

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

~~received by the Board's Office of the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570, on or before~~
October 2, 2009.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

THE IMPERIAL BUFFET & RESTAURANT, INC. D/B/A
MAJESTIC RESTAURANT & BUFFET
and
MAJESTIC BUFFET, INC.
and
NEW MAJESTIC, INC.
and
MING XING CHEN, AN INDIVIDUAL

Case 22-CA-27468

Marguerite R. Greenfield, Esq., of Newark, New Jersey
for the General Counsel

Leslie A. Lajewski, Esq., and Steven Luckner,
Esq., (Coughlin Duffy, Inc.), of Morristown
NJ, for the Respondent Imperial Buffet

John Peirano, Esq., and Kimberly A. Capadana,
Esq., (McElroy, Deutsch, Mulvaney &
Carpenter, LLP) of Morristown, NJ for
Respondent Majestic Buffet

Alan I. Model, Esq., (Littler Mendelson, PC) of Newark,
NJ, for Respondent New Majestic

Carmela Huang, Esq., and Tosh Anderson, Esq., (Urban
Justice Center) of New York, NY, and Darnley
D. Stewart (Giskin, Solotaroff, Anderson,
& Stewart) of New York, NY, for the Charging
Party, Ming Xing Chen.

SUPPLEMENTAL DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge: On June 29, 2006¹, Ming Xing Chen, hereinafter called the Charging Party or Chen, filed a charge in Case No. 22-CA-27468, alleging that The Imperial Buffet Restaurant, Inc. d/b/a Majestic Restaurant and Buffet, hereinafter called Respondent Imperial violated Section 8(a)(1) of the Act. Thereafter, on October 31, 2006, the Region issued a complaint and notice of hearing, alleging that Respondent Imperial violated Section 8(a)(1) of the Act, by refusing to reinstate Chen,² Fong Tsai, herein called Tsai, and Hua Ying Tan, herein called Tan, who had previously walked off

¹ All dates hereinafter are in 2006 unless otherwise indicated.

² Chen also filed a first amended charge on August 14, 2006.

the job in protest about wages, hours and working conditions, and had made unconditional offers to return to work in mid-January 2006. The Complaint also alleged that Respondent Imperial since on or about July 21, 2006 conditioned the reinstatement of Chen, Tsai and Tan on the withdrawal of the unfair labor practice charge filed in this case, and threatened its employees with unspecified reprisals if they would not sign a statement of support of Respondent Imperial's position in this case, also in violation of Section 8(a)(1) of the Act.

The Complaint alleged that David Ho a/k/a David Yeung (David Ho) and Jane Ho a/k/a Jane Yeung (Jane Ho) were owners/supervisors and Paul Huang a/k/a Song Bo Huang (Huang) was a manager, and all three of these individuals were supervisors of Respondent Imperial within the meaning of Section 2 (11) of the Act and agents of Respondent Imperial within the meaning of Section 2 (13) of the Act.

On January 30, 2007, a Hearing was held at the Regional Office before ALJ Joel P. Biblowitz. Respondent Imperial did not appear at the hearing. Since Respondent Imperial did not file an answer to the above complaint, despite being given additional time to file such an answer, Counsel for General Counsel moved for a default judgment, which Judge Biblowitz granted.

On February 21, 2007, Judge Biblowitz issued a Decision and Recommended Order, reflecting these facts, and made findings in accord with the Complaint. In his order, he recommended that Respondent Imperial reinstate Chen, Tsai and Tan to their former positions of employment, and make them whole for any loss of earnings or other benefits that they suffered as a result of the refusal to reinstate them on or about January 15, 2006.

No exceptions were filed to the Judge's decision. Accordingly, on March 30, 2007, the Board issued an order adopting the findings and conclusions of the Judge, and ordered that Respondent Imperial, its officers, agents, and representatives, shall take the action set forth in the recommended order of the Administrative Law Judge.

On January 31, 2008, Region 22 issued a Compliance Specification and Notice of Hearing, which *inter alia* alleged that Majestic Buffet, Inc., herein called Respondent Majestic and New Majestic Inc., herein called Respondent New Majestic, were successors to Respondent Imperial, and responsible to remedy the unfair labor practices committed by Respondent Imperial. The specification was subsequently amended on March 10 and 11, 2008.

The trail with respect to the allegations in the specification was conducted before me over a period of 21 days, between March 10 and September 12, 2008.

Briefs have been filed by all parties,³ and have been carefully considered.

Based upon the entire record, including my observation of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

³ Attached to the brief of General Counsel was a post-hearing corrected backpay calculation concerning the calculations, reflecting testimony in the record. I shall receive the Amendment, marked as Attachments A, B, and C into the record.

I. Due Process and Successor Issues

A. Background

5 As I have detailed above, the Board Order, underlying the Compliance Specification herein was based upon a Default Judgment issued by the ALJ, due to Respondent Imperial's failure to file an answer. During the course of this proceeding, Respondents Majestic and New Majestic raised a due process issue based in part on sections of the NLRB Case Handling Manual. Said Manual contains the following sections:

10 Section 10264.3 provides:

- 15 (a) Derivative Liability. Whenever the Region learns that unnamed parties (such as an alter ego, successor individual, or trustee in bankruptcy) should be alleged in the complaint as derivatively liable for remedying the alleged unfair labor practices, an amendment to the charge should be sought to reflect derivative liability and the complaint should so allege.

20 In addition, Section 10054.2 states:

- 25 (c) Identification of Other Parties and Derivative Liability. The Board agent should also explore with the charging party whether any entities other than those already named in the charge may be liable to remedy the alleged unfair labor practices. Thus, in certain circumstances where an unnamed party, such as an alter ego, successor, partner, individual, or trustee in bankruptcy, may be derivatively liable for remedying the alleged unfair labor practices, amendment of the charge should be sought to reflect such party as derivatively liable.

30 Further, Section 10274.4 provides:

Parties Derivatively Liable for Remedy.

35 When events subsequent to the issue of complaint disclose the existence of an alter ego, successor, individual, trustee in bankruptcy, or other party which should be alleged as derivatively liable for remedying the alleged unfair labor practice, the complaint (and charge where appropriate) should be amended to allege such derivative liability....

45 Respondents Majestic and New Majestic contend that General Counsel was aware of the alleged derivative liability status of these entities, prior to the hearing in the underlying case, wherein Respondent Imperial failed to file an answer, resulting in a default judgment. They argue that the failure of the General Counsel to notify them of the trial and or to amend the initial complaint or obtain an amended charge, deprived these Respondents of the opportunity to file an answer and or to litigate the merits of the unfair labor practices found. Thus they contend that their due process rights were violated.

50 In view of these concerns, I permitted the relitigation of the facts which formed the basis

for the underlying complaint. I did so with the caveat that I was not certain that it was permissible for me to make findings contrary to the prior Board decision here. I clearly stated that I would decide in my decision, whether based on all the circumstances herein, whether it was appropriate for me to do so.

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Accordingly, the facts below relating to the underlying charge and complaint were litigated which facts were intertwined with the relevant facts, concerning the issue of knowledge of the alleged predecessors' unfair labor practices by Respondent Majestic and New Majestic, which is a crucial factor in determining successor liability. *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

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B. Respondent Imperial's Operations

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Respondent Imperial operated a restaurant located at 29 Route 23 South in Wayne, New Jersey, under the name of Majestic Buffet, which was primarily a buffet Chinese restaurant, although on occasion some customers would order specific dishes from the menu.

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Che Lee, known as Jack Lee, began the operation of the restaurant in 2003. He was the sole shareholder, sole director and president of the company. To finance the restaurant, Lee borrowed \$100,000 from the Han Ying Li (Li), who was the mother-in-law of Lee's sister, Duen Lee, also known as Joanne Lee. Unable to repay the loan, Lee transferred the stock to Li on January 1, 2005. Thereafter Lee continued to operate the business on behalf of Li, who resided at all material times in China. Lee ran the business with the help of his extended family, Duen (Joanne) Lee and Chi Ying, Jack Lee's wife, known as Vivian Lee. Jack Lee, his wife and sister worked primarily on weekdays. On the weekends, the restaurant was managed by David (Hing) Ho and Jane Ho. Jane Ho, was formerly married to David Ho, although they still lived together, even though they were divorced. There is no dispute that the Hos were managers and supervisors, and had authority to hire and fire employees. Indeed the record reflects that the employees believed that the owners of the restaurant were David and Jane Ho and that in fact David Ho was introduced to employees as the owner of the business. Further, the employees referred to David as the "boss."

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On Respondent Imperial's payroll, Jane and David Ho are listed as managers, and Duen Lee as management. Duen Lee also signed a restaurant license on behalf of Respondent Imperial. David and Jane Ho, as well as Jack Lee had signatory authority for Respondent Imperial's on bank account. David Ho was listed on Respondent Imperial's restaurant license application as the emergency contact for the restaurant.

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Paul Huang, as noted was found in the underlying proceeding to be a manager and supervisor of Respondent Imperial. Huang was listed on Respondent Imperial's payroll as a captain. According to Jack Lee, Huang's responsibilities as a captain were to teach the wait staff details of service and to make sure the banquets run smoothly. Huang wore a suit and tie to work, while the waiters wore white shirts and dark pants.

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Tsai testified that Huang watched over the wait staff, corrected errors of employees and errors on the computer and could change prices or give discounts.

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Huang had left Respondent Imperial's employment for a period of time, and returned at some point in 2005. At that time, when Huang returned to work, David Ho said to Huang, in the presence of the wait staff, "Welcome back as manager."

5 In October or November 2005, Tsai observed Huang and an employee named Sissy having an argument. Several hours later, at the end of the day, Tsai observed Sissy and Huang again conversing. Immediately, after the discussion, Sissy informed Tsai that Huang terminated Sissy because she and Huang had an argument earlier in the day. Tsai did not recall if either David or Jane Ho were present at the restaurant on that day, although Tsai did recall that the Hos were not there when Sissy and Huang had their argument.

10 Tan found out about the job at Respondent Imperial from an acquaintance of hers (Au Guo), who also knew Huang. Tan telephoned Huang, and told him that Guo had suggested she call about a job. Huang asked Tan about her experience and informed her that she would make \$2500 per month at the restaurant. Huang informed Tan that the restaurant was located in New Jersey, and she should report to work on Friday (a few days after the conversation). Huang instructed Tan that Respondent Imperial provided a van from Chinatown in New York City to transport her to the restaurant.

15 Tan, as instructed met the van in Chinatown, and was driven to the Respondent Imperial's premises. The van's driver introduced Tan to David Ho and told Tan that David Ho was the owner. Tan informed Ho that she was a new worker, who had been referred over here by Huang. Ho asked if she worked at a buffet restaurant. She replied no. He asked if she knew how to work at a Chinese restaurant, and she replied yes. At that point either David or Jane Ho gave Tan a uniform, and she commenced work. There was no discussion between the Hos and Tan about wages, tips or hours.

20 Tang Ho is the son of David and step-son of Jane Ho. While he was never an employee of Respondent Imperial, he would frequently "help out" at the restaurant by working as a cashier, running errands and helping out if there was a party or banquet. During the summer of 2005, Tang Ho spent a lot of time at the restaurant learning to work in the kitchen, because he and his brother Tom were preparing to open their own restaurant.

30 C. The Walk Out

Respondent Imperial paid no wages to its wait staff. Their income was derived entirely from tips. Additionally, the employees were required to pay to Respondent Imperial a portion of their tips every day, allegedly to be distributed to "busboys."⁴

35 Further Respondent Imperial had a practice of fining employees various sums of money for mistakes or errors committed by the wait staff. One of the errors where fines were issued, were violations of the rule that no food can be left on a plate. It was the responsibility of the wait staff to remove all food from plates before the plates are turned over to the dishwashers.

40 On Friday evening, December 30, 2005, at about 10:00 p.m. in the evening, Chen failed to remove a shrimp from a plate of one of his customers. David Ho observed this error, and told Chen that he would be fined \$10. Ho added that everybody else will also be fined \$10 because of this error. Chen replied that the restaurant was very busy and Ho's decision to fine him and everyone else was "not okay."

Later on that evening, the wait staff was eating dinner together, and Chen informed

50 ⁴ Employees Tan, Tsai and Chen testified that Respondent Imperial did not employ any busboys.

5 them of Ho's decision to fine him as well as the other employees. At that point, Jane Ho approached the employees, and said that Chen, as well as every other wait staff employee, would be fined \$10. Several employees responded that this was unfair, and that it was very busy that evening. Jane Ho replied that the fines will stand, and added that the next time it happens, everybody will be fined \$30.

10 After Jane Ho walked away, the employees discussed their dissatisfaction with the decision to fine everyone. The employees said among themselves that they were not going to let Ho fine them for Chen's error. David Ho then came over to the table. He was angry and raised his voice. He repeated that everybody will be fined. He then pointed to Tan, Tsai and Chen, and said that these three had "sabotaged" the company rule and taught newcomers bad things. He added whoever accepts the company rule (i.e. fines) can continue to work here. If anyone does not accept the rule, that "you could get out from here."

15 After David Ho left the table, the employees discussed among themselves what to do. They decided that the fines were unfair, and mentioned that next time there is a mistake; everybody will be fined \$30. They also complained about the fact that they did not earn a base salary. Therefore, the employees decided to walk out. They packed their belongings and walked out. In addition to Tan, Tsai and Chen, approximately five or six other wait staff walked
20 out, including two part-time employees.

25 Paul Huang followed the employees into the parking lot. He urged the employees to return to work and not to get so excited. Several employees responded that the boss was "too much," and that they wanted an apology from David Ho. Huang replied that David Ho "is like that," but the employees should come back to work, and they could "solve" their concerns.

30 The employees discussed Huang's assertions, and decided to continue the walkout. Later on that evening, Jane Ho called Tsai on his cell phone. She said "why don't you guys just come back, you know this is not big deal. Why do you guys make a big deal out of it?" Tsai answered "No, this is a big deal." Jane Ho added that the next day, New Year's Eve, would be very busy and again asked employees to return. Tsai answered that the employees would discuss it. Jane Ho also called Tan on her cell phone. Jane Ho asked her to come to work the next day, because it will be very busy. Jane Ho added that the employees has been working together for a long time and "it's been fine." Tan replied that she would have to discuss it with
35 the other people.

40 The following morning, the employees met at a restaurant in Chinatown and decided to return to work, but to demand that Respondent Imperial make some changes in company rules. Prior to returning to the restaurant, Chen telephoned Huang and asked Huang for "suggestions" on what the employees should do. Huang informed Chen that if the employees returned to work, some of the employees would be fired, after the restaurant was not so busy. Chen reported this comment to the employees, and they nonetheless decided to return to work and to present their demands to Respondent Imperial.

45 At around noon, the nine employees returned to the restaurant. The only wait staff present were 3 or 4 part-time employees. Jane and David Ho were present along with Jack Lee, Vivian Lee, Duen Lee, and David Ho's three children, including Tang Ho. The employees met with various managers and owners, including Paul Huang and David and Jane Ho, in separate rooms. The employees, primarily through Tsai and Chen presented a number of
50 demands in order to return to work. The demands included payment of wages, elimination of the practice of payments by employees every day to management as well as fines for errors, and that the wait staff be supervised directly by Paul Huang and not by David Ho. David Ho

responded to the employees that Respondent Imperial would agree that the wait staff would be directly supervised by Huang, but he rejected the other demands made by the employees. The employees left the restaurant.

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D. The Offer to Return to Work

Over the next several days, all of the employees who walked out expect for Tan, Tsai and Chen returned to work. After finding out that the other six employees had returned, Tan Tsai and Chen agreed among themselves, that if any one of them were offered reinstatement by Respondent Imperial, each would represent the other two and request that they return together. In mid-January, Tan received a phone call from Huang. Huang asked Tan if she would like to return to work. Huang mentioned that most of the other employees, who had walked out, had already returned. Tan replied yes that she wished to return, but also asked if Tsai and Chen could also be allowed to return. Huang responded that he would have to check with the boss's wife first. A few days later, Huang had not called Tan, so she called him. Tan asked if the employees could return to work. Huang responded that the boss's wife did not want the employees to come back because they were "troublemakers."⁵

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E. The Charge

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On June 26, 2006, Wing Lam, the Director of the Chinese Staff & Workers' Association (CSWA), prepared an unfair labor practice charge at the Association's office, after consulting with Chen and Tsai. Lam obtained the signature of Chen on the charge as Charging Party. The charge alleged that since on or about December 29, 2005, Respondent Imperial discharged or constructively discharged nine employees including Chen, Tan and Tsai because they engaged in protected concerted activity, and that since on or about February 2006, Respondent Imperial refused to rehire Chen, Tsai and Tan, after they made an unconditional offer to return to work, because they were the most vocal against the working conditions imposed by the employer and because of their other protected concerted activities. Lam delivered copies of the charges to Region 2.⁶ At that time, the information officer accepted the charge and wrote a memo summarizing the facts as related by Lam. The memo reflects that the charge would be faxed to Region 22 for filing, since the employer was located in New Jersey. The charge was not faxed to Region 22, until June 29, 2006. It was not served by Region 22 until July 3, 2006.

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However, Lam instructed Chen to personally serve a copy of the charges that had been prepared and signed on an official of Respondent Imperial.⁷ Thus, Chen accompanied by Tsai

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⁵ My findings concerning this conversation is based upon the undenied and credible testimony of Tan. Huang did not testify in this proceeding. Although Jane Ho did testify, it was as a witness called by General Counsel. She was not asked by General Counsel or by any of the Respondents about this conversation. Thus Jane Ho did not deny that she informed Huang, in response to a request to reinstate all three discriminates, that she did not want them back because they were "troublemakers."

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⁶ Chen resided in New York at the time.

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⁷ While the record does not reflect why Lam instructed Chen to personally serve the document, it appears likely that 10(b) considerations motivated that decision. Thus the charge alleged that employees were discharged or constructively discharged on June 29. Thus the 10(b) period was close to expiring as of June 26. While the Region did not allege in the complaint that employees were discharged or constructively discharged on June 29, the Association would not have been aware of that decision on June 26, and in fact no decision had

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visited the restaurant on June 26. They encountered Jane Ho and Paul Huang. Chen handed Ho a copy of the charge. Ho asked Chen “What’s this?” Chen replied that this is the NLRB charge.⁸

5 Jane Ho informed David Ho immediately that she had received a copy of an NLRB charge against Respondent Imperial. Jane Ho also notified Jack Lee about the charge at that time.

