

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

NATIONAL LABOR RELATIONS BOARD

**Petitioner/Cross-Respondent
and**

1199 SEIU UNITED HEALTHCARE WORKERS EAST

Intervenor

v.

**ALARIS HEALTH AT CASTLE HILL, ALARIS HEALTH AT ROCHELLE PARK,
ALARIS HEALTH AT BOULEVARD EAST, AND ALARIS HEALTH AT HARBORVIEW**

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

**Nos. 19-1782, 19-1794, 19-1795, 19-1796,
19-1993, 19-1994, 19-1995, 19-1996**

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST

Intervenor

v.

**ALARIS HEALTH AT CASTLE HILL, ALARIS HEALTH AT ROCHELLE
PARK, ALARIS HEALTH AT BOULEVARD EAST, AND
ALARIS HEALTH AT HARBORVIEW**

Respondent/Cross-Petitioner

**ON APPLICATIONS FOR ENFORCEMENT AND
CROSS-PETITIONS FOR REVIEW OF FOUR ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**CONSOLIDATED BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

These consolidated unfair-labor-practice cases are before the Court on the applications of the National Labor Relations Board to enforce, and the cross-petitions of Alaris Health at Castle Hill, Alaris Health at Rochelle Park, Alaris Health at Boulevard East, and Alaris Health at Harborview to review, four separate Board Orders issued against Alaris. The Board’s Decisions and Orders issued on December 21, 2018, and are reported at 367 NLRB No. 52 (Castle Hill), 367 NLRB No. 53 (Boulevard East), 367 NLRB No. 54 (Harborview), and 367 NLRB No. 55 (Rochelle Park). (CH 2854-82, BE 1604-27, HV 1514-32, RP 1289-1313.)¹ The Board had subject-matter jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Orders are final with respect to all parties.

¹ Citations are to the agency record filed electronically with the Court, signified by “CH” (Castle Hill, Nos. 19-1782, 19-1993), “BE” (Boulevard East, Nos. 17-1795, 19-1995), “HV” (Harborview, Nos. 19-1796, 19-1996), and “RP” (Rochelle Park, Nos. 19-1794, 19-1994). “Br.” refers to Alaris’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

The Court has jurisdiction over these consolidated cases under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices occurred in New Jersey. The Board's applications for enforcement and Alaris's cross-petitions for review were timely filed because the Act places no time limit on such filings. 1199 Service Employees International Union, United Healthcare Workers East, has intervened on the Board's behalf.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested unfair-labor-practice findings that Alaris committed a litany of violations of Section 8(a)(1), (3), and (5) of the Act. 29 U.S.C. § 158(a)(1), (3), and (5).

2. Whether substantial evidence on the record as a whole supports the Board's findings that Alaris violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate unfair-labor-practice strikers at all four facilities.

STATEMENT OF THE CASE

I. Proceedings Before the Board

The Union filed unfair-labor-practice charges alleging that Alaris engaged in numerous violations of the National Labor Relations Act ("the Act"), including refusing to bargain, threatening employees, and failing to immediately reinstate

unfair-labor-practice strikers. After investigating, the Board's General Counsel issued four separate unfair-labor-practice complaints against Alaris. An administrative law judge conducted separate hearings and issued four recommended decisions, finding that Alaris's conduct violated the Act. (CH 2879-80, BE 1625, HV 1530, RP 1310-11.) Alaris filed exceptions that were limited to the judge's striker-reinstatement findings; it did not except to his numerous other unfair-labor-practice findings or to the affirmative bargaining order he recommended. (CH 2751-70, CH 2777-80, CH 2859 n.17, RP 1291 n.8, BE 1605 n.8, HV 1514 n.4.) On review, the Board adopted the findings to which no exceptions were filed, as well as the judge's findings that Alaris violated Section 8(a)(3) and (1) of the Act, by refusing to immediately reinstate unfair-labor-practice strikers at all four facilities. (CH 2854-61, BE 1604-06, HV 1514-16, RP 1289-92.) The following subsections summarize the Board's findings of fact and its Conclusions and Orders.

II. The Board's Findings of Fact

A. Alaris Refuses To Bargain with the Union's Chosen Bargaining Committee and To Provide Requested Information; the Union Publicizes Its Dispute with Alaris

Alaris is a management company that operates several nursing home facilities, including the four facilities (Castle Hill, Boulevard East, Rochelle Park,

and Harborview) at issue here. (CH 49.)² The Union has represented bargaining units including certified nursing assistants (CNAs), licensed practical nurses, and dietary, housekeeping, and recreation employees at those facilities for several years. (CH 2863, HV 1518, BE 1609, RP 1295.)

All four of the parties' most recent collective-bargaining agreements expired March 31, 2014. (CH 2863.) In December 2013, to prepare for the negotiation of successor agreements, the Union asked Alaris for information it needed to formulate bargaining proposals. (CH 2863-64.) On March 14, the Union made a supplemental request for information regarding daily work schedules, payroll, and health care—information it needed to formulate proposals addressing employee complaints about short staffing and health insurance costs. (CH 2865, 2867, BE 1613 & n.29, RP 1218 & n.30.)

On March 27, 2014, the Union and Alaris met for the first time to begin bargaining. The parties had set aside two days for this initial session, planning to begin with the Castle Hill contract, followed by the other facilities. The Union's bargaining committee consisted of Attorney William Massey, several union

² Where the Board's findings are the same for all four facilities, this brief cites to the record in the lead case, Alaris Health at Castle Hill. (CH 2854-82.)

officials, and 20-25 employees from all four facilities, who were included so they could follow the negotiations at sister facilities. Before starting the Castle Hill negotiations, however, Alaris Attorney David Jasinski protested the inclusion of employees from other facilities on the Union's bargaining team. The Union explained that it had the right to bargain with its chosen committee, but Jasinski and the other member of Alaris's bargaining team left without negotiating at all. (CH 2865-66.)

Thereafter, the parties met on April 28 to bargain the Castle Hill contract only. Because employees were "intimidated from returning" by Alaris's March 27 refusal to bargain with the Union's chosen committee, only two employees from other facilities participated, supplemented by six from Castle Hill. (CH 2866; CH 947-48, 2645.) Jasinski expressed disapproval of their presence but moved ahead with bargaining. (CH 2867.)

At this meeting and subsequent sessions, Massey reiterated the Union's demand for daily work schedules and health insurance information, explaining that the Union needed this material to formulate bargaining proposals. When Jasinski asserted the request was burdensome, Massey agreed to accept 3 months of daily work schedules instead of 12. But Alaris never provided any daily schedules at all. (CH 2867-68, 2875-76; CH 97, 880, 2157-60.)

During bargaining from March to July, the Union made proposals to increase wages and benefits and reduce employee expenditures for dependent health care coverage. (CH 2256.) To address employee dissatisfaction with health care costs, especially for dependent care, the Union wanted to explore other options. It could not do so, however, because Alaris refused to provide the health insurance information it had repeatedly requested. (CH 58-60, 940-41.) The Union also wanted to address staffing deficiencies, an enduring issue for employees. It could not because Alaris refused to provide the daily schedule information or even discuss staffing levels. (CH 2867; CH 61-62, 2256.)

Despite multiple entreaties, Alaris took three months to provide some of the information sought by the Union in its first request. Although Alaris also eventually furnished some of the information listed in the supplemental request, it never provided the daily schedules or all of the health insurance information sought by the Union. (CH 2867-68, 2875-76; CH 2157-59, 2118.)

By May, the Union had decided to increase the public pressure on Alaris to bargain in good faith. Employees participated in informational picketing outside their facilities, carrying signs bearing messages such as “1199 Stop Unfair Labor Practices!” and “Contract Now!” (CH 2868, RP 1299, BE 1614, HV 1522.) The Union also created a website that detailed its bargaining campaign. (CH 2868.)

In July, the Union, employees, and several public officials held a press conference near Alaris's headquarters. The Union's executive vice president told those assembled that employees were still working under expired collective-bargaining agreements, and that Alaris's bargaining proposals asked low-wage workers "to pay even more for health insurance and to reduce critical benefits including sick leave." (CH 2868; CH 2450.) She noted that the facilities had "persistent staffing shortages," which the Union wanted to address in bargaining but could not because Alaris had refused to provide requested staffing information or to negotiate on that subject. (CH 2869; CH 2450-51.) Finally, she noted that employees were "ready to strike" if necessary. (CH 2869; CH 2451.)

After learning about the press conference and discussing it with Alaris officials, Jasinski definitively refused to fulfill the Union's outstanding information requests. Instead, he asserted that staffing was a "right reserved to this administration," and that Alaris would "reject any Union proposal that modifies [its] rights concerning staffing." (CH 2867, HV 1523; CH 2118.)

