No. 17-2250

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DEEP DISTRIBUTORS OF GREATER N.Y., INC.
DBA THE IMPERIAL SALES, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

FINAL FORM BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

JOEL A. HELLER
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2948
(202) 273-1042

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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BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case presents numerous serious—and uncontested—violations of the National Labor Relations Act ("the Act") by Deep Distributors of Greater N.Y., Inc. in response to its employees' union organizing effort. The case is before the Court on the National Labor Relations Board's application to enforce its Decision and Order issued against Deep Distributors on June 20, 2017, and reported at 365 NLRB No. 95. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, 29 U.S.C. § 160(a), and the Court has jurisdiction over this appeal under Section 10(e), 29 U.S.C. § 160(e). The application is timely, as the Act provides no time limit for such filings. Venue is proper in this circuit because the unfair labor practices occurred in Bethpage and Syosset, New York.

STATEMENT OF THE ISSUE

Is the Board entitled to summary enforcement of its Order, where each of its unfair-labor-practice findings are uncontested?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Board's General Counsel issued a complaint alleging that Deep Distributors violated the Act by threatening, coercing, and retaliating against its warehouse employees on multiple occasions during and after an organizing campaign. The complaint alleged that Deep Distributors unlawfully created the impression of surveillance of employees' union activities, threatened employees with discharge and other unspecified reprisals if they unionized, told employees that unionizing would be futile, interrogated employees about their protected activity and threatened them with unspecified reprisals for it, implemented work rules in retaliation for union activity, and discharged five employees for refusing to sign those rules. It further alleged that Deep Distributors discharged three other employees for engaging in union activity, and threatened to report employees to immigration authorities and with legal action because of their union activity and participation in a Board hearing and to discourage them from such participation. (DA 11-12.) An administrative law judge issued a decision and recommended order finding violations as alleged. The Board affirmed the judge's rulings and

conclusions, as modified, and adopted the judge's recommended order, as modified. (DA 6-10.)[1]

II. THE BOARD'S FINDINGS OF FACT

A. Deep Distributors' Warehouse Employees Begin an Organizing Campaign

Deep Distributors is a wholesale distributor of beauty products, appliances, and electronics with a warehouse in Bethpage, New York. Warehouse employees retrieve the items ordered by customers and provide them to shipping personnel for delivery. (DA 12; DA 36-37, 56, 86.)[2] In early 2015, warehouse employee Henry Hernandez contacted United Workers of America, Local 660 ("Local 660") about organizing the warehouse. Hernandez and his co-workers began meeting weekly with organizers. Employees Javier Reyes, Jose Roberto Reyes, Jose Michel Torres, Jose Wilfredo "Alex" Argueta, and Augustin Sabillon occasionally spoke with a Local 660 organizer across the street from the warehouse. (DA 13, 21; DA 41-43, 54-55, 74-76, 89, 91, 108, 120-21.)

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[1] The Board's Decision and Order also addressed matters from a representation-election case that had been consolidated with the unfair-labor-practice case. None of those matters are before the Court on appeal.

[2] "DA" citations are to the Deferred Appendix. References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence. "Br." cites are to Deep Distributors' opening brief to the Court.

Local 660 filed a petition to represent warehouse employees on February 10. On February 26, Deep Distributors and Local 660 entered into a stipulated election agreement scheduling the vote for March 24. (DA 13; DA 170-72.)

B. Deep Distributors Confronts Employees about Union Activity and Discharges Alex Argueta, Jose Michel Torres, and Jose Martin Torres

On February 17, supervisor Amjad Malik approached employees Alex Argueta and Jose Michel Torres while they were working and stated that they were with the union. Neither man responded. On another occasion, supervisor Herbert Miller asked employee Roberto Reyes if he knew about Local 660 and told him that "I think that the one that is hanging out with the union is Alex." (DA 13; DA 77-78, 92, 97-98.)