10 On June 28, 2006, Jane Ho accompanied her stepson Tang Ho to the Wachovia Bank, to open an account under the name Majestic Buffet. In the application, it lists Tang Ho as an officer, and Jane Ho as manager.

F. The Sale to Respondent Majestic

15 On July 1, 2006, a bill of sale was executed by Han Ying Li, as chairman and owner, to sell the restaurant to Respondent Majestic for \$75,000.⁹ Tang Ho, on behalf of Respondent Majestic, signed a promissory note, dated July 1, acknowledging Respondent Majestic’s debt to Respondent Imperial, and promised to pay the \$75,000 due on September 1, 2006. Tang Ho did not contribute any money to the sale. He promised to pay the \$75,000 to Respondent
20 Imperial from the prospective profits of the business.

The first such payment was made to Respondent Imperial by a check signed by Tang Ho from the Wachovia Bank (acct. # ending 8763). This was the account opened on June 28, as detailed above, with Tang Ho and Jane Ho as signers on the account.¹⁰

25 Although this check was dated July 1, Tang Ho requested that Lee to hold the check until the end of the month. The check was charged to Respondent Majestic’s account on July 25.

30 On July 20, additional bank signature cards were executed at the Wachovia Bank.¹¹ On the signature cards, Tang Ho signed as an officer, and Jane Ho, Huang, Duen Lee, and Chi Ying-Cheng, signed and were listed as managers.

35 On July 19, Respondent Majestic opened an additional account at the Wachovia Bank (acct. # 7891, which was its payroll account). Signatories on this account were Tang Ho, listed as an officer, and Jane Ho, Duen Lee, and Chi Ying-Cheng as managers.

40 On August 9, additional signature cards for both accounts were signed, stating that they “supersede all signature cards.” These cards were both signed by Tang Ho as an officer, and by Paul Huang as manager.

been made concerning this allegation in the charge.

45 ⁸ My findings concerning the delivery of the charge is based on the mutually corroborative and credible testimony of Chen and Tsai. Indeed Jane Ho admitted that she received a copy of the charge from Chen in late June 2006.

⁹ More particularly, the sale included the stock in trade, fixtures, equipment, good will, trade name, license, lease and all rights under any contracts for vending machines, public telephones or any other rental or use of equipment at the said premises.

50 ¹⁰ As noted above, Jane was listed as manager on this bank account card.

¹¹ According to Tang Ho, this account was Respondent Majestic’s spending account.

On August 21, a \$20,000 check signed by Huang, on behalf of Respondent Majestic was given to Respondent Imperial and charged to Respondent Majestic's account on August 22.

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The final check paid to Respondent Imperial, dated August 31, was also signed by Huang.

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The bill of sale also provides that the seller agrees as follows: "There are no liens, mortgages, security interests, judgments, levies, municipal, state, federal unemployment compensation or Social Security taxes unpaid, nor any persons or corporations who have any claim of any nature whatsoever against the said business and goods and chattels and that the same are free and clear."

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On June 28 (before the sale), Huang telephoned Chen and asked what the employees wanted. He suggested that the employees and Respondent Imperial could sit down and talk about any disputes. Chen told Huang to have David Ho call him. David Ho did so, and proposed a meeting to talk. Chen asked Ho to call Tsai on that same day (June 28). David Ho called Tsai. He asked Tsai why the employees were suing Respondent Imperial and "why are they making a big thing out of this." Ho said that anything is negotiable and proposed a meeting. Tsai replied that he would talk to Chen and Tan, and he would call back.

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On July 2 (after the sale), Jane and David Ho visited Tsai's house and asked Tsai's aunt where Tsai was. David Ho told Tsai's aunt that he wanted to invite Tsai back to work.

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On July 3, Tsai called David Ho on the phone. Tsai told Ho that the employees (Chen, Tan and Tsai) wanted to return to work. David reported that he needed some time to arrange it. Tsai answered, "Okay, just give me a call when you are ready."

On July 4, David Ho informed Tsai that the employees could come back any time. Tsai reported that the employees would return on July 14. On July 13, David Ho called Tsai and told him that before the employees come back, he wanted a meeting in Chinatown. On that same day, Tsai, after consulting with the others, called Ho back and said that the employees could not meet that day, and suggested that they return to work on July 14 as agreed, and that they could talk there. David Ho said "No, we have to talk first, before you guys come back." They agreed to meet on July 21, at a restaurant in Chinatown. Tsai and Chen met with David Ho and Paul Huang. Tan was unable to be present, but Tsai and Chen were speaking on her behalf. David Ho informed the employees that they could not return to work, unless they agreed to withdraw the NLRB charges. Ho handed Chen a document, purportedly withdrawing the charge, and told Chen that it must be signed, before the employees can return to work. Ho added that, "There is no way that I will let somebody who is suing me to return to work." Ho continued that he would then consider the employees to be an "enemy," and he would not let "an enemy work in my restaurant." Tsai informed Ho that in addition to reinstatement, the employees are entitled to compensation for the time that they were out of work, but that issue can be negotiated after the employees return to work. Ho insisted, however that the charges must be withdrawn, before the employees can return to work. Ho then asked how much the employees are seeking for compensation. Tsai answered approximately \$20,000 each and again proposed that the employees return to work, and negotiate the amount of compensation later.

Ho was still not agreeable to Tsai's proposal, but offered to pay the employees for one week, since he had previously agreed to reinstate them on July 14. The employees rejected this

proposal, stating that the employees were out of work from the beginning of the year. Ho then made another proposal. He suggested that he would permit the employees to work additional hours, so that they could make more overtime. Tsai and Chen replied that they were open to that kind of idea, and suggested that Ho come up with a detailed proposal and the employees would consider it. Ho informed Tsai and Chen that he would do so and call them back.
5 However, Ho did not call back and there were no further discussions between the parties.

During this conversation, neither Ho nor Huang mentioned to Tsai and Chen that the restaurant had been sold, and made no reference to Tang Ho as being the owner of the business, or indeed any mention of Tang Ho whatsoever.¹²
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According to David Ho, he did not discuss his intention to offer jobs to the three employees with his son Tang Ho, before his conversation with the employees, or his visit to Tsai's house to offer Tsai his job back. However, after the above described meeting with the employees, David Ho contends that he asked his son if it would be okay if these experienced former employees could come back to work. Tang Ho allegedly replied "Fine. It wasn't his problem. It would be okay." Tang Ho furnished no testimony on this subject.
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Tang Ho did testify however, that he never received a copy of the NLRB charge against Imperial, but he didn't deny that he become aware of such charges. Tang Ho also didn't deny that he became aware that Tan, Tsai and Chen had requested to return to work at the restaurant, and that this request had been denied by any Respondent.¹³
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The restaurant was owned by Respondent Majestic from July 1, 2006 through September 11, 2006. After Respondent Majestic began operating the facility, Tang Ho made no substantial changes, and continued operations without interruption, There was no change in the building, furniture, fixtures or menu. Most of the employees appeared on the payroll of both employers. Tang Ho testified that the changes that he made were "mostly paperwork changes," which included using a payroll company and issuing employee handbooks. Respondent Majestic paid the employees the minimum wage of \$2.13 per hour and did not require staff to pay \$15 or \$20 per day from their tips back to management. According to Tang Ho, he did not discuss with Jack Lee how Respondent Imperial was paying its employees.
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Both David and Jane Ho "helped out" at Respondent Majestic for several weekends, after their son/step-son had purchased the business. Jane Ho assisted with vendors and invoices and handled the cash register. As noted above, Jane Ho accompanied her stepson to open bank accounts prior to the purchase, and executed signature cards listing her as "manager" as her title.
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David Ho admits that he worked at the Respondent Majestic for the first couple of weekends after his son become the owner. As noted above, David Ho negotiated with the
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¹² My findings concerning this meeting are based on the mutually corroborative and creditable testimony of Chen and Tsai. While David Ho denied that he requested that the employees withdraw their charge in order to return to work, he did admit that he said to the employees, "if you want to come back to work, it's not necessary for you to file the charge." Huang did not testify.
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¹³ I note in this regard, that when the discussions were held between David Ho and the employees in July concerning reinstatement and back pay, Respondent Majestic was the owner of the facility. Thus it is apparent that David Ho was speaking to the employees on behalf of both Respondent Imperial and Respondent Majestic.
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employees about returning to work at Respondent Majestic, before he discussed it with his son. According to David Ho, "I decided to let them come back."

5 Tang Ho also asked Jack Lee's wife, Vivian,¹⁴ to help out with vendors and review paperwork and invoices for Respondent Majestic. Jack Lee's sister, Duen Lee, who had been a member of the Respondent Imperial's Board of Directors and signatory to its bank accounts, was also a signatory on Respondent Majestic's bank account as of July 31, 2006, and was listed thereon as a manager.

10 Paul (Song Bo) Huang, who was as noted, found to be manager and supervisor of Respondent Imperial in the earlier case, continued to be employed by Respondent Majestic in that position. In fact, Tang Ho continued to be employed as manager of the Smokehouse Restaurant in Linden, New Jersey, which was owned by Tang's brother, while he (Tang Ho) was the "owner" of Respondent Majestic. Tang Ho worked 50 hours per week at the
15 Smokehouse Restaurant and would appear at Respondent Majestic's facility only on weekends for a couple of hours each week. During this period of time, Tang Ho left the running of the restaurant to Huang. Huang was listed as manager of Respondent Majestic's payroll, a signatory on its bank forms, and as noted above, Huang signed the checks repaying promissory notes for the purchase of the restaurant.

20 During the period of July 1, 2006 through September 11, 2006, Respondent Majestic reported gross receipts on its tax return of \$329,438. During the same period of time, Respondent Majestic purchased goods valued in excess of \$5,000 directly from suppliers located outside the state of New Jersey. Respondent Imperial reported gross income of
25 \$1,617,970 for the year 2005.

G. The Sale to Respondent New Majestic

30 Ki Sang Wong, herein called Wong, was employed by Respondent Imperial as a chef, for eight months in 2004. At the end of 2004, he left Respondent Imperial to work at another restaurant (East Buffet) for about a month. Wong then returned in early 2005, and worked there for three months, after which he returned to work at East Buffet.

35 During the time that Wong worked for Respondent Imperial, he knew Huang, who worked there for a least part of the time. Wong also had worked with Huang at another restaurant (Ocean Palace), in 2002 and 2003. Wong also worked with and knew the discriminatees herein (Tan, Tsai and Chen) while at Respondent Imperial.

40 In August of 2006, Wong went to eat at the restaurant (which was operated by Respondent Majestic). Wong discussed purchasing the restaurant with Tang Ho. Tang Ho told Wong that running the restaurant was very different from what Tang Ho was used to, since Tang Ho had not been used to operating a Chinese restaurant. Ho and Wong had several subsequent conversations, wherein they discussed the purchase and the price, and finally a price of \$70,000 was agreed upon.

45 On or about August 24, Wong spoke to Huang at the restaurant. Wong told Huang that he was going to purchase the restaurant, and that he hoped that Huang "would stay to help me." Huang agreed to stay on and work for Wong.

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¹⁴ Her name is Chi Ying-Cheng.

5 Wong borrowed money from his relatives to help him purchase the restaurant. On September 1, Respondent New Majestic and Respondent Majestic entered into an Agreement of Sale and Purchase, signed by Wong and Tang Ho as presidents of their respective corporations. The agreement provided that Respondent New Majestic purchased the assets of the restaurant including, supplies, furniture, and trade name, for the sum of \$70,000. It was also specified that there was an agreement reached with the landlord, to assign the lease to Respondent New Majestic.

10 Paragraph 9 of the Asset Purchase Agreement reads as follows:

9. Seller's Representation

15 Seller represents that there is no litigation, governmental or administrative proceeding, investigation, claim, complaint or accusation, formal or informal, pending either in court or otherwise or before any administrative board, agency, or commission, or any arbitration pending, or are any of the foregoing threatened, relating to Seller, their properties, licenses or business which
20 would prevent Seller from consummation this transaction, nor does Seller know, or any reasonable basis for any such action, arbitration, or governmental proceeding or investigation relative thereto. This paragraph shall survive closing.

25 Paragraph 13 of that document reads:

13. Indemnification By Seller

30 Seller agrees to indemnify and hold harmless the Buyer from and against all debts, liabilities, obligations and commitments of the Seller relating to the business not expressly assumed by Buyer. The Buyer will indemnify the Seller against any claims incurred after closing. This paragraph shall survive closing.

35 On the date of the closing, September 11, Respondent Majestic by Tang Ho extended a bill of sale to Respondent New Majestic, incorporating the terms of the Asset Purchase Agreement, providing for the purchase of the assets of the restaurant for \$70,000. Paul Huang was present at the closing, and signed the checks on behalf of Respondent New Majestic for the purchase of the restaurant.

40 Wong didn't provide any testimony concerning the negotiations of the sale, and did not specifically deny that he was aware of Respondent Imperial's unfair labor practices, or the events concerning them. Wong did testify however that he first found out about the "pending NLRB litigation" in late November 2006, when picketing took place at the restaurant.

45 Tang Ho did testify about the negotiations as I have outlined above. Tang Ho also asserted that during the discussions between himself and Wong concerning the purchase, there was no discussion "of the unfair labor practice proceeding." After Respondent New Majestic began operating the restaurant on September 11, Wong made no major changes in
50 the business. The restaurant continued to operate as a buffet restaurant under the name of "Majestic Buffet." At the same point, undisclosed by the record, Respondent New Majestic added the word "New" to the sign, which had read "Majestic Buffet," when it had been operated

by both Respondent Imperial and Respondent Majestic.

On August 2, 2006, a civil lawsuit was also filed by Chen against Respondent Imperial.

5 On October 31, the Region issued the Complaint and Notice of Hearing described above, alleging that Respondent Imperial violated Section 8 (a)(1) of the Act by refusing to reinstate Chen, Tan and Tsai, by conditioning reinstatement on withdrawal of the charge, filed by Chen, and by threatening employees with reprisals, if they did not sign a statement in support of Respondent Imperial's position.

10 On November 10, the discriminatees attended a large demonstration and press conference in front of the restaurant. The demonstration, which was conducted by Justice Will be Served (JWBS), which is an association of organizations, including the Chinese Staff & Workers' Association, 318 Restaurant Workers Union, and National Mobilization against Sweatshops. The demonstration protested conduct by "Majestic Buffet," and speakers from the
15 protestors asserted over a loudspeaker that the workers had been exploited, that the NLRB had issued a complaint and that all the entities are responsible for the unfair labor practice. A flyer was distributed by the coalition, which related that workers had filed a federal lawsuit against
20 "Majestic Buffet" for minimum wage and overtime violations and that when workers walked out in protest against "Majestic Buffet's illegal policies," that owners resorted to illegal threats and "the owners refused to reinstate the workers." The flyer added that the NLRB filed a complaint against Majestic Buffet for these unfair labor practices and a hearing is set for December 19.

A reporter for the Chinese newspaper *Singtao* spoke to protestors, as well as to Wong.
25 The article published in the paper reflected that Wong told the reporter that it was complying with the labor laws, and was "innocent" concerning the accusations made by the protestors and that the dispute between the former owners and the former employees "should not have anything to do with him." A representative from the CWSA, Li Hwa told the reporter about the lawsuit and the NLRB complaint, and asserted that "no matter who the new or former owners
30 were, they would be responsible for this labor lawsuit of exploiting the employees." Li Hwa also stated that "the fact that Mr. Wong did purchase the business of the "Majestic" means he will bear responsibility for Mr. Yeung's¹⁵ misconduct of exploiting the workers. In the event that the former employees win the lawsuit eventually they shall have the right to return to work."

35 During the demonstration, Chen handed Wong an envelope containing the NLRB complaint, the flyer described above, and other documents related to the dispute. Chen informed Wong that the envelope contained documents from the NLRB "to appear in court." Wong looked at the documents and said to Chen, "I know about that."

40 Wong testified that after he found out about the "litigation" on the day of the demonstration, he discussed the matter with Huang. According to Wong, he asked Huang why "such a thing happened?" Huang allegedly responded that he was not aware of it either. Wong further testified that he "yelled" at Huang concerning the matter, and said if there was such an issue he shouldn't ask me to purchase the restaurant. Huang allegedly replied that he was not
45 aware, "it was not my business."¹⁶ According to Wong, he also told Tang Ho that he (Tang Ho) should have told Wong about the issue. Wong added that if he had known there was such an issue, he would not have purchased the restaurant. Tang Ho allegedly replied that he wasn't

¹⁵ Yeung is David Ho.

50 ¹⁶ Although Huang was still employed by Respondent New Majestic at the time of the trial, he was not called as a witness.

aware of the litigation.¹⁷

On November 30, 2006, Tsai went to the restaurant, along with an individual, Tei Fang, in order to serve a copy of the federal lawsuit on Respondent New Majestic. When Fang and Tsai arrived they spoke to the manager David Yip. Tsai asked Yip where were the two owners, Wong and Huang.¹⁸ Yip replied that Huang and Wong went to Home Depot, and would be back in thirty minutes. Tsai and Fang waited in the parking lot for a half an hour, and Wong and Huang came back. Tsai identified Wong and Huang to Fang, and she delivered a copy of the complaint to Wong.¹⁹ Tsai said hello to Huang and Tsai and Fang left.

On November 13, 2006, Stephen Ploscowe, Esq. of the law firm Fox & Rothschild wrote to Bernard Mintz, attorney for Region 22. The letter requests an extension of time to answer the complaint, because the “decision maker” for Respondent Imperial was in China at the time. The extension of time was granted.

