UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

J & K FLORAL USA, INC.
Respondent
and

NAHU ARMANDO CEBALLAS PALMA, An Individual
Charging Party

Case No. 02-CA-185241

MEMORANDUM IN SUPPORT OF
MOTION TO TRANSFER CASE TO THE BOARD AND FOR DEFAULT JUDGMENT

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (herein the "Board"), Counsel for the General Counsel of the Board (herein "General Counsel"), submits this memorandum in support of its Motion to Transfer Case to the Board and for Default Judgment (herein the "Motion"). As set forth below, General Counsel respectfully submits the Motion and exhibits attached thereto establish no genuine issue of fact exists as to any allegation set forth in the Amended Complaint and Notice of Hearing (herein "Amended Complaint") issued by the Regional Director on December 14, 2017. Therefore, General Counsel respectfully submits the Board should issue an order granting default judgment and remedying the violations as alleged in the Amended Complaint, as a matter of law.

I. STATEMENT OF THE CASE

On September 29, 2016, Nahu Armando Ceballas Palma (herein the "Charging Party") filed a charge against J & K Floral USA, Inc. (herein "Respondent") in Case No. 02-CA-185241, which was partially withdrawn on November 28, 2016, and amended on November 29, 2016.[1] In

[1] The charge and amended charge were served on Respondent by the Region on September 29, 2016 and November 30, 2016, respectively. The charge and affidavit of service, and the amended charge and affidavit of service are attached to the Motion as G.C. Ex 1(a) and (b) and 2(a) and (b), respectively.

pertinent part, the charge, as amended, alleged Respondent violated Section 8(a)(1) of the Act, when it retaliated against employees' protected concerted activity by: 1) in or about August 2016, unlawfully reduced the wages of employees Palma, Nicholas Garcia Hernandez, Francisco Garcia Castro, and Salvador Campos Benitez; 2) on or about August 29, 2016, Respondent unlawfully terminated the employment of Ricardo Agustin and Ruben Lopez; and 3) on or about September 7, 2016, Respondent unlawfully terminated the employment of Palma, Hernandez, Castro, and Benitez. The charge, as amended, also alleged the following two additional independent 8(a)(1) violations: 4) on or about August 6, 2016, Respondent unlawfully interrogated employees about their protected concerted activities; and 5) on or about August 6, 2016, Respondent unlawfully promised benefits to employees in order to discourage them from engaging in protected concerted activities.

On October 26, 2017, based on the charge, as amended, the Acting Regional Director issued a Complaint and Notice of Hearing, which was served on Respondent by regular and certified mail, and on Respondent counsel by regular mail, at their last known addresses.[2] U.S. Postal Service delivery confirmation shows Respondent received the original Complaint and Notice of Hearing at its last known address on about November 6, 2017.

On November 9, 2017, upon discovery of a clerical error that inadvertently set the date upon which Respondent was required to file an answer to the Complaint as October 9, 2017, the Acting Regional Director issued an Erratum, thereby correcting the date upon which Respondent was required to file an answer to November 9, 2017. The Region served the Erratum on Respondent counsel by regular mail, at Respondent counsel's last known address, as provided in

[2] The Complaint was served at Respondent's address as provided in the charge and as confirmed by Respondent in its commerce questionnaire. The Complaint was served at Respondent counsel's address as provided in its notice of appearance. The Complaint and Notice of Hearing and affidavit of service are attached to the Motion as G.C. Ex. 4(a) and (b). The certified mail receipt and USPS confirmation that the Complaint was successfully delivered to Respondent are attached to the Motion as G.C. Ex. 5(a) and (b).

in its notice of appearance.[3] Respondent did not file an answer by November 9, 2017, nor has it filed an answer to date.

On November 9, 2017, the Region, by the undersigned, informed Respondent counsel by letter of the clerical error that led to the Erratum and notified Respondent counsel it had theretofore failed to submit an answer to the Complaint.[4] By this letter, and in light of the clerical error, the Region provided Respondent an additional fifteen days to answer the Complaint, with a new deadline of November 24, 2017. Respondent was further advised that if it failed to submit an answer by November 24, 2017, the Region would take appropriate measures, including filing a motion for default judgment. To date, Respondent has failed to submit an answer to the Complaint, as corrected.

On November 16, 2017, the U.S. Postal Service returned to the Region the copy of the original Complaint and Notice of Hearing sent to Respondent counsel as "unable to forward," and on about November 20, 2017, the U.S. Postal Service returned to the Region the copy of the Erratum sent to Respondent counsel as "unable to forward." The returned copies of the original Complaint and Erratum were sent to Respondent counsel's last known address, which counsel provided to the Region in its notice of appearance.