On March 6—one week after the election agreement—Deep Distributors discharged Argueta and Torres, as well as Torres's brother, Jose Martin Torres. Both Argueta and Michel Torres had worked in the warehouse for 3-4 years, and neither had previously received any written warnings. Miller told the three men that work was slow, and that there was not enough for them to do. Other employees were busy, however, and new products were delivered and work orders received. Deep Distributors hired new workers after the discharges. (DA 14; DA 52, 72-73, 79-82, 90, 93-96.)

C. Deep Distributors Tells Employees "You Will Lose Your Jobs" if They Unionize

Two weeks before the election, and four days after discharging Argueta and the Torres brothers, Miller called a meeting with all warehouse employees to discuss the unionization campaign. At the meeting, which Sabillon recorded, Miller spoke to the gathered employees about "what will happen" if "you vote and … the union gets in." (DA 15; DA 44, 58-63, 161, 168.) He told them:

> What is going to happen is. You will have to strike because we are not going to accept that. So, those who vote Yes. I am telling now that you will lose your jobs because you are going to go out there, stand outside with the union. Those who don't vote are going to be here, working and, and we will be bringing new people …. So, those who do vote, I am telling you as of now, if you want. You are not coming back in here because you will lose your job. Because we will fight this ….
>
> I feel betrayed because I always treated everyone right …. The phones I don't say anything …. Okay. If you want change, careful what you ask for. Okay. Because a lot will change. But I am telling you right now, those who vote for the union, you will lose your job. Because we will fight it until the end. And all the union can do, like I said, is to stand outside ….
>
> But if you're going to start work for us or trouble for us, I don't want you here. You. I have treated you right the whole time. If you want me to treat you poorly, you shall see. Okay. But I am telling you one, one thing, those who. The union is never getting in because we will fight …. You shall see if you can go some two, three weeks without pay. We will bring other people …. If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy …. [I]f you don't believe me, do what you got to do and do what you gotta do. You'll see what happens.

(DA 15-16; DA 161-67.)

D. Warehouse Employees Vote for Union Representation; Deep Distributors Questions Employees about Their Wage-and-Hour Suit

At the March 24 election, warehouse employees voted for Local 660 as their collective-bargaining representative. (DA 25; DA 117.) Following the election, they discussed with union representatives that Deep Distributors had not paid them for overtime. Local 660 connected them with an attorney, who helped them file a Fair Labor Standards Act suit on July 6. Among the 13 named plaintiffs were Henry Hernandez, Marvin Hernandez, Roberto Reyes (listed as Jose Reyes), Javier Reyes, Augustin Sabillon, Alex Argueta, and Jose Michel Torres. (DA 16-17; DA 45-46, 98-99, 136-48.)

General Manager Tony Bindra received a copy of the complaint on July 8. One week later, Bindra and Miller met with Roberto Reyes in Miller's office and asked if he knew anything about the attorney who filed the suit. Reyes denied that he did, and Bindra challenged his denial, telling Reyes that his name was listed in the complaint. Reyes again denied having any knowledge of the matter. (DA 16-17; DA 87, 99-101.)

Soon thereafter, Bindra and Miller met with the warehouse employees about the lawsuit. Bindra read aloud the name of everyone listed in the complaint and asked whether the gathered employees knew anything about the suit or had talked to anyone about it. He told them that the allegations in the suit were false, and

stated that "the question is this. We are fighting or we are not fighting?" Bindra concluded by asking if they still intended to pursue the suit. (DA 17; DA 64-68, 101-02, 122-25, 150-59.)

E. Deep Distributors Implements New Work Rules and Discharges Employees Who Refuse To Sign a Form Acknowledging Them

On July 21—approximately one week after Bindra and Miller met with employees about the overtime suit—Deep Distributors circulated a document titled Employee Code of Conduct. The Code of Conduct provides that employees will be subject to discipline if more than five minutes late to work and will be discharged for three unexcused late arrivals during a twelve-month period. It also prohibits personal cell-phone use by warehouse employees during work hours, and provides that violation of the policy will result in discipline up to discharge. (DA 17; DA 47-49, 134-35.) Deep Distributors had not previously maintained written work rules about lateness, cell-phone use, or any other topic. In the past, warehouse employees had used cell phones during work hours, including in view of supervisors, without consequence. (DA 17; DA 38-40, 118-19.)

