

**Nos. 17-1117, 17-1118, 17-1180**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**AQUA-ASTON HOSPITALITY, LLC, d/b/a  
ASTON WAIKIKI BEACH HOTEL AND HOTEL RENEW**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**KIRA DELLINGER VOL**  
*Supervisory Attorney*

**DAVID CASSERLY**  
*Attorney*

*National Labor Relations Board*  
**1015 Half Street, SE**  
**Washington, DC 20570**  
**(202) 273-0656**  
**(202) 273-0247**

**PETER B. ROBB**  
*General Counsel*

**JOHN W. KYLE**  
*Deputy General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

### **A. Parties and Amici**

Aqua-Aston Hospitality, LLC, d/b/a Aston Waikiki Beach Hotel and Hotel Renew, was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. UNITE HERE! Local 5 was the charging party before the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

### **B. Rulings Under Review**

The rulings under review are Decisions and Orders of the Board in *Aqua-Aston Hospitality, Inc., d/b/a Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53 (April 10, 2017) and in *Aqua-Aston Hospitality, Inc., d/b/a Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 44 (April 11, 2017).

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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## GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Agreement	April 29, 2015 settlement agreement between the Company and the General Counsel
<i>Aqua I</i>	<i>Aqua-Aston Hospitality, Inc., d/b/a Aston Waikiki Beach Hotel and Hotel Renew</i> , 365 NLRB No. 53 (April 10, 2017)
<i>Aqua II</i>	<i>Aqua-Aston Hospitality, Inc., d/b/a Aston Waikiki Beach Hotel and Hotel Renew</i> , 365 NLRB No. 44 (April 11, 2017)
Board	National Labor Relations Board
Br.	The College's opening brief
Company	Aqua-Aston Hospitality, Inc., d/b/a Aston Waikiki Beach Hotel and Hotel Renew
CX	Exhibits introduced by the Company in <i>Aqua I</i>
GCX	Exhibits introduced by the General Counsel in <i>Aqua I</i>
General Counsel	The Board's General Counsel
MDJ	The General Counsel's Motion for Default Judgment in <i>Aqua II</i>
MDJ Reply	The Company's Reply to the MDJ
MDJX	Exhibits to the MDJ
Tr.	The hearing transcript in <i>Aqua I</i>
Union	UNITE HERE! Local 5

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the consolidated petitions of Aqua-Aston Hospitality, Inc., d/b/a Aston Waikiki Beach Hotel and Hotel Renew (the Company) for review, and the cross-application of the National Labor Relations Board (the Board) for enforcement, of two Board Orders issued against the

Company on April 10, 2017, reported at 365 NLRB No. 53 (*Aqua I*), and on April 11, 2017, reported at 365 NLRB No. 44 (*Aqua II*). (*Aqua I* 1-13, *Aqua II* 1-5.)<sup>1</sup>

The Board had subject-matter jurisdiction over both proceedings under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Orders are final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. The Company's petitions and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

## **ISSUES PRESENTED**

1. Whether substantial evidence supports the Board's finding that Company violated Section 8(a)(1) of the Act when a senior executive ordered

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<sup>1</sup> On July 14, 2017, the Court granted the Board's motion to consolidate the Company's petitions.

In this proof brief, references preceding a semicolon are to the Board's findings; those following are to supporting evidence. "Tr.," "GCX," and "CX" refer, respectively, to the hearing transcript, the General Counsel's exhibits, and the Company's exhibits in *Aqua I*. "MDJ," "MDJX," and "MDJ Reply" refer, respectively, to the General Counsel's motion for default judgment, the exhibits to that motion, and the Company's reply in *Aqua II*. These references will be updated to citations to the Joint Appendix in the Board's final brief.

employees to stop union activities, impliedly threatened their jobs, and invited them to apologize to him for their union activity.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by ordering off-duty employees to stop union handbilling in a nonwork area.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by issuing written warnings to employees Edgardo Guzman and Santos Rangunjan for their union activities.

4. Whether the Board correctly determined that the Company's unfair labor practices breached the settlement agreement between the Board's General Counsel and the Company, warranting a default judgment.

## **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are set forth in the Company's brief.

## **STATEMENT OF THE CASE**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. The Company Opposes the Union's Campaign and Settles Multiple Unfair-Labor-Practice Charges Alleging Coercive Conduct in Retaliation for Employees' Union Activities**

The Company operates about 50 resort properties in Hawaii. It manages the two at issue in this case, the Aston Waikiki Beach Hotel and Hotel Renew, as a single property (collectively, the Hotel). (*Aqua I* 3; Tr. 623-25.) Beginning in

February 2015, UNITE HERE! Local 5 (the Union) conducted an organizing campaign at the Hotel. (*Aqua I* 3, 7; Tr. 627-28.) As part of its campaign, the Union held loud weekly rallies outside the Hotel starting on February 3. The Company actively opposed the organizing drive. (*Aqua I* 3, 7; Tr. 268-30.)

In February and March 2015, the Union filed a series of unfair-labor-practice charges alleging that the Company had unlawfully retaliated against employees for participating in the unionization drive, including through: surveillance of their union activities, coercive interrogations, orders to remove union buttons, solicitation of employees to withdraw support from the Union, threats of retaliation for employees' union activities or failure to withdraw support from the Union, and restrictions on off-duty employees' union activities in nonwork areas. (MDJX 1-6.)

On April 29, the Board's General Counsel and the Company signed an agreement settling those charges (the Agreement). (*Aqua II* 1; MDJX 7.) In the Agreement, the Company committed to cease and desist from any like or related violations of the Act. In the event of noncompliance, the Agreement contained a default-judgment provision providing that the Board's General Counsel could issue a complaint on the settled unfair-labor-practice charges, after 14-day notice to the Company of its noncompliance, and move for the Board to grant default judgment. The default-judgment provision contained a timing clause providing that "no

default shall be asserted . . . after six (6) months” from the date of the Agreement.

(MDJX 7.)

**B. Company Executive Threatens Employees for Participating in Union Activities**

Meanwhile, as part of its campaign against the Union, the Company held a series of mandatory meetings where Executive Vice President of Operations Gary Ettinger addressed groups of employees on work time. The Company held two such meetings on May 19, 2015. (*Aqua I 7 & n.21; Tr. 302,629-30, 636.*) Other company managers also attended, sitting among the employees. Ettinger spoke loudly and held a plastic bottle, which he forcefully banged between his hands.

(*Aqua I 7-8; Tr. 217-18, 231, 263, 301, 638.*)

Ettinger opened his remarks by complaining about the length of the Union’s campaign and the noisiness of the rallies. He declared that employees banging on pots and pans woke guests up, which was bad for the Company’s business. He then told employees that the noise “ha[d] to end” and to “stop making noise outside.” (*Aqua I 7; Tr. 221, 223, 266, 306.*) Turning to the Union’s home visits, Ettinger further told employees to stop bothering their coworkers at home, and instructed employees that they could call police if union supporters visited them at home. In delivering that message, Ettinger spoke in English, without a translator, and used sophisticated words like “acrimony” and “deleterious.” (*Aqua I 1 n.1, 7*

n.23, 9; Tr. 270-71, 306-07, 641, 746.) The majority of the employees attending the meetings did not speak English as their primary language. (*Aqua I* 7; Tr. 290.)

Next, using simpler language, Ettinger recounted how, after his father's death, his mother was denied her husband's union-funded pension. Ettinger assured employees that, by contrast, the money in their 401(k) accounts belonged to them and their families, even if the Union won the election. (*Aqua I* 7-8; GCX 16.) Ettinger then briefly discussed a prounion employee's recent radio interview, and rhetorically asked why that employee had left a previous union job for his nonunion job at the Hotel if his union job had been so great. Ettinger then questioned why the Union had not yet called for a vote but was, instead, "do[ing] things via pots, pans and harassment." (*Aqua I* 8; GCX 16.) The Company, he asserted, was ready for an election. (*Aqua I* 8; RX 18, 19.) Ettinger concluded his remarks by advising the assembled employees that they were lucky to have jobs, and that they could stop by his office and apologize to him. (*Aqua I* 1 n.1, 8; Tr. 224, 265, 274, 308-10.)

**C. Housekeeper Dany Pajinag Complains About Two Employees Encouraging Him To Sign a Union Card**

On May 22, 2015, housekeeper Dany Pajinag approached his supervisor, Executive Housekeeper Marissa Cacacho. Pajinag told her that housekeeper Santos Rangunjan had approached him the day before to ask him to sign a union card and to have a picture taken. Pajinag complained that Rangunjan's solicitation

bothered him. He did not tell Cacacho that Ragunjan had interfered with his work. (*Aqua I 4*; Tr. 587-96.) That same day, Pajinag wrote a statement memorializing his complaint, which indicated that the incident was not the first time Ragunjan had bothered him. (*Aqua I 4*; Tr. 428, CX 13.) At some point, Pajinag also complained to Cacacho that, on the loading dock sometime before the May 21 incident, Ragunjan told him to watch his back. (*Aqua I 4*; Tr. 590, 604, 811-12.)

