

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

**JOY LUCK PALACE INC. D/B/A JOY LUCK
PALACE RESTAURANT**

and

**Case Nos. 02-CA-213541
02-CA-216489
02-CA-221921**

318 RESTAURANT WORKERS UNION

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

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel (“General Counsel”) submits this memorandum in support of the motion to transfer these cases to the Board and for Default Judgment (“Motion”). As set forth below, General Counsel respectfully submits that the pleadings herein and exhibits attached to the Motion establish that there exist no genuine issues of fact as to any allegation set forth in the Amended Consolidated Complaint and Order Rescheduling Hearing (“Amended Complaint”), and that, therefore, the Board should issue an Order granting Default Judgment and remedying the violations as alleged in the Amended Complaint, as a matter of law.

I. STATEMENT OF THE CASE

On January 23, 2018, 318 Restaurant Workers Union (“Charging Party” or “Union”) filed a charge against Joy Luck Palace Inc. d/b/a Joy Luck Palace Restaurant (“Respondent”) in Case No. 02-CA-213541, which was amended on July 31, 2018.¹ On March 12, 2018, the Union filed

¹ A copy of the original charge and the affidavit of service are attached in the Motion as Exhibits 1(a) and 1(b), and a copy of the amended charge and the affidavit of service are attached in the Motion as Exhibits 2(a) and 2(b).

another charge against Respondent in Case No. 02-CA-216489, which was amended on April 16, 2018.² On June 11, 2018, the Union filed a third charge against Respondent in Case No. 02-CA-221921.³ Allegations in Case Nos. 02-CA-213541 and 02-CA-216489 were partially withdrawn on September 27, 2018.⁴

In pertinent part, the remaining allegations in the charges, as amended, alleged Respondent violated the Act as follows:

- (1) Respondent violated Section 8(a)(1) of the Act when its manager Tony Chen threatened to deny employees the ability to switch days off with other employees in September 2017 because of their support for or activities on behalf of the Union.
- (2) Respondent violated Sections 8(a)(3) and (1) of the Act when it partially shut down its operation by ceasing its dim sum and dinner service from February 1, 2018 to February 26, 2018.
- (3) Respondent violated Sections 8(a)(5) and (1) of the Act as follows:
 - a. Respondent bargained with the Union for a first contract from March through December 2017, reached a complete agreement on December 21, 2017, but failed and refused to execute a written contract since January 1, 2018.
 - b. Respondent partially shut down its operation by ceasing its dim sum and dinner service from February 1, 2018 to February 26, 2018.
 - c. Respondent notified the Union of its planned closure on or about May 22, 2018, but failed and refused to meet to bargain about the effects since May 24, 2018.

² A copy of the charge and the affidavit of service are attached in the Motion as Exhibits 3(a) and 3(b), and a copy of the amended charge and the affidavit of service are attached in the Motion as Exhibits 4(a) and 4(b).

³ A copy of the charge and the affidavit of service are attached in the Motion as Exhibits 5(a) and 5(b).

⁴ A copy of the Region's letter approving the Union's partial withdrawal request is attached in the Motion as Exhibit 6.

d. Respondent failed and refused to provide relevant information to the Union regarding its planned closure since about May 24, 2018.

On September 28, 2018, based on the remaining allegations in the charges, as amended, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (“Complaint”). Respondent was served the Complaint by certified mail at its last known address and by email. Respondent was therefore required to file an answer to the Complaint by October 12, 2018.⁵ The U.S. Postal Service delivery tracking notice shows the Complaint was delivered to the “Front Desk/Reception/Mail Room” of the Respondent on October 5, 2018.⁶ Respondent also received additional notice of the Complaint by email dated October 1, 2018, which attached a copy of the Complaint, to Respondent’s president Patrick Mock at joyluckpalaceny@gmail.com and manager Tony Chen at joyluckpalacerestaurant98@gmail.com. This email did not “bounce” from either address.⁷ Moreover, these were the same email addresses that had been repeatedly used to communicate with Mock and Chen during the investigation.

Respondent did not file an answer by October 12, 2018.

By letter dated November 5, 2018, the General Counsel, by the undersigned, notified Respondent that it had failed to submit an Answer to the Complaint and gave an additional eight days to answer the Complaint. Respondent was further advised that if it failed to submit an answer by November 13, 2018, the Region would take appropriate measures, including filing a motion for default judgment.⁸ This letter was sent via regular mail to Respondent at its last known business

⁵ A copy of the Complaint and the affidavit of service are attached in the Motion as Exhibits 7(a) and 7(b).