On December 14, 2017, the Regional Director issued an Amended Complaint and Notice of Hearing (herein "Amended Complaint"), which was served on Respondent and Respondent counsel by certified mail.[5] The Amended Complaint includes no new substantive allegations, but only removes a paragraph seeking consequential damages to remedy Respondent's unfair labor practices. On December 20, 2017, the Region received confirmation from the U.S. Postal

[3] Respondent Counsel's notice of appearance is attached to the Motion as G.C. Ex. 3(a). The Erratum and affidavit of service are attached to the Motion as G.C. Ex. 6(a) and (b).
[4] The November 9, 2017 letter to Respondent counsel is attached to the Motion as Exhibit 7.
[5] The Amended Complaint and affidavit of service are attached to the Motion as GC. Ex. 8(a) and (b).

Service of its attempt to deliver the Amended Complaint to Respondent and Respondent's refusal to accept delivery of the Amended Complaint.

Respondent did not file an answer within fourteen days of service of the Complaint or Amended Complaint, as required by Section 102.20 and 102.21 of the Board's Rules and Regulations, and to date has not filed any answer in this matter. Respondent has been on notice of the allegations contained in the Amended Complaint for more than two months and has refused to respond. Although the original Complaint assigned the wrong answer date, Respondent has had more than ample opportunity to file an answer to the Complaint and Amended Complaint, but has failed to respond.

II. ARGUMENT

Point 1: <u>The Amended Complaint was Properly Served on Respondent</u>

On December 14, 2017, the Region properly served the Amended Complaint on Respondent by certified mail, and at the same address last known address the Region served the original Complaint. The U.S. Postal Service confirms Respondent received the original Complaint at this same address on November 6, 2017. Respondent however did not accept delivery of the Amended Complaint, and to date, there is no confirmation the Respondent chose to claim the Amended Complaint.

The Board has repeatedly held "a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act." *Atlantic Northeast Transport, Inc.*, 365 NLRB No. 155 at n. 1 (November 30, 2016), citing *Cray Construction Group, LLC*, 341 NLRB 944, 944 n. 5 (2004) and *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 n. 2 (2003).

The successful delivery of the original Complaint shows Respondent is capable of receiving service at its last known address. Respondent's refusal to accept delivery or refusal to

pick up the Amended Complaint upon the U.S. Postal Service's attempted delivery, at this same address, is not a legitimate basis to deny default judgment. Further, because the Amended Complaint makes the same allegations as the original Complaint, Respondent has been on notice of allegations contained within the Amended Complaint since November 6, 2017. It has had ample notice and opportunity to respond to the allegations contained in the Amended Complaint, no matter its refusal to claim the Amended Complaint.

Point 2: <u>There are No Genuine Issues of Fact Warranting a Hearing.</u>

Respondent has failed to file an answer to the Complaint and Amended Complaint. Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The Board has consistently held if upon receipt of a complaint and notice of hearing, a respondent fails to file an answer within the time and manner prescribed by Section 102.20 of the Board's Rules and Regulations, all allegations in that complaint shall be deemed admitted to be true, may be so found by the Board, and the Board may render judgment on the basis of that complaint alone. Board's Rules and Regulations, Section 102.20; *Electra-Cal Contractors*, 339 NLRB 370 (2003); *Contractors Excavating, Inc.*, 270 NLRB 1189 (1984); *Clean and Shine*, 255 NLRB 1144 (1981); *Galesburg Constr. Co.¸Inc.*, 259 NLRB 722 (1981).

In the instant matter, by Respondent's failure to answer the Amended Complaint, in the time and manner prescribed by the Board's Rules and Regulations, the Board should deem all of General Counsel's allegations in the Amended Complaint to be admitted as true. Subsequently, as Respondent does not contest any of the General Counsel's allegations in the Amended Complaint, there are no genuine issues of fact warranting a hearing.

Point 3: **<u>Respondent's Admitted Conduct Violates Section 8(a)(1) of the Act.</u>**

In the Amended Complaint, General Counsel alleges in the all of the elements necessary to establish that Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

Section 7 of the Act guarantees employees the right to form, join, or assist labor organizations and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. See 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights granted in section 7." 29 U.S.C § 158(a)(1); see *Brighton Retail, Inc.*, 354 NLRB 441, 441, 447 (2009). Section 8(a)(1) of the Act therefore limits the manner in which employers may respond to those activities protected by Section 7.