On June 9, Pajinag approached Cacacho to complain about maintenance engineer Edgardo Guzman. Pajinag stated that, on both June 5 and June 9, Guzman had bothered him, asking him to sign a union authorization card, and also wanting to take his picture. Pajinag did not complain that Guzman interfered with his work during either incident. As he had on May 22, Pajinag wrote a statement summarizing his complaint. (*Aqua I 4*; Tr. 597-599, GCX 13.)

Cacacho relayed each of Pajinag's complaints to her superiors, General Manager Mark DeMello and Rooms Division Manager Jenine Webster. She gave them Pajinag's statements, and also submitted a statement she wrote regarding the loading-dock incident, recounting that Ragunjan's threat had occurred on June 11, rather than before May 21. (*Aqua I 4*, 4 n.7; Tr. 568-69, 575, GCX 13, CX 13, 14.)

**D. The Company Seeks To Document Alleged Harassment of Pajinag But Neither Takes Protective Measures nor Interviews Potential Neutral Witnesses**

The Company launched an investigation to determine whether Ragunjan or Guzman had interfered with Pajinag's work. (*Aqua I 4*; Tr. 805.) On June 10, managers DeMello and Webster interviewed Guzman for about 15 minutes. DeMello asked Guzman if he had ever asked someone to take a picture for nonwork reasons during work time, and Guzman denied doing so. DeMello refused Guzman's requests to reveal the identity of the employee who had complained. (*Aqua I 4*; Tr. 356-58, 815.)

On June 15, DeMello and Webster interviewed Pajinag, who told them about the May 21, June 5, and June 9 incidents involving Ragunjan and Guzman. Pajinag did not indicate that there had been any other incidents with either Ragunjan or Guzman, or mention the threat described in Cacacho's statement as having occurred a few days earlier. (*Aqua I 4-5*, 4 n.10, Tr. 444-45, 602-08, GCX 13, CX 13.) Pajinag also identified at least one other housekeeper who had been present for at least one of the incidents, although he said that he doubted that she had heard anything. (*Aqua I 5*, 5 n.12; Tr. 446.)

Following the interview, no company representative sought to interview the housekeeper or housekeepers Pajinag identified as having possibly witnessed one or more of the incidents under investigation. The Company also did not take any

interim steps to prevent Guzman or Rangunjan from approaching or bothering Pajinag. (*Aqua I 5*, 5 n.13; Tr. 446, 466, 815.)

On June 19, DeMello and Webster briefly re-interviewed Guzman. Guzman again asked who had complained about him, and wrote a statement saying he stood by his original response to their accusations. (*Aqua I 5*; Tr. 359-61, CX 11.) That same day, DeMello and Webster interviewed Rangunjan for the first time. Like Guzman, Rangunjan denied ever asking an employee to take a picture for nonwork reasons during work time. Neither manager asked Rangunjan whether he ever threatened another employee. (*Aqua I 5*; Tr. 447, 812.)

**E. The Company Relies on an Unsupported Version of Events To Discipline Rangunjan and Guzman**

Shortly after the June 19 interviews, DeMello and Webster reported their findings to Senior Vice President of Human Resources Velina Haines. They informed Haines that Pajinag had complained about both Guzman and Rangunjan repeatedly interfering with his work, and that they did not believe Guzman's and Rangunjan's denials. DeMello and Webster recommended issuing written warnings to both employees. (*Aqua I 5*; Tr. 422-26, 707-08.)

Haines agreed with the recommendation and prepared written warnings, Guzman's for violating the Company's rule against interfering with other employees' work and Rangunjan's for the same reason, plus for threatening another employee. (*Aqua I 5*; Tr. 422-23, 714-15, 718-19.) On June 30, the Company

presented both employees with their warnings, which they refused to sign. The warning issued to Guzman referenced the June 5 and 9 incidents. The warning issued to Ragonjan referenced the May 21 incident, as well as the alleged loading-dock threat, which the warning described as having occurred on June 11. (*Aqua I* 5; GCX 10, 11.)

**F. The Company Orders Employees Not To Handbill in Its Lower Lobby, and Threatens To “Trespass” Them Unless They Leave**

On August 10, Webster learned that guest-services agent Jonathan Ching intended to pass out prounion fliers in the Company’s lower lobby the next day. (*Aqua I* 10; Tr. 671.) Webster instructed security guard Andrew Smith to “trespass” Ching—meaning to bar him from the Company’s property for a year—if Ching did so. (*Aqua I* 10; Tr. 50, 64-65, 163.)

The open-air lower lobby serves as the Hotel’s main entrance, connecting to the Company’s covered driveway. No structural facade separates the lobby from the driveway; instead, guests entering the lobby from the driveway cross over a red-painted curb to a tiled entrance area containing several red pillars. That tiled entrance area contains no seating. (*Aqua I* 9-10; Tr. 77-78, 147-48, GCX 5, CX 3, 5.) Two feet beyond the pillars, the entrance area converts to a wood-floored lobby, which contains televisions and a seating area. The lower lobby is open to the public and houses two restaurants and a convenience store, which are not operated by the Company. (*Aqua I* 10; Tr. 85-86, 754-55, 767-68.) The lower

lobby also contains the bell and valet stand, from which the Company's employees greet guests, park their cars, and handle luggage. Security guards regularly patrol the lower lobby, maintenance employees occasionally perform repairs to the area, and a housekeeper empties the lower-lobby trash cans. (*Aqua I* 10; Tr. 50, 59-60, 89, 120, 153-54, 172-73, 755-56.)

On August 11, Ching and guest services agent Lakai Wolfgramm, both of whom were off duty, went to the lower lobby to hand out union fliers. Three or four valet-stand employees were working in the lobby at the time. Ching and Wolfgramm stood in the tiled entrance area between the pillars and the red curb, facing the street, with fliers in hand, and waited for guests or other employees to approach them. Neither Ching nor Wolfgramm blocked any guest's or employee's access to the entrance. About 3 minutes after they arrived, Smith told Ching and Wolfgramm that they could not handbill on the Company's property, and that he would trespass them if they did not leave. After a brief exchange, the employees left. (*Aqua I* 10, Tr. 155-63, 197.)

**G. Union Files New Unfair-Labor-Practice Charges; General Counsel Notifies Company He Will Seek Default on Settled Charges**

From June to October 2015, the Union filed a series of unfair-labor-practice charges based on Ettinger's May 19 speeches, Guzman's and Rangunjan's warnings, and the handbilling incident. On October 15, the Board's General

Counsel notified the Company that, based on the conduct alleged in those charges, the Company was in noncompliance with their Agreement. The letter advised the Company that the General Counsel intended to seek default judgment respecting the settled charges after successfully proving the subsequently charged violations. (*Aqua II*, p.1; MDJX 10.)

## **II. PROCEDURAL HISTORY AND THE BOARD'S CONCLUSIONS AND ORDER IN *AQUA I***

On October 28, 2015, the General Counsel issued a complaint alleging the violations charged by the Union since June. (GCX 1(w).) After a hearing, an administrative law judge found that the Company violated the Section 8(a)(3) and (1) by issuing written warnings to Guzman and Rangunjan for actions they took in the course of protected activity without an honest belief that they had engaged in serious misconduct. The judge also found that the Company violated Section 8(a)(1) when Ettinger told employees that they must stop union rallies and cease bothering their coworkers at home or face adverse consequences, that they were lucky to have jobs, and that they could apologize to him, and when Smith ordered Ching and Wolfgramm to stop handbilling in the entrance area to the lower lobby and leave the Company's premises. (*Aqua I* 2-13.) The Company filed exceptions to the judge's decision. (*Aqua I* 1; Exceptions 1-19.)

The Board (Acting Chairman Miscimarra and Members Pearce and McFerran) issued a Decision and Order on April 10, 2017, adopting the judge's

decision with minor modification and finding that the Company violated the Act as alleged. (*Aqua I* 1-13.) To remedy the violations found, the Board ordered the Company to cease and desist from: disciplining employees for their union or protected conduct; ordering employees to cease their union or protected activity; threatening employees for engaging in union or protected activity; soliciting employees to disclose their union sympathies; threatening employees with unspecified reprisals for handbilling in nonwork areas; and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (*Aqua I* 1, 12.) The Board's Order affirmatively requires the Company to rescind the written warnings issued to Guzman and Ragunjan, and to post a remedial notice. (*Aqua I* 1, 12-13.)

### **III. PROCEDURAL HISTORY AND THE BOARD'S CONCLUSIONS AND ORDER IN *AQUA II***

On October 28, 2015, the General Counsel issued a second complaint against the Company, based on the charges filed in early 2015 and settled in the Agreement. On July 15, 2016, the General Counsel, relying on the judge's May 31 decision in *Aqua I*, filed a motion for default judgment in *Aqua II*, which the Company opposed. (*Aqua II* 2.)

