

Nos. 17-15498 & 18-10198

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**OUTOKUMPU STAINLESS USA, LLC
f/k/a Thyssenkrupp Stainless USA, LLC**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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f/k/a THYSSENKRUPP STAINLESS USA, LLC)	
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Petitioner)	Nos. 17-15498,
)	18-10198
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	

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Dated at Washington, DC
this 2nd day of May 2018

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves the National Labor Relations Board's application of its long-settled precedent to stipulated facts, the Board submits that oral argument is not necessary. If, however, the Court decides to hear argument, the Board requests to participate.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Outokumpu Stainless USA, LLC f/k/a Thyssenkrupp Stainless USA, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Order issued by the Board on September 7, 2017, and reported at 365 NLRB No. 127. The Board’s Order is final under Section 10(e) and (f) of the National

Labor Relations Act (“the Act”), as amended, 29 U.S.C. §§ 151 et seq., 160(e), (f). The Company’s petition for review and the Board’s cross-application for enforcement are timely, as the Act places no time limitation on those filings.

The Board had jurisdiction over the proceedings below under Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. § 160(a). The Court has jurisdiction under Section 10(e) and (f) of the Act, and venue is proper because the unfair labor practices occurred in Alabama. 29 U.S.C. § 160(e), (f).

STATEMENT OF THE ISSUES

1. Under longstanding Board precedent, a party fails to comply with the terms of a settlement agreement requiring posting of an official Board notice if the party also posts a side notice that minimizes, undermines, or detracts from the effectiveness of the Board notice. Did the Board reasonably apply that precedent in finding that the Company’s side letter detracted from the effectiveness of the Board’s notice and thus constituted noncompliance with the Settlement Agreement the Company had signed?

2. The Settlement Agreement authorized the Board to enter default judgment if the Company failed to comply with any of its terms. Did the Board act within its discretion in entering default judgment based on the Company’s noncompliance?

STATEMENT OF THE CASE

The Board seeks enforcement of its Order against the Company. The Order is based on a default judgment the Board entered in accordance with the terms of the Settlement Agreement the Board found that the Company breached. The facts and procedural history underlying the Board's Order are as follows.

I. Facts and Procedural History

A. The Company and Union Agree To Settle Unfair-Labor-Practice Charges

In May 2010, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO ("the Union") filed a petition to represent a unit of the Company's employees for purposes of collective bargaining. (D&O 15; Tab 30 p. 369 ¶ 1, Tab 12 p. 141.)¹ In September 2011, the Union and the Company executed a stipulated election agreement scheduling a representation election for December 13 and 14, 2011. (D&O 1, 15; Tab 30 p. 369 ¶ 1, Tab 12 pp. 163-64.)

Beginning on December 7, 2011, the Union filed several unfair-labor-practice charges alleging that the Company violated the Act in a number of ways

¹ "D&O" refers to the Board's Decision and Order, 365 NLRB No. 127 (Sept. 7, 2017), which is reproduced at Tab 41, pages 582-607 of the Company's continuously paginated appendix. Other record citations refer directly to tabs and page numbers in the Company's appendix. "Br." refers to the Company's opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

between July and December 2011, including by unlawfully surveilling employees' union activities; threatening that employees would lose everything if they selected union representation; and enforcing a new, unlawful rule against discussion among employees during working hours. (D&O 16; Tab 1 pp. 7-11, Tab 2 pp. 13-21.) In accordance with Board policy, the Region put the scheduled representation election on hold pending resolution of the charges. (D&O 1, 16; Tab 30 p. 369 ¶ 1.)

On April 30, 2012, the Company entered into a settlement agreement ("the Settlement Agreement" or "the Agreement") with the Union, which the Region approved, resolving all of the Union's charges. (D&O 1, 16; Tab 30 p. 364 ¶ 1, Tab 3 pp. 23-27.) The Agreement required the Company to post an official Board notice ("the Remedial Notice") and to "comply with all [of its] terms and provisions." (Tab 3 p. 23.) The terms and provisions of the Remedial Notice with which the Company was required to comply included a promise to refrain from violating employees' rights in a number of specific ways, such as by threatening them with losses of benefits for supporting a union, surveilling their union activities, or prohibiting them from talking about the union during working time while allowing them to talk about other subjects. (Tab 3 pp. 23, 28-29.) In addition, the Agreement required the Company to take affirmative action, as described in the Remedial Notice, by repealing a rule against discussing the Union, rescinding discipline issued to two employees pursuant to that rule, notifying those

employees of the rescission, and allowing employees to discuss the Union during working time as long as they were allowed to discuss other subjects. (Tab 3 pp. 23, 28-29.)

The Agreement also provided that, if the Company failed to comply with any of the terms of the Agreement, the Regional Director would have the right, after providing 14 days' notice, to issue an unfair-labor-practice complaint based on the settled allegations. (D&O 2, 13, 16; Tab 30 p. 365 ¶ 3, Tab 3 p. 24.) The Agreement specified that the complaint allegations would be "deemed admitted" and the Company would "have waived its right to file an Answer." (D&O 2, 13, 16; Tab 30 p. 365 ¶ 3, Tab 3 p. 24.) The Regional Director would have the right to move for default judgment based on the complaint, and in the ensuing default proceeding before the Board, the Company would only have the right to challenge the Regional Director's determination that the Company had failed to comply with the Agreement. (D&O 2, 13, 16; Tab 30 p. 365 ¶ 3, Tab 3 p. 24.) If the Board found noncompliance, it could issue a court-enforceable order "providing a full remedy for the violations found." (D&O 2, 13, 16; Tab 30 p. 365 ¶ 3, Tab 3 p. 24.)