⁶ A copy of Region’s internal USPS tracking sheet with the certified mail tracking number 7017 1450 0000 3544 6603 is attached in the Motion as Exhibit 7(c) and the USPS Tracking Results on this tracking number at www.usps.com is attached in the Motion as Exhibit 7(d).

⁷ A copy of the October 1, 2018 email is attached in the Motion as Exhibit 7(e).

⁸ A copy of the November 5, 2018 letter sent via regular mail to Respondent is attached to the Motion as Exhibit 8(a).

address on November 5, 2018, and was not returned to the Region. That letter was also sent to Mock and Chen at the email addresses described in the preceding paragraph. That email message did not bounce back.⁹ Respondent still did not file an Answer to the Complaint.

In about late December 2018, the Region learned that the Respondent had ceased operations and closed. Following the Region's receipt of evidence that Respondent had closed on August 23, 2018 and laid off its workers that same day, on January 18, 2019, the Regional Director issued the Amended Complaint. The Amended Complaint was served on Respondent the same day via certified mail in accordance with Rule 102.113(a) of the Board's Rules and Regulations, at Respondent's last known address at 98 Mott Street, New York, NY, and at the home address of president Patrick Mock. The Amended Complaint alleged Respondent had violated Sections 8(a)(1), (3), and (5) of the Act.¹⁰ Although the General Counsel wrote an incorrect city and zip code on the envelope mailing the Amended Complaint to Respondent, the U.S. Postal Service delivery tracking notice shows the Amended Complaint was delivered to the Respondent's last known address, at 98 Mott Street, New York, NY 10013, at 1:18 pm on January 24, 2019, where it was "refused."¹¹ The U.S. Postal Service delivery tracking notice for the Amended Complaint sent to Mock at his home address showed that delivery was attempted on January 24, 2019 but because "No Authorized Recipient [was] Available," a notice was left at Mock's home address for

⁹ A copy of the email sending the November 5, 2018 letter to president Patrick Mock at joyluckpalaceny@gmail.com and to manager Tony Chen at joyluckpalacerestaurant98@gmail.com are attached to the Motion as Exhibit 8(b).

¹⁰ Copies of the Amended Complaint and the affidavit of service are attached to the Motion as Exhibits 9(a) and 9(b).

¹¹ A copy of Region's internal USPS tracking sheet with the certified mail tracking number 7015 1730 0001 4160 7153 is attached to the Motion as Exhibit 9(c), the USPS Tracking Results on this tracking number at www.usps.com is attached to the Motion as Exhibit 9(d), and a copy of the return envelope is attached to the Motion as Exhibit 9(e).

scheduling redelivery.¹² A copy of the Amended Complaint was also emailed to president Patrick Mock at joyluckpalaceny@gmail.com and to manager Tony Chen at joyluckpalacerestaurant98@gmail.com.¹³

The Amended Complaint (1) clarified that the General Counsel alleged Respondent failed and refused to meet and bargain about the effects of the partial closing on February 1, 2018; (2) further alleged Respondent failed to give prior notice to the Union about its closing on or about August 23, 2018, and without affording the Union an opportunity to bargain with Respondent with respect to the effects of that conduct; and (3) sought an order requiring Respondent make whole the employees in the Unit in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

Respondent did not file an answer within fourteen days of service of the Amended Complaint, as required by Sections 102.20 and 102.21 of the Board's Rules and Regulations. Again, by letter dated February 6, 2019, the General Counsel, by the undersigned, notified Respondent that it had failed to submit an Answer to the Amended Complaint and gave an additional six days to answer. Respondent was further advised that if it failed to submit an answer by February 12, 2019, the Region would take appropriate measures, including filing a motion for default judgment.¹⁴ To date, Respondent has not filed an Answer to the Amended Complaint. The February 6, 2019 letter, along with a copy of the Amended Complaint, was sent via regular mail

¹² A copy of USPS Tracking Results for the certified mail to Patrick Mock with tracking number 7017 1450 00003544 7464 at www.usps.com is attached in the Motion as Exhibit 9(f).

¹³ A copy of the email dated January 22, 2019 with the Amended Complaint sent to Mock and Chen is attached in the Motion as Exhibit 9(g).