On August 19, employees spoke at a public meeting of the Board of Commissioners in Union City, where one of the facilities was located, to complain about Alaris's bargaining position and its refusal to pay for dependent health insurance. The employees' efforts were rewarded with supportive resolutions from

city and county commissioners, and the Union posted on Facebook a photograph of Castle Hill employee Claudia Saldana holding a copy of the resolution with the mayor. (CH 2869; CH 2198-99.)

Union officials began meeting with employees and laying the groundwork for a strike. Those grounds included Alaris's bargaining proposals, which the Union viewed as regressive, and its unfair labor practices, including its refusal to bargain with the full bargaining committee and to provide the requested daily schedules and health insurance information. (CH 2869; CH 2256.)

B. In Response to Employees' Union Activities, and Upon Learning They Might Strike, Alaris Conducts a Campaign of Intimidation

1. Castle Hill

After Alaris officials became aware that employees were considering a strike, they responded with harsh tactics at every facility. At Castle Hill, Administrator Maurice Duran began speaking to union supporters and, in some cases, threatening them. (CH 2869.) In July, Duran told CNA Saldana to come to his office, where he implored her to convince her co-workers not to strike and asked for her help in resolving employee grievances. (CH 2876; CH 283-84.) Saldana demurred, asserting that Duran should "talk to the owner and tell him to sit down and have a fair negotiation with the Union." (CH 285.) If that happened, she said, "nobody" would strike. (CH 2876; CH 285.)

Duran also threatened Saldana several times. Following the employees' meeting with the Board of Commissioners, Duran told her that he had seen the photograph of her with the mayor and could not "believe [she] stabbed [him] in the back." (CH 2869.) Duran later warned Saldana that another employee was instigating the strike and would lose her job. A few days before the strike, Duran again approached Saldana, telling her "it was a shame" that she and "17 single mothers were going on strike and lose their jobs." (CH 2869.) To make sure she got the message, Duran added that she was "going to lose [her] job because of the union and they're not doing anything for [her]." (CH 2869.)

On three separate occasions, Duran interrogated CNA Devika Smith about her intent to strike, without assuring her that no reprisals would be taken against her for declining to answer his questions. Although Smith did not respond the first time, subsequently she admitted she would join the strike. (CH 2876.) Duran also told Smith that she had "a lot of influence in the facility" and that "[i]t would be a shame for [her] to have these people go out on strike and lose their job[s]." (CH 2871; CH 226.)

Duran also threatened employee Diana Lewis, telling her that some employees could be discharged if they went on strike. He blamed the bargaining

standoff on the Union. When Lewis failed to respond, Duran advised her that she could be fired and should “think about it.” (CH 2872; CH 455-56.)

Duran was not the only manager to threaten and interrogate employees. Staffing Coordinator Fredline Altenor asked employee Brenda Mota-Lopes whether she intended to strike. When Mota-Lopes answered affirmatively, Altenor warned that her hours could be cut as a result. Mota-Lopes responded that she was not scared. Altenor then threatened that “management was going to let go of a lot of people.” (CH 2872; CH 795-96.)

Additionally, Director of Nursing Alexandra Bracea asked CNA Komi Anakpa whether he planned to strike. The morning before the strike, Duran told Anakpa that he “might not get unemployment” and “might not come back,” adding that he didn’t know if Anakpa “can afford it.” (CH 2871; CH 671.)

Duran and Bracea also held mandatory employee meetings where they “warned that some employees would be locked out and upon returning their assignments would not be the same.” (CH 2869-70.) After these meetings, Alaris sent out a memorandum warning that it would hire replacements if employees went on strike. (CH 2870.)

At other meetings held by Duran and Regina Figueroa, Alaris’s vice president for healthcare staffing, Duran told employees that their jobs were “on the

line” and that some employees might not return to work after the strike because Alaris would need others to cover their shifts. He added that some employees would have different assignments upon their return. (CH 2871; CH 288, 489, 739.)

About a week before the strike, employees from all four facilities gathered outside the Castle Hill facility for a prayer vigil and rally also attended by their state assemblyman. (CH 2872; CH 998.) Employees overhead Duran, who was observing them, say the vigil was “a joke,” and “it’s not going to be a problem to do what he needs to do with his next step.” (CH 2872; CH 492-93.)

2. Boulevard East

On at least five different occasions, Boulevard East Administrator Robert Smolin threatened and interrogated employees about whether there would be a strike. The first time, he called three employees into his office and asked if they planned to strike. When dietary employee Lorena Aguilar said she would, Smolin insisted the Union was at fault. (BE 1614.) The second time, he called four employees into the main office, where Director of Nursing Amanda Furio was waiting. He then asked each employee whether she planned to strike and warned them that if they did, they could lose their jobs. When employee Elizabeth Christie-Duran insisted they had the right to strike, Smolin assured them he would hire replacements and there would be no work for returning strikers. Furio joined

in, telling employees that they should consider the risk of “winding up without a job.” (BE 1617.) The third time, a week later, Smolin again asked Christie-Duran if she planned to strike. (BE 1617.)

The fourth time, Smolin “increased the pressure.” (BE 1617.) He called employees into his office along with Furio and Business Office Manager Linda Restrepo, who translated his questions and warnings into Spanish. He asked the employees if they planned to strike and continued to blame the Union for an unwillingness to negotiate. He then warned them that the strikers could be replaced. Holding up a document, he said it related to a prior strike after which some employees were locked out and never reinstated. (BE 1617.)

The fifth time, Smolin and Vice-President Figueroa called three employees, including Aguilar, into Smolin’s office. After Figueroa criticized the Union, Aguilar disagreed with her assertions. Smolin then warned the employees that there would be changes if they went on strike and again asked them if they planned to strike. (BE 1617.)

In addition, Dietary Director Maria Rodriguez asked a group of employees when the strike would begin and warned them that “anyone who went on strike would be fired.” (BE 1614.) When employees brought over Union Organizer Christina Ozual to controvert Rodriguez’s warning, Rodriguez doubled down,

insisting that “this is my kitchen . . . and I let back who I want in this kitchen . . . and you’re not coming back after the strike.” (BE 1614.) Rodriguez later threatened employee Aguilar, telling her that she would be fired if she went on strike. When Aguilar said she had the right to strike, Rodriguez replied she would do what she had to do. (BE 1617.) Rodriguez also told dietary employee Wallace Moreira that anyone who participated in the strike would be replaced. She repeated this warning to Aguilar and Moreira a few days later. (BE 1617.)

Before the strike, Smolin gave supervisors buttons stating, “I care. I am Alaris Health.” Although Boulevard East had a uniform policy prohibiting anyone from wearing buttons in the kitchen, Dietary Director Rodriguez wore her button continuously, even in the kitchen. By contrast, when employees Moreira and Aguilar began wearing pro-union buttons, Rodriguez said they had to be removed during work time. Smolin also told Moreira to remove his pro-union button during lunch in the employee dining room. Smolin later issued a memorandum instructing employees they could wear “Alaris Health, I Care” buttons but not buttons “that can be interpreted as threatening to a resident.” (BE 1617.)

3. Harborview

At Harborview, managers held meetings with employees and tucked a leaflet inside their pay envelopes. The leaflet asserted that in the event of a strike, Alaris

would “hire replacements to fill any vacancies,” and that after the strike ended, employees “may not be able to immediately return to [their] job[s]. That is a fact.” (HV 1525; HV 894.)

In meetings with employees, Director of Nursing Gerry Mijares warned employees “could lose their jobs if they went on strike.” (HV 1525.) When employee Kyria Miller disagreed, Assistant Director of Nursing Mariae Lapus reaffirmed the warning and told her “don’t listen to what people tell you . . . you will lose your job.” (HV 1525; HV 71-72.)

4. Rochelle Park

Rochelle Park managers interrogated employees about their plans to strike and threatened to discharge them if they did. Dietary Director Arlene Concepcion called individual employees into her office and asked if they planned to strike. When dietary aide Jamir Gaston said yes, Concepcion replied that she “didn't want [him] to lose [his] job because of the strike.” (RP 1302; RP 52.) But she warned that if he did go on strike, management could “cut [his] hours back.” (RP 53.) Later, Concepcion called the dietary staff into the kitchen and asked if they planned to strike. No one responded. (RP 1302.)

Concepcion again met with dietary staff, this time along with Housekeeping Director Peter German. German asked the employees if they planned to strike and

warned them that they risked losing their jobs if they did. Concepcion added that while they “don’t want you having to lose your jobs. It’s not up to us.” (RP 1302; RP 57.) German went on to make similar statements to his housekeeping staff, warning them the strike would not end well and they would be replaced. (RP 1302.) He also interrogated housekeeping employee Julieta Dominguez about her plans to strike. (RP 1302.)