On December 5, Plascowe sent an email to Mintz. It reads as follows:

Bernie: as I explained in our telephone conversation today, I received a letter today from an individual in China named Han Ying Li. Ms. Li identifies herself as the prior owner of the Imperial Buffet & Restaurant, Inc. She indicates that she sold the restaurant because of health problem and that her husband is currently in the hospital with a heart attack. She further states that because of her husband’s medical condition she could not “attend to this matter in a timely fashion.” Further, she states that her corporation no longer operates the restaurant and would be unable to rehire anyone. Based upon the foregoing and my inability to communicate with my potential client, I am requesting a further time to file an answer – now due on December 11, 2206; and, an adjournment of the trial – now scheduled for December 19, 2006. Lastly, as you suggested, I will try to speak to the Chinese Staff & Workers’ Association, Please get back to me on these requests. Thanks. Stephen A. Ploscowe.

Ploscowe followed up this email with a postponement request directed to the Director, which was scheduled at that time to commence on December 19. The trial was consequently adjourned to January 30, 2007.

On December 26, 2006, Mintz sent a letter to Ploscowe, reflecting that despite two extensions of time to answer, Respondent Imperial still had not filed an answer to the Complaint, contrary to the Board’s Rules and Regulations.

The letter advises that the time to file an answer has been extended again until January 2, 2007. It goes on to state that “if an Answer is not received by the close of business on that

¹⁷ Tang Ho gave no testimony about this alleged conversation between Wong and Tang Ho.

¹⁸ While Tsai referred to Huang as one of the two owners, he was not correct, since Wong was the sole “owner” of the restaurant at the time.

¹⁹ It appears that the document handed to Wong was an amended complaint, alleging that Respondent New Majestic was responsible for Respondent Imperial’s FLSA violations and responsible for reinstating the workers.

date, a Motion for Default Judgment will be filed.”

Neither Ploscowe nor anyone representing Respondent Imperial filed an answer by January 2, 2007, or indeed at any other time. On January 30, 2007, the hearing was held before Judge Biblowitz. No one appeared on behalf of Respondent Imperial, and as detailed above, no Answer was filed to the complaint allegations. Consequently, Judge Biblowitz granted General Counsel’s motion for Default Judgment. No testimony was taken at the hearing.

On February 21, 2007, Judge Biblowitz issued his decision finding the facts and conclusions as reflected in the Complaint. No exceptions were filed to the Judge’s decision. Accordingly, on March 30, 2007, the Board issued an Order adopting the findings and conclusions of the Judge, including the recommendation of reinstatement and back pay to Tan, Tsai and Chen.

The Region then commenced a Compliance Investigation, which included the taking of depositions from various representatives of the Respondents.

In September 2007, Tan received a call from an employee who worked at the Majestic Restaurant at the time, named Agua. Agua told Tan that Huang wanted to talk with the employees about the case. Consequently, a meeting was arranged at a restaurant in Chinatown. Present at the meeting were Tsai, Chen, Huang and Agua. Huang began the meeting by saying that we should sit down, be sensitive on both sides and settle the cases.²⁰ Tsai replied to Huang that he should tell David Ho to talk to the employees. Huang replied that it was okay and that he was representing “all of the restaurants.” Huang insisted that the employees provide them with a “bottom line” and a “number” that they could consider. Tsai mentioned a figure but indicated that the amount was negotiable. Tsai told Huang to consider the employees’ offer, talk to the owners, and get back to the employees.

In January 2008, Chen and Tsai met with Jack and Duen Lee and continued settlement negotiations. During these discussions, Tsai told the Lees not to negotiate through Huang, but to talk directly to the employees. The settlement negotiations were not successful.

As noted above, the initial Compliance Specification and Notice of Hearing was issued on January 31, 2008, and it named Respondent Majestic and New Majestic as successors to Respondent Imperial and responsible for remedying the unfair labor practices committed by Respondent Imperial. The specification contained no jurisdictional allegations with respect to any of the Respondents.

Immediately prior to the commencement of the hearing in March 2008, the Region issued an Amended Compliance Specification, which again failed to allege jurisdictional facts. After the Respondent Majestic moved to dismiss against that Respondent, due to the failure to allege jurisdictional facts, General Counsel issued a second Amended Specification, dated March 11, 2008, which alleged jurisdictional facts with respect to all of the Respondents.

II. THE IMMIGRATION STATUS OF THE DISCRIMINATEES

Tan come to the United States in 1999 as a wife of a U.S. citizen. She obtained a temporary green card at that time, as well as a social security card. In 2002, Tan received a

²⁰ Huang was referring to both the NLRB case and the FLSA lawsuit.

permanent green card. Subsequently, she applied for citizenship, and became a citizen in June 2005.

5 In October 2004, Tan found out from a friend of hers who worked at Respondent Imperial that there might be an opening for a waitress. The friend gave Tan Respondent Imperial's phone number, and instructed her to call Huang. Tan did so and Huang asked Tan about her experience and informed her that she could make about \$2500 per month working there. She replied that would be fine. Huang told her to report to work on Friday. Huang also instructed Tan where she could find the van from Chinatown to the restaurant. Huang did not
10 ask whether Tan was authorized to work in this country, or indeed any questions about her immigration status.

15 When Tan reported to work as instructed, the van driver introduced her to David Ho as the "boss." Tan told Ho that she was a new worker and that Huang had told her to come to the restaurant. David Ho asked about Tan's experience, and then gave her a uniform and told her that she should change and start work. Tan was not given any paperwork or documents to fill out on that day. Neither David Ho, nor any official of Respondent Imperial, asked her any questions about her immigration status, or whether she was authorized to work in this country, on that or indeed any other day.

20 Several months later, sometime in January 2005, Jane Ho asked Tan if she would like to report taxes. Tan replied yes. Jane Ho then asked her for some documents including a social security card and a non-driver ID. Tan also provided to Jane Ho her "A" number from her green card. Jane Ho made copies of Tan's social security card and non-driver's ID. Jane
25 Ho then gave Tan an I-9 form to sign. Ho filled out this information on the form, including Tan's social security number, date of birth, name, and her green card number. Tan signed the form and returned it to Jane Ho.²¹

30 The parties have stipulated that both Chen and Tsai were not authorized to work (or lawfully be present) in the United States, from the dates of their hire until the dates of their testimony.

35 Tsai entered the country in January 1999, and obtained a green card at that time, which expired on January 20, 2001. Tsai did not renew that card. At some point, undisclosed by the record, Tsai obtained a driver's license from the State of New Jersey. Tsai renewed that driver's license in October 2003.

40 The process for renewing that license consisted of Tsai filling out and signing a form, and sending it to the Motor Vehicles Commission of New Jersey. The application renewal form contains several questions including "Are you in the country legally?" Tsai checked off the yes box on that form.

45 As a result of submitting this form, Tsai received a driver's license dated October 22, 2003, which expires on November 30, 2007.

Tsai testified that the reason that he checked off the "yes" box on the form, indicating that he was "in this country legally," was because he wasn't sure what his status was since his status had been legal before when his green card was still in effect.

50 ²¹ I note that the I-9 form, which was introduced into evidence was not signed and certified by any representative from Respondent Imperial.

5 Tsai was hired by Respondent Imperial on December 26, 2004. Tsai was referred by an employee who worked at the restaurant, who told Tsai that there was a position available as an assistant manager. Tsai went to the restaurant and spoke with David Ho. Ho explained the job description and the rate of pay, and offered it to Tsai. Tsai agree to "try it out." David Ho did not ask Tsai to fill out any documents, nor ask Tsai about his immigration status.

10 Tsai worked for one day as an assistant manager. He informed David that the job was not suitable for him, because it was too hard to manage 12 or 13 waitresses. He offered Tsai a job as a waiter, starting on December 29, 2004. Tsai agreed and began working on that date. Once again, neither on December 26 nor December 29, 2004, did David Ho or anyone from Respondent Imperial ask Tsai about his immigration status, or ask him to fill out any documents.

15 A month or two later, Jane Ho asked Tsai if he wanted to file taxes. Tsai said yes. Jane Ho asked Tsai if he had any identification or social security card. Tsai gave her his social security card and his driver's license, which he had obtained in 2003, as described above. Jane Ho made copies of these documents and returned them to Tsai. Ho then asked Tsai if he was "documented" and if he had a green card. Tsai replied that he had a green card but it
20 expired. Ho instructed Tsai to bring it in the next day, so she could look at it. Tsai agreed to do so.

25 The next day Tsai brought in his expired green card and showed it to Jane Ho. Jane Ho said "this is fine." She wrote down the number of the green card on the same document which included copies of Tsai's social security card and his driver's license. Tsai also signed an I-9 form, but the record is unclear as to when this document was signed. Jane Ho filled in Tsai's name and address, and Tsai signed the document, which was not dated. Tsai's date of birth and social security number were left blank on this form, as was the spaces for green card number and other documents under Section 2 of that document. As with Tan's I-9 form, it was
30 not signed by any representative of Respondent Imperial.

35 Chen entered the country and obtained a visa in 2000, but that visa expired at some point undisclosed by the record. Shortly after arriving in the United States, Chen obtained a New York driver's license. He gave his passport and his social security number to the law firm in Chinatown, and the law firm processed the application for him.

40 Chen renewed his driver's license on May 27, 2005. Chen did not recall whether or not the form that he filled out to renew that license asked any questions about his immigration status or his U.S. citizenship.

45 Chen was hired by Respondent Imperial on December 29, 2004, after responding to an ad in the newspaper. Chen telephoned the restaurant and spoke with David Ho. They discussed the position of a waiter, and Chen's experience. Ho said that Chen could expect to make more than \$2500 per month. He asked for Chen's phone number and said that he would call Chen back. Two hours later, Ho called Chen and told him to report to work on December 29, 2004, and gave Chen the restaurant's address. Chen reported to work as requested and spoke with David Ho. Ho showed Chen the stations, introduced Chen to the chef, and told him to start work. Neither during the phone conversation, nor on his first day of work, did David Ho ask Chen any questions about his immigration status. Nor was Chen asked by David Ho, Jane
50 Ho or anyone else from Respondent Imperial to fill out any documents on his first day of work,

About a month later, Jane Ho asked Chen for his documents. Chen asked what

documents she wanted. She replied passport, green card, social security number or driver's license. Chen replied that he only has a driver's license and a social security number. Jane Ho answered there is no problem, and to give her a copy of his driver's license. Chen did so. Jane Ho made a copy of the driver's license.²² Jane Ho asked Chen to fill out his name, date of birth, address and social security number on the piece of paper in which she copied his license. Chen did so. Jane Ho wrote Chen's name on the bottom of the document.

Jane Ho also gave Chen an I-9 form to sign on that same day. Chen signed the form, which included his address and date of birth, but no other information. Neither Chen's social security number nor the date of signing was filled in. As with the I-9s for Tan and Tsai, the I-9 form of Chen was not signed or certified by any representative of Respondent Imperial.

My findings above concerning the immigration status of the discriminatees is based on the mutually corroborative, consistent and credible testimony of Tsai, Chen and Tan. I note that this testimony was for the most part neither denied nor contradicted by any of Respondent's witnesses. Respondents called no witness than other representatives from employment agencies to testify concerning the alleged availability of jobs for wait staff employees. David and Jane Ho did testify as 6 (11)(c) witnesses, and were asked questions on cross examination by Respondents' counsels. However, the testimony of these witnesses did not substantially dispute the testimony of the employees as outlined above.

Jane Ho did testify that generally she would fill out I-9 forms for employees within one or two days of hire, "or maybe a few more days." However, Jane Ho did not provide any specific testimony concerning the hiring of Tan, Chen or Tsai, nor did she deny the testimony of these witnesses that Jane Ho did not ask to see any documents until "tax season," which was from one to two months after the hire of these employees. Jane Ho did specifically dispute Tsai's testimony in one respect, by asserting that when she obtained documents from Tsai, and filled out his I-9 form, Tsai did not show her his green card, but merely provided her with the number of the card. Notably and most significantly, Jane Ho did not deny Tsai's credited testimony that Tsai told her that his green card had expired, and she told him "this is fine," after he showed her the expired card the next day.

To the extent that Jane Ho's testimony can be constructed as denials in part of the testimony of the employees, I do not credit Jane Ho, and I credit the testimony of the employees as described above.

I note that all three employees testified for several days, and each endured extensive and withering cross examination, from three separate attorneys from the three Respondents. Yet their testimony was largely consistent and believable throughout, and importantly was mutually corroborative with respect to the issue of how they were each hired and when they were asked to submit documents by Respondent Imperial.

Jane Ho, on the other hand, although she testified briefly, as a 6 (11)(c) witness, was not an impressive witness. She was at times evasive, at times testifying differently from her deposition, and did not impress me as being a candid witness. For example, initially she testified that she merely "helped out" at Respondent Imperial. However, upon further questioning, she conceded that she was in charge of the restaurant when Jack Lee was not present, she was a manager, and she hired employees, gave warnings to employees, and

²² The license had an issuance date of September 7, 2001 and an expiration date of November 15, 2005.

collected fines from employees.

Further, Jane Ho testified that she did not talk with Tang Ho, (her step-son) at all between January and June 2006. Yet at an earlier point in her testimony, Jane ho admitted that she accompanied Tang Ho to the bank in June 2006, in order to open accounts for Respondent Majestic, before he “bought” the restaurant.

Jane Ho also testified that she was “involved” in the hiring of Tan and Chen, and Respondent Imperial was referred by employment agencies to these employees. She further testified that she had a conversation with someone from the employment agency about Tan and Chen. Jane Ho alleges that she said to the representative from the agency that “we must hire someone who would be legal here.” According to Ho, the representative told her that the employees were legal. I do not credit this vague and unimpressive testimony of Jane Ho. Initially, I note that she did not mention the name of the agency or agencies with which she spoke, not the names of the representative or representatives. Indeed, since two employees were allegedly discussed, she did not testify whether it was the same or a different agency that was allegedly involved in the hiring of these two employees. More importantly, this testimony is inconsistent with the credited testimony of Tan and Chen that they were not hired through an agency. Tan was hired in October 2004 by Paul Huang and David Ho, and was recommended by a friend of hers, who worked for Respondent Imperial. Significantly, David Ho did not refute Tan’s testimony in this regard, nor did Huang, who is noted did not testify.

Chen responded to an ad in the newspaper and was hired by David Ho. Jane and David Ho did not dispute Chen’s testimony in this regard nor was Chen’s testimony disputed that Chen wasn’t asked to supply or fill out any documents, at hire, and that he was not asked to do so until a month after his hire.

Accordingly, based on the above reasons, as well as comparative testimonial demeanor, I credit the testimony of Tan, Chen and Tsai and to the extent that Jane Ho’s testimony is inconsistent with that testimony, I do not credit Jane Ho.

III. BACK PAY CALCULATIONS

A. Gross Back Pay

The back pay specification, as Amended sets forth that the appropriate formula for calculating back pay for the discriminatees, is the average weekly tips earned by the employees in 2005, multiplied by the number of weeks in the back pay period. Respondents do not object to using this formula, but do not agree to the amounts requested. Neither Respondent offered any alternative calculation. I denied General Counsel’s motion that Respondents be required to submit alternative calculations, since Respondent’s Majestic and New Majestic would not have the knowledge of information necessary to formulate a response. Thus while such a motion might be appropriate with respect to Respondent Imperial, it would make no sense to grant such a motion with respect to that Respondent, since the issues would have to be litigated in any event.

Diane Barnes-Gray, the Region’s Compliance Investigation, testified as to how she prepared the specifications and the amendments. With respect to the calculations of average

tips, Barnes-Gray testified that for Tan, she used Tan's 2005 tax return to calculate Tan's average earnings. Her tax return showed earnings of approximately \$41,000, which was averaged out to \$812.58 per week.

5 However, General Counsel in its brief, amended its position, based on testimony and evidence on the record, to reflect Tan's gross back pay to be \$600 per week, based upon estimated tips earnings of \$31,200 in 2005.

10 As for Chen and Tsai, Ms. Barnes-Gray calculated average earnings, by relying on tip records, supplied by these employees. Tsai's tip earnings reported \$30,963 for the year 2005, averaging \$594.44 per week. Chen's tip records revealed earnings of \$30,457, which averaged \$585.71 per week. The specifications used these figures in the calculations of gross back pay.

15 All three discriminatees testified that they earned approximately \$2600 per month in tips. This figure is based on an average of \$3000 earned in tips, minus the approximately \$400 per month that employees were required to "kickback" to Respondent Imperial.

20 The record also contained some other evidence supporting the accuracy of this \$2600 monthly amount. Thus when Chen was hired by David Ho, David Ho told Chen he should be able to make "more than \$2500" per month. Additionally, Li Er Kong, manager of Yi Far Employment Agency, a witness called by Respondent Imperial, testified that restaurants in the metropolitan area that requested wait staff at that agency, would advertise \$2500 to \$3000 per month in wages for the positions available. Similarly, Michelle Troung, manager for the ASA Employment Agency, testified that the average monthly earnings advertised by restaurants
25 were from \$2000 to \$3000 per month.

30 The employees worked on average 60 hours per week from 10:30 a.m. to 11:30 p.m., 5 days a week. The employees were required to make payments to management, from their tips of \$15 on weekdays and \$20 on weekends, allegedly for "busboys."²³ Tips averaged \$1 per person at lunch and \$2 per person at dinner. Wait staff would serve 20-30 persons at lunch and dinner. Tips were pooled if there was a party or banquet, and the wait staff would receive 15% of the bill. The employees testified that on average, they received between \$90 to \$100 per day of tips on weekdays, and between \$100 to \$200 on weekends (including tips from parties.)

35 As I related above, Tan's 2005 tax return reported income of about \$41,000 which figure was originally used by the Region in its calculations. However, General Counsel changed its position in its brief and relied on the record evidence as detailed above to calculate Tan's gross back pay.

40 The tax returns of Tsai and Chen both showed also approximately \$41,000 in income for 2005. The Region did not use these figures in its calculations, as noted above, but decided to use their tip records, which revealed lower figures.

45 The reason for the "inflated" figures on their tax returns, according to the employees, started with incorrect W-2s supplied by Respondent Imperial. The W-2 form supplied by Respondent Imperial for Tsai, showed wages, tips and other compensation of \$10,623, \$3120 in the box stating social security wages, \$658 for social security tax withheld, and \$154.06 for

50 ²³ The employees testified however, that Respondent Imperial did not employ any "busboys."