¹⁴ A copy of the February 6, 2019 letter with the Amended Complaint are attached in the Motion as Exhibits 10(a) and 10(b), respectively.

to Respondent's last known address and to Mock and Chen's last known home addresses. None of those letters have been returned to the Region as undelivered by the U.S. Postal Service.

II. ARGUMENT

Point 1: The Complaint and Amended Complaint were Properly Served on Respondent.

On January 24, 2019, the Region properly served the Amended Complaint on Respondent by certified mail, and at the same last known business address the Region served the original Complaint. The U.S. Postal Service confirms Respondent received the original Complaint at this same address on October 5, 2018. Respondent, however, refused delivery of the Amended Complaint. This Amended Complaint was also delivered to its president Patrick Mock at his home address and the U.S. Postal Service delivery tracking notice showed a notice was left for him to schedule a re-delivery, which he still has not done. Furthermore, the Complaint and the Amended Complaint were emailed to Mock and Chen at the email addresses that the Region used to communicate with them during the investigation, and those messages did not bounce back as undeliverable.

The Board has repeatedly held "a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act."¹⁵

The successful delivery of the original Complaint shows Respondent is capable of receiving service at its last known address. Respondent could not argue that it could not accept delivery because it has closed. This is because Respondent closed before the original Complaint and Amended Complaint were issued, yet it received the original Complaint. It does not appear

¹⁵ *Atlantic Northeast Transport, Inc.*, 365 NLRB No. 155 at n. 1 (November 30, 016), citing *Cray Construction Group, LLC*, 341 NLRB 944, 944 n. 5 (2004), and *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 n. 2 (2003).

that Respondent has a forwarding address on file with the U.S. Postal Service. President Mock also did not claim or seek re-delivery of the Amended Complaint that was sent to him at his home address. In addition, Respondent received the Complaint and the Amended Complaint via email at the time they were issued. Furthermore, a letter dated February 6, 2019, with a copy of the Amended Complaint, was sent by regular mail to Respondent and to Mock at their last known address, notifying Respondent that no answer was filed. Neither has been returned to the Region. Respondent cannot evade the government's prosecution of this case by willfully refusing service or failure to respond to a notice by the U.S. Postal Service to rescheduled delivery. Therefore, General Counsel respectfully submits that the Complaint and the Amended Complaint were properly served on the Respondent, and that Respondent had sufficient notice of the existence of them.

Point 2: There are No Genuine Issues of Fact Warranting a Hearing.

Respondent has failed to file an answer to the Complaint and Amended Complaint. Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The Board has consistently held if upon receipt of a complaint and notice of hearing, a respondent fails to file an answer within the time and manner prescribed by Section 102.20 of the Board's Rules and Regulations, all allegations in that complaint shall be deemed admitted to be true, may be so found by the Board, and the Board may render judgment on the basis of that complaint alone.¹⁶

¹⁶ See Board's Rules and Regulations, Section 102.20; *Electra-Cal Contractors*, 339 NLRB 370 (2003); *Contractors Excavating, Inc.*, 270 NLRB 1189 (1984); *Clean and Shine*, 255 NLRB 1144 (1981); *Galesburg Constr. Co., Inc.*, 259 NLRB 722 (1981).

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

Point 3: Respondent's Admitted Conduct Violates Sections 8(a)(1), (3) and (5) of the Act.

A. Respondent's Admitted Threat To Deny Employees the Ability to Switch Days Off With Other Employees Because of Their Support For Or Union Activities Violates Section 8(a)(1) of the Act

The Board has consistently held that an employer's conduct constitutes an independent 8(a)(1) violation, where that conduct would reasonably tend to interfere with the exercise of employees' Section 7 rights.¹⁷ Threats of benefit losses inherently deter employees from exercising statutory right because they create "the impression ... that unionization itself would trigger the loss of" benefits.¹⁸ In other words, a threat that employees will lose a benefit warn of the employer's intention to "harm the [employees'] interests," through future exercise by that employer of its power over employment benefits, should employees continue to exercise their statutory rights.¹⁹

The Complaint and Amended Complaint allege, and Respondent, by its failure to answer, admits that in September 2017, Respondent, by Tony Chen, threatened employees that it would henceforth prohibit workers from switching days off with other employees because of their support

¹⁷ See generally *American Freightways Co.*, 124 NLRB 146 (1959); *Shearer's Foods, Inc.*, 340 NLRB No. 132 (2003). The Board concluded it is a violation to threaten to rescind a benefit. See *Abramson, LLC*, 345 NLRB 171 (2005).