Kristine Giles, the Rochelle Park administrator, called employees into her office one-by-one and asked if they planned to strike. When Dominguez said yes, Giles terminated the conversation by saying, “that’s it.” (RP 1302.) She followed up by confronting about 50 employees individually and asking how much the Union would pay them during a strike. (RP 1302; RP 55.) Giles also gave employees a memorandum that threatened “[o]nce a strike is over, you may not be able to immediately return to your job. That is a fact.” (RP 1303; RP 965.)

C. Employees Begin a Three-Day Strike To Protest Alaris’s Unfair Labor Practices and Bargaining Tactics; Alaris Makes Arrangements To Temporarily Replace Striking CNAs

On August 27, union officials met with ten employee delegates from Harborview, Rochelle Park, and Boulevard East. Another six delegates from Castle Hill participated by phone. (CH 2870.) Union Organizer Ron McCalla discussed the significant gap between the parties’ bargaining proposals on wages,

insurance, and retirement. (CH 105-06.) Massey described the difference between an economic and unfair-labor-practice strike and discussed the unfair-labor-practice charges the Union filed against Alaris, including its refusal to provide information needed to formulate bargaining proposals regarding staffing and health insurance. Massey also explained he had learned Alaris was committing additional unfair-labor-practices by interrogating and threatening employees. (CH 2870; CH 889-90, 898, 1812.)

The employee delegates then voted to strike and signed a resolution setting forth the reasons for the strike, which included Alaris's failure to provide information requested by the Union, its delay in providing information, and its interference with the composition of the Union's bargaining committee, as well as its unlawful polling and coercive interrogation of employees and its threats of adverse employment consequences for engaging in protected union activity. (CH 2119-20.) Union officials instructed employees to tell the membership that the strike was authorized and that it was motivated both by economics and Alaris's unfair labor practices. (CH 2870; CH 2256.)

On September 5 and 6, 2014, employees delivered to Alaris managers at all four facilities the strike notices required by Section 8(g) of the Act. 29 U.S.C. 158(g). (CH 2871, RP 1301, BE 1616, HV 1524.) In keeping with Section 8(g),

the notices gave Alaris 10 days' advance notice of the planned strike, specified the three days on which the strike would occur, and recited the exact start and end times of the strike at each facility. (CH 2871, RP 1301, BE 1616, HV 1524; CH 2121, BE 878, RP 791, HV 1140.) The notices also stated that the strike was to "protest the Employer's ongoing Unfair Labor Practices and the Employer's unreasonable bargaining demands." (CH 2871; CH 2121.)

In anticipation of the strike, Alaris arranged with four staffing agencies—Towne Nursing Staff, Tristate Rehab Staffing, Medistar Personnel, and StaffBlue—to provide temporary replacements for striking CNAs only, not for housekeeping employees or dietary aides. (CH 2872, HV 1525, BE 1618, RP 1303.) Alaris created addenda to its existing contracts with some of those agencies stating that it would retain temporary CNAs who worked as strike replacements for varying lengths of time at each facility. Specifically, the Towne contract addendum stated that Alaris would keep five CNAs for six weeks at Castle Hill, four CNAs for four weeks at Boulevard East, three CNAs for six weeks at Harborview, and nine CNAs for four weeks at Rochelle Park. (CH 2669.) Alaris's addendum with Tristate stated that it would retain all CNAs used during the strike for four weeks. (CH 2660, HV 1329, BE 1413, RP 1112.)

As for Medistar, which Alaris used only at Castle Hill and Harborview, the Castle Hill addendum stated that Alaris would retain replacement CNAs for 30 days. (CH 2855; CH 2657.) The Medistar contract for Harborview did not have a strike addendum and did not state that Alaris would retain that agency's CNAs for a specified time after the strike ended. (HV 1525; HV 1330-37.) Finally, Alaris did not have a written contract with StaffBlue and presented no evidence that the agency, which Alaris used only at Boulevard East and Harborview, required post-strike retention of its replacement CNAs. (BE 1605 n.6, 1618, HV 1525; BE 1279-85.)

There was also no evidence that any agency, regardless of whether it had written contracts or strike addenda, demanded retention periods as a condition of supplying temporary replacements during a strike that Alaris knew would last just three days. The contracts also did not specify whether Alaris would have to pay for replacements it did not keep after the strike ended. (CH 2858; CH 2660, CH 2669, HV 1329, BE 1413, RP 1112.)

The employees went on strike as scheduled. Alaris covered their shifts with non-striking unit employees, non-unit employees, employees from other Alaris facilities, and CNAs from the four staffing agencies. It also hired eight part-time

CNAs in early September at the Castle Hill facility. (CH 2872, BE 1618, HV 1525, RP 1303.)

During the strike, Castle Hill Administrator Duran, Castle Hill Director of Nursing Bracea, and Boulevard East Administrator Smolin took photographs of picketing employees at their respective facilities. (CH 2877, BE 1618.)

D. The Striking Employees Make an Unconditional Offer To Return to Work; Alaris Refuses To Fully Reinststate 36 of Them

On September 18, the last day of the strike at Castle Hill and Harborview, and the day before the strike ended at the other two facilities, Alaris's attorney, Jasinski, told Union Attorney Massey that "not all of the returning strikers were going to be allowed back to work" at the four facilities. (CH 2872-73; CH 903.) Massey pointed out that the strike notices had clearly announced time-limited three-day strikes, but Jasinski demurred, claiming that Alaris had signed 30-day contracts for replacement CNAs. (CH 2858.) He did not mention the fact that Alaris had no contracts requiring the retention of temporary replacements for other job classifications, such as dietary aides.

Massey immediately sent Jasinski an unconditional offer to return to work upon the conclusion of the strike, on behalf of all striking employees at each facility. (CH 2873; CH 2165.) When the strikers reported for work at the conclusion of the strike at their facility, however, Alaris refused to reinstate some

of them, even though they were entitled to immediate reinstatement as former unfair-labor-practice strikers. (CH 2856.)

1. Alaris refuses to immediately and fully reinstate 16 former strikers at Castle Hill

At Castle Hill, Alaris refused to fully and immediately reinstate 16 of the 40 returning unfair-labor-practice strikers. Instead, when the strike ended, Alaris retained 13 of the 19 agency CNAs it had used as temporary replacements during the strike, although 5 of them failed to report for work the next day. Alaris also supplemented the Castle Hill workforce with two non-unit employees and one CNA from another facility, instead of returning more former strikers to their positions. (CH 2873.)

By October, Alaris had reinstated most of the 16 strikers it had refused to reinstate immediately. But it was not until June 2015 that Alaris reinstated to their full-time positions two CNAs that Administrator Duran had targeted in response to the union campaign: Claudia Saldana and Devika Smith. (CH 1620.) In addition, although Alaris reinstated Brenda Mota-Lopes right after the strike ended, it reduced her hours from full-time to part-time, carrying out Staffing Coordinator Altendor's pre-strike warning to her and others. (CH 2873.) Alaris waited until October 27 to reinstate Leanne Crawford and then only at reduced hours, also in

keeping with the pre-strike warning. When she complained about the reduction, Alaris reduced her hours even further. (CH 2873.)

2. Alaris refuses to immediately and fully reinstate eight former strikers at Boulevard East

At Boulevard East, where there were 20-30 returning strikers, Alaris refused to fully reinstate 6 CNAs; instead, it kept 3-4 of the 22 agency replacement CNAs it had used during the strike. (BE 1605, 1618; BE 1349-54, BE 1365-82, BE 1389-99, BE 1413, CH 2669.) Alaris also refused to reinstate two former strikers who were dietary aides, even though it had not hired any temporary replacements for that position. (BE 1605, 1618.)

In September or October, Alaris belatedly reinstated most of the remaining former strikers. But instead of returning them to their former full-time positions, Alaris placed dietary aide and union steward Wallace Moreira in a part-time position, and relegated Lorena Aguilar to a floater position with an inconsistent schedule that required changes on short notice. Eventually, in April 2015, she became a cook. (BE 1618-17.)

Alaris initially told one of the former strikers, CNA Sandra Meija, that it was reinstating her to a new assignment because it had hired a temporary replacement for her former position. Although Alaris reversed course after the Union explained that Meija had been on approved medical leave during the strike,

it did not restore her customary overtime opportunities until April 2015. (BE 1604 nn.3, 5.)