All employees were required to sign and acknowledge the new Code of Conduct the day it was circulated. Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon refused to sign. Deep Distributors discharged all five men that afternoon. (DA 18; DA 48-50, 68-71, 84-85, 102-06, 125-28.)

F. Deep Distributors' Attorney Threatens To Report Employees to Immigration Authorities at the Board Hearing

The Board's General Counsel issued an unfair-labor-practice complaint against Deep Distributors, and a hearing before an administrative law judge commenced on December 9. During a break in proceedings on the first day, Deep Distributors' attorney pointed at the employees and stated that he would report them to immigration authorities and that they "won't receive a penny" in backpay because of their immigration status. He also said that they would be committing perjury if they testified and could be deported. The comments were made in the Board hearing room, where the employees who were present to serve as witnesses were gathered. (DA 18-19, 25; DA 109-15, 128-30, 132-33.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 20, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued a Decision and Order finding that Deep Distributors violated Section 8(a)(1) of the Act by creating the impression of surveillance, threatening employees with discharge and other unspecified reprisals if they voted for union representation, telling employees that selecting a union would be futile, interrogating employees about their involvement in the wage-and-hour lawsuit and threatening them with unspecified reprisals for doing so, implementing work rules in retaliation for union or protected concerted activity, discharging five employees for declining to sign those rules, and threatening to report employees to

immigration authorities and with legal action because of their union activity and participation in a Board hearing and to intimidate witnesses and discourage them from such participation. It further found that Deep Distributors violated Section 8(a)(3) by discharging three employees for engaging in union activity.

The Board's Order requires Deep Distributors to cease and desist from the violations found and from interfering with employee rights in any other manner. Affirmatively, the Order directs Deep Distributors to offer reinstatement to the eight discharged employees, make them whole for any loss of earnings or benefits as a result of the discrimination, and remove any reference to the discharges from its records. It also directs Deep Distributors to rescind the Code of Conduct and furnish Local 660, upon request, with the names, addresses, and classifications of all employees. The Order further requires that Deep Distributors post a remedial notice, read the notice aloud to employees at a meeting designated for that purpose in the presence (if they request) of Board and Local 660 officials, and publish the notice in three publications of general local interest twice weekly for eight weeks. The Board also referred allegations of misconduct by Deep Distributors' attorney to the Board's Investigating Officer, pursuant to 29 C.F.R. § 102.177(e). (DA 9-10.)[3]

[3] Chairman Miscimarra would not have found an impression-of-surveillance violation or ordered a notice-publication remedy.

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); *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008), and its legal conclusions upheld if they have a "reasonable basis in law," *Cibao Meat Prods.*, 547 F.3d at 339 (internal quotations omitted). The Court will summarily enforce aspects of a Board order addressing uncontested violations. *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n. 2 (2d Cir. 2009). It has recognized that the Board has "wide discretion … in regard to internal affairs." *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 66 (2d Cir. 1979); *accord NLRB v. Iron Workers, Local 433*, 600 F.2d 770, 778 (9th Cir. 1979) (noting "the significant degree of discretion the courts have accorded the Board … to administer the enforcement of a backpay order in compliance proceedings"); *see generally Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 543 (1978) (explaining that agencies generally "should be free to fashion their own rules of procedure" (internal quotations omitted)).

SUMMARY OF ARGUMENT

Deep Distributors does not contest the Board's findings that it violated the Act in numerous, egregious ways—ranging from threats and interrogations to multiple discriminatory discharges—in response to its employees' unionizing

efforts. The Board's Order remedying those violations thus should be summarily enforced.

Deep Distributors offers no reason that would justify departing from that well-established practice. It contends that it already has complied with some parts of the Board's Order, but both the Supreme Court and this Court have held that compliance is no defense to enforcement. And its arguments that it has no backpay or reinstatement obligation due to purported immigration-status or waiver issues are premature, because the proper forum for presenting and evaluating such claims is a Board compliance proceeding rather than the Court in the first instance. Deep Distributors violated the Act, and enforcement is proper.

