlement Agreement in Cases 20-CA-145717, et al. has this day been electronically filed with the National Labor Relations Board's Office of the Executive Secretary and a copy served upon the following persons by e-mail pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations:

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Dated at Honolulu, Hawaii, this 9th day of August, 2016.



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