3. Alaris refuses to immediately and fully reinstate two former strikers at Harborview

At Harborview, 25 former strikers reported for duty on September 19. Managers sent them to the dining room, where Administrator Kevin Woodard announced that two would not be allowed to return: CNAs Kyria Miller, who had spoken up when the Director of Nursing warned employees about losing their jobs for striking, and Ingrid Williams. When the shop steward asked why they were excluded, Woodard replied: “it’s for the good of the facility.” (HV 1526; HV 102-03.) Alaris eventually reinstated Miller on October 17. It did not reinstate Williams until May 19, 2015, and it transferred her out of the assignment she had held for 23 years. (HV 1514 & n.5, 1526; HV 1141-43, 1145.)

During the strike, Harborview had used 22 replacement CNAs from Tristate, Towne, StaffBlue, and Medistar. (HV 1525; HV 1243-73, HV 1330-37.) After the strike ended, Alaris ignored the retention provisions in its contracts with Tristate and Towne and retained only one agency CNA, from Tristate. (HV 1515.)

4. Alaris refuses to immediately and fully reinstate 11 former strikers at Rochelle Park

At Rochelle Park, where 15-20 employees went on strike, Alaris refused to immediately reinstate 6 CNAs and 4 dietary and housekeeping employees, in keeping with warnings by Rochelle Park officials that strikers would lose their jobs or suffer delays in reinstatement. (RP 1290.) In addition, although Alaris immediately reinstated another striker, it reduced his hours. (RP 1291.) When Alaris eventually reinstated five of the strikers, it reduced their hours or overtime opportunities, as officials had warned before the strike. (RP 1291.)

At the time of the Board's decision in 2018, Alaris had still not reinstated Rodley Lewis, a dietary aide, even though no agency contracts had provided replacements for that position. (RP 1289 n.6.) Moreover, Alaris ignored its contracts with Tristate and Towne, which stated that Alaris would retain 11 agency CNAs after the strike, by keeping only 5 of them. (RP 1290, 1303; CH 2669, RP 1112.)

III. The Board's Conclusions and Orders

On the foregoing facts, the Board (Chairman Ring and Members McFerran and Kaplan) found, in agreement with the administrative law judge, that Alaris violated Section 8(a)(3) and (1) of the Act at its Castle Hill, Boulevard East, Harborview, and Rochelle Park facilities by refusing to reinstate unfair-labor-

practice strikers immediately to their former assignments and work hours because they engaged in an unfair-labor-practice strike. (CH 2854-55 & n.3, BE 1604 & n.5, HV 1514, RP 1289 & n.6.)

The Board further found, in the absence of exceptions, that Alaris violated Section 8(a)(5) and (1) of the Act at all four facilities by: refusing to bargain in good faith with the Union's chosen bargaining committee; unreasonably delaying the provision of information requested by the Union that was relevant and necessary for bargaining; and refusing to furnish the Union with information about health insurance and daily work schedules. (CH 2854 n.3, RP 1289 n.3, BE 1604 n.3, HV 1514 n.3.)

The Board also adopted, in the absence of exceptions, a litany of other findings that are specific to each facility. Regarding Castle Hill, the Board found that Alaris violated Section 8(a)(1) and (3) of the Act by: soliciting employees to convince coworkers not to go on strike; soliciting employee grievances and impliedly promising to remedy them; coercively interrogating employees about their union activities and support; threatening employees with termination, job loss, or changes in working conditions if they went on strike; threatening employees with unspecified reprisals for engaging in union or other protected concerted activities; surveilling employees while they engaged in those activities;

and reducing the work hours of employees because they engaged in an unfair-labor-practice strike. (CH 2854 n.3, 2860.)

Concerning Boulevard East, the Board found, in the absence of exceptions, that Alaris violated Section 8(a)(1) and (3) of the Act by: threatening employees with job loss if they went on strike; coercively interrogating employees about whether they planned to strike or about their union activities or support; prohibiting employees from wearing union insignia in nonpatient care areas while permitting employer-issued insignia; surveilling employees engaged in union or other protected concerted activities; and changing employees' terms or conditions of employment because they engaged in an unfair-labor-practice strike. (BE 1604 n.3, 1606.)

Regarding Harborview, the Board found, again in the absence of exceptions, that Alaris violated Section 8(a)(1) and (3) of the Act by threatening employees with job loss if they went on strike. (HV 1514 n.3, 1515.)

Finally, regarding Rochelle Park, the Board found, in the absence of exceptions, that Alaris violated Section 8(a)(1) and (3) of the Act by: refusing to permit the Union's representative to meet at reasonable times with employees in the break room; threatening employees with job loss, loss of work hours, or other changes in terms and conditions of employment if they went on strike; coercively

interrogating employees about their union activities or support; and changing employees' terms or conditions of employment because they engaged in an unfair-labor-practice strike. (RP 1289 n.3, 1291.)

To remedy Alaris's unlawful conduct, the Board's Orders require it to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. Affirmatively, the Orders direct Alaris to bargain with the Union on request; furnish the Union with requested information concerning health insurance and daily work schedules; offer named employees full reinstatement to their former jobs, hours, and overtime opportunities; make named employees whole for loss of earnings and other benefits; on request, permit the Union's representative to meet at reasonable times with employees at the Rochelle Park facility; and post a remedial notice. (CH 2860-61, RP 1291-92, BE 1606-07, HV 1515-16.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

A related case is pending in this Court. In *NLRB v. Alaris Health at Atrium*, 3d Cir. No. 19-3451 (application for summary entry of judgment docketed Oct. 23, 2019), the Board found that Alaris violated the Act by interfering with, restraining,

and coercing employees in the exercise of their statutory rights, and by refusing to bargain collectively and in good faith with the Union.

SUMMARY OF THE ARGUMENT

1. In the absence of exceptions, the Board adopted the administrative law judge's uncontested findings that Alaris committed a wide range of unfair labor practices. Specifically, in negotiating for successor collective-bargaining agreements covering the four facilities, Alaris refused to bargain in good faith with the Union's chosen bargaining committee, unreasonably delayed providing information requested by the Union, and refused outright to provide information about health insurance and daily work schedules. Moreover, after learning of its employees' plans to strike partly in protest over these unfair labor practices, Alaris responded by committing a variety of unlawful acts, including threatening employees with job loss and changed work conditions; coercively interrogating employees and surveilling them; reducing strikers' work hours and changing their terms and conditions of employment; soliciting employees to convince others not to strike; soliciting grievances; prohibiting employees from wearing union insignia; and refusing to permit the Union's representative to meet at reasonable times with employees in one facility's break rooms.

Given Alaris's complete failure to challenge the Board's reasonable findings that it committed this litany of Section 8(a)(1), (3), and (5) violations, the Court should summarily enforce the portions of the Board's Order that correspond to the uncontested findings.

2. It is settled that employees who engage in an unfair-labor-practice strike are entitled to immediate and full reinstatement upon their unconditional offer to return to work. There is no dispute that Alaris's employees participated in an unfair-labor-practice strike and that Alaris failed to immediately and fully reinstate some of them. The record therefore amply supports the Board's finding that by refusing to reinstate them, Alaris violated Section 8(a)(3) and (1) of the Act.

The Board reasonably rejected Alaris's attempt to circumvent the cardinal rule that unfair-labor-practice strikers must be reinstated immediately and fully. Contrary to Alaris, the Board's decision in *Pacific Mutual Door* governing reinstatement of economic strikers—who have fewer protections—simply does not apply to the unfair-labor-practice strikers here. Moreover, the Board did not hold, in *Pacific Mutual Door* or any other case, that an employer may delay reinstatement of unfair-labor-practice strikers based on retention provisions in contracts for replacement workers.

In any event, even if *Pacific Mutual Door* pertained here, which it does not, the record belies Alaris's claim that its contracts for temporary replacement CNAs forced it to delay reinstatement of the former strikers. Alaris did not present any evidence showing how the contracts were negotiated, whether the staffing agencies required retention as a condition for providing temporary replacements, or whether Alaris had to pay for CNAs it did not retain after the strike. Further, Alaris did not comply with the contracts: at none of the four facilities did Alaris retain all the CNAs it claims the contracts required. Instead, Alaris carried out the threats its managers made to replace and reassign returning strikers and reduce their hours. It also erroneously invoked the staffing contracts in denying reinstatement to dietary and housekeeping employees whose positions were not covered by those contracts. In addition, it reduced the hours of returning strikers and reassigned them to less desirable positions—discriminatory actions not contemplated by the staffing contracts.

Finally, the Board properly rejected Alaris's claim that because it is a health care provider, it should be granted an "exception" to discriminate against former unfair-labor-practice strikers. As the Board explained, the 1974 amendments to the Act already reflect the balance struck by Congress between the competing interests of health care employees and employers. The legislative history of those

amendments, as well as subsequent appellate decisions, make it clear that the Board is not free to disturb that balance by creating the exception Alaris seeks.