B. Before and During the Remedial Notice-Posting Period, the Company Disseminates a Letter Insisting It Did Nothing Wrong, Misrepresenting that the Settlement Merely Required It To Post a Notice, and Blaming the Union for Delaying an Election

On May 7, 2012, ten days before it posted the Remedial Notice, the Company posted a letter about the settlement on company letterhead on its main

bulletin board next to the time clocks at its Calvert, Alabama facility. (D&O 2, 16-17; Tab 30 p. 365 ¶ 4.) It also emailed the letter to all of its employees at the facility on the same day. (D&O 2, 16-17; Tab 30 p. 365 ¶ 5.)

The letter began by stating that the Union had filed charges “in its ongoing campaign to organize our company,” shortly before the scheduled election. (D&O 16; Tab 4 p. 31.) It stated that “[t]he [U]nion then used the charges to block the election from occurring, which prevented you from exercising your right to vote and have a choice.” (D&O 16; Tab 4 p. 31.) It asserted that the Company “has not been found guilty of any of the allegations,” but that the Board planned to hold a hearing on some of them. (D&O 16-17; Tab 4 p. 31.) But a hearing, the letter stated, “would only delay your opportunity to have your voices heard by voting.” (D&O 17; Tab 4 p. 31.) Therefore, it continued, “although [the Company] believes it has not violated any laws, we agreed to resolve the remaining charges by posting a notice.” (D&O 17; Tab 4 p. 31.)

The letter represented that “the remaining [charges] are resolved by the posting.” (D&O 17; Tab 4 p. 31.) It noted that “[t]here are no fines, penalties or other monetary requirements as a result of this resolution.” (D&O 17; Tab 4 p. 31.) The letter made no mention of the other remedial obligations the Company had agreed to undertake.

The letter went on to remind employees that “the same thing happened in 2010, which was the first time we tried to have your voices heard.” (D&O 17; Tab 4 p. 31.) “At that time,” the letter said, “the [U]nion filed charges that blocked the election,” but “[t]he Company settled the few remaining charges in order to try to get to a vote.” (D&O 17; Tab 4 p. 31.) The Union, however, “filed newer charges before the December 2011 election that kept that from happening.” (D&O 17; Tab 4 p. 31.)

In conclusion, the letter reiterated “that the Labor Board has *not* found the Company guilty regarding the current charges.” (D&O 17; Tab 4 p. 31 (emphasis in original).) And it noted that “[t]he Company believes that the charges would have been dismissed after a hearing.” (D&O 17; Tab 4 p. 31.) “By resolving the charges now, however,” the letter stated that “the election can be pushed forward once again provided the union does not file new charges.” (D&O 17; Tab 4 p. 31.)

Two days later, on May 9, the Region sent the Company the approved Agreement and copies of the Remedial Notice to be posted at the facility. (Tab 30 p. 366 ¶ 6.) On May 17, the Company posted the Remedial Notice on its intranet home page site and on its bulletin board, close to the letter it had previously posted. (D&O 2, 16; Tab 30 p. 366 ¶ 10.) The Company’s side letter stayed there for the full 60-day period the Agreement required for posting the Remedial Notice. (D&O 2, 16; Tab 30 p. 366 ¶ 10.)

C. The Company Refuses the Region's Request To Repost the Remedial Notice Without a Side Letter

The Region notified the Company that its dissemination of the side letter diminished the remedial effect of the Remedial Notice and constituted noncompliance with the Agreement. (D&O 2, 17; Tab 30 pp. 366-67 ¶ 12.) The Region proposed that the Company rectify the matter by simply reposting the Remedial Notice for 60 days, without the side letter. (D&O 2, 17; Tab 30 pp. 366-67 ¶¶ 14-16.) The Company refused. (D&O 2, 17; Tab 30 p. 368 ¶ 17.)

In a March 27, 2013 letter, the Region formally advised the Company that it had 14 days, under the terms of the Agreement, to remedy its noncompliance; if it failed to do so, the Region could issue a complaint based on the previously settled unfair-labor-practice charges and file a motion for default judgment. (D&O 2, 17; Tab 30 p. 368 ¶ 18, Tab 8 pp. 50-51.) When the Company failed to repost the Remedial Notice, the Region issued a complaint. (D&O 2, 17; Tab 30 p. 368 ¶ 19, p. 369 ¶ 2.)

After the Board denied initial motions for summary judgment and default judgment filed by the Company and General Counsel, respectively, the General Counsel filed an amended complaint and the case came before an administrative law judge on a stipulated record. (D&O 3, 18.) The judge found that the Company's side letter constituted noncompliance with the Agreement and that default judgment was therefore warranted. (D&O 18-21.)

II. The Board's Conclusions and Order

Agreeing with the administrative law judge, the Board (Chairman Miscimarra and Members Pearce and McFerran) found that the Company had failed to comply with the Agreement by posting a side letter that undermined and detracted from the Remedial Notice. (D&O 3-4.) Accordingly, in further agreement with the judge, the Board entered a default judgment, deeming the Company to have effectively admitted the alleged violations of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), covered by the Agreement and finding those allegations to be true.² (D&O 3-5.)

To remedy the admitted violations, the Board ordered the Company to cease and desist from the unfair labor practices found; from posting notices that modify, alter, or undermine the effectiveness of notices posted under orders of or agreements approved by the Board; and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (D&O 6.) Affirmatively, the Board's Order requires the Company to rescind the policies the Board found unlawful, to expunge from its files any discipline against the two employees and notify them of

² Chairman Miscimarra dissented in part. (D&O 7-11.) He agreed that the Company's side letter impermissibly undermined the Remedial Notice, but he would not have entered a default judgment. (D&O 7.) Instead, Chairman Miscimarra would have set aside the Agreement and required the parties to litigate the previously settled unfair-labor-practice allegations. (D&O 7.)

that action, to post a remedial notice and a copy of the Agreement in its facility for 60 days; to email those documents to all former and current employees who worked at its facility since July 1, 2011; and to certify its compliance to the Region. (D&O 6-7.)