The term "mutual aid or protection" broadly encompasses employee activities "that could improve their lot as employees." *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565-66 (1978); see *New River Indus., Inc. v. N.L.R.B.*, 945 F.2d 1290, 1294 (4th Cir. 1991) (listing terms and conditions of employment as "includ[ing] wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like"). "The term 'concerted activities' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 (1984).

Employees' concerted demand from their employer for better wages, hours, and other improvements to working conditions is an axiomatic example of activity protected by the Act.

See *Loyalhanna Health Care Associates*, 332 NLRB 933, 933 (2000)(finding unlawful the discipline and discharge of nurses because they "complained to [their supervisor] generally about wages, staffing levels, and working conditions"); see also *Esterline Electronics Corp.*, 270 NLRB 658, 660 (1984)(finding that employer unlawfully discharged employee perceived as the instigator of a small group of employees who then complained to supervisor about working conditions and wages).

The Act has long protected the concerted activity of employees who seek to improve working conditions through resort to administrative and judicial forums, such as seeking redress in federal court pursuant to the Fair Labor Standards Act ("FLSA") and similar statutes. See e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-949 (1942) (Board holding that the Act protects employees who file suit under the FLSA); see also *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953) (Board finding protected an employee's circulation of a petition among coworkers asking that he represent them in a claim to obtain back wages under the FLSA); see also *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162, 1162 n.2, 1165 (2005) (finding employer unlawfully failed to hire employees because they filed a federal lawsuit claiming violations of FLSA and New York Labor Law).

A. Respondent's Admitted Reductions of Wages and Terminations of Employees Violate Section 8(a)(1) of the Act.

Where an employer takes an adverse action against an employee, including discharge and reduction of wages, in retaliation of employees' protected concerted activity, that employer violates Section 8(a)(1) of the Act "if the employee was engaged in activity which is 'concerted' within the meaning of Section 7, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the [adverse act] was motivated by the employee's protected, concerted activity." *Corr. Med. Services, Inc.*, 356 NLRB 277, 278

(2010), citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The Amended Complaint alleges, and Respondent by its failure to answer admits, on about August 1, 2016, Respondent's employees, including Salvador Campos Benitez, Francisco Garcia Castro, Nicolas Garcia Hernandez, Ruben Lopez, Nahu Armando Ceballos Palma, and Ricardo Agustin Santiago engaged in protected concerted activity by demanding Respondent bring terms and conditions of employment, including employees' wages, hours, and working conditions, into accordance with the requirements of New York State and federal law.[6]

The Amended Complaint also alleges, and Respondent by its failure to answer admits, that from August 8, 2016 through September 7, 2016, Respondent took the following adverse actions, because employees engaged in the protected concerted activity described above: 1) reduced the wages and terminated employees Nicolas Garcia Hernandez, Salvador Campos Benitez, Nahu Armando Ceballos Palma, and Francisco Garcia Castro; and 2) terminated employees Ricardo Agustin Santiago and Ruben Lopez.[7]

Board law clearly establishes that Respondent's conduct and adverse employment actions taken against these employees violates Section 8(a)(1) of the Act, as discussed above. Therefore, the Board should find Respondent violated Section 8(a)(1) by reducing the wages and terminating employees, as alleged in the Amended Complaint and described in the Motion, and further, the Board should order appropriate remedial action.

[6] Amended Complaint ¶5(a), attached to the Motion as Exhibit 8(a).
[7] Amended Complaint ¶¶5(b) – (i) and 8, attached to the Motion as Exhibit 8(a).

B. Respondent's Admitted Interrogation of Employees about Their Protected Concerted Activities Violates Section 8(a)(1) of the Act.

The Board has consistently held that an employer's conduct constitutes an independent 8(a)(1) violation, where that conduct would reasonably tend to interfere with the exercise of employees' Section 7 rights. See *generally American Freightways Co*., 124 NLRB 146 (1959); *Shearer's Foods, Inc.*, 340 NLRB No. 132 (2003).

The Board uses a totality of the circumstances analysis to determine whether an employer's interrogation of employees would tend to coerce employees' Section 7 rights. See *Rossmore House*, 269 NLRB 1176 (1984). The Board will consider 1) the context in which the statements were made, e.g. evidence of the employers' animus toward the employees' protected activities; 2) the nature of the information sought, i.e. will the information necessarily implicate another employee and/or cause the employer to retaliate against another employee; 3) the identity of the alleged interrogator, i.e. the interrogator's authority over the employee's terms and conditions of employment; 4) the place and method of interrogation; and 5) the truthfulness of the reply, i.e. whether the employer's statements actually caused the employee to answer truthfully for fear of retaliation. See id. The Board does not apply these factors mechanically, but instead uses these factors to guide a broader totality of the circumstances analysis.