STANDARD OF REVIEW

The Court will not disturb the Board’s factual findings, or the reasonable inferences drawn from those findings, even if the Court would have made a contrary determination had the matter been before it *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Board’s credibility determinations are entitled to deference and must be affirmed unless they are “inherently incredible or patently unreasonable.” *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 609 (3d Cir. 2016).

The Board’s interpretation of the Act “is accorded substantial deference” because of its “‘special competence’ in the field of labor relations.” *Citizens Publ’g*, 263 F.3d at 232 (quoting *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 100 (1985)). And its legal conclusions must be upheld if based on a “reasonably defensible” construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)). The Board has no discretion to limit the statutory rights of health care employees beyond those already imposed by Congress. *Civil Serv. Employees*

Ass'n, Local 1000 v. NLRB, 569 F.3d 88, 95 (2d Cir. 2009); *Laborers Local 1057 v. NLRB*, 567 F.2d 1006, 1015 (D.C. Cir. 1977).

ARGUMENT

I. The Board Is Entitled to Summary Enforcement of Its Uncontested Findings that Alaris Repeatedly Violated Section 8(a)(1), (3), and (5) of the Act

Section 10(e) precludes the Court from considering any “objection that has not been urged before the Board . . . unless the failure or neglect to urge such exception shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Before the Board, Alaris failed to except to numerous findings made by the administrative law judge, which the Board accordingly adopted in the absence of exceptions.³ (CH 1 n.3, RP 1 n.3, BE 1 n.3, HV 1 n.3.) The Court therefore lacks jurisdiction to consider any challenge to those findings, warranting summary enforcement of the corresponding portions of the Board’s Orders. *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. FES, Div. of Thermo Power*, 301 F.3d 83, 95 n.6 (3d Cir. 2002).

³ Even if Section 10(e) did not bar judicial review of any challenge to the findings, Alaris waived a challenge by failing to contest them in its opening brief. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

Accordingly, the Court should summarily enforce the Board's findings that Alaris, in all four cases, violated Section 8(a)(5) and (1) of the Act by: refusing to bargain in good faith with the Union's chosen bargaining committee, unreasonably delaying in providing the Union with requested information that was relevant and necessary for bargaining, and refusing to furnish the Union with requested information concerning health insurance and daily work schedules.⁴ (CH 1 n.3, RP 1 n.3, BE 1 n.3, HV 1 n.3.)

In addition, Alaris failed to contest the Board's findings of numerous violations of Section 8(a)(1) and (3) of the Act at each of its four facilities.⁵ Specifically, regarding Castle Hill, Alaris failed to contest the Board's findings that it violated Section 8(a)(1) and (3) of the Act by:

⁴ Section 8(a)(5) of the Act prohibits employers from "refus[ing] to bargain collectively with the representatives of [their] employees." 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) also produces a derivative violation of Section 8(a)(1). *Citizens Publ'g*, 263 F.3d at 233.

⁵ Section 8(a)(1) of the Act prohibits "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed" by the Act. 29 U.S.C. § 158(a)(1). Section 8(a)(3) prohibits discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) also produces a derivative violation of Section 8(a)(1). *Citizens Publ'g*, 263 F.3d at 237.

- soliciting an employee to convince coworkers not to go on strike and to help in resolving employees' grievances;
- interrogating an employee about whether she planned to go on strike;
- threatening an employee by stating it would be a shame for her and her coworkers to go on strike and lose their jobs;
- accusing an employee of backstabbing Administrator Duran after that employee testified before the city Board of Commissioners, thereby implying retaliation for her protected activity;
- warning an employee to "be careful" because Duran was mad and wanted to know when employees would go on strike;
- threatening an employee that she and 17 other single mothers were going to lose their jobs for going on strike;
- at group meetings, interrogating employees about the strike, and threatening them with job loss and changes in working conditions if they did strike;
- surveilling picketing employees; and
- reducing employees' work hours.

(CH 2854 n.3.)

As for its Boulevard East facility, Alaris failed to contest the Board's findings that it violated Section 8(a)(1) and (3) of the Act by:

- threatening employees with job loss if they went on strike;
- interrogating employees about their plans to strike;
- directing employees to remove union buttons and prohibiting them from wearing union buttons or other insignia without management's express approval;
- surveilling picketing employees;
- reducing a striker's work hours and reassigning him to a part-time pot-washer position;
- imposing more onerous working conditions on a striker; and
- reducing another striker's overtime opportunities.

(BE 1604 n.3.)

Concerning its Harborview facility, Alaris failed to contest the Board's findings that it violated Section 8(a)(1) of the Act by:

- warning employees of job loss if they went on strike; and
- distributing leaflets to employees warning that Alaris would replace all strikers, and that they might not be able to immediately return to their jobs after the strike ended.

(HV 1514 n.3.)

Finally, regarding its Rochelle Park facility, Alaris failed to contest the Board's findings that it violated Section 8(a)(1), (3), or (5) of the Act by:

- denying a union agent access to the facility without giving the Union an opportunity to bargain over the change;
- threatening employees with job loss, loss of work hours, and other changes in their terms and conditions of employment if they went on strike;
- interrogating employees about their plans to strike; and
- reducing the work hours of four strikers and denying overtime opportunities to a fifth.

(RP 1289 n.3.)

Courts have stressed that uncontested violations do not disappear simply because a party has not challenged them, but remain in the case, "lending their aroma to the context in which the contested issues are considered." *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (citation omitted). *Accord Torrington Extend-A-Care Employees Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991). As shown below, these numerous uncontested violations were part and parcel of

Alaris's broader effort to discourage its employees' union activity and to deny them full and immediate reinstatement after they ended their unfair-labor-practice strike.

II. Substantial Evidence Supports the Board's Findings that Alaris Violated Section 8(a)(3) and (1) of the Act by Refusing To Reinstatement Unfair-Labor-Practice Strikers Immediately and Fully

The Board found, and Alaris does not dispute, that the employees engaged in an unfair-labor-practice strike to protest, among other things, Alaris's refusal to bargain with the Union and to provide requested information needed by the Union in negotiations. (CH 2878, BE 1624, HV 1529, RP 1309.) The Board further found that Alaris violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the former unfair-labor-practice strikers immediately and fully upon their unconditional offer to return to work. Alaris admits its refusal but contends that its staffing contracts for temporary replacement CNAs justified its decision to delay reinstatement of the former strikers. But as the Board aptly found, longstanding Supreme Court-approved precedent establishes unequivocally that unfair-labor-practice strikers must be immediately and fully reinstated upon their unconditional offer to return to work, irrespective of the employer's contracts for replacement workers. Alaris also argues that because it operates health care facilities, the Board should have granted it an exception to this settled rule. The Board, however,

reasonably declined to create such an exception because it would be contrary to the balance struck by Congress in Section 8(g) of the Act. It therefore follows that Alaris violated the Act by refusing to reinstate the former strikers immediately and fully to their positions.

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Failing To Reinstatement Unfair-Labor-Practice Strikers Immediately and Fully Upon Their Unconditional Offer To Return to Work

An unfair-labor-practice strike “is any strike that is caused ‘at least in part’ by an employer’s unfair labor practice.” *Citizens Publ’g*, 263 F.3d at 235 (quoting *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 471 (3d Cir. 1983)). Even if strikers are motivated by economic concerns as well as labor law violations, the strike is an unfair-labor-practice strike if the employer’s unlawful acts had “anything to do with causing the strike.” *General Drivers & Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir. 1962).

Moreover, it is settled that unfair-labor-practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work, even if the employer has hired replacements, and regardless of whether they are permanent or temporary. *NLRB v. Int’l Van Lines*, 409 U.S. 48, 50-51 (1972); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 n.5 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Citizens Publ’g*, 263 F.3d at 234-35. By

contrast, economic strikers can be permanently replaced, with the employer's hiring of such replacements serving as a "legitimate and substantial business justification" for not immediately reinstating them. *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). Thus, as the Court has recognized, unfair-labor-practice strikers plainly "have more, not fewer, rights and protections under the Act" than economic strikers. *Citizens Publ'g*, 263 F.3d at 237.

Precedent makes clear why former unfair-labor-practice strikers have greater rights and are entitled to full and immediate reinstatement regardless of whether the employer has hired replacements. As the Supreme Court explained long ago, denying former unfair-labor-practice strikers full and immediate reinstatement would "penalize" them for their employer's unlawful conduct, "thus giving advantage to the wrongdoer." *Mastro Plastics*, 350 U.S. at 287. *Accord Orit Corp.*, 294 NLRB 695, 698 (1989) ("since the employer is at fault for interfering with protected rights of the employees, it must bear the consequences of having violated the Act"), *enforced*, 918 F.2d 225 (D.C. Cir. 1990) (table). An employer therefore violates Section 8(a)(3) and (1) of the Act by failing to immediately and fully reinstate unfair-labor-practice strikers once they have made an unconditional

offer to return to work. *Mastro Plastics*, 350 U.S. at 278; *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972).