SUMMARY OF ARGUMENT

The Board reasonably applied its precedent in finding that the Company breached the terms of the Settlement Agreement it voluntarily signed, which required it to post the Board's Remedial Notice. For over 50 years, Board decisions have uniformly recognized that posting a side notice that minimizes, undermines, or detracts from the effectiveness of an agreed-upon Board notice constitutes noncompliance with a settlement agreement's terms. Here, the Board reasonably found that the Company undermined the Remedial Notice by preemptively posting a side letter emphasizing that it had not been found guilty of anything, falsely suggesting that the Agreement required it to do nothing more than post a notice, and blaming the Union for delaying an election. The Board then acted within its discretion and consistent with the Agreement in determining that the Company's noncompliance triggered the Agreement's default language.

The Company's contrary arguments fail. Because the Company breached the Agreement, it is irrelevant that, as the Company notes (Br. 21-23), the Board did not find any post-settlement unfair labor practice. The Company also misses

the mark in claiming (Br. 23-27) it did not breach any express term of the Agreement. As the Board found, the Company breached the Agreement's notice-posting provision as it is properly defined by decades of established Board law. And contrary to the Company's assertions (Br. 27-38), the Board reasonably applied that law to the facts of this case. The Company's various remaining challenges (Br. 39-53) to the Board's application of the Agreement's default language, which largely rehash its flawed argument about the Agreement's express terms, are all meritless.

STANDARD OF REVIEW

The Court's "review of the Board's order is limited." *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1126 (11th Cir. 2008). The Board's finding that the Company violated the terms of the Agreement is entitled to deference because it turns on the Board's interpretation of its own precedent addressing noncompliance with settlement agreements. *See Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006) (the Board's "interpretation of its own precedent is entitled to deference" (internal quotation marks and citations omitted)); *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 568-69 (1st Cir. 2016) (same). That precedent, moreover, is concerned with preserving the effectiveness of the Board's remedial notices, and the Board's remedial authority "is a broad discretionary one, subject to limited judicial review." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)

(quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)).
Accord Goya Foods, 525 F.3d at 1126. Deferential review is all the more appropriate because the Company's communication to its employees is at issue. "[A] reviewing 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." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). *Accord Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB*, 705 F.2d 1537, 1541 (11th Cir. 1983).

"It is for the Board to regulate its own procedures and interpret its own rules, so long as it does not act unfairly or in an arbitrary and discriminatory manner." *Goya Foods*, 525 F.3d at 1125-26 (quoting *Piggly Wiggly*, 705 F.2d at 1539). Accordingly, the Court reviews the Board's procedural rulings for abuse of discretion. *See U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1254 (11th Cir. 1991); *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978). That deferential standard of review applies to the Board's decision to enter default judgment based on noncompliance rather than set aside a settlement agreement. *See Jack Cooper Transp. Co.*, 365 NLRB No. 163, 2017 WL 6554383, at *7 (2017) ("The issue of whether to give effect to or rescind a settlement agreement . . . must be determined by the exercise of sound judgment based upon

all the circumstances of each case.” (citations, brackets, and internal quotation marks omitted)).

ARGUMENT

I. The Board Reasonably Found that the Company’s Side Letter Constituted Noncompliance with the Terms of the Agreement

Board precedent dictates that a party breaches the terms of a settlement agreement that requires the posting of a Board remedial notice by also posting a side letter that minimizes, detracts from, or undermines the remedial notice. The Board acted consistently with its precedent in finding that the Company’s side letter undermined the Remedial Notice it agreed to post, and therefore constituted noncompliance with the terms of the Agreement.

A. A Charged Party Violates the Terms of a Settlement Agreement Requiring Notice Posting if It Disseminates a Side Notice that Detracts from, Undermines, or Minimizes the Board’s Remedial Notice

Section 10(c) of the Act directs the Board, upon finding that a party has committed an unfair labor practice, to issue an order requiring the party “to cease and desist” and “to take such affirmative action . . . as will effectuate the policies of [the] Act.” 29 U.S.C. § 160(c). Under Section 10(c), “since the earliest days under the Act,” it has been “an essential element of the Board’s remedies” to require the “post[ing of] a notice informing employees of their rights under the Act, the violations found by the Board, the [party]’s undertaking to cease and

desist from such unlawful conduct in the future, and the affirmative action to be taken by the [party] to redress the violations.” *J. Picini Flooring*, 356 NLRB 11, 12 (2010) (citing *Penn. Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935)).

“[T]he traditional posting of the notice has a therapy beyond mere communication.” *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539 (5th Cir. 1969).³ The Board has explained that its notices are “necessary as a means of dispelling and dissipating the unwholesome effects of a [party]’s unfair labor practices.” *Chet Monez Ford*, 241 NLRB 349, 351 (1979), *enforced mem.*, 624 F.2d 193 (9th Cir. 1980). They “help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board’s role in protecting the free exercise of those rights,” *J. Picini Flooring*, 356 NLRB at 12, thereby reassuring employees that they may freely exercise their “unhampered right[s] in the future,” *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940). At the same time, the notices “also serve to deter future violations.” *J. Picini Flooring*, 356 NLRB at 12 (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002)).

No less venerable than the Board’s notice-posting remedy is its “policy of encouraging the peaceful, nonlitigious resolution of disputes.” *Independent Stave Co.*, 287 NLRB 740, 741 (1987). “[T]he Board has from the very beginning

³ This Court has adopted pre-1981 Fifth Circuit precedent as binding. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

encouraged compromises and settlements.” *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944)). Those resolutions are commonly embodied in binding settlement agreements, voluntarily negotiated and agreed to between a charging party and a charged party, and approved by a Regional Director of the Board. *See generally News-Texan, Inc.*, 174 NLRB 1035, 1036-37 (1969) (emphasizing the parties’ ability to freely negotiate the terms of a settlement agreement), *enforced*, 422 F.2d 381 (5th Cir. 1970).