On April 11, 2017, the Board issued a Decision and Order finding that the Company had breached the Agreement by committing the unfair labor practices found in *Aqua I*. The Board rejected the Company's argument that the General

Counsel's motion for default was untimely, finding that the General Counsel's October 15, 2015 letter constituted an assertion of default within the time frame set forth in the Agreement. Accordingly, the Board granted default judgment, finding that the Company had violated the Act as alleged in the *Aqua II* complaint. (*Aqua II* 1-2.)

To remedy the violations found, the Board ordered the Company to cease and desist from: interrogating employees about their union activities or those of other employees; placing employees under surveillance while they engaged in union or protected activities; directing employees to remove union buttons; encouraging or soliciting employees to sign an antiunion petition; threatening employees for engaging in union or protected activities; threatening off-duty employees for handbilling in nonwork areas; and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7. Affirmatively, the Board ordered the Company to post a remedial notice. (*Aqua II* 4.)

### **SUMMARY OF ARGUMENT**

Employer statements violate Section 8(a)(1) if a reasonable employee would interpret such statements as antiunion orders or threats. Substantial evidence supports the Board's finding that Ettinger's May 19 speeches included the unlawful messages that employees must stop union activities or their jobs would be

at risk, and that they should demonstrate their contrition by apologizing for such activities. Ettinger's elevated position in the Company's hierarchy, demeanor, and use of sophisticated language without translation all increased the coerciveness of his remarks. And the judge's well-founded credibility determinations validate the employee testimony the Board relied on to discern the substance of the unlawful messages Ettinger conveyed. The Company does not come close to meeting the high standard required to overturn those credibility resolutions.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) by barring off-duty employees from handbilling in a nonwork area, contrary to established law. More specifically, ample evidence supports the Board's finding that the entrance area to the Hotel's lower lobby, where the employees were handbilling, was a nonwork area. The work activities performed there fit comfortably within the range of work activities that the Board's prior cases have held are insufficient to establish that an area is a work area.

The record also substantiates the Board's finding that the Company violated Section 8(a)(3) and (1) by issuing warnings to Guzman and Rangunjan. An employer cannot lawfully discipline employees for actions in the course of union activity unless it establishes that it honestly believed the employees committed serious misconduct. Here, it is undisputed that the warnings sanction actions during the course of union activity, and the Board reasonably found that the

Company lacked an honest belief that either employee engaged in the alleged misconduct of interfering with Pajinag's work or, in the case of Rangunjan, recently threatening Pajinag. Pajinag's complaints did not involve either type of misconduct, and the Company's deficient investigation of the complaints demonstrates that it was more focused on proving misconduct than discerning the truth. The Company's challenges to this violation depend largely on disputing the Board's factual findings but fail to challenge the Board's well-founded underlying credibility determinations.

Finally, the Board correctly read the timing clause of the Agreement's default-judgment provision as requiring only that the General Counsel notify the Company of his intent to seek default judgment, not that he move for default judgment, within 6 months. The Board's reading comports with both the ordinary meaning of the term "assert" and the default-judgment provision's structure, which defines an integral process for remedying noncompliance with the Agreement, beginning with notice. Moreover, unlike the Company's interpretation of the 6-month limitation, the Board's reading makes sense: it ensures that the Company is subject to default judgment based on actions occurring within 6 months of the Agreement's date.

## STANDARD OF REVIEW

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2012). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). Further, the Court defers to an administrative law judge’s Board-adopted credibility determinations unless they are “hopelessly incredible,” “self-contradictory,” or “patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quotation marks and citations omitted).

The Board’s interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *see also Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016) (the Court “will uphold Board’s legal determinations so long as they are neither arbitrary nor inconsistent with established law”) (internal quotation omitted). “However, the Court gives no special deference to the Board’s interpretation of contracts, instead

interpreting contracts de novo.” *Minteq Int’l, Inc. v. NLRB*, 855 F.3d 329, 332 (D.C. Cir. 2017).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT WHEN A SENIOR EXECUTIVE ORDERED EMPLOYEES TO STOP UNION ACTIVITIES, IMPLIEDLY THREATENED THEIR JOBS, AND INVITED THEM TO APOLOGIZE TO HIM FOR THEIR UNION ACTIVITY**

Section 7 of the Act guarantees employees “the right to self-organization, 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 . . . .” 29 U.S.C. § 157. And the right to engage in self-organization lies “at the very core of the purpose for which the [Act] was enacted.” *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). In turn, 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 guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

An employer’s statements violate Section 8(a)(1) of the Act if, considering the totality of the circumstances, the statements have a “reasonable tendency” to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). When reviewing the Board’s evaluation of the coercive effect of employer statements, the Court

must “recognize the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.”

*Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

Accordingly, “threaten[ing] retaliation against employees for the exercise of their rights to organize and to participate in union activities” violates Section 8(a)(1). *Tasty Baking*, 254 F.3d at 124. Similarly, ordering an employee to stop union activity violates Section 8(a)(1), *see Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 106 (D.C. Cir. 2003), as does soliciting employees to reveal their union sentiments, *see Midwest Reg’l Joint Bd. v. NLRB*, 564 F.2d 434, 444 (D.C. Cir. 1977); *see also Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175-76 (3d Cir. 2002). Moreover, an employer’s misleading or confusing statements can violate Section 8(a)(1) if an employee would reasonably attach an unlawful meaning to those statements. *See Lancaster Care Ctr., LLC*, 338 NLRB 671, 672 (2002) (employee is not required to “divine a legitimate gloss to what was said”).

In determining whether a statement violates Section 8(a)(1), context matters. Employer statements that would not violate the Act in isolation nonetheless can “take on the character and quality of coercive comments which accompany them.” *Oak Mfg. Co.*, 141 NLRB 1323, 1325 (1963). And when “the highest levels of management” communicate the employer’s antiunion message, “it is highly

coercive and unlikely to be forgotten.” *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996), citing *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), *enforced*, 44 F.3d 516 (7th Cir. 1995). Finally, when an employer addresses non-English-speaking employees in English, the employer’s “statements deserve careful scrutiny” due to the potential for employees to misunderstand them and, in such circumstances, the Board “construe[s] any ambiguity in a threatening statement against the employer making the statement.” *Labriola Baking Co.*, 361 NLRB 412, 413 n.6, 414 (2014).

**A. Ettinger’s May 19 Speeches Reasonably Tended To Interfere with Employees’ Union Activities**

As the Board found (*Aqua I 9*), several aspects of Ettinger’s May 19 presentations contributed to the coercive nature of his remarks. The meetings were mandatory; employees’ supervisors pulled them from shifts and told them they had to attend, impressing upon the employees the importance to the Company of the message Ettinger delivered. That impression was reinforced by the identity of the messenger—Ettinger, the director of operations for all of the Company’s properties in Hawaii, outranks every manager at the Hotel. General Manager DeMello, Rooms Division Manager Webster, and Human Resources Senior Vice President Haines all sat among employees, reinforcing the seriousness of Ettinger’s remarks. *See Aldworth Co.*, 338 NLRB 137, 149 (2002) (captive audience meetings convey a particularly significant impact when conducted by high-level officials), *enforced*

*sub nom., Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004).

At the meetings, a visibly angry Ettinger spoke loudly and banged a water bottle in his hands. Although most employees did not speak English as a first language, Ettinger addressed them without any translation, using at times a very sophisticated vocabulary—but, as discussed below, couching certain key messages in more plainspoken terms. At no time during the meetings did Ettinger counter any consequent confusion by acknowledging employees' organizational rights or assuring employees that the Company would not retaliate against them for continued union activity.

The substance of Ettinger's remarks was coercive in several respects. Notably, he started by telling employees that the Hotel would lose business if they kept banging on pots and pans, a feature of their union rallies. Guests, Ettinger pointed out, do not want to come thousands of miles only to be woken up. Then, he told employees that "it has to end," and ordered them to "stop making noise outside." (Tr. 223, 306.) Turning to the subject of employees visiting coworkers on behalf of the Union, Ettinger told employees to "stop bothering" and "stop badgering" their coworkers at home. (Tr. 270-71, 306-07.) He then told employees that they could call the police on coworkers who visit their homes. Finally, Ettinger suggested that unionized hotels were losing money and unable to

keep people employed. Lest employees misunderstand the consequences of failing to fall in line, he closed his remarks with “readily understandable English phrases, telling them they were ‘lucky to have jobs’ and were welcome to ‘apologize’ to him.” (*Aqua I 9.*)

The compulsory attendance, Ettinger’s elevated position in the Company’s hierarchy, and his demeanor lent a coercive atmosphere to his remarks. In such circumstances, ample evidence supports the Board’s finding (*Aqua I 1 n.1*), discussed in more detail below, that Ettinger delivered several messages that violated Section 8(a)(1) of the Act.