Medicare tax withheld.²⁴ Chen's W-2 form was identical to that of Tsai's (i.e. \$10,623 in wages and tips, plus the other numbers set forth above.)

5 Both Chen and Tsai, upon instructions from Wing Lam, sent identical letters to Respondent Imperial in August 2006. The letters read as follows:

"I received an incorrect W-2 form from you. You claimed I received \$3120.00 in wages, however I never received wages from you in year 2005. Please send me a corrected W-2."

10 Tan's W-2 reflected wages and tips of \$22,892, social security wages of \$4368, and Medicare tax withheld of \$331.98, social security tax withheld \$1419.28, federal income tax withheld of \$58.22, and state income tax for New Jersey of \$250.45. Tan, also on instruction from Lam, sent a letter to Respondent Imperial, stating that she had received an incorrect W-2, which claimed that she received \$4368 in wages, which she never received in 2005. She also
15 told Respondent Imperial to send her a correct W-2.

Respondent Imperial did not respond to any of these letters and did not send any of the employees corrected W-2s as requested.

20 Subsequently, the employees consulted with the CSWA, and decided to use an accountant recommended by the CSWA to prepare their tax returns for 2005. Additionally, CSWA representatives assisted the employees in preparing letters to send to the accountant, explaining what the CSWA believed should be done with the return. Thus the CSWA believed
25 based on its reading of the W-2s that the amounts listed on the W-2s for the employee as "Social Security Wages," was money that was deducted from the employees' income by Respondent Imperial, but not transmitted to the government.

Accordingly, the CSWA advised the employees to request the accountant to "gross up" their income to reflect that assumption. In that regard, the CSWA prepared letters for Chen and
30 Tsai, to send to the accountant. Chen's letter states that he earned \$30,457 in tips for the year 2005, and Tsai's letter asserts that he earned \$30,963 in tips. Both letters then state that the individuals "received this NET income entirely in cash. I never received any wages at all. At the end of the year, I received the attached W-2 only showing that I received \$106.23 in tips and \$3120 in wages, that W-2 is incorrect. I sent a letter to my employer asking for a corrected W-2
35 but the employer did not respond. Please gross up my income and file my tax return also to claim the \$3120 as my money and credit me the Federal, State, and local taxes withheld." Such letters were sent to the accountant, recommended by the CSWA, Eileen Glassman.

40 For Tan's case, Wing Lam sent a letter to Glassman, instructing her to "gross up" Tan's income.

This letter reads as follows:

Year 2005. Wages in tips: \$2600/month, \$31,000/year.

45

Note: Ms. Tan worked as a waitress and she received no wages at all. At the end of the year, she got the attached W-2 form only showing that she received \$4368.00 in wages and \$18,524.00 in

50 ²⁴ The box for federal income tax withheld was left blank. Under state income tax for New Jersey, the form reflected \$34.93.

tips, so, the W-2 is incorrect. Please gross up her income and help her to file her tax return. In this case, the employer claims he paid her \$4368 which she never received. I assumed the employer withheld \$4368 for tax purpose. She should claim that as her money and credit to her as her Federal, State and local taxes withheld. Miss Tan sent her employer a letter and asked for corrected W-2. She did not receive a response.

Upon receiving these letters, as well as the W-2s supplied by Respondent Imperial, Glassman prepared tax returns for the employees. She as instructed "grossed up" their income. In that regard Glassman testified that she had prepared numerous returns of wait staff through the CSWA. It was a common problem that employers submit incorrect W-2s, understate income, and withhold federal withholdings without transmitting them to the government. Thus, here she "assumed" based on the letters, that the earned income that employees received was net income, and was based on a computer program, she calculated the federal and state taxes that should have been withheld and sent to the governments. These calculations resulted in over \$41,000 in gross income for each of the employees. Glassman prepared tax returns based on these figures, and the employees signed and filed them without any discussion with Glassman.

All three employees testified that they maintained contemporaneous tip records while employed at Respondent Imperial. Tan testified that she lost those records, prior to the compliance investigation, so they were never submitted to the Region.

Chen did submit to the Region copies of his tip records, which were introduced into the record. However, Chen did not have the originals of the tip records, asserting that he gave the originals to his attorney in the civil suit, and that they were no longer available.

Tsai did produce his original tip records, but testified that it was his girlfriend, and not he, who maintained these records, based on information that he allegedly provided her. Tsai testified that he would watch his girlfriend write down the information that he gave her. He would not always verify that what she wrote down was accurate. Further, Tsai testified that holidays were generally days where tips were high, and that Mother's Day was usually the "biggest" holiday for tips. However, Mother's Day in 2005 in his tip records reflected only \$43, which was considerably less than several other days in 2005. Tsai explained this discrepancy by asserting that his girlfriend "made a mistake" with respect to that entry. Tsai's girlfriend was not called as a witness to authenticate the tip records or to corroborate Tsai's testimony in that area.

The record also revealed several documents and testimony which differed somewhat from the amounts earned in Tsai's tip records. Thus Tsai testified that he earned \$3000 per month (\$36,000), minus "kickbacks" of \$400-500 per month (for a net total of \$31,000 for the year.) In Tsai's affidavit submitted to the Board, he stated that he averaged \$115 a day on weekends after the \$20 kickback and \$85 per day on weekdays after the kickback. Calculations of those figures on a yearly basis come to \$25,220 per year. Tsai explained the discrepancy between this figure and the \$30,963 on his tips records, by stating that he did not have his tip records with him when he gave his affidavit. Tsai conceded however, that he knew it this time that his tip records revealed that he earned nearly \$31,000 per year, but he did not recall if he told the Board agent that he had tip records or whether the Board agent asked Tsai if he had such records. Further Tsai submitted a letter to the NLRB in support of the charge, where Tsai talked about a conversation with David Ho, concerning how much the employees were claiming as compensation. The letter goes on to say that "we should be compensated according to an

average income in 2005, this is \$2800 a month plus \$500 basic wages and that adds up to \$3300 a month.” Tsai explained that this figure represents \$2800 in tips, plus the \$500 that the employees were forced to pay management. Finally in the back pay questionnaire submitted to the Region, Tsai indicated that his rate of pay was \$3000 in tips per month, and did not make any reference to the monies paid as “kickback money.”

Chen’s back pay questionnaire also showed that he earned \$3000 in tips per month, and made no reference to the alleged “kickbacks.”

Tan’s back pay questionnaire submitted to the Board was identical to that of Tsai and Chen in this regard, and stated that she earned \$3000 per month in tips, with no reference to the “kickbacks.”

The record also reflects that Tan’s tax return for 2006, revealed income from wages and salaries of \$22,624. The W-2s for Tan for the year of 2006, consisted of \$14,780.23 of wages and tips, from Trump Taj Mahal, and \$7,843.75 from Shing Kee Restaurant.

Tan’s tax return for 2007, showed \$25,809 in wages and salaries, and a W-2 from Trump Taj Mahal for that same amount.

B. Interim Earnings and Search for Work

1. Hua Ying Tan

In February 2006, Tan was driving with a friend in Brooklyn, New York. She observed a restaurant, East Coast Buffet, which was undergoing renovation, which had a sign with a telephone number listed. Tan called that number and asked if the restaurant was still hiring. The person, with whom Tan spoke, said that they were still hiring and asked if Tan had any experience. Tan replied that she did have experience, and was told to come in for an interview. Tan did so, and after the interview Tan was hired.

She worked five days a week, and was paid a salary of \$80 per day with no tips. Tan worked at this restaurant for little more than a week. At that time, the boss of the restaurant told Tan that he “did not want me to stay.” The owner did not say, nor did Tan ask why he did not want her there any more. According to Tan, nothing “happened” during the week that she worked there that might have caused the owner to terminate her. Tan did not receive a W-2 from East Coast for 2006, and therefore did not include any amounts received from that restaurant on her tax returns. She also did not include this employment on the questionnaire that she submitted to the Region. Tan explained that she did not recall that job when she filled out the questionnaire.²⁵

In early March 2006, Tan was referred by a friend of hers, Sue Chen, to a position at a nail salon located in Staten Island, N. Y. Chen was an employee at the salon, and she spoke to the owner about employing Tan. The owner agreed to hire her, starting as an apprentice for the first three weeks, wherein she was learning how to perform the functions of the job. She received no pay or tips during the apprenticeship period. In the beginning of April, she began to receive pay from this job. She received two payments in cash, one for \$60 and the other \$120, in late April. She did not receive a W-2 from the nail salon. Tan neither reported this income on

²⁵ The questionnaire was dated 3/27/07.

her 2006 tax return, nor included it in the NLRB questionnaire which listed her jobs. Tan testified that she did not include this job on her form, because she did not believe that learning was considered a job, and that she forgot the payments because she believed that the money was during the learning period and should not be counted. Tan left that job after a month and a half because the smell caused her breathing difficulty as well as causing her eyes to be tired.

In April 2006, Tan was referred to a job at Shing Kee (or Chung Kee) by an acquaintance named Sister Ling. Tan had asked Sister Ling if she knew of any jobs on several occasions in January and February. Sister Ling called Tan in late March, and informed her of an opening at Shing Kee. Tan called the restaurant, received an interview, and was hired as a part-time employee, starting in April. She worked two days a week, 10 hours per day and earned a flat salary of \$11 per hour. She received no tips at this restaurant since she was a part-time employee.

In May 2006, Tan's friend Sue Chen told Tan of an opening at a restaurant in Atlantic City, New Jersey, and gave Tan the name of the assistant manager (Ray) of the Dynasty Restaurant, located in the Taj Mahal Hotel. Tan called Ray and he arranged for an interview. Tan was hired as a waitress in the Dynasty Restaurant. Initially, she worked there 3 days a week on Fridays, Saturdays and Sundays. In June, Tan worked two days a week at the Noodle Bar also at the hotel as a counter server. Later on, when work became slow, she was assigned one day at the restaurant and four at the Noodle Bar. In both positions, Tan received a combination of salary and tips.

Tan continued to work at her part-time job at Shing Kee (two day a week) while working at the Taj Mahal for 3 and then 5 days for several months. By December 2006, Tan was working 35 hours a week at the Taj Mahal and 20 at Shing Kee. Tan testified that these hours became "too much" for her (particularly considering the locations involved, Atlantic City, New Jersey and Brooklyn, New York.) Therefore, Tan quit her part-time job at Shing Kee in December 2006.

Tan ceased looking for work after she received the job at the Taj Mahal.

Tan began searching for work in January 2006, by reading newspapers, speaking to friends and visiting employment agencies. She continued to use these sources until she stopped looking, as described above, in April, when she was hired at the Taj Mahal. Tan continued to look for work during the times she was employed at the nail salon, and when her only position was a part-time employee at Shing Kee.

Between January and March 2006, she read newspapers regularly, looking at advertisements in the Chinese language newspapers, Sing Tao and World Journal, and responded to between eight and ten ads during this period. Her responses were by phone. In nearly all of these responses, the jobs were not appropriate for Tan because some required driving, some bartending skills, and others required fluency in English.²⁶

She did obtain one interview from a newspaper ad in early February. The restaurant was the Szechuan Star, located in midtown Manhattan. She went to the restaurant, had an interview, and was given a "trial" of working one hour during lunch. At the end of the hour, the manager told Tan, "I'm sorry, this job is not suitable for you." She was not given any reason for

²⁶ Tan was not fluent in English. She testified in this proceeding with the aid of an interpreter.

why she was not hired, and did not receive any compensation for working this one hour.

Tan visited three employment agencies during this three month period. They were A&N Employment Agency, the Atlantic Agency and the D&L Agency. The process at each of the agencies was essentially the same. The agency would post the job openings that they have available, which include the location, type of job, hours and salary. If an applicant is interested, they ask a staff member if the position is still available, and if so the staff member calls the prospective employer, and the applicant has a phone interview with the employer. Tan received one or two phone interviews from these agencies. However, she did not receive any job offers or in person interviews. In one phone interview, she was told that the restaurant would hire only girls, 25 or younger.²⁷

Tan did not apply for most of the jobs posted because they were located in out of state locations such as Pennsylvania, Connecticut, South Carolina or North Carolina. She looked only for waitress positions, since this is where she had experience. She did not apply for positions posted for such jobs as dishwasher, kitchen help, kitchen worker, chef or bar attendant, since she had no experience in these jobs.

During this period, she called numerous friends and former co-workers to ask about jobs, including Ahye, Sue Chen, on several occasions, Sister Ling, Uncle Bao, Michael, Sky, as well as others from the CSWA. As detailed above, she was referred to the nail salon and the Taj Mahal by Sue Chen and to Shing Kee by Sister Ling.

2. Ming Xing Chen

Chen testified that he began his job search efforts in January 2006, using referrals from friends, consulting newspapers ads (two or three times a week), visiting restaurants and going to employment agencies in Flushing and Chinatown. He testified that he continued to search for work, using these sources throughout the back pay period, until he eventually found a full time position at East Market Buffet in November 2007.

In January 2006, Sue referred Chen to a job at the Taj Mahal. Chen spoke to a female manager named Cee Cee, who asked about his experience and asked Chen to read a menu. At the end of the interview, Cee Cee informed Chen that she would call him and asked him to wait for her call. Cee Cee did not call Chen, and he was not offered a position at the Taj Mahal. Subsequently, Chen called his friend Sue and asked her to find out from Cee Cee about the job. Sue replied that it was best not to call Cee Cee and to "show her respect." She added, "If she did not call, then she did not want to hire you." Also in January, Chen went to the New York Villa restaurant, located on Christie Street in Chinatown. Chen had been employed at this restaurant prior to his employment at Respondent Imperial. Chen spoke to the manager of New York Villa, whose name was Amy. She was not the same manager, who was employed there when Chen was an employee of that restaurant. Chen asked Amy about a job, and she informed him that for the time being, there were no jobs available. In March, Chen's friend, Shi Jin Dong, referred him to a restaurant, East Garden, located in New Jersey. Chen went to the restaurant, interviewed with the manager, who informed Chen that he preferred to hire a waitress. Later in March, Chen asked another friend of his Ran Bing Chen (a female) if there was a position at the restaurant where she was employed, located in New Jersey. She replied that if she knew if something became available at her restaurant, she would call him.

²⁷ Tan is 31 years old.

Also in January, Chen saw an ad in the newspaper for a job making sushi. He answered the ad and went to the restaurant named Hunan Park, located on Columbus Avenue in New York, New York. Chen was told that he needed to learn how to prepare sushi. Thus he would need to pay \$1000 for training. He agreed and worked at Hunan Park for a month and a half, from late January through early March. He received no pay for this work since he was “learning” how to make sushi. After he completed his “training,” Hunan Park did not hire him as an employee, telling Chen that “only the top people learn how to make sushi, and they do not need so many people.”

Shortly, after leaving Hunan Park in April, Chen’s friend Long Bin referred him to a Japanese restaurant, called Koi on 40th Street in New York, New York for a position as a sushi chef. Chen worked at that restaurant for one day as a sushi chef. He earned \$70 in cash for that day. The manager informed Chen at the end of the day that because the restaurant was so busy that he needed a more experienced sushi chef.

During April and May, Chen went to the CSWA and spoke to Tuo Zhong Wu and Sister Hua about possible job openings. These representatives from the CSWA told Chen that they would contact Chen if they hear of any open positions. In June, Chen spoke to an employee named Zhoqji, whom Chen met at the CSWA, about a possible job at the restaurant where Zhoqji worked named Siwamian or Grand Harmony. Chen went to this restaurant, and Zhoqji introduced Chen to another employee of the restaurant. Chen asked both Zhoqji and the other employee about a job at the restaurant. They informed Chen that they would “pay attention,” and if they “get any news” about an opening, they would call Chen. He did not receive a call from either of these employees.

In June 2006, Chen also answered ads in newspapers for jobs as a waiter or sushi chef but received no responses from his applications.

In June, Chen went to the People’s Employment Agency, where he obtained a part-time job as a waiter at the Hand V Restaurant. He worked there on Fridays, Saturdays and Sundays from 7:00 p.m. to 10:00 p.m. at a rate of \$10 per hour, paid in cash. He did not receive tips since he was not a full time employee. Chen worked at the Hand V Restaurant until August 31, when he was laid off.

In September, Chen spoke to another employee, whom he met at the CSWA, who was employed at the Golden Bridge Restaurant, located in Chinatown. He asked this employee (also named Chen) if he could inquire about a job at the restaurant where he worked. The other Mr. Chen did not report back to Chen about finding Chen a job.

In early September, Chen visited the Asian Employment Agency, and was referred to a part-time job at the Tan Cao Restaurant in Brooklyn, New York. Chen started working at Tan Cao on September 8, as a waiter, 3 days a week at four hours a day, earning \$10 per hour with no earnings from tips. Chen worked at Tan Cao until December 31, when he was laid off.

Chen testified that he visited numerous Employment agencies during 2006 and 2007, including the New York Agency in February and March, the People’s Agency in February, the Twa Far Agency twice in February and the Asian Employment Agency in September. At these agencies, Chen would look for jobs as a sushi chef or a waiter. He was not able to obtain any sushi chef positions because of his lack of experience. Chen stayed at these agencies for 15-20 minutes on each visit. If there were no suitable positions, he would leave. Chen would leave his phone number with the agencies, but received no calls from any of them.

In January 2007, Chen saw an ad in the newspaper for a job as a salesman of cosmetic products. Chen answered the ad and interviewed for the job with a manager named Thang. After the interview, Thang told Chen that he would prefer a salesperson with some experience, and further that Chen's English was not so good. Therefore, Chen was not hired for this job.

5

In January 2007, Chen also spoke to two other friends of his, Kenny Zhang and Andy Zhou, and asked if they knew of any jobs. They both informed Chen that if they became aware of any jobs that they would call him.

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On March 5, 2007, Chen was recalled to work at Tan Cao, from which he had been laid off on December 31, 2006. Initially, he worked as a part-time employee, again working 10 hours per week, at \$10 per hour. In April, Chen was given additional hours, and he began working six days a week, 35 hours a week. He continued to receive \$10 per hour with no tips. Chen continued to visit various employment agencies in 2007, once again staying for 15-20 minutes per visit.