A Board-approved settlement agreement reflects the parties’ voluntary accord, but like a Board order it “clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act.” *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 743 (4th Cir. 1951). *Accord Mammoth of California, Inc. v. NLRB*, 673 F.2d 1091, 1093-94 (9th Cir. 1982); *Straus Commc’ns, Inc. v. NLRB*, 625 F.2d 458, 463 (2d Cir. 1980); *W.B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966). The remedial action a charged-party employer must take under a settlement agreement almost invariably includes posting an official Board notice in the workplace informing employees of their rights under the Act and stating what the employer will do—and will not

do—to respect those rights in the future.⁴ The purpose of the official Board notice in settled cases, as in cases that culminate in a Board order, is “to assure employees that their statutory rights shall be respected.” *Bingham-Williamette Co.*, 199 NLRB 1280, 1281 (1972), *reaffirmed*, 203 NLRB 394, 395 n.3 (1973), *enforced mem.*, 491 F.2d 1406 (5th Cir. 1974).

The terms of a settlement agreement, as the Board noted in this case, are interpreted “as consistent with and conforming to existing Board law.” (D&O 3.) *Cf. Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956) (a collective-bargaining agreement is interpreted “in the light of the law relating to it when made”); *Siemens Power Transmission & Distrib., Inc. v. Norfolk S. Ry. Co.*, 420 F.3d 1243, 1251 (11th Cir. 2005) (“[I]t is well settled that the laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it.” (brackets, citation, and internal quotation marks omitted)).

Court-enforced Board precedent defines the obligation a party agrees to undertake when it signs a settlement agreement requiring it to post a Board notice. The Board long ago held that “[t]he agreement to post a notice presupposes that nothing else will be added or otherwise done to minimize it.” *News-Texan, Inc.*,

⁴ See NLRB Casehandling Manual, Part 1, § 10132.1, available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/chm-april-2018.pdf>; NLRB Casehandling Manual, Part 3, § 10518, available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM3.pdf>.

174 NLRB 1035, 1036 (1969), *enforced*, 422 F.2d 381 (5th Cir. 1970). For that reason, it is well established that a party engages in “noncompliance with the terms of the settlement agreement” if it posts or otherwise disseminates to employees a separate message that undermines, minimizes, or detracts from the remedial effectiveness of an official, agreed-upon Board notice. *Arrow Specialties, Inc.*, 177 NLRB 306, 308 (1969), *enforced*, 437 F.2d 522 (8th Cir. 1971). *See also* NLRB Casehandling Manual, Part 3, § 10518.6 (such conduct “constitutes noncompliance with the posting provision” of a settlement agreement).

In *News-Texan*, the former Fifth Circuit upheld the Board’s application of the foregoing principles, agreeing that an employer’s side notice “breached [a] settlement concord” by subverting its effect on employees. 422 F.2d 381, 385 (5th Cir. 1970). *See also Bingham-Williamette Co.*, 199 NLRB 1280, 1281 (1972) (finding that employer’s side notice violated terms of settlement agreement), *reaffirmed*, 203 NLRB 394, 395 n.3 (1973), *enforced mem.*, 491 F.2d 1406 (5th Cir. 1974).

B. The Board Reasonably Applied Its Precedent in Finding that the Company Did Not Comply with the Terms of the Agreement Because Its Side Letter Undermined and Detracted from the Remedial Notice

1. The Board's finding was reasonable and consistent with precedent

The Board found (D&O 3-5) that the Company's side letter undermined the Remedial Notice the Company had agreed to post, and therefore constituted noncompliance with the terms of the Agreement. That finding was reasonable and consistent with precedent. Indeed, as the Board observed (D&O 3), the letter was "strikingly similar" to the one the Board found to violate a settlement agreement in *Gould, Inc.*, 260 NLRB 54 (1982), a case with facts "essentially indistinguishable from those here" (D&O 18).

In *Gould*, as here (D&O 2-3), the employer entered into an agreement during a union organizing campaign to settle a variety of unfair-labor-practice charges, including allegations of threats of reprisal for supporting a union, promulgation and enforcement of unlawful rules against discussing the union, and discipline of several employees for violating those rules. 260 NLRB at 55. In that case, like this one, the employer largely complied with the agreement, but also posted a side notice which the Board found to be in breach of the terms of the settlement agreement based on four considerations, each of which is present in this case as well.

First, the side notice in *Gould*, like the Company's letter, "stressed that [the employer] had not been found guilty of any violation of the law. (D&O 3 (citing 260 NLRB at 57).) Specifically, the *Gould* employer noted that it "did not admit to any violation of the law" and that it "was not found guilty" of anything. 260 NLRB at 57. Similarly, the Company twice asserted that it had not been found guilty of anything, and also insisted that it "believes it has not violated any laws." (Tab 4 p. 31.) "Thus, instead of assuring employees that it intended to abide by its commitments in the settlement notice, the [Company] implied that the conduct it had agreed not to engage in was permissible." *Bingham-Williamette*, 199 NLRB at 1282. *Accord Arrow Specialties*, 177 NLRB at 308.⁵

Second, like the employer in *Gould*, the Company further obfuscated and undermined the Remedial Notice by misrepresenting what it had agreed to do. As the Board observed, both employers "falsely suggested that the posting of a notice was the only action [they were] required to undertake pursuant to the settlement agreement." (D&O 3.) In *Gould*, the employer's notice purported to describe "[t]he major provisions" of the settlement, but the only obligation it acknowledged