B. The Board Properly Rejected Alaris’s Claim that Its Contracts with Agencies for Replacement CNAs Provided a Legitimate and Substantial Business Justification for Refusing To Immediately and Fully Reinstatement the Former Unfair-Labor-Practice Strikers

Instead of reinstating the former unfair-labor-practice strikers as it was required to do under settled law, Alaris told the Union that because its contracts with staffing agencies provided for the retention of agency CNAs for four-to-six weeks after the strike, Alaris could not reinstate all the strikers immediately. In taking this position, however, Alaris erroneously relied on legal principles pertaining only to economic strikers. As shown below, the Board properly found that the rules governing the reinstatement of economic strikers do not apply to unfair-labor-practice strikers; accordingly, the staffing contracts did not excuse Alaris’s failure to reinstate the former strikers here. We also show that even assuming for argument’s sake a delay in reinstating unfair-labor-practice strikers could ever be justified by contractual obligations to retain temporary replacements, Alaris utterly failed to establish that its contracts would impose such a duty.

1. Alaris’s contracts with staffing agencies did not justify its refusal to immediately and fully reinstate the former unfair-labor-practice strikers

There is no dispute that Alaris’s employees engaged in an unfair-labor-practice strike, and not an economic one.⁶ Longstanding precedent therefore required Alaris to immediately reinstate the former strikers upon their unconditional return to work. *Mastro Plastics*, 350 U.S. at 278. But Alaris did not. Instead, it delayed fully reinstating many of the strikers, reduced their hours, and changed their terms and conditions of employment. In attempting to justify this conduct, Alaris argues its staffing agency contracts constituted a “legitimate and substantial business justification” for not immediately and fully reinstating the former unfair-labor-practice strikers. (Br. 8.) But this argument reflects a fundamental misunderstanding of critical differences between economic and unfair-labor-practice strikers.

As noted above, and as the Board explained here, “[t]he difference in [its] treatment of economic and unfair labor practice strikers is well established.” (CH

⁶ In the absence of exceptions, the Board adopted the administrative law judge’s unchallenged finding that the strike was caused at least in part by Alaris’s unfair labor practices. (CH 2855 n.8.) Because Alaris failed to challenge this finding before the Board, it is not before the Court. *See* cases cited above at p. 32.

2856.) An employer can delay its reinstatement of *economic* strikers by demonstrating a “legitimate and substantial business justification” for the delay, such as hiring permanent replacements. *Fleetwood Trailer*, 389 U.S. at 379. By contrast, the Board, with Supreme Court approval, has long required the immediate reinstatement of unfair-labor-practice strikers, regardless of whether the employer has hired replacements of any kind. *See* cases cited above at pp. 38-40.

Although there is a limited exception to the rule requiring immediate reinstatement of former unfair labor practice strikers, Alaris did not invoke it here. (CH 2856.) Specifically, because employers may encounter administrative difficulties in discharging replacements and immediately reinstating strikers, the Board allows a five-day grace period “to accomplish those administrative tasks necessary to the orderly reinstatement of the unfair-labor-practice strikers and to accord some consideration to the replacement employees who must be terminated.” *Drug Package Co., Inc.*, 228 NLRB 108, 113 (1977), *enf. denied in part on other grounds*, 570 F.2d 1340 (8th Cir. 1978); *Louisville Chair Co., Inc.*, 161 NLRB 358, 379 (1966), *enforced*, 385 F.2d 922 (6th Cir. 1967). But because the Board has already weighed the competing considerations and arrived at a five-day “fixed period” compromise, it does not entertain arguments for more (or less) delay. *Drug Package*, 228 NLRB at 113 n.28, 114. Moreover, if an employer “has made

clear that it does not intend to reinstate” the strikers at all or seeks to delay, the Board will not grant the five-day grace period. *Id.* at 114. *Accord Dorsey Trailers, Inc. Northumberland, PA Plant*, 327 NLRB 835, 856-57 (1999), *enforced in relevant part*, 233 F.3d 831 (4th Cir. 2000). Before the Board, Alaris “specifically disavowed any claim that its multiweek delay was justified by the 5-day administrative grace period.” (CH 2856.) Because Alaris “made clear” that it did not intend to utilize the grace period, the Board reasonably declined to grant it here. (CH 2856.) On review, Alaris does not, and could not, contest the Board’s finding, having failed to challenge it below. *See* cases cited above at p. 32.

Instead, Alaris claimed below, as it does before the Court (Br. 18-19), that the cancellation provisions of its staffing contracts established a legitimate and substantial business justification for its delay under *Pacific Mutual Door Co.*, 278 NLRB 854 (1986). (CH 2856.) In that case, the Board held that a 30-day notice-of-cancellation clause in a contract for temporary replacements constituted a legitimate and substantial business justification for delaying the reinstatement of *economic* strikers. *Id.* at 856.

As the Board explained, however, *Pacific Mutual* “does not apply to unfair-labor-practice strikers, who are entitled to immediate reinstatement (subject to the 5-day administrative grace period).” (CH 2856.) Because economic and unfair-

labor-practice strikers do not stand in the same position with regard to reinstatement, “it does not follow that a legitimate and substantial business justification for a delay in reinstating economic strikers . . . also constitutes a legitimate and substantial business justification for a delay in reinstating unfair labor practice strikers.” (CH 2857.) Indeed, in *Dorsey Trailers*, the Board specifically rejected a similar claim that a cancellation provision would justify delaying reinstatement of unfair-labor-practice strikers. 327 NLRB at 856-57.

Attempting to buttress its argument that *Pacific Mutual* applies to unfair-labor-practice strikes, Alaris (Br. 18) mistakenly relies on a trio of distinguishable cases, including *Special Touch Home Care Services, Inc.*, 351 NLRB 754 (2007), *enforced in part and remanded*, 566 F.3d 292 (2d Cir. 2009). But those cases, like *Pacific Mutual Door*, involve economic strikes, not unfair-labor-practice strikes. Alaris cites no case where the Board has allowed an employer to delay reinstatement of unfair-labor-practice strikers based on a contract with a temporary agency. The reason, as the Board fully explained, is that applying *Pacific Mutual Door* to the unfair-labor-practice strikers here would remove key protections that the Board and the courts have long afforded them. (CH 2856-57.) Notably, unfair-labor-practice strikers, unlike economic ones, “are not required to assume the risk of being replaced during the strike.” *Colonial Press, Inc.*, 207 NLRB 673, 674

(1973), *rev'd in part on other grounds*, 509 F.2d 850 (8th Cir. 1975). Instead, they are “guaranteed” immediate reinstatement because absent this guarantee, an employer could “defeat, for all practical purposes, the interdictions of the Act against his commission of unfair labor practices and lightly to disregard the protests of his work force against his unlawful acts.” *Id.* For this reason, the Board in *Colonial Press* properly rejected (as it did here) the employer’s attempts to “recruit a new group of employees and to leave without employment some or all of those who had been adversely affected by [its] unlawful infringement of employee rights.” *Id.* *Accord Citizens Publ’g*, 263 F.3d at 234-35; *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1644 (2001) (holding all unfair-labor-practice strikers must be reinstated immediately rather than piecemeal), *enforced*, 281 F.3d 442 (4th Cir. 2002).

2. In any event, Alaris failed to show that its contracts for replacement CNAs would have provided a legitimate and substantial business justification for delaying reinstatement

As the Board further explained, even assuming for the sake of argument that a delay in reinstating unfair-labor-practice strikers beyond the five-day grace period could ever be justified by an employer’s contractual obligation to temporary strike replacements, Alaris did not establish that its contracts provided such a business justification. This is because Alaris completely failed to prove that the

staffing agencies required lengthy cancellation periods as a condition of furnishing temporary replacements, or that the contracts actually required Alaris to retain them after the strike ended. After all, even an employer facing an economic strike must provide evidence that the contracting agencies demanded cancellation periods; such an employer must also show that it “would be financially liable if the replacement workers were turned away.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 351 (D.C. Cir. 2011). Otherwise, that employer would violate the Act by failing to immediately reinstate the former economic strikers. *See Harvey Mfg.*, 309 NLRB 465, 469 (1992) (contract requiring employer to retain replacement workers for 30 days did not bar immediate reinstatement of economic strikers where there was “scant evidence” of the parties’ intentions and “absolutely no basis to find that these provisions were necessary” to guarantee replacement workers).⁷