15

In late November 2007, Chen obtained a full time position as a waiter at the East Market Restaurant, working 40 hours per week at a salary of \$4.60 per hour, plus a share of pooled tips. Chen had received a referral from a friend Sky to this restaurant in November 2006, and at that time, Chen filled out an application and gave it to Sky. Subsequently, Chen followed up with Sky and asked about the job one or two times. Sky told Chen to wait for the notice. Initially, in late November 2007, Chen was offered and accepted a position at the East Market Restaurant. Chen was still employed at East Market Restaurant at the time of the instant hearing, and as noted above, made no further efforts to search for work after obtaining this position.

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3. Fong Chen Tsai

Tsai began searching for work in mid-January when he learned from Tan, that Respondent Imperial would not reinstate Tan, Chen and Tsai. Tsai's search for work consisted of visiting unemployment agencies, speaking to friends and reading newspaper ads. In this regard, Tsai admits that he limited his search to Chinese restaurants. According to Tsai, he did so because he was not confident of his language skills, he had no prior experience in non-Chinese restaurants, and he was not familiar with the higher service requirements of "American" restaurants. In the latter regard, according to Tsai, in "American" restaurants, you need to know cocktails, and a lot more "service orientated works."

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With respect to Tsai's contention that his language skills prevented him from searching for work at non-Chinese restaurants, Tsai testified at the instant hearing without the aid of an interpreter, and he completed both high school and college in English in the United States. Tsai received a degree in finance from Jersey City State College.

40

Tsai testified that in the Chinese restaurant industry, one usually can obtain better jobs through referrals from current employees, because bosses normally ask employees if they know of experienced friends, who are looking for jobs, and the waiters hired would work hard, so as not to embarrass the referring friend. Thus, Tsai emphasized that source in his job search in 2006.²⁸

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²⁸ In fact, Tsai obtained his job at Respondent Imperial, as well as three prior jobs at three different restaurants, Thai Ping Noodle House, Siam Village and Hunan Restaurant in Manhattan, by referrals from friends.

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5 In January 2006, Tsai called his friends, Allen Wong and Kaka Weng, and asked them about referrals. They told Tsai that they would start looking for him, and would call Tsai back if they heard of a position. In February and March, Tsai spoke to On Chen, who was employed at the Golden Bridge Restaurant, plus Frankie Chen and Sky Wong about jobs. These three individuals told Tsai that they would look around and ask around for Tsai.

10 In late March, Tsai received a call from Kaka Weng, whom he had previously asked (in January) to look around for him. Weng told Tsai that there was a job available at Mr. Wok Sushi, where Weng was employed as a waitress. Upon Weng's instructions, Tsai reported to Mr. Wok Sushi, spoke to the manager, and introduced himself as being referred by Weng. Tsai was hired as a combination host and waiter, working five hours a day on Fridays and Saturdays, at a fixed salary if \$60 a night, with no earnings from tips. Tsai worked there from April 1 to July 10, 2006, when he was laid off because business was slow.

15 In April, Tsai contacted Frankie Chen once again, and Chen referred him to the Ching Fang Restaurant. Chen accompanied Tsai to this restaurant to fill out an application. Tsai filled out the application, but did not receive an offer from this restaurant.

20 Also in April, Tsai contacted Sky Wong once again, who told Tsai there was no position available at his current restaurant. Tsai also spoke to Otun Chung in April, who told Tsai that he would get back to Tsai if he heard about any openings. Tsai also spoke to Gai Cou, an employee at the Grand Harmony Restaurant in April, and asked Cou if he knew of any available positions. Cou was unable to refer Tsai to a job at his restaurant. However, in May, Cou referred Tsai to a job at the Congee Village Restaurant in Chinatown. Cou accompanied Tsai to the restaurant, where Tsai was interviewed. The representative from the restaurant took down Tsai's information but never called him for a job.

25 Also, in May, Tsai spoke with Jerry Wang, an employee of Ali's Restaurant in Manhattan. Tsai asked if Wang knew of any positions available. Wang responded that he would see what he could do. Tsai also contacted Fong Yee Chen in May and asked her about jobs. She said that she would look around.

30 In June, Tsai followed up with Cou, who took Tsai to the Yee Gee Restaurant on Christie Street in Chinatown.

35 Cou accompanied Tsai to this restaurant, where Tsai was interviewed, asked about his experience, and was told that the restaurant would call him back. No one from the Yee Gee Restaurant ever called him back or offered him a job.

40 Shortly thereafter, Tsai again contacted his friend Kaka Weng, who told Tsai that she would inquire for Tsai at the restaurant where Wang worked in New Jersey, but there was no opening.

45 In August, Tsai asked Wing Lam, director of the CSWA, about jobs, and Lam informed Tsai that he would ask around for Tsai. However, Tsai received no referrals from Lam in 2006.

50 In November 2006, Weng called Tsai, and told him that she (Weng) had talked to the owner of Mr. Wok (where Tsai had worked earlier in 2006 and had been laid off), and was informed that "business was back up," and to tell Tsai to "come back." Tsai returned to work at Mr. Wok on November 20, 2006, at the rate of \$65.00 per night, two days a week. Tsai continued to look for work while he was employed part-time by Mr. Wok, from November 2006

to March 27, 2007.

5 In January 2007, Lam recommended that Tsai “change careers” and work for the National Mobilization against Sweatshops (NMAS), an organization loosely affiliated with the CSWA. Tsai worked for NMAS, as an unpaid trainee organizer from January 2007 until he began paid employment for NMAS in April 2007. His salary was approximately \$701.00 every two weeks, working nine hour days, six days per week.²⁹

10 Once Tsai started receiving a salary from NMAS, he ceased looking for work. Thus in late 2007, he was offered a position in East Market Restaurant, where he had previously applied in 2006, but he turned down the offer. In fact, this was the job that Chen accepted. The offer was made based on an unfair labor charge against that employer. A list of employees was given offers based on alleged unlawful to hire. Tsai turned down his offer because he was employed. Chen, as noted, accepted his offer, and was still employed at East Market, as of the
15 close of the hearing.

20 Tsai also searched for work by looking at ads in *Sing Tao* and the *World Journal*, Chinese language newspapers, several times a week. He responded to an ad in January 2006 for a job at the Rice Shop Restaurant, located in Hoboken, New Jersey. As a result, he interviewed with Robert, the manager. Robert informed Tsai that the position in the ad had just been filled, but he would get back to Tsai if there were any more openings.

25 Subsequently, Tsai returned to the Rice Shop to further inquire about a job, and Robert told Tsai that he had just hired an extra person for the summer, and informed Tsai to come by after the summer, and they might have a position. Tsai, as instructed, went back to that restaurant in September, but there was still no position available.

30 In February, Tsai answered another ad for a waiter at a restaurant named the Illusion, also located in Hoboken, New Jersey. Tsai was interviewed for that position, but was not offered a job.

35 In March, Tsai saw an ad for a job at the Siam Village in Jersey City, New Jersey. Tsai spoke to Allen Lau, the manager, and received an interview. However, Tsai did not receive an offer, and was told by Lau that the restaurant “only wants to hire waitress.”

40 In September, Tsai answered an ad for the Wild Ginger Restaurant, located in Hoboken, New Jersey. Tsai was interviewed by a female manager and filled out an application. The manager told Tsai that she would call him back, but she never did so. Tsai returned to the Wild Ginger Restaurant in November, and the same manager told Tsai that there was no position available.

45 Also, in September, Tsai answered an ad for a delivery job at a take-out restaurant, in Jersey City, New Jersey, named the Dragon. Tsai spoke to the owner, who took Tsai for a drive around the neighborhood, where he would be delivering the food. Tsai observed that there were housing projects and people hanging out in the streets. Further, the owner instructed Tsai that if there is an order to be delivered to the projects, do not deliver it to the floor or even go into the building. The owner suggested that Tsai call the customer and ask them to come down and pick-up the order. Further, Tsai noticed that the counter in the restaurant had bullet proof glass

50 ²⁹ The amended back pay specification, divided Tsai’s 2007 earnings at NMAS by the number of weeks worked, and listed for Tsai the average salary of per week of \$419.23.

over it. Tsai was offered a job as a delivery person. Tsai turned the job down because based upon the above factors, he felt that the job was unsafe.

5 Tsai also applied for a job in June at the Fong Buffet Restaurant in Jersey City, New Jersey, where he was eating. He asked about a job after he finished eating and was informed that there was no position right now, but that Tsai could leave his information. Tsai was further informed that if there is a vacancy, they would call him.

10 Tsai answered an ad in the newspaper in October for a job at the Sawadee, a Thai restaurant, in Jersey City, New Jersey. Tsai spoke to the manager, named Allen, was interviewed, and was given the opportunity to serve one table. Allen told Tsai to wait at home for a call. No such call was received. Tsai returned to that restaurant in December, and was informed that there was no position available.

15 Tsai also included visits to employment agencies in his effort to search for work. He visited three agencies in February (Hua Ming, Star and Friends of Youth), twice in March (A&N Agency and the 88 Agency), and the ASA Agency in August. Tsai would generally stay for two to three hours at each agency, and would go back to some of them a second time. Tsai received no job offers from any of these agencies. Most of the jobs listed at these agencies
20 were for out of state positions, or lower paying jobs, such as bus boy or inexperienced waiters, such as new immigrants, who would work for less money than what Tsai was used to earning and what he was seeking to earn.³⁰

25 Tsai did receive a phone interview for a restaurant in Edison, New Jersey, from the Friends of Youth Agency, located in Flushing, New York. Tsai was asked about his experience, and at the end of the interview, was told that the restaurant wanted to hire waitresses instead of waiters. Tsai also had a phone interview while visiting the 88 Agency, located in Chinatown. The restaurant involved was in Morristown, New Jersey. Tsai was told during the interview that the restaurant did not want experienced waiters like Tsai, because they could not pay that much.
30 Thus the restaurant preferred to hire inexperienced workers, who would work for less money.

35 Tsai testified that in all of the interviews that he had, whether through friends, ads, or agencies, no one asked him if he was lawfully authorized to work in the United States, except for one restaurant, Wild Ginger. Tsai asserts that he informed the manager of that restaurant that he was not so authorized. The manager replied that this would “be no problem,” but as noted above, Tsai did not receive a job offer from that restaurant. Tsai also claims that no one from any of the agencies, where he visited and received a few phone interviews, ever asked him if he was authorized to work in this country.

40 **C. Respondent Imperial’s Witnesses**

The only witnesses presented by any of the Respondents, were three representatives from the employment agencies, called by Respondent Imperial. Kuang Chia Hsai is the
45 manager of the People’s Employment Agency, located in Flushing, New York. Hsai testified that his agency, since it is located in Flushing, received most of their postings from employers located in Long Island, New York or Connecticut. He did testify that the agency does have some job from employers located in New Jersey and in New York City.

50 _____
³⁰ Tsai was looking for at least \$2000 per month.

5 Hsai testified further that his agency fills openings first with applicants, who are present at the facility. If there are no applicants present for a particular position, he will call applicants, who have previously left their phone numbers with him. He estimated that half of his placements came from applicants, who were present, and half from those, who had left their numbers, and whom he called when positions were available.

10 Hsai also testified that if an applicant with experience as a waiter or waitress comes to his agency, every day and stays all day, he would be able to place that applicant in a job, on average from 10 days to two weeks.

15 Hsai furnished further testimony as to the specific nature and number of the positions at his agency. On average, he has 7-10 restaurant positions available every day, which includes wait staff, as well as other jobs, and some are for out of state positions. Hsai also asserted that he would receive on average two or three calls a day from restaurants in New Jersey. Half of these openings would be for wait staff, and half for kitchen positions or delivery jobs.

20 Further, according to Hsai, his agency received three or four calls a day for Chinese restaurant jobs as waiters or waitresses. Also, Hsai estimated that about one third of these jobs were for positions in a buffet restaurant. In that connection, Hsai testified that generally, an applicant need not speak English in order to be placed in a buffet restaurant, but it would generally be required that an applicant speak English, to be placed in an *a la carte* restaurant. Hsai testified further that approximately 80% of restaurants that use his service are *a la carte* restaurants and about 20% are buffet restaurants.

25 Finally, Hsai testified that his agency does not ask applicants about their immigration status. Further, the employers do not instruct the agency to refer only applicants, who are legally able to work.

30 Michelle Traung, the manager of the ASA Agency, testified that on a given day her agency would have 10 openings a day posted, of which one or two would be for wait staff positions. She also testified that if an experienced wait staff applicant come to the agency, every day, and stays the entire day, her agency would be able to place that applicant within a week, particularly, if the applicant was willing to go to any location. If the person wanted to work in the New York Metropolitan Area, defined as New York, Manhattan, Northern New Jersey and Southern Connecticut, she estimated that "I believe in a few weeks, I am able to find that person a job."

35 Traung testified further that about 30% of the open positions at her agency were for jobs in New York and New Jersey. She could not recall how many calls she would receive from Chinese buffet restaurants, but when pressed, she estimated about five to seven per month. Of these positions, Traung estimated that one or two would be for wait staff jobs. Traung also conceded that the majority of the agency's calls from employers seeking wait staff for buffet restaurants came from outside of the metropolitan area.

45 Li Er Kong was a receptionist employed by the Yi Far Agency in Chinatown, New York City. That agency closed in December 2006. She testified that the agency would receive about 10 calls a day for waiters or waitresses, and the agency would send out three or four applicants a day for these openings. That is because restaurants would normally call a few agencies for a particular position, so that by the time Yi Far would call, the opening might be filled. Further, there are times when the applicant would reject the offer from the restaurant due to location, money or other reasons. Kong estimated that from 50% to 60% of the restaurants that referred positions to the agency were located in the New York Metropolitan Area.

Although as noted above, Kong testified initially that the agency received 10 calls a day overall, later on in her testimony, she asserted that the agency received 10 calls a day from restaurants in the metropolitan area. She further testified that of these 10 calls a day, three were from buffet restaurants and the rest from eat-in or take-out restaurants.

5

Kong also testified that if an experienced waiter or waitress came to her agency, and stayed there all day, every day, it would normally take her three or four days to obtain a position for them.

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Kong also testified that in her experience, it was important, even for buffet positions, for someone to know English. Kong added that she would ask the applicant about their English skills, and “if the person did not speak English, the employer would not hire the person.”

15

IV. ANALYSIS AND CONCLUSIONS

A. Jurisdiction

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The Board will assert jurisdiction over the operations of a restaurant, where it derives gross annual revenue of \$500,000 or more. *City Line Open Hearth*, 141 NLRB 799 (1963).³¹

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Where, as here, the assertion of jurisdiction over alleged successors are involved, and the successor has been in existence for less than a year, the Board uses two independent standards using projections.³² The Board will either project the revenues of the successor based on the experience of the predecessor, *Northgate Cinema*, 233 NLRB 586 (1977); *Galaxy Theatre*, 216 NLRB 645 (1974); *Will Coach Lines*, 175 NLRB 518, 519 (1969); *Carcity* 116 NLRB 1571 (1956), or a projection of the successor’s actual earnings, for the period of time that it has operated the business. *Galaxy Theatre, supra*; *Pet Inn’s Grooming Shoppe*, 220 NLRB 828, 829 (1975); *Powerful Gas No. 1*, 181 NLRB 104 fn. 3 (1970).

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General Counsel argues that Respondent Majestic meets the test under either standard. General Counsel contends that since the Board found in the underlying case that Respondent Imperial met the \$500,000 standard, Respondent Majestic must also be found to be in commerce. Alternatively, General Counsel asserts that since Respondent Majestic had gross receipts of \$329,438 for the two months that it operated the restaurant, its projected earnings, established that it would have met the \$500,000 annual threshold. Further, Respondent Majestic admitted that it purchased goods valued in excess of \$5000 directly from suppliers located outside the state of New Jersey, which satisfies the statutory jurisdictional standard.

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Respondent Majestic, on the other hand, argues that these jurisdictional tests that General Counsel asserts are applicable, presume that the business of the successor employer will be operating for the time period that its revenues are being projected. *Galaxy Theatre, supra*; *Pet Inn’s Grooming Shoppe, supra*; *Powerful Gas, supra*.

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Further, Respondent Majestic contends that presumptions can be rebutted by other

³¹ The Board also requires statutory jurisdiction to be established. *Carolina Supplies and Cement*, 122 NLRB 88, 89 (1958).

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³² Of course, where the alleged successor has been operating the business for over a year, the successor’s actual operations will be evaluated.

proof or evidence, and here there is irrefutable proof to rebut the presumptions that Respondent Majestic would have earned in excess of \$500,000. That evidence is simply that Respondent Majestic ceased operating the business after two months. Therefore, it cannot be presumed that Respondent Majestic would have exceeded the \$500,000 threshold, since it could not have done so because it had sold the business.

I agree with Respondent Majestic and conclude that General Counsel has failed to establish jurisdiction over that entity.

A careful reading of the cases that find jurisdiction based on these projections, support Respondent Majestic's position. Thus in *Northgate Cinema, supra*, the Board quoted *Galaxy Theatre, supra* as follows:

The Board has treated a successor employer as if it had commenced operations of a new business and has determined whether it meets the jurisdictional standard by making a forward projection based on actual experience. The Board has also used the 12-month experience of a predecessor to project what the revenues of the successor will total during its first 12 months of control where evidence indicates that the business will continue in essentially the same manner as before the change of ownership.

Further in *Power Gas No. 1, supra*, the Board asserted jurisdiction over a gas station that had been in operation for only one month. It did so based on testimonial evidence from an individual with experience in the industry that the station's monthly sales would be \$45,000 and on an annual basis \$547,200. The Board observed, "as no evidence was put forth which conflicted with this estimate or with Mr. Oliver's qualifications to submit an opinion as to this estimate, we find the estimate and projection to be accurate." (fn. 3, at 104.)

Finally, in *General Seat & Back MFG Co.*, 93 NLRB 1511, 1512 (1951), the Board asserted jurisdiction over an employer based on sales figures for the four months that it was operating the business. The Board reasoned that "where on the basis of available financial information and statements reflecting the volume of a company's sales and purchases for any period of time, there is a reasonable expectation that the company under consideration will in a period of 12 months attain the minimum jurisdictional requirements, the Board will obtain jurisdiction." *Id* at 1512.