⁵ It is nonsense for the Company to claim (Br. 34) that its assertions of innocence were permissible because its letter did not reference the Remedial Notice; the letter specifically did so by asserting that the Company had "agreed to resolve the remaining charges *by posting a notice*." (Tab 4 p. 31 (emphasis added).) And so that there could be no mistaking the connection between the two messages, the Company displayed its notice right beside the Remedial Notice for the full 60-day posting period. (See p. 7, above.)

was that it would “post a Notice to Employees which simply states that we will not violate the labor law in the future,” which was no more than “what we have always said.” 260 NLRB at 57. The employer thus elided the other commitments it had taken on, such as to rescind unlawful rules. *Id.*

In the same way, the Company’s notice informed employees that it had “agreed to resolve the remaining charges by posting a notice,” and that it would face “no fines, penalties or other monetary requirements.” (Tab 4 p. 31.) It failed to acknowledge that the Agreement also required it to take specific affirmative steps—rescinding discipline, notifying employees of that action, and allowing employees to talk about the Union during working hours as long as it allowed them to talk about other subjects—and to refrain from violating employees’ rights in a number of specific ways. (*See pp. 4-5, above.*) Thus, contrary to the Company’s claims, its side letter did “minimize its affirmative obligations set forth in the Remedial Notice” (Br. 38), just like the improper side notice in *Gould*.

Third, the timing and duration of the Company’s posting of its side letter magnified its impropriety. Like the *Gould* employer, the Company attempted to soften the impact of the Board’s message by preemptively “distributing its ‘spin’ on the [Board’s] notice before the notice itself was posted.” (D&O 2-3 (citing *Gould*, 260 NLRB at 56-57).) In *Gould*, the employer disseminated its message earlier on the same afternoon that it posted the Board’s notice, and as a result the

Board observed that employees' "view of [the Board's notice] was necessarily influenced by the [employer]'s notice." 260 NLRB at 57-58. Here, the Company's timing was far more damaging: as noted above, the Company posted and emailed its letter to employees a full 10 days before it posted the Remedial Notice. (D&O 2.) In doing so, the Company effectively inoculated employees against the remedial force of the Board's notice by telling them that it had done nothing wrong and had agreed to do no more than post a piece of paper. Moreover, the Company left its side letter up for the entire 60-day notice-posting period, ensuring that the impression it had created in employees' minds would not be superseded by the Remedial Notice. (D&O 2.) *See Gould*, 260 NLRB at 57 (violative notice remained posted for full Board notice posting period); *Bingham-Williamette*, 199 NLRB at 1281 (same); *Arrow Specialties*, 177 NLRB at 308 (same).

Finally, as the Board found, like the employer in *Gould*, the Company "used the letter to blame the union for election delays." (D&O 3.) In *Gould*, the employer stated that the settled charges had been blocking an election and that "the union will deny employees their most basic right to vote in order to satisfy their own selfish ends." 260 NLRB at 57. In the same way, the Company accused the Union of having "used the [unfair-labor-practice] charges to block the election from occurring, which prevented you from exercising your right to vote and have a

choice.” (Tab 4 p. 31.) Indeed, the Company accused the Union of having done “the same thing” in 2010, when the Company said it had previously “tried to have your voices heard.” (Tab 4 p. 31.) Thus, the Company preemptively sought to divert employees’ attention away from its own conduct and obligations, as outlined in the Remedial Notice. And its side letter left employees with the impression that it was the Union who had violated their rights by filing charges based on company conduct that, in the Board’s judgment, required remedial action. (See p. 15, above (citing *Poole Foundry & Machine Co.*, 192 F.2d at 743).) That rhetorical sleight of hand, the Board has long recognized, undercuts the intended remedial effect of a Board notice. See *Arrow Specialties*, 177 NLRB at 308 (employer “unfairly cast the Union in the role of a culprit whose efforts . . . w[ere] frustrated by the [employer]’s agreement to settle the case”).

In sum, contrary to the Company’s claims (Br. 37-38), *Gould* is on all fours with the facts of this case. And the Board’s analysis here is consistent with its broader precedent, which identifies the same hallmarks of an improper side letter that were present in *Gould* to find the breach of a settlement agreement. The Board reasonably concluded that the foregoing elements of the Company’s side letter, taken together, “suggest[ed] to employees that the Board’s notice [wa]s being posted as a mere formality and that [the Company]’s true sentiments are to be found in [its] own notice, not the Board’s.” *Bingham-Williamette*, 199 NLRB at

1282 (citation and internal quotation marks omitted). Under settled Board law, the Board properly concluded that the Company's deliberate undermining of the Remedial Notice it had agreed to post constituted noncompliance with the terms of the Agreement.

2. The Company does not show that Board precedent requires a contrary result

The Company's challenges to the Board's well-reasoned application of its precedent to the facts of this case are meritless. As an initial matter, the Company does not dispute that a party fails to comply with a settlement agreement if it posts a side notice that minimizes the effect of the Board's notice. (Br. 17.) On the contrary, the Company concedes that a side notice may violate a settlement agreement if it "suggest[s] to employees that the Board's notice is being posted as a mere formality and that [the employer's] true sentiments are to be found in its own notice, not the Board's." (Br. 27-28.) The Company instead argues (Br. 27-38) that its conduct did not meet that test for various reasons. As we now show, the Board reasonably concluded otherwise.

First, the Company errs in asserting (Br. 28-30) that its side letter was permissible because it merely conveyed factual information and emphasized the Company's interest in a prompt election. As shown above (pp. 19-22), the side letter in fact misrepresented the terms of the Agreement, and the Board properly found that its portrayal of the Company as defending employees against a union

seeking to deprive them of the right to vote supported finding a breach of the Agreement. In any event, as the Board noted in *News-Texan*, “[t]he point is not whether the communication is a truthful or fair report,” but rather whether it improperly minimized or detracted from the effectiveness of the Board’s notice. 174 NLRB at 1037.