¹⁸ See *Hertz Corporation*, 316 NLRB 672, fn. 2 (1995).

¹⁹ See *Waterbed World*, 286 NLRB 425, 427 (1987).

for or activities on behalf of the Union.²⁰ The Board should therefore find Respondent violated Section 8(a)(1) of the Act and order appropriate remedial action.

B. Respondent Admitted its partially shut down of its dim sum and dinner service from February 1 to February 26, 2018 violated Sections 8(a)(3) and (1) of the Act.

While the termination of an entire business is lawful even if the motivation is for discriminatory reasons, partial closing is not lawful because “a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of Section 7 rights among remaining employees of much the same kind as that found to exist in the ‘runaway shop’ and ‘temporary closing’ cases.” Therefore, a partial closing, if motivated by a discriminatory reason, is a violation of Section 8(a)(3).²¹

The Complaint and Amended Complaint allege, and Respondent, by its failure to answer, admits that from February 1, 2018 through February 26, 2018, Respondent partially shut down its operation by ceasing its dim sum and dinner service because employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Section 8(a)(3) of the Act.²² Therefore, the Board should find Respondent violated Section 8(a)(3) of the Act by partially closing its operation by shutting down its dim sum and dinner service, as alleged in the Amended Complaint and the Board should order appropriate remedial action.

C. Respondent violated Sections 8(a)(5) and (1) of the Act as follows:

a. Respondent admitted to having bargained with the Union for a first contract from March through December 2017, reached a complete agreement on

²⁰ See Complaint ¶7 and Amended Complaint ¶7.

²¹ *NLRB v. Darlington Mfg. Corp.*, 380 U.S. 263, 274 (1965).

²² See Complaint ¶9(a), (b) and (d) and Amended Complaint ¶9(a), (b) and (d).

December 21, 2017, but failed and refused to execute a written contract since January 1, 2018, in violation of Section 8(a)(5) and (1) of the Act.

The Board will find that an employer has voluntarily recognized a union when there is a clear and unequivocal agreement by the employer to recognize the union on proof of majority status, and the union's majority status has been demonstrated.²³ The clear and unequivocal agreement to recognize the union may also be demonstrated by an employer's statements or conduct evidencing a "commitment to enter into negotiations with the union [may constitute] an *implicit* recognition of the union."²⁴ Express consent is not necessary for a finding of voluntary recognition.²⁵

The Complaint and Amended Complaint allege, and Respondent, by its failure to answer, admits that the following employees of Respondent ("Unit") is appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:²⁶

All full-time and regular part-time dining room employees including waiters, busboys, and dim sum sellers, and excluding all kitchen employees, office clerical employees, managers, guards and supervisors as defined in the National Labor Relations Act.

Respondent also admits, by its failure to answer, that (i) on about March 5, 2017, a majority of the Unit designated the Union as their exclusive collective-bargaining representative;²⁷ (ii) since about March 5, 2017, and at all material times thereafter, Respondent has recognized the Union as

²³ See *Nantucket Fish Co.*, 309 NLRB 794 (1992).

²⁴ See *Id.* at 795 (emphasis added); see *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), *enfd.* 601 F.2d 575 (3d Cir. 1979).

²⁵ *In re Terracon Inc.*, 339 NLRB 221, 223 (2003).

²⁶ See Complaint ¶6(a) and Amended Complaint ¶6(a).

²⁷ See Complaint ¶6(b) and Amended Complaint ¶6(b).

the exclusive collective-bargaining representative of the Unit;²⁸ and (iii) the Union has therefore been the exclusive collective-bargaining representative of the Unit since March 5, 2017.²⁹

The Complaint and Amended Complaint further allege, and Respondent by its failure to answer, admits that (i) at various times from about March 5, 2017, through December 21, 2017, Respondent and the Union met for purposes of negotiating an initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment;³⁰ (ii) on or about December 21, 2017, the parties reached complete agreement on the Unit's terms and conditions of employment to be incorporated in a collective-bargaining agreement;³¹ (iii) since about December 21, 2017, the Union requested that Respondent execute a written contract containing their agreement;³² (iv) since January 1, 2018, Respondent, by its then president and admitted Section 2(13) agent Yong Jin Chan, has failed and refused to execute their agreement;³³ and (v) since about February 1, 2018, Respondent, by its president and admitted Section 2(13) agent Patrick Mock, has failed and refused, to execute their agreement.³⁴ Therefore, based on these admitted facts, the Board should find Respondent failed and refused to bargain in good faith with the bargaining representative of its employees in violation of Sections 8(a)(5) and (1) of the Act, and the Board should order appropriate remedial action.