The Amended Complaint alleges, and Respondent by its failure to answer admits, on August 8, 2017, Respondent, by President and Owner Hyun Ok Cho, interrogated its employees about their participation in the protected concerted activities employees engaged one week earlier on August 1, 2017, and as described above.[8]

The Amended Complaint also alleges, and Respondent by its failure to answer has admitted, that by this interrogation, Respondent interfered with, restrained, and coerced

[8] Amended Complaint ¶¶5(a) and 6.

employees in the exercise of their Section 7 rights.[9] As discussed above, an employer's interrogation that reasonably tends to coerce employees in the exercise of their Section 7 rights violates Section 8(a)(1) of the Act. Therefore, the Board should find Respondent violated Section 8(a)(1) of the Act by interrogating employees, as alleged in the Amended Complaint and described in the Motion, and further, the Board should order appropriate remedial action.

C. Respondent's Admitted Promise of Benefits to Employees in order to Discourage Their Protected Concerted Activities Violates Section 8(a)(1) of the Act.

The Board has consistently held that an employer's conduct constitutes an independent 8(a)(1) violation, where that conduct would reasonably tend to interfere with the exercise of employees' Section 7 rights. See *generally American Freightways Co.*, 124 NLRB 146 (1959); *Shearer's Foods, Inc.*, 340 NLRB No. 132 (2003). Where an employer offers employees a benefit in order to induce employees to refrain from engaging in protected concerted activity, such conduct tends to coerce employees' Section 7 rights and violates Section 8(a)(1) of the Act. See *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 460 (1964), enfg. 131 NLRB 806 (1961).

The Amended Complaint alleges, and Respondent by its failure to answer admits, on August 8, 2017, Respondent, by President and Owner Hyun Ok Cho, promised employees the opportunity to operate their own retail flower shops, to induce employees to refrain from engaging in protected concerted activity, including employees' protected concerted activity on August 1, 2016, as alleged in the Complaint.[10]

The Amended Complaint also alleges, and Respondent by its failure to answer admits, this promise of benefit interferes with, restrains, and coerces employees in the exercise of their

[9] Amended Complaint ¶8.
[10] Amended Complaint ¶¶5(a) and 7.

Section 7 rights, in violation of Section 8(a)(1) of the Act.[11] Therefore, the Board should find Respondent violated Section 8(a)(1) of the Act by offering promises of benefits to employees, as alleged in the Amended Complaint and described in the Motion, and further, the Board should order appropriate remedial action.

III. CONCLUSION

As all Amended Complaint allegations should be deemed admitted due to Respondent's failure to answer, no genuine issues of fact remain to be litigated before the Board, and no hearing is warranted. Further, as the Amended Complaint states legally cognizable violations of Section 8(a)(1) of the Act, General Counsel respectfully submits the Board should grant the Motion for Default Judgment.

IV. REMEDY

If the Board grants this Motion for Default Judgment and finds Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, General Counsel respectfully requests the Board issue a Decision and Order against Respondent, containing findings of fact and conclusions of law in accordance with the allegations in the Amended Complaint, and remedying Respondent's unfair labor practices.

DATED AT New York, NY, this 29th day of December, 2017.

Respectfully submitted,

Michael J. Bilik
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza Ste 3614
New York, NY 10278

[11] Amended Complaint ¶8.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J & K FLORAL USA, INC.
Respondent
and

NAHU ARMANDO CEBALLAS PALMA, An Individual
Charging Party

Case No. 02-CA-185241

AFFIDAVIT OF SERVICE OF:
GENERAL COUNSEL'S MEMORANDUM IN SUPPORT OF
MOTION TO TRANSFER CASE TO THE BOARD AND FOR DEFAULT JUDGMENT

Date of E-Filing: December 29, 2017

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated above, I served the above-referenced document by electronic mail upon the following persons, addressed to them at the following addresses:

Do Kyung Kim, Esq.
Law Firm of DK & Associates, P.C.
150-03 Northern Blvd, 2nd Floor
Flushing, NY 11354
e-mail: dkkimlaw@gmail.com

Benjamin Dictor, Esq.
Eisner & Dictor, P.C.
39 Broadway, Ste 1540
New York, NY 10006
e-mail: ben@eisnerdictor.com

Date: December 29, 2017

Designated Agent: Michael J. Bilik, Esq.
Senior Field Attorney
NLRB Region 2

/s/ Michael J. Bilik
National Labor Relations Board