The sole authority the Company cites (Br. 30) on this score, *Treasure Island Foods, Inc.*, 2007 WL 130795 (Jan. 16, 2007), is no authority at all: it is an administrative law judge’s decision that was not reviewed by the Board and it therefore “has no precedential value.” *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003). See also *NLRB v. Downtown BID Servs. Corp.*, 682 F.3d 109, 114 n.3 (D.C. Cir. 2012); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997).

Nor is there merit to the Company’s claim (Br. 30-33) that its compliance with other provisions of the Agreement balanced out the detrimental effect of its side letter. As the Board recognized (D&O 19), the cases the Company cites, *Deister Concentrator Co.*, 253 NLRB 358 (1980), and *Littler Diecaster Corp.*, 334 NLRB 707 (2001), are “plainly distinguishable.”⁶ In both cases, the side notices

⁶ The Company errs in claiming those cases constitute “the Board’s more recent view of side notices.” (Br. 33.) As the Board noted, *Deister* predates the Board’s decision in *Gould* (D&O 19), and the Board has continued to apply *Gould* after *Littler*. See *Am. Postal Workers Union, Local 735*, 340 NLRB 1363, 1364-65 (2003) (setting aside settlement agreement with union respondent which posted

did less damage to the Board's notices, and the employers satisfied more significant remedial obligations, than in this case. In *Littler*, the employer's side letter merely stated that it believed it had not violated the Act and that it had settled to avoid litigation costs; it did not repeat its protestations of innocence three times like the Company did. 334 NLRB 709-10. Moreover, in *Littler*, unlike here, the letter "contained no misstatements, did not preempt the Board's notice, glossed over none of the required remedial actions, and neither disparaged nor blamed the Union." *Id.*; *see id.* at 710-11 (distinguishing *Gould* for those very reasons). Moreover, the *Littler* employer's side notice was posted for only a week of the Board's 60-day period—a fraction of the time the Company's side letter was displayed. *Id.* at 709. The side notice in *Deister* was similarly limited, merely denying having committed any unfair labor practices and explaining that the employer settled to save time and money. 253 NLRB at 359 n.3.

At the same time, the employers in *Littler* and *Deister* took affirmative steps in compliance with their settlement agreements that were more significant than the Company's actions. In *Littler*, the employer paid monetary compensation to employees and bargained with their union. 334 NLRB at 708. The remedial actions in *Deister* were still greater, including a large sum of backpay and reinstatement of numerous employees. 253 NLRB at 359.

required notice and provided backpay but also circulated a newsletter column that undermined settlement).

As explained above (pp. 18-23), the Company's notice included each of the elements absent in *Little*: it misrepresented the Company's remedial obligations, it was disseminated well before the Remedial Notice and remained posted throughout the full notice-posting period, and it attempted to shift blame onto the Union. Moreover, the Company's partial compliance did much less than that of the employers in *Little* and *Deister* to "meaningfully illustrate[] to employees that [it] was abiding by the settlement agreement." *Little*, 334 NLRB at 708.

Finally, the Company misses the mark in suggesting that its notice was "lawful" under the Sixth Circuit's decision in *Bangor Plastics*, 392 F.2d 772, 775 (6th Cir. 1967). As discussed further below (pp. 27, 35), the issue is not whether the notice violated the law, but whether it breached the Agreement. In any event, *Bangor Plastics* is not binding on this Court, and it would not require a different result even if it were. In that case, the Sixth Circuit disagreed with the Board's finding that an employer's side notice violated a settlement agreement. But in upholding the Board's finding in *News-Texan*, the former Fifth Circuit distinguished *Bangor Plastics* as addressing a side notice that "merely gave administrative reasons why [the employer] had accepted the settlement." *News-Texan*, 422 F.2d at 381. Here, the Company went far beyond the *Bangor Plastics* notice, as outlined above (pp. 18-23), by preempting the Remedial Notice by 10 days, misrepresenting the Company's obligations under the Agreement, and

diverting blame to the Union for election delays. The Company's actions "rendered the settlement paltry, subverting its effect on the employees," *News-Texan*, 422 F.2d at 385, and the Board therefore reasonably found that the Company violated the Agreement.

3. The Company's other challenges to the Board's finding of noncompliance are meritless

The Company's various other challenges to the Board's noncompliance finding are of no moment. First, the Company's observation (Br. 21-23) that the Board found no post-settlement unfair labor practices is irrelevant. To be sure, the Board may set aside a settlement agreement if the charged party has continued to violate the Act, *Bingham-Williamette*, 199 NLRB at 1281; *Arrow Specialties*, 177 NLRB at 308, but the General Counsel did not allege, and the Board did not find, that the Company did so. (D&O 18 n.4.) Conduct that does not violate the Act may nonetheless constitute noncompliance with the obligations a party has voluntarily accepted in a settlement agreement, as is the case here. (D&O 2-5, 18-20.) *See, e.g., News-Texan*, 174 NLRB at 1036-37 (employer's statements breached settlement agreement even though they did not independently violate the Act).