The Board goes on to conclude that "we consider this financial information as representative and indicative of the Employer's business capacity and sufficient to warrant the expectation that the Employer will, during the following months, continue to do business at least at the rate established during the first 4 months." *Id*.

It is obvious to me from reading these cases that the projections that the Board relies upon to establish jurisdiction, presumed that the Employer will be in business for the full 12 months, and that therefore its income can be reasonably projected to meet the Board's standards. However, here the evidence is clear that Respondent Majestic will not and was not in business for 12 months, and in my view these projections cannot be made.

This position is supported by *Sparkle's Specialty Delivers and Messenger Service*, 247 NLRB 623, 628 (1980) and *District 76 RWDSU (Morgan Shoe Co.)*, 129 NLRB 1339, 1340, 1341-1342 (1961). In *Sparkle's Messenger, supra*, the ALJ, affirmed by the Board, dismissed

the compliant based on his finding that the General Counsel had not established that the Respondent’s partial year business projected forward met an applicable jurisdictional standard, and that “it was impossible to determine whether the predecessor’s business, when projected forward satisfies an applicable jurisdictional standard.” *Id* at 625. The ALJ made an alternative finding however, since under at least one view of the record therein, it was possible to find that the predecessor would have satisfied the Board’s indirect outflow jurisdictional standard. The Judge noted that during the four months that the alleged successor operated the business, it had either lost or stopped doing business with 6 of the 14 customers that has been customers of the predecessor, and whose purchases has been relied on by General Counsel; to establish indirect outflow. Therefore, the ALJ concluded, “in short, Respondent has rebutted any possible inference that it would have satisfied the Board’s indirect outflow jurisdictional standard during its first 12 months in operation.” *Id* at fn. 5.

Similarly, here I conclude that Respondent Majestic has rebutted any possible inference that it would have satisfied the Board’s jurisdictional standards during its first 12 months in operation since it sold the business after two months.

Morgan Shoe, supra is clearly dispositive, since there the Board squarely held that it is improper to project sales figures of a store “which will not be repeated during the period under projection, as obviously is the case with the store that went out of business.” 129 NLRB at 1340.

Accordingly, based on the foregoing analysis and authorities, I conclude that it is improper to project Respondent Majestic’s earnings, since it ceased operating the restaurant after two months. Therefore, jurisdiction has not been established over the operations of Respondent Majestic. *Morgan Shoe, supra, Sparkle’s Messenger supra*. I shall recommend that the Backpay Specification, as Amended, be dismissed as to Respondent Majestic.

Respondent New Majestic has not contested jurisdiction as to its operations. It has failed to deny the amended specification’s commerce allegations, and I find that Respondent New Majestic annually derived gross revenues in excess of \$500,000. Further, it is also appropriate to project income for Respondent New Majestic, based on the revenue of its predecessors, Respondent Imperial and Respondent Majestic. *Galaxy Theatre supra, Power Gas supra*.

It was found in the underlying case that Respondent Imperial derived over \$500,000 in revenues, and it can be presumed that Respondent New Majestic would do so as well. *Northgate Cinema supra*. Further, since Respondent New Majestic’s immediate predecessor, Respondent Majestic derived revenues of \$329,438 in a period of two months, it is also appropriate to project these earnings over a 12-month period, to conclude the Respondent New Majestic would exceed the \$500,000 threshold. Notably, unlike the assessment of Respondent Majestic’s revenues, there is no evidence to rebut these presumptions and projections.

Accordingly, I find that jurisdiction has been established over the operations of Respondent New Majestic.³³

B. Due Process Issues

³³ I note again that Respondent New Majestic has not argued to the contrary.

Respondents Majestic and New Majestic contend that they have been deprived of their due process rights by the General Counsel's failure to serve them with the original complaint, and/or make them parties to that proceeding even though General Counsel was aware of their existence prior to the date of the hearing. They rely in part on Sections 10264.3, 10054.2 and 10274.4 of the NLRB Case Handling Manual, which instructs board agents that when the Region learns that unnamed parties such as successors should be alleged derivatively liable for remedying alleged unfair labor practice, an amended charge should be sought and the complaint should so allege. The manual also provides that when events subsequent to the complaint disclose the existence of such a party, the complaint should be amended to allege such derivative liability.

However, I note initially that it is well settled that the NLRB Case Handling Manual is merely a set of instructions to regional personnel, creates no substantive or procedural rights for any party, and any purported non-compliance with its provisions, results in no prejudice to any party. *CMI-Dearborn Inc.*, 327 NLRB 771, 780 fn. 27 (1999); *Houston Building Services*, 321 NLRB 123, 127 (1996); *Embassy Suites Hotel*, 313 NLRB 302 (1993); *Correctional Health Care Solutions*, 303 NLRB 835 (1991); *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 655-656, fn. 41 (1985); *Multimatic Products*, 288 NLRB 1279, 1390 (1928); *Aeroglatics, Inc.*, 228 NLRB 1137, 1158, fn. 2 (1975). Further, the manual itself contains a disclaimer, which specifically states that "this manual is not a form of binding authority, and the procedures set forth in the manual do not constitute rulings or directives of the General Counsel or the Board."

Moreover, it is not even clear based on this record that Respondents have established that General Counsel has violated the provisions of the manual. Thus, the manual instructs that when the General Counsel learns of a party that should be alleged as "derivatively liable," such as a successor or a single employer, it should amend the complaint and or solicit an amended charge, depending on the timing of such knowledge by the General Counsel. Here, however, the record discloses that in early December, after the complaint was issued, General Counsel was notified that the restaurant has been sold. There is no record evidence as to when General Counsel became aware of the names of the alleged successor, or when each alleged successor was operating the business. Thus, the evidence does not establish that General Counsel knew the names of the successors, when it decided to proceed with the trial in January 2007. More importantly, General Counsel, at that time, was not aware that either Respondent Majestic or Respondent New Majestic should be alleged as derivatively liable, to remedy Respondent Imperial's unfair labor practices. The record reveals that General Counsel conducted an investigation using investigatory subpoenas and depositions during 2007, in order to determine whether these entities should be alleged as derivatively liable based on their alleged status as a successor, or perhaps single employer or alter ego. I note that in connection with the issue of liability as a successor, to remedy the predecessor's unfair labor practices, the issue of knowledge is crucial. Therefore, until General Counsel completed its investigation, it was not aware that either of these entities should be derivatively liable as successors to remedy Respondent Imperial's unfair labor practices.

Accordingly, Respondents' reliance on the manual is totally misplaced.

Furthermore, their assertion that due process requires that they not be held liable because they were not given an opportunity to litigate the underlying unfair labor practices, is also without merit and contrary to established precedent. The Board's practice, consistently applied, requires only that Employers found to be derivatively liable based on a theory of successorship or single employer's alter ego, be given an opportunity to litigate their status at a

compliance proceeding. They need not be named in the underlying proceeding or be given a chance to contest the unfair labor practice findings. *United Exposition Service Co.*, 313 NLRB 107 fn. 1 (1994); *VSI-Technologies*, 300 NLRB 95 (1990) WL 201606 (1990); *National Transit Inc.*, 299 NLRB 453, fn. 4 454 (1990); *Frederick Iron & Steel*, 303 NLRB 514 fn. 1 (1991);
 5 *Commissary of Great Race*, 277 NLRB 1175, 1176 fn. 4 (1985); *Southeastern Envelope*, 246 NLRB 423, 424 (1979).

Moreover, the record discloses that Respondents were aware of the pendency of the trial in the underlying case, and made no attempts to intervene in that proceeding or to
 10 persuade Respondent Imperial to file an answer. Thus, when picketing was commenced in November 2007, Respondent New Majestic received a copy of the complaint and became aware that the complaint was issued, the trial was pending and the picketing established that the Union was asserting that it was liable to remedy the unfair labor practices committed by Respondent Imperial. Yet Respondent New Majestic took no action as described above.

Notably, it is doubtful that either of the successors could have filed an answer on behalf of Respondent Imperial, even if it did make an appearance. *National Transit supra* at 453. (In response to order to show cause against Employer, purchaser of business responded asserting the right to answer the complaint, in view of possibility that it could be held to be a successor.
 20 Board denied that request since no good cause was shown for the Employer having failed to answer, and the alleged successor can litigate its potential status as a successor in the compliance proceeding.) See also *Frederick Iron, supra* and *VSI Technologies, supra*, where the alleged potential successors were named in the original complaint as successors and as a party in interest, but the Board nonetheless granted summary judgment against the Employer
 25 that committed the unfair labor practice for their failure to answer, while noting that the potential successor will be able to litigate their status as successors, responsible for remedying the unfair labor practices of the predecessor at the compliance stage. Furthermore, even after the Board decision of the issuance of the Compliance Specification, neither Respondent Majestic nor Respondent New Majestic made any motion to the Board for reconsideration, rehearing or to
 30 reopen the record in that proceeding. In such circumstances, Respondents have waived any due process claims that it may have. *Web Tractor and Equipment Co.*, 181 NLRB 230, 234, 235 (1970), enforced, 80 LRRM 2738, (9th Cir. 1972).

Accordingly, based on the foregoing analysis and authorities, I reject the assertions of Respondents Majestic and New Majestic that the specification be dismissed against them on
 35 due process grounds, and that they should be permitted to relitigate the unfair labor practice findings found by Judge Biblowitz and affirmed by the Board. Therefore, although as related above, I did permit the parties to present evidence relating to the underlying findings, I find it inappropriate to make any contrary conclusions. These findings and conclusions are the law of
 40 the case and cannot be disturbed.

C. Liability of Respondents Majestic and New Majestic as a Successor Employer

In *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court upheld the Board's position detailed in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enfd. sub nom. U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968), concerning the liability of
 45 purchasers to remedy unfair labor practices committed by the seller. Thus, a *bona fide* purchaser of a business, which has knowledge of the seller's unfair labor practices at the time of the purchase, who continues the business without interruption or substantial change in operations, employee complement, or supervisory personnel has joint and several liability for
 50 remedying the seller's unfair labor practices. *Golden State supra*; *Baker Electric*, 351 NLRB 35, 515, 517, 519-520, 550 (2007) 519-520; *Lebanite Corporation*, 346 NLRB 748, 749 (2006).

5 There can be no dispute that there was a “substantial continuity”³⁴ between the predecessor and the successor, when both Respondent Majestic and Respondent New Majestic began to operate the restaurant. Indeed neither Respondent asserts that this prong of the *Golden State* test has not been met.

10 While Respondent New Majestic does observe that it hired a new manager David Yip, who was not employed by either Respondent Imperial or Respondent Majestic, it concedes that it continued to operate the restaurant with no hiatus, at the same location with the same equipment and furniture. The evidence further establishes that the employees performed essentially the same jobs, under the same working conditions, serving the same body of customers. Further, it was admitted that both Respondents made minimal changes when they took over the operations.

15 In these circumstances, I conclude that both Respondents continued to operate the restaurant “basically in unchanged form,” after they assumed control, and that there was a “substantial continuity” between the operations of the old and new business. *Fall River, supra*; *Bell Glass Co.*, 293 NLRB 700, 708 (1989); *Croley Coal Corp.*, 280 NLRB 844 fn. 3 (1986) *enfd* 844 F.2d 380, 383-384, (6th Cir. 1988).

20 Both Respondent Majestic and Respondent New Majestic vigorously contest the existence of the other prong of the *Golden State* test, i.e. knowledge by the successor of the predecessor’s unfair labor practices. Both Respondents assert that General Counsel has not established that they had knowledge of the unfair labor practices committed by Respondent Imperial, prior to their respective purchases of the restaurant. However, I note that Respondents misperceive the burden of proof on this issue.

25 It is well settled Board law, supported by the Courts, that once the General Counsel establishes successorship status, i.e. continuity of the enterprise, the burden is on the successor to show that it lacked the knowledge of the predecessor’s unfair labor practices. *S. Bent & Bros.*, 336 NLRB 788, 790 (2001); *Robert Andrew, Inc.*, 300 NLRB 444 (1990); *Proxy Communications*, 290 NLRB 540 fn. 2 (1988), *Croley Coal, supra* at 901, 844 F.2d at 384; *Blue Fountain Manor*, 270 NLRB 199, 210 (1984); *enfd sub nom* 786 F.2d 195 (7th Cir. 1986); *Cumberland Nursing & Convalescent Center*, 263 NLRB 428, 434 (1982); *Am Del Co.*, 234 NLRB 1040, 1044 (1978), *Mansion House Center*, 208 NLRB 684, 686 (1974).

30 I find that neither Respondent has met their respective burdens of proof in this regard. With respect to Respondent Majestic, Tang Ho, its sole officer and stockholder, testified that he never received a copy of the NLRB charge. Significantly, he did not deny that he was aware of the charge before he bought the restaurant. The failure by Ho to so testify is sufficient in itself, to find that Respondent Majestic has not met its burden of proof, particularly in the absence of any evidence that he was not so aware. Further, I find that there is sufficient evidence in the record for me to conclude, which I do, that Tang Ho did become aware of the charge prior to July 1.

35 I note the suspicious timing of the sale. On June 26, Jane Ho was personally served with a copy of the NLRB charge, which had been dropped off at Region 2. The fact that this document was not the official copy of the charge with the case number on it, is of no significance to the issue of notice. Due to the fact that the charge was initially filed at the wrong

50 ³⁴ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

Region, the charge had to be sent to Region 22, which resulted in the official date of filing the charge to be July 3. However, when Jane Ho received a copy of the charge, she was not aware of the venue issues. Thus, as far as Respondent Imperial was concerned, this was the notice of an NLRB charge. I have also found that she immediately notified David Ho about the receipt of the charge. More significantly, two days later, June 28, Jane Ho accompanied her stepson Tang Ho to the bank to open up an account under the name of Majestic Buffet, with Jane Ho as a signatory, listed as manager of that entity and Tang Ho as an officer. Based on these facts, I conclude that Jane Ho likely notified Tang Ho about the charge, and that it was the filing of the charge that motivated Respondent Imperial to sell the restaurant to Respondent Majestic. I also rely upon in this regard, post sale events, such as the fact that Tang Ho, during his brief tenure as “owner” of Respondent Majestic, spent over 50 hours per week in another restaurant in a different town in New Jersey.

I note that I do not and cannot conclude that an “alter ego” relationship existed between the two companies, since there is no complaint allegation to this affect. However, I do deem it appropriate to consider the above facts in assessing successorship and knowledge issues, particularly since many of the factors considered by the Board in determining successor and alter ego issues are identical. *Co. Fab Inc.*, 322 NLRB 162, 163 (1996).

Accordingly, based on Tang Ho’s failure to deny that he was aware of the filing of the charges, as well as the other facts detailed above, I find that Tang Ho and Respondent Majestic were aware of the unfair labor practices prior to July 1, when Respondent Majestic began operating the restaurant.

Even apart from the above findings concerning Tang Ho’s knowledge of the charges, the record contains sufficient other evidence to impute knowledge of Respondent Imperial’s unfair labor practices to Respondent Majestic. In that connection, it is well established that it is not essential that the *Golden State* successor have knowledge of the actual charges or complaints, but rather the test is whether the successor was aware of the conduct that the Board ultimately found unlawful. *S. Bent & Bros.*, *supra* at 790; *Commercial Forgings Company*, 315 NLRB 162, 166 (1994); *Robert Andrew*, *supra* at 444; *NLRB v. St. Mary’s Foundry*, 860 F.2d 679, 682 (6th Cir. 1988), *enforcing* 284 NLRB 232, 234 (1987); *Cumberland Nursing*, *supra* at 428.

Here Tang Ho did not deny that he was aware of the conduct that the Board ultimately found unlawful, i.e. the refusal to reinstate the three discriminatees. This omission alone is sufficient to impute knowledge to Respondent Majestic, since as I have detailed above, the burden is on Respondent Majestic to establish lack of knowledge.

Further the record contains ample affirmative evidence to impute knowledge of the unlawful conduct to Respondent Majestic. In this connection, General Counsel and Charging Party rely on the fact that Tang Ho was present at the restaurant on December 30, 2005, when the employees, including the discriminatees, who had walked out the previous day, returned to discuss their grievances. However, I agree with Respondent Majestic that this evidence is insufficient to establish knowledge of any unlawful conduct. The fact is that no unfair labor practices were committed by Respondent Imperial on December 31, 2005. The employees had walked out the day before in support of various grievances that they had, and were engaging in protected concerted activity, by such conduct and by their conduct in discussing these issues with Respondent Imperial’s representatives on December 31, 2005. However, the employees were not terminated or otherwise discriminated against on that day. The violation did not occur until mid-January, when the three discriminatees requested reinstatement, and when Respondent Imperial denied that request. Accordingly, I place no reliance on Tang Ho’s

presence at the restaurant on December 31, 2005.

5 However, I do agree with Charging Party and General Counsel, that it is appropriate to impute knowledge of Respondent Imperial's conduct, which led to the unfair labor practice findings, based on Respondent Majestic's relationship with David and Jane Ho and with Paul Huang.

10 In this regard, where the successor employs a manager previously employed by the predecessor, as a manager, principal or agent of the successor, and these individuals were aware of and or committed the unfair labor practices as representatives of the predecessor, knowledge of such unfair labor practice conduct will be imputed to the successor. *Baker Electric, supra*, 351 NLRB at 519-520, 550; *S. Bent & Bros., supra* at 791; *Robert Andrew, supra* at 445; *Commercial Forgings, supra* at 166; *Bell Glass Co.*, 293 NLRB 706, 708 (1989); *Airport Bus Co.*, 273 NLRB 561, 597 (1984); *Bellingham Foods*, 237 NLRB 1450, 1466 (1978);
15 *General Wood Preservative Co.*, 288 NLRB 956, 964 (1988), *enfd* 905 F.2d 803, (4th Cir. 1990); *Reliable Electric*, 330 NLRB 714, 722 (2000); *St. Mary's Foundry, supra*, 284 NLRB at 234; 860 F.2d at 682-683.

20 Here the evidence establishes that Jane and David Ho, as well as Paul Huang were employed by Respondent Majestic as managers and/or were principals and agents of that Respondent. Moreover, they were the individuals, who committed and/or were aware of the conduct of Respondent Imperial, found by the Board to constitute unfair labor practices.