ARGUMENT

The Board Is Entitled to Summary Enforcement of Its Order Remedying Deep Distributors' Uncontested Unfair-Labor-Practice Violations

A. Deep Distributors' Failure To Contest the Board's Unfair-Labor-Practice Findings Is Grounds for Summary Enforcement

Deep Distributors does not contest any of the Board's findings of unfair labor practices. Specifically, it does not deny that it "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed" in Section 7 of the Act in violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), throughout the organizing campaign.[4] Deep Distributors does not contest that, shortly after Hernandez and his fellow warehouse employees approached Local 660, it created the impression of surveillance of their union activities when supervisor Malik confronted Argueta and Michel Torres about their involvement with Local 660. Nor does it challenge the Board's finding that supervisor Miller repeatedly threatened employees with discharge and various other consequences if they voted for union representation in his March 10 speech about "what will happen," and told employees over and over in that same speech that unionizing would be futile.

[4] Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

The Section 8(a)(1) violations continued after the election. Deep Distributors does not deny that it interrogated Roberto Reyes and other employees about their protected activity in jointly filing a wage-and-hour lawsuit and threatened them with reprisal for doing so. Nor does it contest the Board's finding that it implemented the new Code of Conduct in retaliation for its employees' union activity, and promptly discharged Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for declining to sign those unlawful work rules. It likewise broaches no challenge to the finding that its attorney threatened to report employees to immigration authorities and with legal action while in the Board hearing room during this very case, in reprisal for their union activity and for participating in Board proceedings.

Finally, Deep Distributors does not contest that it violated Section 8(a)(3), which prohibits "discrimination in regard to hire or tenure of employment … [to] discourage membership in any labor organization," 29 U.S.C. § 158(a)(3), by discharging Jose Michel Torres and Jose Wilfredo Argueta for engaging in union activity, and Jose Martin Torres because of his brother's union activity.

Given that Deep Distributors has failed to challenge any of those findings, the Board's Order should be summarily enforced in full. As the Court has explained, "[t]he Board is entitled to summary affirmance of portions of its order identifying or remedying … uncontested violations of the Act." *NLRB v. Consol.*

Bus Transit, Inc., 577 F.3d 467, 474 n.2 (2d Cir. 2009); *see also NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir. 1992) (enforcing Board's order as to violations that employers "have not challenged … in this Court"). And, indeed, all of Deep Distributors' actions against its employees are clear violations of the Act under settled law. *See, e.g.*, *NLRB v. Long Island Assoc. for AIDS Care, Inc.*, 870 F.3d 82, 89 (2d Cir. 2017) (discharge for refusing to sign unlawful rule); *Atelier Condominium v. NLRB*, 653 F. App'x 62, 63-64 (2d Cir. 2016) (discharge for union activity); *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427 (2d Cir. 1996) (impression of surveillance, interrogation, threats of reprisal for union activity); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 996-97 (2d Cir. 1976) (telling employees unionization is futile); *AM Prop. Holding Corp.*, 350 NLRB 998, 1042-43 (2007) (immigration-related threats at Board hearing), *enforced in part on other grounds*, 647 F.3d 435 (2d Cir. 2011); *Tuscaloosa Quality Foods, Inc.*, 318 NLRB 405, 410-11 (1995) (retaliatory rules).

B. Deep Distributors' Compliance-Related Arguments Are Misplaced or Premature

Despite not contesting that it violated the Act as the Board found, Deep Distributors nonetheless asks the Court not to enforce the Order remedying those violations. But Deep Distributors' arguments that it already has or should not have to comply with the Order are misplaced or premature.