The Company also misses the mark in asserting that it did not fail to comply because the Agreement did not specifically prohibit the side letter the Company posted. (Br. 23-27.) As noted above, for over 150 years, it has been "settled that

the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.” *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1866). And for decades Board law has been clear that posting a side letter that detracts from a Board notice is a “fail[ure] to comply with [the] terms” of a settlement agreement. *Bingham-Williamette*, 199 NLRB at 1281. Thus, as the Board correctly recognized, by signing an agreement incorporating that law the Company “must be deemed to have agreed *not to post such a letter.*” (D&O 3 (emphasis in original).) By the same token, as noted above (pp. 16-17), under the law that was part of the Agreement, the Company’s commitment to post the Remedial Notice “requir[ed] the posting of *that notice and nothing that detracts from that notice.*” (D&O 3 (emphasis in original).)⁷ See *News-Texan*, 174 NLRB at 1036 (“The agreement to post a notice presupposes that nothing else will be added or otherwise done to minimize it . . .”). For those reasons, the Board properly found that the Company breached the Agreement, including the notice-posting obligation to which it expressly agreed. (D&O 4 n.12.)⁸

⁷ That conclusion, as the Board observed, accords with the common-law principle that a party to a contract breaches an implied covenant of good faith and fair dealing if it “evades the ‘spirit of the bargain’ or engages in ‘subterfuges and evasions.’” (D&O 4 n.10 (quoting Restatement (Second) of Contracts § 205 cmt. d (1981).)

⁸ In any event, Board law does not support the distinction the Company would draw between express and implicit terms of a settlement agreement. See *Nations*

The Company therefore gets it exactly backwards when it argues (Br. 26-27) that the Region should have bargained for language in the Agreement prohibiting a side letter that was already prohibited under governing law. As the Board recognized in *News-Texan*, if an employer wishes to qualify or diminish the scope of its obligations under a settlement agreement, it must do so before signing the agreement. 174 NLRB at 1036. What it cannot do is agree to notice posting language the Board and the parties deem necessary to “to attain the desideratum of industrial peace” and then unilaterally detract from that language in a side notice. *Id.* at 1037.

The Company is equally mistaken in suggesting (Br. 25 n.1) that it should not have to post the notice ordered by the Board because it already took certain affirmative actions contemplated by the Agreement. The Board’s notice is intended to remedy the unfair-labor-practice allegations it “found to be true” (D&O 5) under the Settlement Agreement by informing employees of the Act’s protections and the steps the Company will take to safeguard their rights. That remedy remains appropriate because the Company’s employees have not yet had the benefit of a remedial notice untainted by the Company’s side letter.

Furthermore, the Agreement authorized the Board to “provid[e] a full remedy for

Rent, Inc., 339 NLRB 830, 832 (2003) (finding violation of settlement agreement that “implicitly required that the [employer] delete the no-solicitation/no-distribution rule from the employee handbook”).

the violations found” (D&O 6; Tab 3 p. 24), and the Company falls far short of showing that the Board abused its broad remedial discretion by ordering the Company to take the action it agreed the Board could order it to take in the event of a default. And to the extent the Company has already complied with some requirements of the Board’s Order, its partial compliance does not affect the Board’s entitlement to enforcement. *See NLRB v. Mexia Textile Mills, Inc.*, 339 US 563, 567-68 (1950); *NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1006 (11th Cir. 2015). *See also Farr Furnishings, Inc.*, 338 NLRB 784, 786 (2003) (an employer “shall be required to comply with our Order only to the extent it has not already done so”).

II. The Board Acted Within Its Discretion in Applying the Agreement’s Default Language Based on the Company’s Noncompliance

A. Default Judgment Was Authorized Under the Agreement

The Board acted within its discretion in determining that the Company’s noncompliance warranted entry of a default judgment. (D&O 3-5.) As the Board explained, the Agreement provided that “in case of noncompliance with any of the terms” of the Agreement, the General Counsel was entitled to issue a complaint on the settled charges and move for default judgment, which the Board could grant if it found that the Company had defaulted. (D&O 3; Tab 3 p. 24.)⁹ The Company

⁹ In the absence of default language, if a party fails to comply with a settlement agreement, the Regional Office may revoke its approval of the agreement and

does not disagree: it concedes that “if it defaulted on a term of the Settlement Agreement and then refused to remedy such default after notice from the Regional Director, the Regional Director would be justified in issuing a complaint and seeking a default judgment.” (Br. 24.) And as shown above, the Board reasonably found that the Company failed to comply with the terms of the Agreement. Thus, as the Board concluded, “[t]he correct answer in this case is the simple one: the settlement agreement states that noncompliance will trigger default, noncompliance occurred, and default judgment is warranted.” (D&O 5.)

B. The Company Provides No Basis for Overturning the Default Judgment

In an effort to complicate what the Board properly found to be straightforward, the Company offers a series of meritless arguments against the imposition of default judgment. Those arguments are little more than recapitulations of the Company’s flawed claim that the Agreement did not expressly prohibit its side letter (*see* above, pp. 28-29), and all of them fail.

The Company first errs in characterizing default judgment as an “extraordinary remedy.” (Br. 39.) It is, in fact, nothing more than what the Company agreed to in the event of noncompliance. (Tab 3 p. 24.) And it was no less appropriate merely because the Company purportedly believed its conduct was

proceed to litigate the unfair-labor-practice allegations that were previously settled. *See* NLRB Casehandling Manual Part 1, § 10152.1. *See also, e.g., NLRB v. Se. Stages, Inc.*, 423 F.2d 878, 880 (5th Cir. 1970); *News-Texan*, 422 F.2d at 386.

compliant. *See, e.g., Williamsville Suburban, LLC*, 365 NLRB No. 14, 2017 WL 133955, at *2 (2017) (entering default judgment despite employer’s argument that it “did not *materially* default” on agreement’s terms); *Bristol Manor Health Care Ctr.*, 360 NLRB 38, 38-39 (2013) (similar). *Cf. Cty. Agency, Inc.*, 363 NLRB No. 26, 2015 WL 6576314, at *2-3 (2015) (rejecting argument that default judgment was “wholly inappropriate” because employer “never sought to actively defy the Board or the dictates of the Act”).