25 Dealing with the latter issues first, the evidence establishes the Respondent Imperial refused to reinstate the discriminatees in mid-January after Tan made a request for reinstatement on behalf of all three discriminatees. Although no specific findings were made concerning these facts in the underlying decision,³⁵ in this proceeding, evidence was added concerning these issues. I can and do rely on such evidence, including that Paul Huang informed Tan, that Respondent Imperial would not reinstate Tan, Tsai and Chen because the boss's wife (Jane Ho) thought that they were "troublemakers." This evidence implicates Jane and David Ho as well as Paul Huang in the unlawful conduct of Respondent Imperial. Further, Paul Huang informed Chen on December 31, that if the employees returned to work, some of the employees would be fired, after the restaurant was not so busy. This remark of Huang could be construed as an unlawful threat in violation of Section 8(a)(1) of the Act, in addition to further
30 evidence of Huang's knowledge of and involvement in the subsequent refusal to reinstate Tan, Chen and Tsai.

40 Additionally, on June 26, 2006, Chen delivered a copy of the NLRB unfair labor practice charge to Jane Ho, in the presence of Huang. This fact establishes knowledge of the charge by Huang and Jane Ho, as well as David Ho,³⁶ prior to the sale.

45 Furthermore, shortly after the charge was filed, David and Jane Ho visited Tsai's house, in order to invite Tsai back to work. This visit resulted in phone calls between David Ho and Tsai, during which reinstatement was discussed, and a meeting was scheduled for July 21, 2006. At the meeting attended by Huang, David Ho, Tsai and Chen, David Ho demanded that

³⁵ As noted above, no answer was filed by Respondent Imperial, so a default judgment was issued.

50 ³⁶ Jane Ho immediately notified David Ho of the charge. As related above, two days later, Jane Ho accompanied her stepson, Tang Ho, to the bank, to open an account under the name Majestic Buffet.

the employees withdraw their NLRB charges before they could return to work. Ho added “There is no way that I will let somebody, who is suing me, to return to work.” Ho continued that he would consider such employees (suing him) to be an “enemy,” and he would not let “an enemy work in my restaurant.”

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After some further discussion of the amounts of compensation requested by the employees, and Ho’s refusal to allow the employees to return to work and negotiate the amounts due later, Ho suggested that he would permit employees to work additional hours, so they could make more overtime. The employees indicated that they were open to such an idea, and asked Ho for a specific proposal to be considered by the employees.

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Several portions of this meeting are highly relevant to the issue of knowledge of Respondent Imperial’s unfair labor practices. The demand by Ho that the employees withdraw their unfair labor practice charge in order to be reinstated is a violation of Section 8 (a)(1) of the Act, as the underlying decision so found. Thus Ho made the unlawful statement in the presence of Huang.

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It is therefore appropriate to impute knowledge of the conduct underlying the unfair labor practices of Respondent Imperial to Respondent Majestic based, on the status of Huang and David Ho, and their knowledge of such conduct. *Baker Electric, supra* at 519-520, 550; *Robert Andrew, supra*; *Bell Glass, supra*.

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Both Huang and David Ho were clearly principals, managers and agents of both Respondent Imperial and Respondent Majestic. Huang was admittedly a manager and supervisor of Respondent Imperial. He was hired by Tang Ho to manage Respondent Majestic, and in fact was the principal manager of the restaurant, and in charge of hiring and essentially in charge of running the restaurant, while Tang Ho, the “purported” owner was spending 50 hours a week working at a different restaurant in a different part of New Jersey. Huang was also a signatory on Respondent Majestic’s bank forms, and signed the checks repaying the promissory notes for the purchase of the restaurant on behalf of Respondent Majestic.

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As for David Ho, while he was not actually employed by Respondent Majestic, he was clearly acting as a principal and agent of the entity, “allegedly” owned by his son. It was David Ho, along with his ex-wife Jane and Paul Huang, who attempted to persuade the employees to return to work at the restaurant, and negotiated with them in this regard on July 21. David Ho’s comments at this meeting are quite revealing. David Ho demanded that the employees withdraw their charges before being reinstated, and added that “there is no way that I will let somebody, who is suing me, to return to work.” He added that he would not let “an enemy work in my restaurant.” Further, David Ho testified that he did not discuss his intention to ask the employees to return to work with his son, until after the meeting. Ho testified “I decided to let them come back.” These comments by Ho demonstrate who was really in charge of the restaurant, while it was “owned” by Tang Ho. Since David Ho was clearly authorized to offer and discuss reinstatement issues with the employees, including the possibility of increased overtime for employees, if they agreed to come back, there can be little doubt, and I find that David Ho was a principal and agent of Respondent Majestic.

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I also find that Jane Ho was a principal and agent of Respondent Majestic. She was a signatory on several bank forms for Respondent Majestic, and was listed thereon as manager. Jane Ho also accompanied David Ho to Tsai’s house, to offer Tsai reinstatement, after the sale and at the time when Respondent Majestic was the owner of the facility.

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Accordingly, based on the foregoing, I conclude that David Ho, Jane Ho and Paul

Huang were principals, agents and/or managers of both Respondent Imperial and Respondent Majestic, that they were participants in and/or aware of the conduct found to constitute unfair labor practices, and that knowledge of such conduct and unfair labor practices, is imputed to Respondent Majestic. *Baker Electric, supra*; *S. Bent & Bros., supra*; *St. Mary's Foundry, supra*;
 5 *Bell Glass, supra*; *Bellingham Foods, supra*.

In these circumstances, Respondent would be liable as a *Golden State* successor to remedy the unfair labor practices of Respondent Imperial. However, since I have found above that no jurisdiction has been established over the operations of Respondent Majestic, it cannot
 10 be ordered to do so, and I recommend dismissal of the specification against Respondent Majestic.³⁷

Turning to the issue of knowledge of Respondent New Majestic, the same principles and precedent that I have discussed above, concerning Respondent Majestic are applicable.
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As I have detailed above, once the General Counsel has established the "substantial continuity" of the business, after the purchase, as it has done here, the burden shifts to Respondent New Majestic to show that it lacked knowledge of the predecessor's unfair labor practice. *S. Bent & Bros., supra*; *Robert Andrew, supra*. Further, as I also related above, it is
 20 not essential that the successor have knowledge of the actual charge or complaint, but rather the test is whether the successor was aware of the conduct that the Board found unlawful. *S. Bent & Bros., supra*; *Commercial Forgings, supra*; *St. Mary's Foundry, supra*.

Here Ki Sang Wong, Respondent New Majestic's owner, testified only that he was not aware of the "litigation" until November 2006, when a demonstration was held in front of the restaurant. Even assuming that the "litigation" can be construed as identical to the NLRB charge, such testimony cannot be construed as a denial that Wong was not aware of conduct underlying the unfair labor practice, found by the Board. Thus for this reason alone, Respondent New Majestic has failed to meet its burden of proof.³⁸
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Furthermore, as in the case of Respondent Majestic, Paul Huang was an active participant in and aware of the unfair labor practices, committed by Respondent Imperial. I also find sufficient evidence to establish that Huang was a principal and an agent of Respondent New Majestic. In this regard, Wong discussed the purchase of the restaurant with Huang before the purchase, and asked Huang to stay on and help him out in the new business. More significantly, Paul Huang was present at the closing, and signed checks on behalf of Respondent New Majestic for the purchase of the restaurant.
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Further, on November 30, 2006, Tsai went to the restaurant along with a process server, to serve a copy of the federal lawsuit on Respondent New Majestic. Tsai spoke to David Yip, Respondent New Majestic's manager. Tsai asked Yip, where were the owners, Wong and
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³⁷ If I am reversed as to my conclusions *vis a vis* jurisdiction, then my recommendation would be to order Respondent Majestic to jointly and severally with Respondent Imperial, reimburse the employees for their losses.
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³⁸ Nor does Wong's testimony that he yelled at Huang for asking him to purchase the business, "if there was such an issue," and his (Wong's) alleged statement to Tang Ho that Tang Ho should have told Wong about the issue, relate to knowledge of the conduct underlying the unfair labor practices. Such testimony might be relevant to whether Respondent New Majestic had knowledge of the charge, but not to the issue of knowledge of the underlying conduct.
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Huang. Yip replied that they would be back soon. While Huang was not an owner, I find that Yip failure to correct Tsai's assertion that Huang was one of the owners, implicitly suggests that Yip believed that Huang was one of the owners, or at least a principal of Respondent New Majestic.

5 Based on the above evidence, I concluded that Huang was a principal and an agent of Respondent New Majestic. Therefore, I find it appropriate to impute knowledge of Respondent Imperial's unfair labor practices to Respondent New Majestic based on Huang's status with the Employer. *Baker Electric, supra*; *S. Bent & Bros., supra*; *Commercial Forgings, supra*; *Robert Andrew, supra*; *Bell Glass, supra*; *Airport Bus, supra*; *Bellingham Foods, supra*; *General Wood, supra*; *Reliable Electric, supra*; *Cumberland Nursing, supra*; *St. Mary's Foundry, supra*.³⁹

15 Furthermore, in this regard, I also rely on the failure of Respondent New Majestic to call Paul Huang as a witness in this proceeding although he was still employed by it at the time of the trial. In such circumstances, it is appropriate to draw an adverse inference against Respondent New Majestic for its failure to call Huang as a witness, and find that his testimony would be adverse to Respondent New Majestic concerning the issue of Respondent New Majestic's knowledge of the unfair labor practices of Respondent Imperial. *Mail Contractor of America*, 346 NLRB 164, 166 (2005); *Daikichi Sushi*, 335 NLRB 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1981), *enfd mem* 861 F.2d 720 (6th Cir 1988).
20 Notably, the Supreme Court in *Golden State supra* specifically approved the Board's reliance on the adverse inference rule, in finding knowledge of the predecessor's unfair labor practices by the successor. 414 U.S. at 174.

25 Respondent New Majestic places significant reliance on *Navajo Freight Lines*, 254 NLRB 1272, 1281-1282 (1981), where the Board affirmed the decision of the judge, who concluded based on the facts therein, that knowledge of the predecessor's unfair labor practices by the successor, had not been established, notwithstanding that the successor employed the predecessor's shop superintendent, who was aware of the unfair labor practice litigation. However, I find that Respondent New Majestic's reliance on this case is misplaced. In
30 my view, the judge in that case failed to properly apply Board precedent, as I have detailed above. Initially, while recognizing the need for the successor to prove lack of knowledge he simply credited the testimony of the successor's official that neither that official nor any representative from the successor had knowledge of the unfair labor practice charge filed
35 against the predecessor, when it purchased the business. The judge concluded that this was sufficient to shift the burden to General Counsel to rebut this *prima facie* showing. I find no support in the subsequent or previous precedent for this burden shifting approach. Indeed, as I have detailed above, there are numerous Board cases, which contrary to *Navajo Freight supra*, impute knowledge of the predecessor's unfair labor practices by the successor, where it employs a manager, principal or agent of the predecessors and that individual had knowledge
40 or committed the unfair labor practices while employed by the predecessor. Further, the judge failed to draw any distinction between the unfair labor practice charge and the conduct, underlying the unfair labor practices, which I have noted above, is the relevant criteria for assessing knowledge. *S. Bent & Bros. supra*, and cases cited therein.

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³⁹ See also *Thomas Engine Co.*, 179 NLRB 1029 (1970), cited favorably by the Supreme Court in *Golden State* in upholding the Board's and Court of Appeal's finding of knowledge. 414 U.S. at 173. In *Thomas Engine*, the Board affirmed the judge's imputation of knowledge to the successor, of the unfair labor practices of the predecessor, based solely on the successors
50 hiring of the predecessor's plant superintendent, who was aware of the unfair labor practices. *Id* at 402.

I recognize of course that the Board affirmed the judge's decision in that case. However, I note that the Board did not write anything in its affirmance, and it is not totally clear whether or not Exceptions were ever filed by any party to the judge's decision on this issue. I believe that this decision is a "sport" case, which simply slipped through the cracks, and is contrary to the numerous cases that I have cited above, which reach contrary conclusions concerning the imputation of knowledge, based on the hiring of a predecessor's manager or principal.

Moreover, I also find *Navajo Freight* distinguishable in several important respects, from the facts at hand. There, the successor hired the shop superintendent, who had knowledge of the unfair labor charge. Here, the Respondent New Majestic hired Paul Huang, who as a manager of Respondent Imperial and Respondent Majestic, was intimately involved and committed some of the unfair labor practices found. Thus it was Huang, who informed Tan, that the employees would not be reinstated because they were "troublemakers." It was also Huang, who informed the employees that if they returned to work, they would eventually be terminated, when work got less busy. This is an important distinction, as the Board and the Courts have placed significant reliance on the facts that the manager, principal or agent hired by the successor had committed unfair labor practices when employed by the predecessor in imputing knowledge of such conduct to the successor. *Baker Electric, supra*, 351 NLRB at 520, citing *Golden State*, 414 U.S. at 123, finding the employment of the predecessor's manager, who committed the unfair labor practice, satisfies the knowledge requirement; *Commercial Forgings, supra*, 315 NLRB at 166; *Bell Glass, supra*, 293 NLRB at 708; *St. Mary's, supra* 289 NLRB at 234; *Cumberland Nursing, supra*, 263 NLRB at 434; *Bellingham Foods, supra*, 237 NLRB at 1466.

Furthermore, in *Navajo Freight, supra*, the supervisor hired by the successor, who was aware of the unfair labor practice charges filed against the predecessor, appeared to be a relatively low level, minor supervisor. Here, in contrast, Huang was, as I have concluded above, an agent of Respondent New Majestic, approaching the level of principal. Huang discussed the purchase with Wong, prior to the sale, was present at the closing, had check writing authority for Respondent New Majestic and signed checks on behalf of Respondent New Majestic to pay for the purchase. In such circumstances, the imputation of knowledge through Huang is a more logical conclusion than in *Navajo Freight*, where the supervisor involved did not engage in any similar activities on behalf of the successor.

Therefore, based on the foregoing, I find that *Navajo Majestic* is not dispositive of Respondent New Majestic's position that it did not have knowledge of the unfair labor practices of the predecessor. I find for the reasons set forth above, particularly Respondent New Majestic's failure to deny knowledge of the conduct of the predecessor, which led to the unfair labor practices found by the Board, plus the status of Paul Huang, that knowledge of such unfair labor practices are properly imputed to Respondent New Majestic.

Finally, Respondent New Majestic argues that the principles of equity weigh against finding it liable to remedy the unfair labor practices of Respondent Imperial, since it could not have reflected its potential liability in the purchase price or through indemnification by the seller. *Lebanite Corp.*, 346 NLRB 748 (2006); *Hill Industries Inc.*, 320 NLRB 1116 (1996); *Glebe Electric*, 307 NLRB 883 (1992). Respondent New Majestic contends that since the unfair labor practice liability of the predecessor reflected in the compliance specification was approximately \$122,000, is substantially greater than the \$70,000 purchase price paid by Wong, that there was no opportunity to structure the transaction that could protect the purchaser. *Lebanite supra* at 752. Therefore, Respondent New Majestic argues that "it cuts against the grain of equity and fundamental fairness to impose successor liability on New Majestic."

I disagree. I note initially, that unlike *Lebanite supra*, as well as the cases cited therein,⁴⁰ here Respondent New Majestic did in fact negotiate an indemnification agreement with Respondent Majestic, wherein Respondent Majestic agreed to indemnify and hold harmless Respondent New Majestic “from and against all debts, liabilities, obligations and commitments of the seller relating to the business.” Therefore, the cases cited by Respondent New Majestic are inapplicable since they were focused on whether based on the particular facts therein, the successor “could have” negotiated such an indemnification clause. Here such a chance was negotiated and agreed to, so the cases cited, as well as the rationale supporting their holdings, are not dispositive.

In this regard, Respondent New Majestic also cites *Lebanite, supra*’s statement that “it would seem apparent that an indemnity clause is worthless if the predecessor has no assets to pledge.” Respondent New Majestic argues therefore, that the “indemnity clause is hollow, because Respondent Majestic does not have any assets.” However, Respondent New Majestic’s assertion that Respondent Majestic “has no assets to pledge,” is not supported by the record. Indeed the record does not establish what assets Respondent Majestic had or did not have at the time of the sale, or indeed at any time.⁴¹

Furthermore, Respondent New Majestic’s calculation of its liability is in my view misplaced. It seems to me that in measuring the relative liability versus the purchase price, as was done in *Lebanite, supra*, the appropriate date to use is the date of the purchase. Here the purchase was made on September 1, 2006, at a time, when the potential liability was much less than the \$122,000 alleged in the specification, which runs through January 2008. Indeed, the record reflects that in mid-July 2006, approximately a month and a half before the sale, during settlement negotiations between David Ho, Paul Huang and the employees, Tsai requested \$20,000 each for the three discriminatees, totaling \$60,000. Thus, since Paul Huang was present at this meeting, he was aware of the demand by the employees, which knowledge is imputed to Respondent New Majestic. Therefore, I conclude that the \$70,000 purchase price here, in fact exceeded the Respondent New Majestic’s potential liability at the time of the sale.

Further, in terms of assessing the equities and fairness issues, raised by Respondent New Majestic, the Board supported by the Courts has explained the public policy reasons for its position, by emphasizing the language of the Supreme Court in *Golden State*. These considerations are aptly summarized by the Court of Appeals decision in *St. Mary’s Foundry, supra*, 860 F.2d at 682. The Court held that the public policy reasons underlying the decision on *Golden State* would seem to apply.

When a new employer...has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor’s failure to remedy the predecessor employer’s unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor’s labor policies. To the extent that the employees’

⁴⁰ *Hill Industries, supra*; *Glebe Electric, supra*.

⁴¹ The record does indicate that Tang Ho did not contribute any money to Respondent Majestic when it was formed. However, this testimony does not foreclose the possibility that Respondent Majestic may have had some assets from other sources.

legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest.... Similarly, if the employees identify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices....

Golden State, 414 U.S. at 184, 94 S.Ct. at 425.