**i. Ettinger unlawfully ordered employees to stop union rallies and to cease bothering coworkers about the union at home, threatening them with job loss and police intervention**

The Board reasonably found that employees would understand Ettinger’s remarks as telling them to “stop the rallies or you will lose work,” to “stop bothering their coworkers about the Union at home or the police would get involved,” and as an implicit threat of job loss. (*Aqua I 1 n.1, 9.*)

First, Ettinger clearly focused on the noise of the union rallies, claiming that it bothered guests and thus damaged business. He then explicitly directed employees to stop the noise. After discussing complaints regarding union-organizing home visits, he similarly ordered employees not to “bother” or “badger” coworkers at home and immediately advised employees that they could summon

police if they received a union home visit. In other words, Ettinger’s speeches clearly conveyed the message that he was “fed up and angry with [employees’] union organizing . . . and was telling them to stop.” (*Aqua I 9.*)<sup>2</sup> Thus, as the Board found, Ettinger’s orders to stop union activities (both rallies and home visits) were comparable to the employer’s unlawful order to “discontinue this disruptive behavior immediately” in *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 401 (1993).<sup>3</sup>

Second, linking the rallies to customer dissatisfaction and decreasing business reasonably implied that employees’ failure to stop might cost them their

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<sup>2</sup> Even without the Board’s finding that Ettinger unlawfully ordered employees stop union activities, the Board’s Order can be enforced in full. The provision of the Order requiring that the Company cease and desist from “ordering employees to cease engaging in union and/or protected activity” is independently supported by the Board’s finding that the Company violated Section 8(a)(1) when security guard Smith banned employees Ching and Wolfgramm from handbilling on company premises. (*Aqua I 12.*) Absent any challenge to that finding in the Company’s opening brief, the Board is entitled to enforcement of that provision of its Order. *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735-36 (D.C. Cir. 2015).

The Board’s related finding that Smith unlawfully threatened Ching and Wolfgramm for handbilling in the Hotel’s lower-lobby entrance in particular supports a separate provision of the Board’s Order related to “handbilling in nonwork areas” (*Aqua I 1*). The Company’s challenge to that finding is discussed below (Br. 34-42).

<sup>3</sup> The Company’s attempts (Br. 32-33) to distinguish *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 401 (1993), and *American Tool & Engineering Company*, 257 NLRB 608, 608 (1981), ring hollow. That the employer in those cases did not dispute the Board’s factual findings is irrelevant; an employer cannot escape liability for unfair labor practices based on its own *failed* attempt to dispute the facts of the case.

jobs, because decreasing business could presumably lead to decreased workloads. *See Paradise Post*, 297 NLRB 876, 889 (1990) (improperly connecting loss of business to union activity constituted a threat of job loss). That Ettinger juxtaposed his order to stop soliciting employees at home with an instruction to call the police if such solicitation occurred likewise reasonably conveyed the impression that failure to stop home visits could lead to police involvement.

Third, Ettinger's final comments included the assertion that employees were "lucky to have jobs." (Tr. 224, 308.) That statement was necessarily emphasized as the last message the employees took from meetings, which were undeniably focused on their union activity, and particularly the rallies. And it reaffirmed Ettinger's earlier message that continued union activity could result in lost work. As the Board found, the combination of that earlier message and the suggestion that unionized hotels were firing employees meant that an employee "would reasonably feel his job security threatened" upon hearing Ettinger's assertion that he was "lucky" to be employed. (*Aqua I 9.*) *See Mid-East Consolidation Warehouse*, 247 NLRB 552, 553 (1980) (statement that employees were lucky to have jobs and could leave if they did not like their wages violated the Act).<sup>4</sup> That

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<sup>4</sup> Although the Company claims (Br. 40) that the Board did not find the "lucky" statement unlawful in *Mid-East*, the Board's opinion in that case did not separate the employer's remark into its component parts. Instead, the Board in *Mid-East*, as here, analyzed the message that employees would receive, which was that the

context materially distinguishes Ettinger’s “lucky” remark from the lawful statement in *Children’s Services International*, 347 NLRB 67 (2006). As the Board found, the employer in that case, unlike here, linked employees’ luck to non-union-related factors such as their “skill level [and] the overall job market.” (*Aqua I 9* n.30.)

Finally, the other aspect of Ettinger’s concluding remarks—the invitation to employees to apologize to him—made clear that he so strongly disapproved of employees’ union activity that he believed expressions of contrition from employees who had engaged in such activity would be appropriate. Both of Ettinger’s concluding statements thus buttress the Board’s finding that employees’ reasonable takeaway from the meetings included the unlawful messages that the union activity must stop and that failure to do so could have adverse consequences to their employment.

The Company’s challenges to that finding (Br. 28-30, 44-46) misread the Board’s assessment of employees’ bottom-line takeaways from Ettinger’s speeches as direct quotations and entirely ignore the intimidating circumstances of Ettinger’s remarks. Contrary to the Company’s contention (Br. 25) that the Board based the

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employer “did not favor employees remaining in its employ who would choose to band together for mutual aid and protection.” 247 NLRB at 553.

May 19 unfair-labor-practice findings on subjective impressions of Ettinger's message, the Board analyzed what "a reasonable employee attending Ettinger's meetings" would understand. (*Aqua I 9*.) Ettinger took no steps to ensure that a reasonable employee whose first language is not English would understand his remarks in anything but the broadest terms. And the broad, coercive messages that the Board found employees would have understood are well supported by record evidence.

The Company's specific contention (Br. 30-33) that Ettinger told employees only to stop making noise, and not to stop the rallies, lacks merit. There is no evidence that employees banged pots and pans in any other circumstance, so a reasonable employee would understand Ettinger's message as directed at the rallies. And no witness testified that Ettinger assured employees they could continue to rally so long as they did so quietly. Nor would such an assurance make sense: the entire point of the rallies was to "get[] the attention [of] management" (Tr. 267), and banging on pots and pans to make noise was thus an integral part of the rallies' purpose.

Similarly meritless is the Company's claim (Br. 28, 34-35) that the testimony does not support the Board's finding that Ettinger told employees to stop

bothering their coworkers about the Union or the police would be involved.<sup>5</sup>

Fabro, who generally testified with the benefit of a translator, was asked to relay Ettinger's exact words in English. According to him, they were: "stop[] bothering workers at their home when they are working." (Tr. 270.) The Company emphasizes (Br. 35) the final phrase, "when they are working," but it was reasonable for the judge to interpret Fabro's testimony as meaning that Ettinger said to stop bothering coworkers at home *and* when they are working. The missing conjunction is understandable in light of Fabro's weak English skills, and without it, the statement is nonsensical.

Moreover, Daniels' testimony that Ettinger told employees to "stop badgering" coworkers bolsters that interpretation. (Tr. 306.) Regarding the police, Daniels recounted that Ettinger advised employees that they "have the right to call police" on coworkers who visit them at home. (Tr. 306-07.) The exact wording of her testimony regarding the police is irrelevant; ordering employees to stop bothering their coworkers at home in the context of discussing union-organizing home visits violates Section 8(a)(1), particularly when juxtaposed with the threat

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<sup>5</sup> Contrary to the Employer's claim (Br. 33-34), the Board did not find these two statements were part of the same sentence.

of potential police involvement, regardless of the precise circumstances under which police could be involved.<sup>6</sup>

Finally, contrary to the Company's claim that there is no evidence Ettinger's "lucky to have jobs" comment came after his unlawful orders to stop union activity (Br. 39), Daniels' testimony places the comment at the same time that Ettinger discussed other hotels. (Tr. 308.) In turn, Ettinger's own outline indicates that the discussion of other hotels came toward the end of his presentation, when he asked employees, "Why are union hotels struggling to keep people[?]" (GCX 16.) In arguing that Ettinger did not reference *union* hotels at the meetings, the Company gives no reason why the judge should not have credited Ettinger's outline. The Board's finding thus appropriately took Ettinger's prior threats into context.

**ii. Ettinger unlawfully solicited employees to disclose their union sentiments**

In addition to reinforcing his other coercive messages, Ettinger's closing announcement that employees were welcome to apologize to him was independently an unlawful solicitation. As an initial matter, the judge reasonably

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<sup>6</sup> The Company relies (Br. 36) on *Station Casinos, LLC*, 358 NLRB 1556 (2012), but that case issued when the Board lacked a lawful quorum and thus does not constitute binding precedent. *See NLRB v. Noel Canning*, 573 U.S. 2 (2014). *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 87-90 (D.C. Cir. 2015), which the Company also cites (Br. 37), is no more helpful. That case involved governmental restrictions on an employer's right to call the police, whereas the Board's unfair-labor-practice finding here is based solely on the Company's communications with its own employees.

inferred that Ettinger's request that employees apologize to him referred to employees' union activity. The captive-audience meetings were part of the Company's antiunion campaign, and everything Ettinger said in the meetings was directed at the Union and employees' union activity. It is unclear what else Ettinger could possibly have been referencing. In any event, Daniels' testimony, as quoted in the Company's brief (p.41), clearly indicates that Ettinger asked employees to apologize for their union activity: "if you want to stop, then you guys have to stop to my office, say sorry about maybe about [u]nions." (Tr. 309-10.)