²⁸ See Complaint ¶6(c) and Amended Complaint ¶6(c).

²⁹ See Complaint ¶6(d) and Amended Complaint ¶6(d).

³⁰ See Complaint ¶8(a) and Amended Complaint ¶8(a).

³¹ See Complaint ¶8(b) and Amended Complaint ¶8(b).

³² See Complaint ¶8(c) and Amended Complaint ¶8(c).

³³ See Complaint ¶8(d) and Amended Complaint ¶8(d).

³⁴ See Complaint ¶5 and ¶8(e); and Amended Complaint ¶5 and ¶8(e).

- b. Respondent admitted to partially shutting down its operation from February 1, 2018 to February 26, 2018 without prior notice to and without affording the Union an opportunity to bargain about the effects in violation of Sections 8(a)(5) and (1) of the Act.

Sections 8(a)(5) and 8(b)(3) of the Act compels collective bargaining with respect to mandatory subjects of bargaining, which the Supreme Court has recognized as those generally delineated in Section 9(a) as “rate of pay, wages, hours of employment, or other conditions of employment,” and in Section 8(d) as “wages, hours, and other terms and conditions of employment.”³⁵

An employer’s bargaining obligation also includes a duty to bargain about the effects on unit employees of management decisions which are not subject to bargaining obligations.³⁶ As a general matter, an employer must bargain over the effects on unit employees of decisions involving non-mandatory subjects, whenever these effects cause “material, substantial, and significant” changes to unit working conditions.³⁷ Effects bargaining “must be conducted in a meaningful manner and at a meaningful time.”³⁸

The Complaint and Amended Complaint allege, and Respondent, by its failure to answer, admits that the effects of the partial shutdown on Unit employees from February 1, 2018 through February 26, 2018, relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.³⁹ Respondent further admitted that it failed to give prior notice to and without an opportunity afforded to the Union to

³⁵ See *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, (1958).

³⁶ See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681--682 (1981) (employer not obligated to bargain decision to cancel contract affecting employee terms and conditions of employment but it is obligated to bargain about the effects on employees); *Champion International Corp.*, 339 NLRB 672 (2003).

³⁷ See *The Bohemian Club*, 351 NLRB 1065, 1066-1067 (2007).

³⁸ See *First National Maintenance*, supra, 452 U.S. at 682.

³⁹ See Complaint ¶¶9(a) and (b); and Amended Complaint ¶¶9(a) and (b).

bargain about the effects of the partial shutdown.⁴⁰ By this conduct, Respondent admitted, and the Board should find Respondent, failed and refused to bargain collectively and in good faith with the exclusive bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act, and the Board should order appropriate remedial action.

- c. Respondent admitted to notifying the Union of its planned closure on or about May 22, 2018, but failed and refused to meet to bargain about the effects since May 24, 2018, in violation of Sections 8(a)(5) and (1) of the Act.*

Similarly, the Complaint and Amended Complaint allege, and Respondent, by its failure to answer, admits that on or about May 22, 2018, Respondent, by Patrick Mock, made known to the Union that the restaurant would fully shut down its business operation for financial reasons on an unspecified date;⁴¹ that the Union, by letter dated May 24, 2018, requested Respondent to bargain over the effects of the planned closing;⁴² that the effects of the planned closing on Unit employees relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining;⁴³ and that since May 24, 2018, Respondent has failed and refused to meet and bargain with the Charging Party regarding the effects of the planned closure.⁴⁴ Respondent has admitted, and the Board should find, that by this conduct Respondent failed and refused to bargain collectively and in good faith with the exclusive

⁴⁰ See Complaint ¶9(c) and Amended Complaint ¶9(c̄). Please note that the Region corrected ¶9(c) from the Complaint to the Amended Complaint to allege only the effects of Respondent's partial shutdown on Unit employees was a violation.

⁴¹ See Complaint ¶11(a) and Amended Complaint ¶10(a).

⁴² See Complaint ¶11(b) and Amended Complaint ¶10(b).

⁴³ See Complaint ¶11(c) and Amended Complaint ¶10(c). Note that the Amended Complaint ¶10(c) inadvertently referred to ¶11(b) when it should have referred to ¶10(b).