⁷ It is worth noting that “even economic strikers are entitled to reclaim their jobs—not just be placed on a rehire list—if the jobs are vacant or are occupied only by temporary replacements when they make their unconditional offer to return.” *Harvey Mfg.*, 309 NLRB at 469-70 (quoting *Teledyne Still-Man*, 298 NLRB 982, 985 (1990), *enforced mem.*, 938 F.2d 627 (6th Cir. 1991)). In fact, reinstating economic strikers “routinely” requires “the discharge of temporary replacements occupying the strikers’ prestrike or substantially similar jobs.” *Id.* at 470. Thus, even under Alaris’s preferred legal framework—treating economic and unfair-

In finding that Alaris utterly failed to establish that its contracts with the temporary agencies required the post-strike retention of agency CNAs, the Board emphasized there was “no credited record evidence regarding the parties’ negotiations that resulted in the contract amendments or the reasons [Alaris] agreed to the 4-6 week terms.” (CH 2858.) Nor did the record “support [Alaris’s] claim . . . that the staffing agencies insisted on the 4-6 week terms as a condition of providing temporary replacements.” (CH 2858.) Absent evidence of such a condition, there would be no basis for delaying reinstatement, even if this had been an economic strike. *See Wayneview*, 664 F.3d at 351; *Harvey Mfg.*, 309 NLRB at 469. In short, on this record, the Board properly rejected Alaris’s claim that its contracts for replacement CNAs could excuse its failure to immediately reinstate all the strikers, assuming arguendo that such a rule would apply in the unfair-labor-practice strike context. (CH 2858.)

In so finding, the Board rejected Alaris’s reliance on the testimony of its witnesses (Jasinski, Figueroa, and Taylor) to establish that it “had a substantial business justification” for not reinstating the former strikers. (Br. 21.) The

labor-practice strikers the same—it would still be required to reinstate strikers who were merely temporarily replaced.

administrative law judge did not credit those witnesses' "vague testimony" about the negotiations with the contract agencies and noted that "the circumstances by which the addenda were added were not explored." (CH 2872 n.67, BE 1618 n.61, RP 1303 n.61, HV 1525 n.55; CH 723, 1367-68, 1381, 1384, 1477, 1649-50, 1652.) The Board's adoption of the judge's findings should be affirmed because Alaris completely failed to challenge them, much less show, as a litigant must, that they were "inherently incredible or patently unreasonable." *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 609 (3d Cir. 2016).

In any event, Alaris could not have met the *Advanced Disposal* standard on this record. Jasinski, Alaris's attorney, was not even involved in the negotiations; instead, he merely reviewed the contracts afterwards. (CH 1477.) Similarly, Figueroa, Alaris's vice president for healthcare staffing, did not negotiate the contracts or ever see them; she did not know what retention terms the contracts required. (CH 1367-68, 1384.) And Taylor, a quality assurance nurse, testified that she "wasn't involved in the contracts or anything like that" and only "knew the names of the people that we were allowed to use" as replacements. (CH 1729.) The one manager who did negotiate the contracts, Linda Dooley, was available but did not testify. (CH 2872 n.67, BE 1618 n.61, RP 1303 n.61, HV 1525 n.55.)

As the Board also noted, the record in other ways seriously undermines Alaris's claim that it delayed reinstatement based on the agency contracts. Perhaps most tellingly, although Alaris claims the temporary contracts required it to retain a specified number of agency CNAs at each facility for four-to-six week terms, there is no evidence it actually kept those CNAs for the specified time or paid any sort of penalty for failing to do so. (CH 2858.) For example, although the Boulevard East contracts provided that Alaris would retain 22 CNAs, the facility actually kept only 4. (BE 1605.) Similarly, at Castle Hill, the contracts stated that Alaris would retain 19 CNAs, but only 13 remained after the strike. (CH 2855.) As for Harborview, although the contracts provided that Alaris would retain 11 CNAs, in fact it retained only 1. (HV 1515.) And at Rochelle Park, where the contracts provided Alaris would retain 11 CNAs, it kept just 5. (RP 1290.)

Nor can the contracts explain Alaris's delay in reinstating some former strikers for months after the strike ended, including Harborview CNA Ingrid Williams, who was not reinstated until May 2015 (HV 1514); Rochelle Park dietary aide Rodley Lewis, who had not been reinstated by the time of the Board's decision in December 2018 (RP 1289 n.6, 1291); and Castle Hill CNAs Devika Smith and Claudia Saldana, who were not reinstated until June 2015 because

Alaris had replaced them with part-time employees to whom it gave more hours. (CH 723-24, 729-30, 1620.)

Not only did Alaris delay the reinstatement of CNAs, it delayed immediate and full reinstatement of dietary and housekeeping employees—job classifications not covered by the agency contracts. (BE 1604, RP 1290.) Instead, Alaris replaced the dietary and housekeeping employees with unit employees who did not strike, non-unit employees, and employees from other facilities. (CH 2855.) But even if the strikers had been *economic* rather than unfair-labor-practice strikers, Alaris could not have used its own employees to justify a delay in reinstatement. *See, e.g., Sutter Health Ctr.*, 348 NLRB 637, 637 n.7 (2006) (employer violated the Act by failing to immediately reinstate economic strikers who were replaced by non-unit or managerial employees).

Finally, nothing in the agency contracts explains Alaris's decision to reinstate many of the returning strikers at reduced hours or to different assignments. (CH 2873, BE 1604 n.5, RP 1291.) For example, Alaris reinstated Castle Hill CNA Leanne Crawford to a reduced schedule and then reduced her hours even further when she complained; it restricted Rochelle Park CNA Deloris Alston's overtime hours; it reassigned Rochelle Park housekeeping employees to part-time positions; it reassigned Boulevard East dietary employees to more

onerous jobs; and, when it finally reinstated Harborview CNA Ingrid Williams in May 2015, it did not return her to the position she had held for 23 years. (CH 2873, BE 1604, HV 1526, RP 1304.)

It is settled that not only must an employer reinstate returning unfair-labor-practice strikers upon their unconditional offer to return to work, it must reinstate them to their former assignments and hours. *See, e.g., Pennant Foods Co.*, 347 NLRB 460, 470 (2006); *Frank Leta Honda*, 321 NLRB 482, 493 (1996); *A.P.A. Warehouse, Inc.*, 302 NLRB 110, 115 (1991). Before the Board, Alaris did not challenge the judge's findings that it unlawfully reassigned employees and reduced their hours.⁸ Nor did Alaris challenge the Board's findings that it presaged its unlawful actions by making a host of threats to employees before the strike, including threatening Boulevard East employees that they could be replaced and lose their jobs if they went on strike (BE 1604 n.3); threatening Castle Hill

⁸ Specifically, Alaris did not file exceptions to the administrative law judge's findings that it unlawfully reduced the hours of Castle Hill employees Crawford and Mota-Lopes (CH 1854 n.3); reduced the hours of Rochelle Park employees Fritz, Dominguez, Hormaza, and Gaston, and denied overtime to employee Alston (RP 1289 n.3); reduced Boulevard East employee Moreira's hours and reassigned him to a part-time pot washer position, imposed more onerous conditions on employee Aguilar, and changed the assignment of and reduced the overtime opportunities of employee Meija (BE 1604 n.3).

employees that it would be a “shame” if they went on strike and lost their jobs, and that an employee “and 17 other single mothers” would lose their jobs if they went on strike (CH 2854 n.3); warning Harborview employees that they could lose their jobs if they went on strike (HV 1514 n.3); and telling Rochelle Park employees that “there would be no overtime for anyone who participated in the strike,” and warning that “there would be consequences” if the employees went on strike (RP 1304 & nn.70-72).

As discussed above (p. 32), because Alaris did not file exceptions to these findings, they are not before the Court. But they do put the lie to Alaris’s claim that it took these actions based on its agency contracts for temporary replacements. Instead, the evidence demonstrates that Alaris threatened employees with job loss and reduced hours, then made good on those threats. In short, given this overwhelming record evidence, there is ample support for the Board’s finding that even assuming arguendo contractual obligations could ever justify denying immediate reinstatement to unfair-labor-practice strikers, they “could not justify [Alaris’s] refusal to immediately reinstate at least some of” the strikers here. (CH 2858.)

C. Alaris’s Status as a Health Care Employer Does Not Entitle It to an Exemption from the Settled Rule that Unfair-Labor-Practice Strikers Must Be Immediately and Fully Reinstated

The Board properly rejected Alaris’s final argument (Br. 14-16, 22-23) that because it operates health care facilities, the Board should have created an exception permitting it to circumvent the rule requiring immediate and full reinstatement of unfair-labor-practice strikers. As the Board explained, any such exception is not within the Board’s power to grant. Instead, Congress reserved that power for itself. (CH 2857.)