1. Compliance Is Not a Defense to Enforcement

Deep Distributors contends that it has "taken reasonable steps necessary to satisfy its compliance" with various parts of the Board's Order. (Br. 19-22, 25-29.) Even if those claims were true, it is well-established that compliance is not a defense to enforcement. As the Supreme Court has explained, "the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950); *see also NLRB v. Dover Hosp. Servs., Inc.*, 636 F. App'x 826, 827 (2d Cir. 2016) ("Even if these actions constituted compliance, that would not render the petition [for enforcement] moot."); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 273-74 (2d Cir. 1981) ("[T]he Board is still entitled to enforcement of its orders despite corrective actions taken by offending parties."); *William J. Burns Int'l Detective Agency, Inc., v. NLRB*, 441 F.2d 911, 914 (2d Cir. 1971) ("The fact … that the employer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts."), *affirmed on other grounds*, 406 U.S. 272 (1972).

Compliance is no defense in part because a Board order contains cease-and-desist language prohibiting an employer that violated the Act from resuming its violations. That aspect of the order "imposes a continuing obligation; and the

Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." *Mexia Textile*, 339 U.S. at 567. Enforcement "ensure[s] against possible future violations of the same character" even where employers "have discontinued their unlawful conduct and are now in compliance with the Board's order." *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 238 (2d Cir. 1953). Specifically, a court judgment enforcing the Board's order provides the threat of contempt if the employer resumes the unfair labor practice. It is thus warranted even if an employer is presently in compliance with the order. As the Supreme Court explained, the Board is "not require[d] … to play hide-and-seek with those guilty of unfair labor practices." *Mexia Textile*, 339 U.S. at 568. Accordingly, the Court has noted that "the issue of compliance [is] … clearly irrelevant in the ordinary course of review." *Id.* at 569.

Deep Distributors presents no reason to depart from those principles. Nor could it, given their provenance and longstanding application by both the Supreme Court and this Court. As is typical, the Board's Order in this case imposes an ongoing obligation, directing Deep Distributors to cease and desist from the violations found and from "[i]n any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." (DA 9.) A court-enforced judgment is particularly important here, given that, as the Board found, Deep Distributors' "egregious or widespread misconduct

… demonstrate[s] a general disregard for [its] employees' fundamental statutory rights." (DA 31 (internal quotations omitted).) Even as to those aspects of the Board's Order to which Deep Distributors purports to have complied, therefore, enforcement is proper.[5]

2. Deep Distributors' *Hoffman Plastic* and Waiver Arguments Are Premature

No more availing is Deep Distributors' contention (Br. 21-25) that some or all of the unlawfully discharged employees are ineligible for relief due to purported immigration-status issues under *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), or have waived their right to relief. Those arguments are premature, as they should be raised in a Board compliance proceeding, not to the Court in the first instance.

Once the Board has found a violation of the Act in the merits stage of an unfair-labor-practice case and issued an order, parties can litigate issues related to

[5] The Board does not agree with Deep Distributors' unproven assertions that it has complied with the Order, and it admittedly has not complied with some aspects (as to notice-publication, for example, Deep Distributors offers no authority for the proposition (Br. 26-27) that it can refuse to comply simply because not all of the details have been worked out). But the Court need not address that issue. Whether or not there actually has been compliance is not relevant to the propriety of enforcement.

Moreover, none of the evidence purporting to show compliance is part of the agency record in this case and thus was not before the Board. The Board opposes Deep Distributors' attempt to present such extra-record material to the Court on appeal, for the reasons stated in its opposition to Deep Distributors' motion to supplement filed November 13, 2017.

implementation of the remedy in subsequent compliance proceedings. 29 C.F.R. § 102.54-.59; *see also NLRB v. Katz's Delicatessen, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (describing compliance process). For example, as the Supreme Court has explained, "compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any, to which the discharged employees are individually entitled." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). Accordingly, that Court has approved the Board's practice of "order[ing] the conventional remedy of reinstatement with backpay" upon finding an unlawful discharge, and "leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due." *Id.* The Supreme Court's "if any" language makes clear that even arguments that a discharged employee is not eligible for backpay at all are presented during the compliance stage rather than the merits stage. *Cf. NLRB v. Local 3, IBEW*, 828 F.2d 936, 939 (2d Cir. 1987) (noting that courts "have usually left questions … that might excuse compliance with an order to be pursued in … compliance proceedings before the Board"). Similarly, through compliance proceedings, the Board can "modify[] its general reinstatement … remedy … as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge." *Sure-Tan*, 467 U.S. at 902. Such individualized compliance determinations "are routinely made 'after entry of a Board order directing remedial action, or the entry

of a court judgment enforcing such [an] order.'" *Katz's Delicatessen*, 80 F.3d at 771 (quoting 29 C.F.R. § 102.52).