⁴⁴ See Complaint ¶11(d) and Amended Complaint ¶10(d).

bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act, and the Board should order appropriate remedial action.

d. Respondent admitted to failing and refusing to provide relevant information to the Union regarding its planned closure since about May 24, 2018, in violation of Sections 8(a)(5) and (1) of the Act.

Pursuant to Section 8(a)(5) of the Act, an employer has the statutory obligation to provide on request, relevant information that a union needs for the proper performance of its duties as collective-bargaining representative.⁴⁵ Where the requested information pertains to employees or matters outside the bargaining unit, a union has the burden of demonstrating the relevance of such information.⁴⁶ The standard for relevancy is “a liberal discovery type standard.”⁴⁷ The information sought need not be dispositive of the issues between the parties but must have some bearing on it,⁴⁸ or it must be shown that it would be of use to the union in carrying out its statutory duties and responsibilities.⁴⁹ In fact, the requested information need only be “of use” or have a mere probability of relevancy to the union in fulfilling its statutory duties.⁵⁰ Further, even absent a showing of probable relevance, an employer is obligated to furnish the requested information

⁴⁵ See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

⁴⁶ *Dodger Theatrical Holdings*, 347 NLRB 953, 967 (2006).

⁴⁷ *Acme Industrial*, *supra* at 437.

⁴⁸ *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991).

⁴⁹ *Wisconsin Bell Co.*, 346 NLRB 62, 64 (2005).

⁵⁰ *Bentley-Jost Electric Corp.*, 283 NLRB 564, 567 (1987); *Acme Industrial*, *supra* at 437.

“where the circumstances put the employer on notice of a relevant purpose which the union has not spelled out.”⁵¹

Here, as alleged in the Complaint and Amended Complaint, Respondent, by its failure to answer, admits that since about May 24, 2018, the Union requested in writing that Respondent furnish it with the following information:⁵²

- i. All documents that support the letter stating the restaurant is in arrears regarding the rent for the restaurant;
- ii. All documents including information contained electronically/digitally regarding the monthly income statements for the restaurant from January 2017 to present;
- iii. All documents that contain information about the monthly expenditures for the restaurant from January 2017 to present;
- iv. All documents that contain information about the debts currently owed by the restaurant;
- v. All documents including information contained electronically/digitally regarding the assets of the restaurant;
- vi. All documents including information contained electronically/digitally identifying the owners of the restaurant;
- vii. All documents including information contained electronically/digitally identifying the ownership shares of the restaurant; and
- viii. All documents that contain information about the lease of the restaurant at 98 Mott Street.

All of the foregoing information is plainly related the assets available to the Respondent to provide severance pay and other benefits to Unit employees who would be losing their jobs as a result of Respondent’s decision to close. Respondent, by its failure to answer, admits that the

⁵¹ See *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011) (quoting *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000), *enfd. sub nom. KLB Industries, Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012).

⁵² See Complaint ¶10(a) and Amended Complaint ¶11(a).

Union, by its letter and requested documents, demonstrated to Respondent the relevance of the information;⁵³ that the information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit;⁵⁴ and that since about May 4, 2018, Respondent, by Patrick Mock, has failed and refused to furnish the Union with the information requested by it.⁵⁵ Respondent has therefore admitted, and the Board should find, that Respondent has, by the foregoing conduct, failed and refused to bargain collectively and in good faith with the exclusive bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act, and the Board should order appropriate remedial action.

e. Respondent admitted to failure to give prior notice to the Union about its closing on or about August 23, 2018, and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct, in violation of Sections 8(a)(5) and (1) of the Act.

As discussed above, Respondent had an obligation to bargain about the effects of its closing. The Amended Complaint alleges, and Respondent, by its failure to answer, admits that it closed on August 23, 2018;⁵⁶ that as a result of the closing, the Unit employees were terminated from their positions;⁵⁷ that the effects of the closing on the Unit employees relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining;⁵⁸ and that Respondent closed its restaurant without prior notice

⁵³ See Amended Complaint ¶11(b).

⁵⁴ See Complaint ¶10(c) and Amended Complaint ¶11(c).

⁵⁵ See Complaint ¶10(d) and Amended Complaint ¶11(d).

⁵⁶ See Amended Complaint ¶12(a).

⁵⁷ See Amended Complaint ¶12(b).

