



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, D.C. 20570

September 9, 2015

Clerk, United States Court of  
Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square, Room 1702  
New York, NY 10007

Re: *NLRB v. East Market Restaurant, Inc.*,  
Board Case Nos. 02-CA-120982, 02-CA-  
133656 and 02-CA-144988

Dear Ms. Wolfe:

I am emailing to the Court at [newcases@ca2.uscourts.gov](mailto:newcases@ca2.uscourts.gov) a copy of the Board's application for summary entry of a judgment enforcing the Board's order in this case and a proposed judgment.

Please serve a copy of the application on Respondent, whose addresses appear on the service list. I have served a copy of the application, proposed judgment and agency appeal pre-argument statement (Form C-A), on each party admitted to participate in the Board proceedings, and their names and addresses appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of all correspondence the Court sends to counsel in this case, and a copy of the judgment issued.

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2960

cc: Service List

SERVICE LIST

RESPONDENT:

Jimmy Cheng  
East Market Restaurant  
75 East Broadway  
New York, NY 10002

Tel: (212) 732-8889

Fax: (212) 732-8885

CHARGING PARTY:

Nelson Mars, President  
318 Restaurant Workers Union  
345 Grand Street, Bsmt.  
New York, NY 10002

Tel: (917) 726-9186

Email: pres.318rwu@gmail.com

REGIONAL DIRECTOR:

Karen P. Fernbach  
National Labor Relations Board  
26 Federal Plaza- Room 3614  
New York, NY 10278-0104

RESPONDENT'S COUNSEL:

Curt D. Schmidt, Esq.  
Law Office of Joe Zhenghong Zhou &  
Associates, PLLC  
136-20 38th Ave., Ste 10H  
Flushing, NY 11354

Tel: (718) 539-7098

Email: curtschmidt88@gmail.com

CHARGING PARTY'S COUNSEL:

Hollis V. Pfitsch, Esq.  
The Legal Aid Society  
199 Water St Fl 3  
New York, NY 10038-3526

Tel: (212) 577-3465

Fax: (212) 509-8761

Email: hvpfitsch@legal-aid.org

Richard Blum, Esq., Staff Attorney  
77 Water St Fl 21  
New York, NY 10005-4401

Tel: (212) 577-3648

Email: rblum@legal-aid.org

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

|                                |   |                  |
|--------------------------------|---|------------------|
| NATIONAL LABOR RELATIONS BOARD | : |                  |
|                                | : | No.              |
| Petitioner                     | : |                  |
| v.                             | : | Board Case Nos.: |
|                                | : | 02-CA-120982     |
| EAST MARKET RESTAURANT, INC.   | : | 02-CA-133656     |
|                                | : | 02-CA-144988     |
| Respondent                     | : |                  |

APPLICATION FOR SUMMARY ENTRY OF A JUDGMENT  
ENFORCING AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Second Circuit:

The National Labor Relations Board (the “Board”), pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(e)), applies to this Court for summary entry of a judgment enforcing its order against East Market Restaurant, Inc. (Respondent). The Board is entitled to summary enforcement of its order because Respondent withdrew its answer to the Board’s unfair labor practice complaint and the Board entered an order by default. In support, the Board shows:

**A. Jurisdiction of this Court**

This Court has jurisdiction over this application under Section 10(e) of the Act (29 U.S.C. § 160(e)). Venue is proper in this Circuit because the unfair labor

practices occurred in New York. The Board's final order issued on June 30, 2015, and is reported at 362 NLRB No. 143.

## **B. Proceedings Before the Board**

1. The Regional Director for Region 2 issued a complaint, consolidated complaint, and an amendment to the consolidated complaint on August 29, 2014, and March 20 and April 8, 2015, respectively, in Case Nos. 02-CA-120982, 02-CA-133656 and 02-CA-144988, charging Respondent with certain violations of the Act. The complaint, in part, advised the Respondent that under the Board's Rules (29 C.F.R. 102.20 and 102.21), the Respondent was required to file an answer and that if the Respondent failed to file an answer, the allegations of the complaint may be deemed to be true.

2. Respondent initially filed an answer to the complaint; however, by letter dated March 19, 2015, Respondent withdrew its answer. Respondent also stated its intention not to file an answer to the consolidated complaint. By letter dated April 9, 2015, the Respondent also stated its intention not to file an answer to the amendment to the consolidated complaint. Consistent with its statements, the Respondent did not file an answer to the consolidated complaint or to the amendment to the consolidated complaint.

3. On April 15, 2015, Counsel for the General Counsel filed with the Board a Motion for Default Judgment.

6. By order dated April 20, 2015, the Board transferred the case to itself and issued a Notice to Show Cause, giving Respondent until May 4, 2015, to file with the Board in Washington, D.C., a response to the Motion for Default Judgment.

7. Respondent did not file a response.

8. On June 30, 2015, due to the absence of an answer from Respondent, the Board issued its Decision and Order granting the Motion for Default Judgment and entering an appropriate order against the Respondent.

### **C. The Board Is Entitled to Summary Enforcement of Its Order**

On these facts, the Board is entitled to summary enforcement of its order against Respondent. Where a respondent in a Board proceeding fails to file an answer to the unfair labor practice complaint in a timely manner, the Board may, pursuant to Board Rule 102.20, absent a showing of “good cause” for the delay, deem the complaint’s allegations admitted and then may enter an order, essentially by default, against the respondent.