Deep Distributors' invocation (Br. 23) of *Hoffman Plastic*'s holding that lack of work authorization renders an employee ineligible for backpay is thus premature. Under the established, and Supreme Court-approved, process detailed above, issues regarding whether a discharged employee's immigration status affects the remedy are litigated in compliance proceedings. *Tuv Taam Corp.*, 340 NLRB 756, 760-61 (2003). Such questions are left for compliance because "an individual's immigration status is irrelevant to [an employer's] unfair labor practice liability under the Act." *Id.* at 760. It sheds no light, for example, on whether an employee was fired for engaging in protected activity, and thus has "no bearing on whether the [employer] did, in fact, commit the unfair labor practices of which it has been accused." *Id.* at 761.[6] The Supreme Court in *Sure-Tan* thus "approve[d] the Board's … course of action" of ordering the conventional remedy of backpay and reinstatement to employees who lacked work authorization at the time they were discharged, and leaving to compliance the determination of what, if anything, they actually were owed or whether they could accept reinstatement. 467 U.S. at 902-04. It explained that the issue of whether the employees "were

[6] As the Supreme Court held in *Sure-Tan*, undocumented-immigrant workers are "employees" within the meaning of the Act, and thus are afforded the Act's rights and protections. 467 U.S. at 891-94.

lawfully available for employment during the backpay period" or had "enter[ed] the country lawfully to accept the reinstatement offers" could be "establish[ed] at the compliance proceedings." *Id.* at 904.

Under similar facts as here, the Board in *Tuv Taam* ordered reinstatement and backpay where the employer's violations were uncontested. 340 NLRB at 756, 759. The employer challenged the remedy on *Hoffman Plastic* grounds, but the Board rejected the argument that it had to inquire into immigration status "before [it] can decide, at the merits phase … that a backpay award is an appropriate remedy." *Id.* at 759. The Board followed that same approach, with this Court's approval, in *Mezonos Maven Bakery, Inc.*. It ordered reinstatement in the underlying unfair-labor-practice proceeding after finding that employees had been unlawfully discharged, and noted that the employer "may avail itself of a compliance proceeding and therein attempt to establish that one or more of the alleged discriminatees is not entitled to an unconditional offer of reinstatement." 362 NLRB No. 41, 2015 WL 1439921, at *1 (2015). The Court enforced that order, and used the same language, as part of a consent judgment. *Id.*; *see also Palma v. NLRB*, 723 F.3d 176, 177-78 (2d Cir. 2013) (describing history of the *Mezonos Maven* litigation).[7]

[7] Both *Hoffman Plastic*, 535 U.S. at 141, and *Palma*, 723 F.3d at 178—the two cases Deep Distributors cites (Br. 23) regarding the impact of immigration status

Whether the eight employees whom Deep Distributors unlawfully discharged were authorized to work during the backpay period or will be when offered reinstatement is thus a question for compliance.[8] Deep Distributors seeks to depart from that well-established process not only by raising immigration status in the merits stage of the case, but also by asking the Court to examine the issue in the first instance. The matter was not litigated before the Board, and the Board has made no finding. That departure would serve no purpose—because the discharged employees' immigration status "is irrelevant to [Deep Distributors'] unfair labor practice liability under the Act," *Tuv Taam*, 340 NLRB at 760, it has no bearing on whether the Board's Order should be enforced.

A similar analysis applies to Deep Distributors' argument (Br. 21-22, 25) that the backpay and reinstatement aspects of the Order should not be enforced because some of the discharged employees purportedly waived their right to any remedy as part of a settlement of a Fair Labor Standards Act case. Whether or how a settlement in that case impacts the remedy here is likewise a matter for

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on backpay and reinstatement—likewise arose from Board compliance proceedings.