1. Congress balanced the rights of health care industry employers and employees when it enacted Section 8(g) of the Act requiring strike notices

Congress amended the Act in 1974 to bring workers employed by nonprofit health care institutions within the Act’s coverage and to grant them all its rights and protections, including the right to strike. As part of those amendments, Congress enacted Section 8(g) of the Act, 29 U.S.C. § 158(g), which requires a labor organization to give advance written notice to a health care institution at least 10 days before engaging in any strike, picketing, or other concerted refusal to work. Moreover, under Section 8(g), the notice must specify the date and time that the strike will begin, and once given it can be extended only by the parties’ written

agreement. Section 8(g) was the result of Congress's careful balancing of the interests of both health care employers and employees.

Under Section 8(g)'s rubric, unions are given the opportunity to establish the date and time for a strike that is most advantageous; health care employers are provided the degree of certainty in the date and duration of the strike necessary to plan for continuity of care. The penalty for failing to comply with the notice requirements set forth in Section 8(g) is severe: any organized striker who does not comply "shall lose his status as an employee of the employer." 29 U.S.C. § 158(d). *NLRB v. Washington Heights-W. Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1246 (2d Cir. 1990).

As the Senate report on the health care amendments shows, the notice requirement in Section 8(g) was intended to give health care employers "sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care." Senate Comm. on Labor and Public Welfare, S. Rep. No. 93-766, at 4 (1974), *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, at 11 (1974). But at the same time, the Senate report cautioned that "the public interest demands that employees of health care institutions be accorded the same

type of treatment under the law as other employees in our society, and that the notice not be utilized to deprive employees of their statutory rights.” *Id.*

Thus, while employees in the health care field have the same right to strike as other employees, the Section 8(g) notice provision gives health care employers extra time to arrange for uninterrupted client care. *See District 1199, Nat’l Union of Hosp. & Healthcare Emps.*, 232 NLRB 443, 445 (1977), *enforced*, 582 F.2d 1275 (3d Cir. 1978) (table); *Walker Methodist Residence & Health Care Ctr., Inc.*, 227 NLRB 1630, 1631 (1977). Such notice allows the employer to assess the extent to which normal operations may be disrupted. *See Retail Clerks Union Local 727*, 244 NLRB 586, 587 (1979). In that manner, Congress balanced the right of health care workers to engage in a strike with a health care employer’s need to maintain stability in its operations. *Washington Heights*, 897 F.2d at 1247.

2. The Board reasonably determined that allowing Alaris to delay reinstatement of unfair-labor-practice strikers would be contrary to the balance already struck by Congress

There is no dispute that the Union complied with the notice requirements of Section 8(g). Indeed, the Union’s notices specified that each strike would be limited to three days and provided the exact start and stop times for those strikes. (CH 2121, BE 878, RP 791, HV 1140.) Despite receiving the statutory notice Congress designed to allow stability in operations, Alaris nevertheless failed to

immediately reinstate all the returning strikers. Alaris now claims the Board erred by failing to grant it an “exception” in order “to deny immediate reinstatement of strikers based on staffing agency contracts, where those contracts were procured in order to ensure continuity of patient care during a strike.” (Br. 8.) The Board properly declined to create such an exception.

As discussed above, Congress has already provided an “exception” for health care facilities when their employees strike. It created that exception in Section 8(g) by requiring the 10-day strike notice—a requirement that applies only to strikes against health care facilities and fully balances the competing interests of health care employers and their employees. 29 U.S.C. §158(g).

As the Board explained, “[p]ermitting health care employers to deny immediate reinstatement to unfair-labor-practice strikers would place an additional and significant burden on health care employees’ right to strike beyond that deemed appropriate by Congress. This, the Board is not free to do.” (CH 2857.) A review of the legislative history and case law affirms the Board’s restrained approach.

Soon after the amendments passed, the Board clarified that their purpose “was to extend the protection of the Act to employees of nonprofit health care institutions,” but cautioned that they should “not be read to reduce the preexisting

rights of health care employees unless explicit language mandates that result.”

Walker Methodist, 227 NLRB at 1632. The Board’s view is confirmed by the comments of Senator Harrison A. Williams, Chairman of the Senate Committee on Labor and Public Welfare, who noted in the Conference Report on the amendments that Congress “decided to treat the health care industry uniquely in certain respects. It decided to go so far, and no more” and cautioned the Board not to “substitute its will for that of the Congress.” Senate Comm. on Labor and Public Welfare, S. Conf. Rep. 93-988 (1974), *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, at 364 (1974).

In addition, case law fully supports the Board’s refusal to expand Section 8(g) beyond what Congress intended. The D.C. Circuit has warned that the Board is “not free to draw the line elsewhere even in a well-intentioned belief that broader protection of the public interest in health care outweighs the resulting imposition on employees.” *Laborers Local 1057 v. NLRB*, 567 F.2d 1006, 1015 (D.C. Cir. 1977). The Second Circuit has agreed, holding that even if picketing by health care workers “could cause disruption in the ability of a health care facility to deliver health care,” the response of courts is limited to “what Congress decreed in

its effort to balance competing interests. If the balance is imperfect, the Board should petition Congress to fix it.” *Civil Serv. Employees Ass’n, Local 1000 v. NLRB*, 569 F.3d 88, 95 (2d Cir. 2009). With these cautionary principles in mind, the Board properly determined that it had no discretion to grant Alaris an exception that would allow it to delay the reinstatement of unfair-labor-practice strikers. (CH 2857.)

Alaris’s arguments do not overcome Congress’s and the courts’ admonitions to the Board. For instance, in arguing that the Board allows health care employers to poll employees before a strike, Alaris cites *Continental Manor Nursing Home*, 233 NLRB 665, 676 (1977). (Br. 12-13.) But Alaris fails to acknowledge that *Continental* merely applied existing law regarding polling to health care facilities in order to achieve “[p]arity of treatment with other types of employees.” *Id.* After reviewing the legislative history, the Board concluded that “the same safeguards against coercion applicable to other circumstances involving permissible inquiry should be extended” to health care employees. *Id.* Applying those “minimal standards heretofore established to lessen the inherent coercive effect of permissible interrogation and polling,” the Board held that the employer (like Alaris here) violated the Act by coercively polling its employees. *Id.* See also *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1016 (2006) (health care

employer violated the Act by coercively interrogating employees about their plans to strike without giving the required assurances against reprisals). Moreover, Alaris's claims overlook *Holyoke Visiting Nurses Association*, where the Board expressly rejected a health care employer's demand that the "strict safeguards" provided to employees being interrogated about their plans to strike be "relaxed" for health care employers. 313 NLRB 1040, 1049 (1994).⁹

In sum, Alaris claims that "notice alone cannot prevent disruptions in patient care." (Br. 12.) It wants, in addition to the notice requirement mandated by Congress in Section 8(g) of the Act, the ability to treat health care employees engaged in an unfair-labor-practice strike as economic strikers, essentially stripping them of longstanding protections afforded to unfair-labor-practice strikers simply because they work in health care. (Br. 22.) But as the Board correctly

⁹ Alaris's reliance (Br. 15-16) on unit determinations in the health care context similarly falls short. In the 1974 amendments, Congress explicitly admonished the Board to give "due consideration . . . to preventing proliferation of bargaining units in the health care industry." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 615-16 (1991) (quoting S. Rep. No. 93-766, at 5 (1974), H.R. Rep. No. 93-1051, at 6-7 (1974)). Thus, again, the Board was responding to Congress's mandate. In any event, the Board's health care regulation, which specifies the appropriate bargaining units for health care facilities, applies only to acute care facilities such as hospitals, not nursing homes like Alaris. *See San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1185 n.4 (D.C. Cir. 2012).

found, Congress has already balanced the competing interests of health care employers and their employees, and the Board is not free to overturn that balance. Accordingly, Alaris violated the Act by denying the former unfair-labor-practice strikers their right to immediate and full reinstatement.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Orders in full and deny Alaris's cross-petitions for review.

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December 2019

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner/Cross-Respondent)	
)	
and)	
)	
1199 SEIU UNITED HEALTHCARE WORKERS EAST)	
)	
Intervenor)	
)	
v.)	Nos. 19-1782, 19-1794,
)	19-1795, 19-1796,
ALARIS HEALTH AT CASTLE HILL,)	19-1993, 19-1994,
ALARIS HEALTH AT ROCHELLE PARK,)	19-1995 & 19-1996
ALARIS HEALTH AT BOULEVARD EAST, AND)	
ALARIS HEALTH AT HARBORVIEW)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Kellie Isbell certifies that she is a member in good standing of the State Bar of Maryland. She is not required to be a member of this Court’s bar, as she is representing the federal government in this case.

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Dated at Washington, DC
this 13th day of December 2019

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Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,691 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the

Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 13th day of December 2019

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)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I certify that on December 13, 2019, I electronically filed the foregoing Motion with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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