As the Board found (*Aqua I 9*), inviting employees to apologize for their union activities unlawfully pressures them "to disclose [their] union sympathies, one way or another." See *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995) (employer may not ask employees to make "an observable choice that demonstrates their support for or rejection of the union"). There is no way for an employee to apologize to a manager for union activity without disclosing that the employee was involved in union activity.<sup>7</sup> Indeed, in addition to revealing an employee's union sentiments, an *apology* implies that Ettinger expected employees

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<sup>7</sup> It is thus immaterial that, as the Company notes (Br. 42), the employer in *Barton Nelson* offered employees antiunion paraphernalia. The relevant point is that, like here, the employer's action required employees to reveal their union sympathies in response.

to repudiate their union support. Moreover, although Ettinger phrased his statement as a voluntary opportunity, not an order, it would reasonably be understood as more than a passing suggestion because it came from a visibly angry top manager who had just railed against union rallies, characterized union solicitation as bothersome, ordered employees to stop both, and threatened employees' job security. *See Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994) (“it makes no difference whether employees were ‘asked’ . . . or ordered not to” engage in protected activity), *enforced*, 83 F.3d 156 (6th Cir. 1996). In that context, reasonable employees would feel pressured to disclose—and possibly even disclaim—their union support and would worry for their job security should they decline to do so.

**B. The Company Has Not Shown that the Court Should Overturn the Board’s Credibility Determinations**

In addition to arguing that the credited testimony does not support the Board’s factual findings as to what Ettinger said on May 19, the Company challenges (Br. 25-30) the underlying credibility determinations. But the Court defers to the Board’s adoption of an administrative law judge’s credibility determinations unless those determinations are “hopelessly incredible,” “self-contradictory,” or “patently unsupportable.” *Stephens Media*, 677 F.3d at 1250. The judge’s credibility determinations, which the Board adopted here, are well

founded and articulated. The Company does not come close to demonstrating that they should be overturned.

In assessing the various accounts of the May 19 meetings, the judge credited current employees Fabro, Daniels, and Kava based on their forthright demeanor, which she contrasted with the demeanor of the Company's witnesses. (*Aqua I 8.*) With respect to Fabro, whom she found to be "especially credible," she noted "that he listened carefully to questions and maintained the same demeanor regardless of who was examining him." (*Aqua I 8.*) The judge also aptly considered that "testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adverse to their pecuniary interests." *Flexsteel Indus.*, 316 NLRB 745, 745(1995), *aff'd mem.* 83 F.3d 419 (5th Cir. 1996)

The Company points out (Br. 25-28) that Fabro's, Daniels', and Kava's accounts of Ettinger's comments at the meetings did not match as to every detail. But it is not unusual for witnesses to remember only parts of a conversation (here, a lengthy monologue), and the three employees did not directly contradict each others' accounts. Accordingly, each employee's recollection complemented the others where it did not serve as direct corroboration. And contrary to the Company's contention (Br. 27), the judge considered that Kava, in particular, did not corroborate the other employees' accounts in full, explaining that although her

“recollection was not as complete as the two others, her demeanor was composed and steady, and she struck me as committed to speaking the truth.” (*Aqua I 8.*)

That analysis is reasonable and consistent with the judge’s prerogative, as the factfinder present for each witness’s testimony, to weigh demeanor and other credibility considerations.

There is also no merit to the Company’s argument (Br. 30) that the judge erred by declining to draw an adverse inference against the General Counsel for failing to produce Daniels’ supposed recording of the meeting she attended.

Factually, Daniels did not “record” what Ettinger said, but merely took notes in her cell phone. (Tr. 330.) Legally, the Board draws an adverse inference when a party refuses to produce relevant evidence within its control. *See Overnite Transp. Co.*, 140 F.3d 259, 266 n.1 (D.C. Cir. 1998). But Daniels did not provide her notes to the General Counsel or the Union, and there is no evidence that either had the notes in their possession or control. (Tr. 331.) In *National Football League*, 309 NLRB 78, 97-98 (1992), the Board drew an adverse inference where the employer *refused to produce* meeting minutes that the General Counsel had subpoenaed.

Here, the Company never even asked Daniels to produce or read from her notes.

No more availing is the Company’s claim (Br. 28-29) that the judge should have credited its witnesses. The judge explained why she discredited each one, based primarily on demeanor. (*Aqua I 8.*) As the trier of fact, she was best

positioned to determine the cause of Ettinger's nervous laughter. That the Company may be able to construct another plausible explanation does not render the judge's contemporaneous impression unreasonable, much less indefensible. Moreover, contrary to the Company's contention (Br. 29), the judge did not inconsistently weigh nervousness in favor of crediting the General Counsel's witnesses. Rather, the judge explicitly credited Daniels *despite* her nervousness: "[she] was clearly nervous, *but* visibly worked hard to relate what she heard Ettinger say in English." (*Aqua I 8*, emphasis added.)

Finally, the judge did not, as the Company insists (Br. 29-30), unfairly discredit Haines for her vague testimony. Before the Company's leading questions began, Haines gave only a brief description of the meetings, peppered with qualifiers such as "he was basically telling them" and "that's sort of how he said it." (Tr. 688.) The Company's argument also ignores the judge's primary reason for discrediting Haines: the judge found "[e]specially concerning" that Haines' contemporaneous handwritten notes, which were ostensibly the source of her typewritten notes corroborating Ettinger's testimony, "consisted of two short notations that could not have possibly served as the basis for [her] typewritten notes." (*Aqua I 8* n.27.)

In short, the judge's reasoning supported her credibility determinations, and the Company falls far short of meeting the stringent standard for overturning them.

Thus, as demonstrated above, the credited testimony supports the Board’s findings that Ettinger’s statements conveyed several messages that had a reasonable tendency to interfere with the gathered employees’ Section 7 rights in violation of Section 8(a)(1).<sup>8</sup>

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ORDERING OFF-DUTY EMPLOYEES TO STOP UNION HANDBILLING IN THE ENTRANCE AREA TO THE HOTEL’S LOWER LOBBY, A NONWORK AREA**

Based on its experience in enforcing the Act, the Board has, with court approval, made particular restrictions on Section 7 rights “presumptively lawful or unlawful under § 8(a)(1) subject to the introduction of evidence sufficient to overcome the presumption.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492 (1978). With respect to protected solicitation and distribution, such as organizational handbilling, the jobsite is “uniquely appropriate” for the exchange of employees’ views regarding union representation. *Republic Aviation Corp. v.*

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<sup>8</sup> Before the Board, the Company did not contend, as it does before the Court (Br. 44-46), that Ettinger’s comments were protected by Section 8(c) of the Act, 29 U.S.C. § 158(c). (*See* Exceptions 1-19.) Therefore, the Court lacks jurisdiction to consider that contention. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes courts from reviewing claim not raised to the Board).

*NLRB*, 324 U.S. 793, 803 n.6 (1945); *see also New York, New York Hotel & Casino*, 356 NLRB 907, 915 (2011), *enforced*, 676 F.3d 193 (D.C. Cir. 2012) (workplace is also “uniquely effective location” for employees “to communicate with the relevant members of the public”). Moreover, absent special circumstances, “time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property.” *Republic Aviation*, 324 U.S. at 803 n.10. Conversely, an employer has a legitimate interest in maintaining discipline and production in operating its business. *See id.* at 797-98, 802 n.8. Therefore, an employer “may legitimately prohibit [employee] solicitation in working areas during working time.” *Albertson’s, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998).

**A. The Company Does Not Dispute that It Barred Off-Duty Employees from Engaging in Protected Handbilling in the Entrance Area to the Hotel’s Lower Lobby**

Here, the Company does not dispute that it ordered off-duty employees Ching and Wolfgramm to stop their union solicitation and threatened them with “trespass.” Nor does the Company contend that Ching or Wolfgramm lost the Act’s protection by, for example, interfering with any employee’s work or with

any customer's access to the Hotel.<sup>9</sup> The Company's sole defense to the Board's unfair-labor-practice finding is that the interference with Section 7 activity was justified because the employees were handbilling in a "work area." (Br. 52-57.) As shown below, substantial evidence and the relevant case law fully support the Board's finding that the area in question—the entrance to the Hotel's lower lobby—is a nonwork area and thus that the Company's threats violated Section 8(a)(1) of the Act.