[8] Because the issue properly was not litigated before the Board in the merits proceedings, there is no record evidence in support of Deep Distributors' claim (Br. 11) that the discharged employees lacked work authorization. Deep Distributors will bear the burden of proving any such claim at the compliance stage. *Tuv Taam*, 340 NLRB at 760-61.

compliance. Deep Distributors' position that those employees should receive no backpay or other relief from the Board case as a result of the settlement is essentially an argument as to "the amounts of backpay, if any, due," and whether the Board should "modify[] its general reinstatement … remedy"—classic compliance issues. *Sure-Tan*, 467 U.S. at 902.[9] The waiver argument thus poses no more obstacle to enforcement than Deep Distributors' immigration-status claim.

Moreover, asking the Court to rule in the first instance on whether the settlement should affect backpay and reinstatement would disregard the Board's established test for evaluating the impact on Board remedies of settlements to which it was not a party. The Board is not bound by private settlements, and must evaluate such settlements before agreeing to forego Board remedies, because Board orders remedying unfair labor practices vindicate public rights, not just the interests of private litigants. *Independent Stave Co.*, 287 NLRB 740, 741 (1987). Under the Board's test, it considers factors such as "whether the charging party, the respondent, and the discriminatee had agreed to be bound, and the General Counsel's position regarding the settlement; whether the settlement was reasonable

[9] Alternatively, even assuming that the Fair Labor Standards Act settlement could be considered in the merits phase of the case, Deep Distributors did not ask the Board to reopen the record (under 29 C.F.R. § 102.48(c)) or otherwise bring the settlement to the Board's attention even though the settlement predated the Board's decision. Thus, the Court would lack jurisdiction to consider it because a party is barred from raising an issue before the Court that was not raised before the Board. 29 U.S.C. § 160(e); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001).

in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; whether fraud, coercion, or duress were present; and whether the respondent has a history of violations or has breached previous settlement agreements." *American Pacific Concrete Pipe Co.*, 290 NLRB 623, 623 (1988); *Independent Stave*, 287 NLRB at 743; *accord Beverly California Corp. v. NLRB*, 253 F.3d 291, 294-96 (7th Cir. 2001). The Board has not had an opportunity to conduct that analysis here, and having the Court do so now would serve only to circumvent the settled process for such matters. *Cf. NLRB v. Yonkers Assocs., 94 L.P.*, 416 F.3d 119, 122-23 (2d Cir. 2005) ("[W]e find no precedent supporting judicial modification of a Board award based on a settlement agreement reached in the context of an unrelated employment dispute, over Board objection and in the absence of Board involvement in negotiating the settlement or a prior motion before the Board … to defer to a settlement agreement." (internal quotations omitted)). Because Deep Distributors' waiver argument does not bear on the propriety of enforcement, such a departure would be both unnecessary and unwarranted.

In sum, Deep Distributors offers no reason for the Court to depart from its usual and well-established practice of summarily enforcing a Board order remedying uncontested violations of the Act. Deep Distributors' employees indisputably have rights under the Act, and Deep Distributors indisputably violated

those rights. Under longstanding principles, purported compliance issues are no obstacle to enforcement of the Order addressing Deep Distributors' numerous threats, discharges, and other unfair labor practices directed at employees who sought to organize and otherwise exercise their rights under the Act.

CONCLUSION

The Board respectfully requests that the Court enforce the Board's Order in full.

s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

s/ Joel A. Heller
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2948
(202) 273-1042

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

National Labor Relations Board
March 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner	)	
	)	No. 17-2250
v.	)	
	)	Board Case Nos.
DEEP DISTRIBUTORS OF GREATER N.Y.,	)	29-CA-147909,
INC. DBA THE IMPERIAL SALES, INC.,	)	29-CA-157108
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,489 words of proportionally spaced, 14-point type, and 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 6th day of March, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/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 6th day of March, 2018