The Board also properly rejected (D&O 4 n.12) the Company’s claim (Br. 39-40) that default judgment is inappropriate because it never clearly and unmistakably waived the right to post its side letter. As the Board recognized (D&O 4 n.12), that argument “muddies the waters by conflating two separate issues: (i) whether, as a matter of law, the [Company]’s waiver of its right to contest the allegations of the complaint in the event it failed to comply with any term of the settlement agreement was clear and unmistakable; and (ii) whether, as a matter of fact, the [Company] failed to comply with a term of the settlement agreement.” (D&O 4 n.12.)

The first issue is resolved in the Board’s favor by the unequivocal waiver language in the Agreement. (Tab 3 p. 24.) And the Board properly decided the second issue “by looking at the [Company]’s conduct with reference to the terms of the agreement, as interpreted under Board precedent.” (D&O 4 n.12.) As

explained above (pp. 18-23), the Board reasonably applied that precedent to the facts in finding a breach here. Indeed, as the Board went on to explain, even if the second inquiry were governed by a clear and unmistakable waiver standard, Board precedent finding noncompliance on essentially the same facts gave the Company the requisite notice that its conduct would violate the Agreement. (D&O 4-5 n.12 (citing *Gould*, 260 NLRB 54).)

Along similar lines, the Company repackages earlier arguments in asserting (Br. 44-46) that default judgment is inappropriate unless a party fails to comply with an express requirement of a settlement agreement. The Company cites nothing to support that assertion, and as noted above (p. 29 n.8), Board law is to the contrary. And the Board, in any event, reasonably found a breach of “an express term, the notice-posting provision,” as it is defined by Board law. (D&O 4 n.12.) The Company cites several cases in which the Board entered default judgment after a party failed to take certain steps required by a settlement agreement (Br. 44-45), but it cites no case—and Board counsel is aware of none—where the Board has denied a motion for default judgment based on a side notice that breached a settlement agreement containing default language.

Nor does the Company’s discussion of General Counsel Memorandum 11-04 support its position. (Br. 42-44.) Memoranda issued by the General Counsel are not binding on the Board. *See NLRB v. Gaylord Chem. Co., LLC*, 824 F.3d

1318, 1332 n.42 (11th Cir. 2016); *Lee's Roofing & Insulation*, 280 NLRB 244, 247 (1986). And that memorandum has been rescinded, in any event. *See* General Counsel Memorandum 18-02 pp. 4-5 (Dec. 1, 2017). Regardless, there is no inconsistency between the memorandum, which observed that default language requires a party “to honor the commitments it made in the settlement agreement” (Br. 43 (quoting GC Memorandum 11-04 p. 2)), and the Board’s finding in this case that the Company violated its notice-posting commitment. If the Company did not understand the well-established meaning of the notice-posting term to which it agreed, the fault is the Company’s—not the General Counsel’s.

It is unclear what legal argument the Company attempts to advance (Br. 46-49) by criticizing the Region’s handling of the case—including, apparently, the Region’s efforts to informally settle the issue of the Company’s noncompliance and avoid further litigation. (Br. 47.) As the Board noted, the Region gave the Company “ample notice” that it had failed to comply with the Agreement, and offered it “several opportunities to correct the situation” before invoking the Agreement’s default language. (D&O 5 n.12.) Meanwhile, the Company intransigently refused to repost the Remedial Notice without its noncompliant side letter. (D&O 2-3.) The Company does not suggest that the Region, in its efforts to resolve the case, ever failed to follow any Board regulation or provision of the Agreement. And the Company’s speculation about what the Region believed at

any stage of this case is irrelevant because the Board has now conclusively determined that the Company breached the Agreement, justifying entry of default judgment.

Finally, contrary to the Company's claims (Br. 49-53), the Board rightly concluded that neither Section 8(c) of the Act nor the First Amendment requires a different result. (D&O 4 n.9, 5 n.13.) Section 8(c) provides that a party's expression of "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). As noted above (p. 27), the Board did not find the Company's side letter to be an unfair labor practice, but rather a breach of the Agreement the Company freely chose to sign. Section 8(c) therefore has no application here. (D&O 5 n.13.) Further, as the Board observed, in light of Board precedent clearly defining the Company's obligations under the Agreement, by signing it the Company "knowingly, voluntarily, and intelligently waived its First Amendment rights to post" a side letter detracting from the Board's notice. (D&O 4 n.9.) The analysis is no different merely because, as the Company observes (Br. 50), the Agreement arose in the context of an organizing campaign. *See, e.g., Bingham-Willamette Co.*, 203 NLRB 394, 394-95 & n.3 (1973) (employer's side notice breached terms of agreement that settled charges of

unlawful conduct during organizing campaign), *enforced mem.*, 491 F.2d 1406 (5th Cir. 1974); *Gould, Inc.*, 260 NLRB at 56-58 (same).

As the Board explained in *News-Texan*, “[t]his is no matter of limitation on the right of free speech of communication. By agreement the parties may limit or extend their right to communicate under given circumstances; they may declare the extent of communication.” 174 NLRB at 1037. In the Agreement, the Company voluntarily accepted a notice-posting obligation and the attendant legally imposed obligation not to undermine the Remedial Notice through a separate posting. Neither Section 8(c) nor the First Amendment gave it license to violate that commitment.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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May 2018

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

OUTOKUMPU STAINLESS USA, LLC)
f/k/a Thyssenkrupp Stainless USA, LLC,)
)
Petitioner/Cross-Respondent)
) Nos. 17-15498 & 18-10198
v.)
) Board Case No.
NATIONAL LABOR RELATIONS BOARD,) 15-CA-070319
)
Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,675 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2013.

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Dated at Washington, DC
this 2nd day of May 2018

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)
Respondent/Cross-Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh 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.

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