The Board reasonably applied relevant, court-enforced precedent to assess whether the Hotel's lower lobby—and particularly the lobby's entrance, where the employees stood—is a work area. An employer's entire property may not be deemed a "work area" for purposes of determining the legality of rules prohibiting distribution, even though some work tasks are performed in nearly every part of most employers' property. *See U.S. Steel Corp.*, 223 NLRB 1246, 1248 (1976); *see also DHL Express, Inc. v. NLRB*, 813 F.3d 365, 376 (D.C. Cir. 2006) ("merely because a work function or functions occur in a given space does not render that space a 'work area' within the meaning of the Board's rules") (quoting *Brockton Hosp.*, 333 NLRB 1367, 1375 (2001), *enforced in relevant part*, 294 F.3d 100

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<sup>9</sup> *Litton Microwave Cooking Products*, 300 NLRB 324 (1990), *enforced*, 949 F.2d 249 (8th Cir. 1991), cited by the Company (Br. 53-54), is thus inapposite. That case involved an employer prohibiting handbilling only during a 30-minute window when 580 employees passed through a narrow lobby and handbilling would interfere with security guards' work. *Id.* at 325.

(D.C. Cir. 2002)). Instead, to determine whether an area constitutes a work area, the Board and courts examine whether any tasks performed in the area are central to the employer's primary business function; work incidental to that function will not suffice to create a "work area." *See Beth Israel*, 437 U.S. at 490, 502, 505-06; *U.S. Steel*, 223 NLRB at 1247-48; *see also, e.g., United Parcel Serv.*, 327 NLRB 317 (1998) (check-in area where drivers congregate not work area despite drivers occasionally receiving assignments there), *enforced*, 228 F.3d 772, 775-77 (6th Cir. 2000).

Of particular relevance here, the Board has already applied the work-area inquiry to hotel entrances. As the Board explained, "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." (*Aqua I* 11.) In *Sheraton Anchorage*, 362 NLRB No. 123 (2015), *incorporating by reference* 359 NLRB 803 (2013), *enforced sub nom. Unite Here! Local 878 v. NLRB*, \_\_\_ F. App'x \_\_\_, 2017 WL 6617024 (Dec. 28, 2017), the Board found that work performed just outside a hotel's entrance to provide security, maintenance, and valet parking was insufficient to transform that entrance into a work area where the employer could lawfully restrict employee handbilling. 359 NLRB at 854. Similarly, in *Santa Fe Hotel & Casino*, 351

NLRB 723 (2000), the Board found that the area outside the entrance to a casino-hotel was a nonwork area because the security, maintenance, and gardening that occurred there were incidental to casino-hotel's main functions of "lodg[ing] people and permit[ting] them to gamble." *Id.* at 723. *See also New York-New York, LLC v. NLRB*, 676 F.3d 193, 197 (2012) ("[T]he Board has long concluded that the working areas are the hotel rooms and gaming areas because a hotel-casino's main function is to lodge people and permit them to gamble.") (internal quotation omitted).<sup>10</sup>

The Company is mistaken in its assessment that the Court need not analyze whether the work performed in the lower-lobby entrance is central or incidental to the primary functions of the Company's business. The Company's contention (Br. 53) that "the focus should be on whether work is performed in an area to determine whether it is a work area" is wholly unsupported by Board and court precedent, including the cases the Company cites. *See Brockton Hosp. v. NLRB*, 294 F.3d 100, 105 (D.C. Cir. 2002) (the Board "correctly relied upon two of its prior cases for the proposition that cleaning, guarding, and escorting patients do not a work

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<sup>10</sup> The Company's suggestion (Br. 53, 55) that the Board applied a distinct "casino standard," rather than the established work-area standard, is incorrect. The Board's hotel cases are a specific application of the general work-area standard articulated in *United States Steel*. *See Santa Fe Hotel*, 351 NLRB at 723 (applying *U.S. Steel*); *Sheraton Anchorage*, 359 NLRB at 854 (analyzing entrance area of a hotel that is not a casino).

area make” in finding that a hospital vestibule was a nonwork area); *Times Publ’g Co. v. NLRB*, 576 F.2d 1107, 1109 (5th Cir. 1978) (denying enforcement on grounds that work done in newspaper lobby, including customers placing classified ads, employees selling publications, and members of the public bringing news items, was central to newspaper business); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620 (1962) (the Board did not elucidate standard for determining whether area was work area but stated that nonworking areas include “plant entrances or exits”).<sup>11</sup> This Court’s precedent is directly contrary to the Company’s view. *See DHL Express*, 813 F.3d at 376, and cases cited at pp. 36-37.

**B. Substantial Evidence Supports the Board’s Finding that the Hotel’s Lower-Lobby Entrance Is a Nonwork Area**

Substantial evidence supports the Board’s finding that the Hotel’s lower-lobby entrance was similar to hotel entrances found to be nonwork areas in the Board’s other cases. While the lower lobby contains a bell and valet stand, seating,

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<sup>11</sup> The Company grossly mischaracterizes *Brockton Hospital* as standing for the proposition that “the test for a work area is whether more than minimal work occurs there.” (Br. 53.) In that case, this Court merely stated that “the [Sixth] [C]ircuit has since held that an area in which minimal work occurs is not a work area.” 294 F.3d at 105. The Company’s remaining citations (Br. 54-55) are variously to a dissenting opinion, an advice memorandum, and an unpublished administrative law judge’s decision, none of which constitutes Board precedent. *See, e.g., Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (unreviewed administrative law judge decisions are not binding precedent); *Geske & Sons Inc.*, 317 NLRB 28, 56 (1995) (advice memoranda do not constitute Board law), *enforced*, 103 F.3d 1366 (7th Cir. 1997).

televisions, and entrances to two restaurants and a convenience store, it is freely accessible to the public and the Company operates none of that commerce. As in other hotel cases, the only employees who typically work in the lower lobby are a security guard, bell and valet attendants, the occasional maintenance employee, and a housekeeper who empties the trash and cleans the lobby (the record does not clearly indicate whether any employees other than the valet attendants regularly work in the entrance area). The work those employees perform is not central to the Hotel's main function of lodging guests, as the Board and courts held in *Sheraton Anchorage*, *Santa Fe*, and *New York, New York*.

Nor is the lower lobby itself is a resort-style attraction, as it “does not provide ocean or sky views,” and the Company “provides no regular live entertainment there.” (*Aqua I* 11.) Accordingly, customers in the lobby use it like a typical hotel lobby, and “most of the waiting guests are either watching television, napping or engaging with their smartphones.” (*Aqua I* 11.) Members of the public not staying at the Hotel, including the non-company restaurants' patrons, can access the lobby. Again, as in the earlier hotel cases, the Hotel's lower lobby is exactly what it seems to be—a waiting area that is not “integral to [the Company's] provision of lodging and guest services.” (*Aqua I* 11-12.)<sup>12</sup>

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<sup>12</sup> Indeed, unlike many hotel lobbies, the lower lobby does not even include a check-in area, for the Hotel has a second, upper lobby where it handles check-in, operates a restaurant, and regularly hosts events. (Tr. 59-60.)

Moreover, ample evidence supports the Board's finding that Ching and Wolfgramm were standing only in the *entrance area* to that open-air lobby. The tiled entrance area is akin to the space between the curb and a typical hotel's front door, distinct from the full lobby, and separated from the lobby's wood-floored seating area and commercial offerings by pillars, which are "the only physical barrier of any kind" separating the lobby from the driveway. The only hotel amenity in the entrance area is a bell and valet stand, and the only employees or customers who would pass by Ching and Wolfgramm, who stood between the curb and the pillars, would be entering or exiting the Hotel. Thus, the Board reasonably found that the employees "were positioned similarly to the employees in the Board's prior hotel handbilling cases." (*Aqua I* 12.)

Despite the Company's assertion (Br. 56), the lobby's open-air design and weather do not materially distinguish it from the lobbies in the other hotel-entrance cases. Although the Hotel lacks a structural façade, it has a curb and clear entrance. To the extent the Hotel provides resort experiences, like fine dining and views, it does so elsewhere. Nor does the availability of other areas to handbill, which has nothing to do with the work being performed in an area, distinguish this case; the Company points to no case where the Board has examined that supposed factor.

In sum, the relevant work-area inquiry is simply whether the work performed is central to the employer's business and, here, the work performed in the lower lobby's entrance area is not central to the Company's principal business of providing lodging. Therefore, substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by prohibiting Smith and Wolfgramm from handbilling at the Hotel's entrance.

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ISSUING WRITTEN WARNINGS TO GUZMAN AND RAGUNJAN FOR THEIR UNION ACTIVITIES**

When an employer takes an adverse employment action against an employee in order to discourage union activity, it violates Section 8(a)(3) of the Act, which prohibits discrimination "to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3); *see Ark Las Vegas*, 334 F.3d at 103 n.1. In addition, such union-motivated retaliation derivatively violates Section 8(a)(1) of the Act, 29 U.S. C. § 158(a)(1), because it interferes with employees' Section 7 right to engage in union activity. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *accord Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016). Under the test approved in *NLRB v. Burnup & Sims*, an employer commits an unfair labor practice by disciplining an employee for conduct that occurs during the course of union activity unless the employer proves that it had an honest or good-faith belief that the employee engaged in serious misconduct. 379 U.S. 21,

23-24 (1964); accord *UAW v. NLRB (Udylite Corp.)*, 455 F.2d 1357, 1367 (D.C. Cir. 1971) (employer has the burden to show honest belief).<sup>13</sup>

Here, there is no dispute that the Company issued written warnings to Guzman and Rangunjan for actions taken while they were engaged in union activity. Thus, the only question is whether the Company honestly believed that Guzman and Rangunjan committed serious misconduct. Because, as shown below, substantial credited evidence supports the Board’s finding of no such belief (*Aqua I 7*), the Company violated Section 8(a)(3) and (1) of the Act by issuing the warnings.