⁵⁸ See Amended Complaint ¶12(c).

to the Union and without affording the Union an opportunity to bargain about the effects of the closing.⁵⁹ With regards to this last closing and as discussed above, Respondent admits that Patrick Mock's May 2, 2018 announcement that the restaurant would shut down provided no specific date,⁶⁰ that the Union requested by letter dated May 24, 2018 that Respondent bargain over the effects of the planned closing,⁶¹ and that Respondent failed and refused to meet and bargain with the Union regarding the effects of the planned closure.⁶² The Respondent further admits that it continued to operate until August 23, 2018, when it ceased operations without further notice to the Union despite the Union's May 24, 2018 request to meet and bargain regarding the effects of the planned closure. Respondent has thereby admitted, and the Board should find, that Respondent has, by the foregoing conduct, failed and refused to bargain collectively and in good faith with the exclusive bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act, and the Board should order appropriate remedial action.

Point 4. An order requiring Respondent make whole the employees in the Unit in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998), is just and appropriate.

When an employer violates Section 8(a)(5) of the Act by failing to bargain over the effects of its decision to discontinue its operation and lays off its employees, the Board will order the employer to bargain over the effects of its decision and to provide backpay to the laid-off

⁵⁹ See Amended Complaint ¶12(c) – the second ¶12(c) as the General Counsel inadvertently numbered it ¶12(c) rather than 12(d).

⁶⁰ See Complaint ¶11(a) and Amended Complaint ¶10(a).

⁶¹ See Complaint ¶11(b) and Amended Complaint ¶10(b).

⁶² See Complaint ¶11(c) and Amended Complaint ¶10(c).

employees.⁶³ Backpay will be calculated at the rate of the employees' normal wages when last in respondent's employ and the backpay period will commence five days after the Board's decision and continue until the occurrence of one of the following conditions: (1) The date respondent bargains to agreement with the union on those subjects pertaining to the effects of the discontinuation of the operation and the layoff of employees and over its changing of work schedules; (2) a bona fide impasse in bargaining; (3) failure by the Union to request bargaining within five days of the Board's decision or to commence negotiations within five days of respondent's notice of its desire to bargain with the union; or (4) subsequent failure of the Union to bargain in good faith.

The Board in *Transmarine* required that an employer who has unlawfully refused to engage in effects bargaining provide unit employees with a minimum of 2 weeks' backpay. The goal of the limited backpay requirement is both to make employees whole for losses suffered as a result of the 8(a)(5) violation, and to recreate in a practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the employer. The Respondent has a duty to bargain over such matters as severance pay, payment of accrued benefits, etc. Its failure to do so requires that employees be made whole for losses incurred by such failure.⁶⁴

As discussed above, Respondent admitted to failing and refusing to bargain about the effects of the shutdown on August 23, 2018. The Amended Complaint sought an order requiring that Respondent make whole the employees in the Unit in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998), and Respondent did not contest that remedial request by filing an answer. Therefore, the Board

⁶³ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). See also *W. R. Grace & Co.*, 247 NLRB 698 (1980).

⁶⁴ *TNT Logistics North America, Inc.*, 346 NLRB 1301, 1309 (2006).

should issue an order requiring Respondent make whole the employees in the Unit in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

III. CONCLUSION

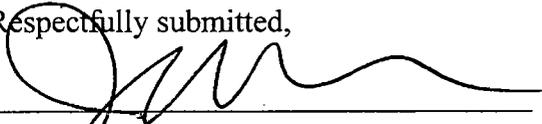
As all the allegations in the Complaint and the Amended Complaint should be deemed admitted due to Respondent's failure to answer, no genuine issues of fact remain to be litigated before the Board, and no hearing is warranted. Further, as the Complaint and the Amended Complaint states legally cognizable violations of Sections 8(a)(1), (3), and (5) of the Act, General Counsel respectfully submits the Board should grant the Motion for Default Judgment.

IV. REMEDY

If the Board grants this Motion for Default Judgment and finds Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, General Counsel respectfully requests the Board issue a Decision and Order against Respondent, containing findings of fact and conclusions of law in accordance with the allegations in the Amended Complaint, and issue the proposed Order and Notice to Employees, which are attached to the Motion as Exhibits 11(a) and 11(b), respectively, and/or that the Board issue any other order and remedy deemed appropriate.

Dated at New York, NY, this 1st day of March 2019.

Respectfully submitted,



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