It is settled that the Board is entitled to have that default judgment summarily enforced. Under Section 10(e) of the Act (29 U.S.C. § 160(e)), no objection that has not been urged before the Board shall be considered by a court of appeals “unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Interpreting that requirement, courts have consistently held that a respondent’s failure to assert a defense before the

Board entitles the Board, absent extraordinary circumstances, to summary enforcement of its order. *See e.g., KBI Security Service, Inc. v. NLRB*, 91 F.3d 291, 295 (2d Cir. 1996); *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 435 (2d Cir. 2001); *Father and Sons Lumber v. NLRB*, 931 F.2d 1093, 1095-96, 1097 (6th Cir. 1991); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 830 (9th Cir. 1991); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1319-21 (7th Cir. 1986); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984); *NLRB v. Aaron Convalescent Home*, 479 F.2d 736, 738-39 (6th Cir. 1973). No such circumstances have been shown here.

WHEREFORE, the Board respectfully requests that the Court, after serving notice of the filing of this application on Respondent, enter judgment summarily enforcing the Board's order in full. A proposed judgment is attached.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570

Dated in Washington, D.C.  
this 4th day of October, 2016

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

|                                |   |                  |
|--------------------------------|---|------------------|
| NATIONAL LABOR RELATIONS BOARD | : |                  |
|                                | : | No.              |
| Petitioner                     | : |                  |
| v.                             | : | Board Case Nos.: |
|                                | : | 02-CA-120982     |
| EAST MARKET RESTAURANT, INC.   | : | 02-CA-133656     |
|                                | : | 02-CA-144988     |
| Respondent                     | : |                  |

JUDGMENT ENFORCING AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

Before:

This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against Respondent, East Market Restaurant, Inc., its officers, agents, successors, and assigns, enforcing its order dated June 30, 2015, in Case Nos. 02-CA-120982, 02-CA-133656 and 02-CA-144988, and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, East Market Restaurant, Inc., its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Mandate shall issue forthwith

FOR THE COURT:

---

NATIONAL LABOR RELATIONS BOARD

v.

EAST MARKET RESTAURANT, INC.

**ORDER**

East Market Restaurant, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Threatening employees with criminal charges, unspecified reprisals, or discharge because they engage in concerted activities.
- (b) Threatening to close the restaurant to discourage employees from engaging in protected concerted and union activities.
- (c) Discharging employees because they join the Union and engage in concerted activities or to discourage employees from engaging in these activities.
- (d) Failing and refusing to bargain collectively and in good faith with 318 Restaurant Workers Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit with respect to the effects of its decision to cease operations at its New York, New York facility:

All full-time and regular part-time dining room employees, including bus persons, waiters, captain, hosts and dim sum sellers employed by Respondent at its facility. And excluding guards, professionals, kitchen employees and supervisors as defined in the National Labor Relations Act, as amended.

- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) In the event that the Respondent resumes operations, offer Sky Wong and Sai Qin Chen full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without

prejudice to their seniority or any other rights or privileges previously enjoyed.

- (b) Make Sky Wong and Sai Qin Chen whole for any loss of earnings and other benefits they may have suffered as a result of its unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.
- (c) Compensate Sky Wong and Sai Qin Chen for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.
- (d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges of Sky Wong and Sai Qin Chen and, within 3 days thereafter, notify them in writing that this has been done and that its unlawful conduct will not be used against them in any way.
- (e) On request, bargain collectively and in good faith with the Union concerning the effects of the Respondent's decision to cease operations at its New York, New York facility, and reduce to writing and sign any agreement reached as a result of such bargaining.
- (f) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.
- (g) Compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.
- (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (i) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix," in English as well as Mandarin, Cantonese, Foo Zhu, and any other dialects spoken by the employees, to the Union and to the last known addresses

of all unit employees who were employed by the Respondent at any time since November 26, 2013. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

- (j) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES

MAILED PURSUANT TO A JUDGMENT OF THE UNITED STATES  
COURT OF APPEALS ENFORCING AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 threaten employees with criminal charges, unspecified reprisals, or discharge because they engage in concerted activities.

WE WILL NOT threaten to close the restaurant to discourage employees from engaging in protected concerted and union activities.

WE WILL NOT discharge employees because they join the Union and engage in concerted activities or to discourage employees from engaging in these activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with 318 Restaurant Workers Union as the exclusive collective-bargaining representative of our unit employees with respect to the effects of our decision to cease operations at our New York, New York facility. The bargaining unit is:

All full-time and regular part-time dining room employees, including bus persons, waiters, captain, hosts and dim sum sellers employed by Respondent at its facility. And excluding guards, professionals, kitchen employees and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, in the event that we resume operations, offer Sky Wong and Sai Qin Chen full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Sky Wong and Sai Qin Chen whole for any loss of earnings and other benefits they may have suffered as a result of our unlawful conduct, with interest.

WE WILL compensate Sky Wong and Sai Qin Chen for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharges of Sky Wong and Sai Qin Chen, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL, on request, bargain collectively and in good faith with the Union concerning the effects of our decision to cease operations at our New York, New York facility, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay our unit employees their normal wages for the period set forth in the Board's decision, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

#### EAST MARKET RESTAURANT, INC.

The Board's decision can be found at [www.nlr.gov/case/02-CA-120982](http://www.nlr.gov/case/02-CA-120982) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