**A. The Board Reasonably Found that the Company Did Not Establish an Honest Belief that Guzman or Rangunjan Committed Serious Misconduct**

The credited evidence shows that Pajinag specifically complained only about four discrete incidents. He complained to managers Cacacho, Webster, and DeMello that Guzman approached him on June 5 and 9 and asked him to both sign a union card and take a picture for the Union. Pajinag also complained to the three managers that Rangunjan had approached him on May 22 with the same requests.

Although Pajinag stated that the two employees’ solicitations “bothered” him, he

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<sup>13</sup> Regardless of its good faith, an employer still violates the Act “when it is shown that the misconduct never occurred.” *Burnup & Sims*, 379 U.S. at 23. Here, because the Board found that the Company did not establish its honest belief in the alleged misconduct, the Board did not reach the issue of whether the misconduct actually occurred or would qualify as “serious.”

firmly denied “complain[ing] that Guzman and Ragonjan were interfering with him getting his work done.” (*Aqua I* 6.) Finally, Pajinag told Cacacho that, sometime before soliciting him, Ragonjan had warned him to watch his back. But when Webster and DeMello interviewed him, Pajinag did not mention the threat. Pajinag’s mild complaints and the Company’s meager subsequent investigation both support the Board’s finding that the Company did not have an honest belief either that Guzman and Ragonjan interfered with Pajinag’s work or that Ragonjan had recently, seriously threatened Pajinag.

First, the Board reasonably found that the Company lacked a good-faith belief that Guzman and Ragonjan committed serious misconduct when soliciting Pajinag on May 22, June 5, and June 9. As the Board explained, one employee approaching another to solicit support for a union does not rise to the level of serious misconduct absent interference with the solicited employee’s work, regardless of “the subjective reactions of others to [the] protected activity.” (*Aqua I* 6.) *See Consol. Diesel Co.*, 332 NLRB 1019, 1020 (2000). The Company does not argue otherwise; to the contrary, it implicitly acknowledges as much by incorrectly stating in Guzman’s and Ragonjan’s written warnings that they had interfered with another employee’s work, and by counterfactually arguing the same

to this Court (Br. 49-51).<sup>14</sup> But Pajinag's complaints, the sole basis for believing Ragunjan and Guzman engaged in serious misconduct, do not support the Company's asserted belief in the obstruction of work alleged in the written warnings.

The Company's minimal investigation of the solicitations further supports the Board's finding that the Company did not honestly believe the two employees disrupted Pajinag's work. The investigation focused on "amassing documentation of the alleged misconduct," not on determining Guzman's and Ragunjan's guilt. (D&O 6.) The Company disregarded several avenues of investigation. It never told either Guzman or Ragunjan who had complained about them, forcing them to guess what conduct the Company was investigating, and consequently depriving them of the ability to effectively refute the allegations. It did not even seek out the potential neutral witness or witnesses Pajinag identified to at least one of the solicitation incidents. *See UAW v. NLRB*, 455 F.2d at 1367 (employer lacked good-faith belief of serious misconduct where, inter alia, it "made no attempt to question [the discriminatee] as to his version of the facts"); *Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 16 (2015) (refusing to tell discriminatee the name of

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<sup>14</sup> The Company's reliance on *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) for the proposition that an employer may discipline employees for "repeatedly solicit[ing] coworkers who have asked them to desist" is misplaced. *Id.* at 648 n.13. Even if two solicitations could be considered "repeated," there is no evidence that Pajinag asked either Guzman or Ragunjan to stop soliciting him.

the employee who had complained about alleged misconduct was evidence of an insufficient investigation), *enforced sub nom. NLRB v. Remington Lodging & Hosp., LLC*, 708 F. App'x 425 (9th Cir. 2017).

Second, the Board reasonably found that the Company did not have an honest belief that Rangunjan had recently physically threatened Pajinag as the Company stated in Rangunjan's warning and argues to the Court (Br. 50-51). As noted, the Board found that Pajinag mentioned to Cacacho that Rangunjan had threatened him sometime before May 22. In relaying that complaint to DeMello and Webster, Cacacho "repackaged" the threat "to appear more imminent, allowing [the Company] to seize upon it as a reason for discipline." (*Aqua I 6 n.19.*) But DeMello and Webster's investigation did not substantiate Cacacho's report. When they interviewed Pajinag the same day Cacacho reported the allegedly recent threat, Pajinag made no mention of a threat. And none of the Company's actions following that interview indicate that it took the supposed threat seriously.

To the contrary, the Company "waited *four* days [after Cacacho's report] to interview Rangunjan and then failed to confront him about the loading dock incident." (*Aqua I 7.*) The Company not only refused to tell Rangunjan who had complained about him, as discussed above, but also failed to even question him directly about the threat, making it impossible for Rangunjan to defend himself. *See*

*Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 16 (failure to question discriminatee about alleged threat or tell him the name of the allegedly threatened employee constituted a deficient investigation). The Company also took no interim action to ensure Pajinag’s safety—it did not suspend Ragunjan pending investigation, offer Pajinag any protection, or contact law enforcement about the supposedly dire threat. Moreover, although Ragunjan’s warning explicitly sanctioned the supposed threat in addition to his solicitation conduct, the Company “meted out exactly the same level of discipline it issued Guzman, who was found guilty of no such infraction.” (*Aqua I 7.*) As the Board concluded, such a “languid and tepid response to Pajinag’s complaint that Ragunjan had recently physically threatened him was not consistent with the actions of a concerned employer.” (*Aqua I 6.*)

**B. The Company’s Defense of the Written Warnings Relies on a Version of the Facts that Ignores the Board’s Credibility Findings**

The Company’s description of the events leading to Ragunjan’s and Guzman’s warnings (Br. 8-13) and its argument challenging the Board’s unfair-labor-practice finding (Br. 47-51) rely on evidence the Board explicitly discredited. Most notably, like the written warnings themselves, the Company’s defense rests almost entirely on counterfactual assertions that Pajinag: (1) repeatedly told Cacacho, then DeMello and Webster, that Ragunjan and Guzman interfered with his work; and (2) told Cacacho that, shortly before June 15, Ragunjan seriously

threatened him, causing him great stress that visibly affected him. The judge, however, made contrary factual findings based on explicit credibility determinations, which the Board adopted. (*Aqua I* 1 n.1, 4-6.)

Specifically, the Board found that although the Company asserted that “Pajinag had complained that Guzman and Rangunjan were interfering with him getting his work done, this is precisely what Pajinag *denied* complaining about.” (*Aqua I* 6.) With respect to the purported threat, the Board found that while Pajinag may have reported “an allegedly threatening comment by Rangunjan occurring some time before [May 21],” he “never reported that he had been seriously threatened the Saturday prior to June 15.” (*Aqua I* 6.) Similarly, the Company’s contention that Rangunjan left “uncontested the testimony of [the Company’s] witnesses that he was questioned about his threat to Pajinag” (Br. 51) ignores the Board’s finding (based on crediting the testimony of Webster over that of DeMello) that the Company never asked Rangunjan about the alleged threat but only asked him “whether he had ever requested that someone take a picture for a nonwork related purpose.” (*Aqua I* 5, citing Tr. 812.)<sup>15</sup>

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<sup>15</sup> In arguing that the judge should have drawn an adverse inference against the General Counsel for failing to call Rangunjan as a witness, the Company (Br. 51-52) cites two cases where the Board *reversed* administrative law judges’ decisions to draw such inferences. See *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1021-22 (2006); *Riley Stoker Corp.*, 223 NLRB 1146, 1146-47 (1976). Where, as here, the employee’s testimony is “unnecessary to elucidate any facts in issue . . . the adverse inference rule has no application.” *Riley Stoker*, 223 NLRB at 1146.

The Company does not challenge the credibility determinations explicitly supporting each of those findings, much less attempt to show that they are “hopelessly incredible,” “self-contradictory,” or “patently unsupportable.” *Stephens Media*, 677 F.3d at 1250 (quotation marks and citations omitted). Without doing so, it cannot simply ignore the factfinder’s account and base its argument on an alternate set of facts. *See* Fed. R. App. P. 28(a)(8)(A) (opening brief must contain “citations to the authorities, statutes and parts of the record relied on” for each issue); *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.\*\* (D.C. Cir. 2000) (assertions “alluded to . . . in the statement of facts” without any supporting argument are considered waived).

In light of the credited facts, there is little substance to the Company’s challenges to this violation. Notably, the Company’s insistence (Br. 50-51) that its managers reasonably believed Pajinag’s account is irrelevant given that the Board found that Pajinag did not mention the serious misconduct cited in the warnings. For that reason, the Company’s reliance (Br. 49-50) on *Detroit Newspapers*, 342 NLRB 223, 238-39 (2004), is misplaced. In that case, the Board found that a manager honestly believed that a striker engaged in picket-line misconduct based on a police report stating that the striker had thrown a liquid at a replacement worker’s car. Here, the credited evidence simply does not support the Company’s

challenges to the Board's finding that the written warnings were not supported by an honest belief in Guzman's and Ragunjan's misconduct.

#### **IV. THE BOARD CORRECTLY DETERMINED THAT THE COMPANY'S ACTIONS BREACHED THE AGREEMENT, WARRANTING A DEFAULT JUDGMENT**

The settlement agreement between the General Counsel and the Company is a contract, subject to ordinary contract-interpretation principles. Thus, its meaning must, if possible, be "discerned within its four corners." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Here, the Company does not dispute that the unfair labor practices found by the Board in *Aqua I* breach the cease-and-desist provisions of the Agreement. Its sole defense to the Board's finding of default, and consequent order remedying the settled violations, is the contention (Br. 18-23) that the Board misinterpreted the 6-month limitation in the timing clause of the Agreement's default-judgment provision, mistakenly allowing the General Counsel to file an untimely default motion. As shown below, the Board correctly found that the General Counsel timely asserted the Company's default within the meaning of the Agreement.

The Agreement provides that, in the event of noncompliance, the General Counsel may seek a judgment fully remedying the settled unfair labor practices before the Board, and enforcement in a U.S. Court of Appeals, by default. To enforce that penalty, the default-judgment provision of the Agreement provides

that the Regional Director must give at least 14 days' notice of noncompliance without remedy by the Company before issuing a complaint alleging the settled violations and "[t]hereafter" filing a motion for default judgment on that complaint. (MDJX 7.) However, the provision's timing clause limits the timeframe during which the Regional Director may invoke that penalty, stating that "no default shall be asserted based on [the default-judgment] paragraph after six (6) months from the Regional Director's approval of the Settlement Agreement." (MDJX 7.) Thus, because the Regional Director approved the settlement on April 29, 2015, the Agreement required that he "assert" default by October 29, 2015.<sup>16</sup>

On October 15, the Regional Director sent the Company a letter stating that it was in noncompliance with the Agreement. As the Board found, the letter further "advised the [Company] of the General Counsel's intention to seek default judgment in the settled cases after successfully proving the 8(a)(1) violations alleged in those post-settlement charges." (*Aqua II* 1.) In conformity with the Agreement, the Regional Director then issued a complaint alleging the settled

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<sup>16</sup> The Company asserts (Br. 22) that the Board erroneously conflated the Regional Director's authority to issue a complaint with the General Counsel's authority to seek default. That distinction is immaterial: under Section 3(d) of the Act, 29 U.S.C. § 153(d), the General Counsel has final authority to prosecute unfair labor practices and supervises all of the Board's regional officers. Thus, the Regional Director acts on behalf of the General Counsel when asserting default.

violations on October 28 (also within the 6-month window), after the Company had failed to remedy its noncompliance for 14 days.

Noting that the default-judgment provision required 14 days' notice of noncompliance to start the process, followed by a complaint, then ultimately a motion for default judgment, the Board properly found that the 6-month limitation "is clearly linked to the initiation of this process—i.e., the provision of notice." (*Aqua II* 2.)<sup>17</sup> Because the default notice was within the 6-month period, and the Agreement did not otherwise restrict the timing of the motion itself, the Board correctly found that "the motion for default judgment was timely filed." (*Aqua II* 2.) That interpretation of the 6-month limitation not only implements the Agreement's plain language but makes sense in practice.

The Board's interpretation of the timing clause comports with the ordinary meaning of the term "assert." *Black's Law Dictionary* (10th ed. 2014) defines the term "assert" as "[t]o state positively" or "[t]o invoke or enforce a legal right." The October 15 letter clearly fits within both definitions. The letter states

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<sup>17</sup> Because the meaning of the Agreement's language is clear, there is no ambiguity to construe against the drafter. In any event, the General Counsel is not, as the Company argues (Br. 21), the sole "drafter." The timing clause was added to the Agreement at the Company's behest and "along the terms [the Company] requested." (MDJ Reply Appendix D.) The record does not reveal who drafted the clause, and the Company hardly needs protection from the results of language it specifically requested. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (point of construing against drafter is "to protect the party who did not choose the language from an unintended or unfair result").

positively, with assurance, that “the alleged new conduct constitutes a breach of the cease and desist terms of the April Settlement Agreement,” and that the General Counsel “intend[s] to seek default judgment in the Settled Cases” after proving the violations alleged. (MDJX 10 p.1.) Thus, the letter clearly “asserts,” within the timing clause’s 6-month timeframe, that the Company violated the Agreement and the General Counsel intended to seek default judgment.

More fundamentally, the Agreement only makes sense when interpreted to require *notice* of default within 6 months, so that the timing clause modifies the timeframe for invoking the default-judgment provision, but not the default process the provision describes. As the Board noted, nothing in the default-judgment provision limits the timing of the default-judgment *motion* in the default process (unlike the notice and complaint).<sup>18</sup> Moreover, the General Counsel’s standard practice is to move for default judgment only *after* proving allegations before an administrative law judge. Anne Purcell, Additional Guidance Regarding Default

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<sup>18</sup> The Company’s argument (Br. 19-20) that the 6-month limitation must be linked to the filing of the *motion* for default rather than to the notice, based on their relative proximity to “assert” in the default-judgment provision, is flawed. It artificially breaks the process that provision describes into its component steps. None of those steps alone effectuates the penalty the provision is designed to impose upon breach of the Agreement; that penalty requires notice, opportunity to remedy, issuance of a complaint, and a motion. Moreover, both “notice” and “motion” appear in the same paragraph, whereas the 6-month limitation is in the following paragraph.

Judgments, OM-Mem. 14-48, p. 5 (Apr. 10, 2014).<sup>19</sup> Requiring the General Counsel to move for default judgment within 6 months “would have inhibited this process.” (*Aqua II*, 2 n.3.) The reason is evident: it is difficult to imagine how the General Counsel could possibly investigate an unfair-labor-practice charge, find merit to the charge, issue a complaint, proceed to trial, and win a decision before an administrative law judge within just 6 months.<sup>20</sup> Requiring a default motion within that timeframe would, as a practical matter, eliminate the default-judgment provision from the Agreement.

Finally, the Board’s interpretation of the timing clause does not, as the Company suggests, “eliminate[] any meaningful temporal limitation.” (Br. 21, 22-23.) Indeed, the Company entirely misses the most likely purpose of the timing clause, to ensure that the default penalty applies only to breaches that the Company commits within 6 months of the settlement date. After all, it would be impossible for the General Counsel to notify the Company of its default within 6 months if the

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<sup>19</sup> Available at <https://apps.nlr.gov/link/document.aspx/09031d458168965d>.

<sup>20</sup> Before the Board, the Company contended that a default motion would be premature unless the *Board* had issued a final decision on the post-settlement violations (*Aqua II* 2 n.4), an even more unrealistic bar to clear within 6 months. The Board cited *Conagra Foods, Inc.*, 361 NLRB 944 (2014), *enforcement denied in part*, 813 F.3d 1079 (8th Cir. 2016), only to reject that argument not, as the Company seems to misunderstand (Br. 23), in evaluating the 6-month limitation.

Company did not default within 6 months.<sup>21</sup> In other words, it is the Board's reading of the Agreement which comports with the Agreement's language, the purposes of the default-judgment provision and timing clause, and common sense; the Company's reading is both strained and illogical, and would render the default-judgment provision illusory.

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<sup>21</sup> Contrary to the Company's argument (Br. 22), the General Counsel's emails shed no light on the parties' intended interpretation of the timing clause; they show only that the parties agreed to some unspecified limitation of the default-judgment provision. (MDJ Reply Appendix D.)

## CONCLUSION

The Board respectfully requests that the Court deny the Company's petitions for review and enforce the Board's Orders in full.

Respectfully submitted,

/s/ Kira Dellinger Vol  
KIRA DELLINGER VOL  
*Supervisory Attorney*

/s/ David Casserly  
DAVID CASSERLY  
*Attorney*

National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-0656  
(202) 273-0247

PETER B. ROBB  
*General Counsel*  
JOHN W. KYLE  
*Deputy General Counsel*  
LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board  
February 2018

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AQUA-ASTON HOSPITALITY, LLC, d/b/a	)	
ASTON WAIKIKI BEACH HOTEL AND	)	
HOTEL RENEW	)	
	)	Nos. 17-1117, 17-1118,
Petitioner/Cross-Respondent	)	17-1180
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	13-CA-104166
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,965 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 14th day of February, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on all counsel, who are registered CM/ECF users.

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

Dated at Washington, DC  
this 14th day of February, 2018