The Board itself has frequently cited these portions of *Golden State* in support of its equitable decision to hold a successor liable to remedy the unfair labor practices of a predecessor, even though the successors did not commit any unfair labor practices, as long as the successor had knowledge of such unfair labor practices. *S. Bent's & Bros.*, *supra* at 790-791; *Robert Andrew*, *supra* at 446. (Also noting in support of its position to impose liability on the successor, that in fact, the successor there, like Respondent New Majestic, had obtained an indemnification clause in the sale agreement.)

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent New Majestic was a successor under the *Golden State* rationale, and is responsible for remedying the unfair labor practices committed by Respondent Imperial.

D. Back Pay and Reinstatement

The Immigration Reform and Control Act 1986 (IRCA), for the first time, made the employment of undocumented workers illegal. It established an extensive verification system, which mandates that employers verify the identity and eligibility to work of all new hires by examining specified documents before they begin work. 8.U.S. C § 1324 a(b). If an applicant is unable to present the required documentation, the applicant cannot be hired. § 1324 a(a)(1). If the employer unknowingly hires an unauthorized alien, the employer is compelled to discharge the worker upon discovery of the workers undocumented status. § 1324 a (a)(2). These requirements also require employers to use the I-9 Form to verify the identity and work authorization of their employees within three days of the employee's hiring date, and if the employer does not complete the verification process within three days, it may not continue to employ the workers. 8 C.F.R, § 274a.2(b)ii. The obligation of the employer to verify employment status by requiring an I-9 Form to be filled out, also requires that it "attest under penalty of perjury" that it has examined the appropriate documents, and sign the I-9 Form. 8.U.S.C. § 1324a(b), 8 CFR § 274a.2 (b)ii. Further, employers, who violate IRCA are subject to civil fines, [8.U.S.C. § 1324 a (e)(4)(A)], and may be subject to criminal prosecution. § 1324 a(f)(1).

IRCA does not provide that it is unlawful for an undocumented worker to obtain employment or to work in the United States. However, IRCA does prohibit such a worker from tendering fraudulent documents in order to obtain employment. It makes it unlawful for a person to knowingly, "forge, counterfeit, alter or falsely make any document ... or to use, attempt to use, possess, obtain, accept or receive or to provide any forged, counterfeit, altered or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter." § 1324c(a)c11(2).

In *Hoffman Plastic Compound v. NLRB*, 535 U.S. 137 (2000), the Supreme Court held that IRCA foreclosed the Board from awarding back pay to an undocumented worker, who had not been authorized to work in the United States. *Id* at 138.

The Respondents relying on *Hoffman* contend that since the parties have stipulated that both Tsai and Chen were not authorized to work in the United States, at hire or any time during the back pay period that no back pay is due to these employees.⁴²

5 General Counsel and Charging Party assert however, that *Hoffman* is inapplicable to the facts here since the employees did not obtain their jobs through the use of any fraudulent documents, and Respondent Imperial hired and continued to employ Tsai and Chen, knowing that they were not authorized to work in this country, in violation of IRCA. *Mezonos Maven Bakery*, JD (NY) 48-06, Case No. 29-CA-25476, 2006 W.L. 3196754, 2006 NLRB Lexis 491
10 (Nov. 1, 2006).

15 Whether or not the ALJ's finding in *Mezonos*, that the facts therein created an exception to the seemingly unequivocal holding of the Supreme Court in *Hoffman* to deny back pay to undocumented workers is an open question and will require considerable discussion and analysis.

20 Before I do so however, it is necessary to decide whether the facts here are sufficiently similar to facts in *Mezonos*, to justify consideration of the legal issues involved. In that regard, Judge Davis concluded that two essential facts in *Hoffman* were absent in *Mezonos*. These facts were that the discriminatee in *Hoffman* had criminally violated IRCA by presenting fraudulent documents to his Employer, and that the Employer in *Hoffman* did not violate IRCA, and hired the discriminatee with no knowledge that he was undocumented. Instead, Judge Davis concluded that the reverse was true, and the employees there did not present fraudulent documents to their Employer and did not violate IRCA, but the Employer violated IRCA by
25 knowingly hiring them and continuing their employment without evidence that they were documented. In such circumstances, he concluded that *Hoffman* is not dispositive, and that back pay should be awarded to the employees. JD (NY) 48-06 slip op at 14-18.

30 Respondents contend that in addition to disagreeing with the "exception" to *Hoffman*, created by *Mezonos*, that the facts here are also different. In that regard, they assert that Tsai and Chen did present fraudulent documents to Respondent Imperial, and that Respondent Imperial did not "knowingly" hire Chen or Tsai in violation of IRCA. I disagree with the contentions of Respondents on both issues, and find as argued by Charging Party and General Counsel that the facts here are similar to the facts in *Mezonos*.

35 Respondents claim that both Tsai and Chen produced "fraudulent documents" to Respondent Imperial, in that they provided driver's licenses that were obtained through fraud. In that regard, Tsai did admit that when he renewed his driver's license in 2003, he filled out a form, which asked the question, whether he was "in this country legally?" He answered yes to
40 that question, and as a result, obtained a renewal of his license, which expired on November 30, 2007. Tsai testified that he checked off that box because at the time he wasn't sure what his status was, since his status had been legal before when his green card was still in effect.⁴³

45 As I have detailed above, Tsai was not asked to present any documents, nor asked about his immigration status, when he was hired by Respondent Imperial in December 2004. A

⁴² Tan was authorized to work in this country at all times, and became a citizen in June 2005, prior to the unlawful refusal to reinstate. Respondents do not contest Tan's back pay award based on her immigration status.

50 ⁴³ Tsai obtained a green card in 1999, when he entered the country, which expired on January 20, 2001.

month or two later, Jane Ho asked Tsai if he wanted to pay taxes. Tsai said yes, and in response to that Jane Ho asked if he had any identification or social security card. Tsai gave Ho his social security card and the driver's license described above. Ho made copies of these documents and returned them to Tsai. Ho then asked if he was "documented" and if he had a green card. Tsai replied that he had a green card but it expired. Ho instructed Tsai to bring it in the next day so she could look at it. Tsai agreed and as requested brought in the expired green card. Ho wrote down the number of Tsai's expired green card on the document wherein she included copies of his social security card and driver's license. Ho also asked Tsai to sign an I-9 Form, which included Tsai's name and address (filled out by Ho), and which did not include any other information, such as his social security number, date of birth, green card number or other documents in Section 2 of the document, where proof of identity or work authorization is asked for. These sections were left blank. The I-9 Form was not signed by any representative of Respondent Imperial.

Chen entered the country in 2000 and obtained a visa, which expired at some point undisclosed by the record. He obtained a New York driver's license in 2000 by submitting his passport and social security number. On May 27, 2005, Chen renewed his driver's license but could not recall whether or not the form that he filled out asked any questions about his immigration status or his U.S. citizenship.

Similar to Tsai (as well as Tan), when Chen was hired in late December 2004, he was not asked about his immigration status, nor asked to fill out any documents. About a month later, Jane Ho asked Chen for his "documents," specifically asking for a passport, green card, social security number or driver's license. Chen replied that he only had a driver's license and a social security number. Ho answered "no problem" and asked for a copy of Chen's license, which Chen provided.⁴⁴ Ho made a copy of the license, and asked Chen to fill out his name, date of birth, address, and social security number on the piece of paper in which Ho copied Chen's license. Chen did so, and Ho wrote Chen's name on the bottom of the document.

Ho also gave Chen an I-9 Form to sign on that same day. Chen signed the form, which included his name, address, and date of birth, but no other information. Neither Chen's social security number nor the date of signing was filled in. As with the I-9s signed by Tsai and Tan, the form was not signed or certified by any representative from Respondent Imperial.

Based on these facts, I do not agree with Respondents' contentions that either employee knowingly provided fraudulent documents in order to satisfy requirements of IRCA. Although Tsai, as Respondents correctly observe, did check a box on the renewal form for his New Jersey driver's license that he was "legally in this country," this conduct does not violate IRCA. The statute requires that he "knowingly" produced false work authorization documents to Respondent Imperial. That standard had clearly not been established. Initially, I note that Tsai provided a reasonable explanation for his conduct in checking off that box, since he was uncertain of his status *vis a vis* the question asked. Notably, he was in the country legally when he first obtained his driver's license, and his green card was in effect at that time. Thus he did not "knowingly" commit fraud when he checked off the box in question.

More significantly, Tsai was not asked about his status at hire, and only submitted the license to Respondent Imperial, over a month later, in connection with the issue of paying taxes, and not for the purpose of obtaining employment. Although Tsai did sign an I-9 Form, this document made no reference to the driver's license submitted by Tsai to Respondent

⁴⁴ The license was issued on September 7, 2001 and expired on November 15, 2005.

Imperial. Thus Tsai did not violate IRCA in any respect, by providing this license to Respondent Imperial.

5 As for Chen, he submitted a copy of his New York driver's license to Respondent Imperial, but no evidence was presented that his license was produced by any false statement of Chen. In fact the record is not even clear, whether or not Chen was legally in the country at the time he procured this license in 2001.⁴⁵ Thus there is not an arguable basis to assert that Chen "knowingly" submitted fraudulent documents to Respondent Imperial.

10 Respondents also argue that both employees committed fraud under IRCA by failing to inform Respondent Imperial at hire or thereafter when they submitted the above documents to it, that they were unauthorized to work in this country. I do not agree. There is no provision in IRCA that requires employees to notify employers of their undocumented status at hire or at
15 any time during their employment. I do not agree that the employees by signing an I-9 Form were fraudulently representing to Respondent Imperial that they were authorized to work in the United States.

20 Accordingly, I conclude that like the employees in *Mezonos*, Tsai and Chen did not knowingly submit fraudulent documents to Respondent Imperial in order to procure work authorization, and did not violate IRCA in any respect.

25 Respondents also contend that Respondent Imperial did not hire Tsai and Chen knowing of their undocumented status, and was at all times unaware of the facts that they were both unauthorized to work in this country. Therefore, they argue that Respondent Imperial did not violate IRCA. Once more, I cannot agree.

30 I agree with Charging Party and General Counsel that Respondent Imperial's violations of IRCA are numerous and unambiguous. IRCA requires that employers examine documents evidencing employee eligibility to work and identity within three days of employment, record the information on an I-9 Form, and sign and date the certification. All of these requirements were
35 violated by Respondent Imperial since it made no inquiries about the employees' status at hire and did not ask them to produce any documents until over a month after hire, and only for the purpose of filing taxes, not to establish work authorization. While Respondent Imperial did have the employees fill out an I-9 Form, the relevant and required information with respect to authorization was left blank, the form was not dated, and not signed by Respondent Imperial as required by IRCA.

40 Further, when Respondent Imperial did request some documents from the employees, over a month after their employment commenced, Respondent Imperial clearly and knowingly became aware that both employees were unauthorized to work in this country. Tsai informed Jane Ho that his green card had expired, and produced that card to her as she requested. Ho made a copy of the expired card and told Tsai that "this is fine."

45 While Ho asked Chen if he had a green card, Chen truthfully informed her that he did not and she said "no problem." She accepted a copy of Chen's driver's license and his social security number. Thus despite Respondent Imperial's knowledge at that time that both Tsai and

50 ⁴⁵ Chen testified that when he entered the USA in 2000, he had obtained a visa, but he was unsure as to when it expired. Chen renewed his license in May 2005, well after his hire and his submission of his original license to Respondent Imperial. Chen also did not recall if questions were asked on his renewal application about his immigration status in 2005.

Chen did not have green cards, and were not authorized to work in this country, it continued to employ them in further violation of IRCA. In this respect, the facts are virtually identical to that of *Mezonos*.

5 That leads me to the more difficult issue of whether *Mezonos* correctly interpreted the Supreme Court's decision in *Hoffman* and concluded that where the employees have not violated IRCA and the Employer has, back pay should be awarded to the worker. It is to that question that I now turn.

10 In that connection the Board has long held that the Act does not differentiate between citizens and non-citizens, and that no distinction should be drawn on such a basis. *Logan & Paxton*, 55 NLRB 310, 315 fn. 12 (1944). Thus illegal or undocumented aliens are considered employees within the meaning of Section 2(3) of the Act, and are entitled to the protection of the Act. *Concrete Form Walls*, 346 NLRB 831, 733 (2006); *Duke City Lumber Co.*, 251 NLRB 53, 54 (1980). These protections have included the normal Board remedies of backpay and reinstatement for discriminatory discharges. *Apollo Tire Inc.*, 236 NLRB 1627, fn. 1 (1978), *enfd.* 604 F.2d 1180, 1182-1183 (9th Cir. 1979); *Amy's Bakery & Noodle Co.*, 227 NLRB 214 (1976); *Duke City Lumber*, *supra*.

20 These issues however did not reach the Supreme Court until *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984). This case requires extensive analysis because it preceded *Hoffman*, and much of *Hoffman* was litigated on the basis of whether the Board's and Circuit Courts' opinions in *Hoffman* were consistent with *Sure-Tan*.

25 In *Sure-Tan*, a union organization drive began at two leather processing firms, located in Chicago, IL in July 1976. Of the 11 employees in the unit, most were Mexican nationals present illegally in the United States without visas or immigration papers authorizing them to work. The Union prevailed in an election held on December 18, 1976. The Employer filed objections to the election based on the fact that six or seven of the voters were illegal aliens. The Acting Director overruled the objections and certified the Union on January 10, 1977. The next day, the Employer's president sent a letter to the INS asking it to check on the immigration status of a number of its employees. In response to the letter, INS agents visited the Employer's premises on February 18, 1977, and discovered that five employees were living and working illegally in the United States and arrested them. Later that day, each employee executed an INS form acknowledging their illegal presence in the country and accepting INS's grant of voluntary departure as a substitute for deportation. By the end of the day, all five employees were on a bus ultimately bound for Mexico.

40 Thereafter, the Acting Director issued a complaint against the Employer alleging numerous violations of the Act, including a "constructive discharge of the five employees." A hearing was held by an administrative law judge, who found consistent with the complaint that the Employer violated the Act by requesting that the INS investigate the employees solely because the employees supported the Union, and that such conduct amounted to a "constructive discharge."

45 The administrative law judge recognizing the problem that the employees were in Mexico and that the prospects for reinstatement were "dim," recommended that the Employer offer reinstatement to the employees and that offer be kept open for six months. The administrative law judge also concluded that since under past precedent backpay is tolled during periods of unavailability for employment, a normal backpay award could not be ordered. 50 Nevertheless, the administrative law judge invited the Board to consider awarding backpay for a minimum four week period.

5 The Board affirmed the administrative law judge’s decision on the merits⁴⁶ but disagreed with his remedy. The Board concluded that the remedy of the administrative law judge was “unnecessarily speculative,” since the record contained no evidence that the employees have not returned to the United States. The Board modified the administrative law judge’s decision by substituting the conventional remedy of reinstatement and backpay, thereby leaving until subsequent compliance proceedings to determine “issues relating to their availability for work.” *Id* at 1187.

10 On appeal, the Court of Appeals enforced the Board’s order but modified its remedy. *NLRB v. Sure-Tan Inc.*, 672 F.2d 592 (7th Cir. 1982). The Court first considered the propriety of backpay and reinstatement, and rejected Sure-Tan’s argument that such an order cannot be reconciled with immigration laws. At that time, IRCA was not in effect and immigration issues were regulated by the Immigration and Nationalization Act (INA). The INA did not make it
15 unlawful for an employer to hire an alien, who was not authorized to work in the United States, nor was it illegal for an alien to accept employment even if they entered the country illegally.

20 Sure-Tan argued however that since re-entry of the discriminatees into the country could be a felony under INA, that the Board’s award encourages violations of the INA. The Court disagreed pointing out that the discriminatees were not deported but voluntarily left the country, so under INA, they could lawfully return to this country to reclaim their positions. The Court also rejected Sure-Tan’ contention that the purposes of the NLRA would not be furthered by ordering reinstatement and backpay to “illegal” aliens. It concluded as follows:

25 Moreover, the purpose of backpay in cases such as this is to vindicate public policy by making employees whole for their losses caused by the employer’s unfair labor practices. *NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 90 S.Ct. 417, 24L.Ed.2d 405 (1969). It would be anomalous to encourage the
30 honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies. Indeed, the rights of *both* alien and non-alien employees under the Act are flouted if employers are free to discriminate against alien employees who exercise their right to
35 form and join unions. This is precisely what happened here since Sure-Tan, by constructively discharging these alien employees, destroyed the bargaining union and thus undermined the Union’s support during the crucial period immediately after certification. Both reinstatement and backpay are justified under the
40 circumstances to vindicate the policy of the Act and to deter similar conduct by other employers in the future. 672 F.2d at 604.

45 The Court then discussed whether a reinstatement offer made by Sure-Tan was conditional or unconditional. It concluded that they were (contrary to the position of the Board) unconditional since it offered reinstatement “provided that re-employment shall not subject Sure-Tan to any violations of United States immigration laws.” The Court construed this letter as a reminder to employees that they “may not legally enter the United States to claim these
50 jobs without paper documents.” *Id* at 605-606. Thus, the Court viewed the letters as

⁴⁶ *Sure-Tan*, 234 NLRB 1187 (1978).

unconditional and made the following observation. “Further, and consistent with our analysis of Sure-Tan’s reinstatement offer, the Board’s remedial order must be modified to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement.” *Id* at 606.

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The Court then concluded that the offers were deficient (as did the administrative law judge) because they must afford the discriminatees a reasonable time to consider the offer and make arrangements for legal entry into the United States. The Court found however that the administrative law judge’s recommendations to keep the offer open for six months to be insufficient, in view of the difficulties of securing legal entry into the country, and ordered that the offers be kept open for a period of four years.

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It also stated the following with regard to backpay:

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Consistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by the law to be employed in the United States , we modify the Board’s order so as to make clear (1) that (except for the modification hereinafter permitted) in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States, and (2) that backpay need not be placed in escrow for more than one year.

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We have one further concern, in view of the statutory direction that the Board shall order such remedial action as will effectuate the policies of the Act. See 29 U.S.C. § 160(c). In the circumstances of this case it may well be that the discriminatees will not have been lawfully available for employment in the United State prior to the date of the new offers of reinstatement which will be required. In that event the discriminatees will receive no backpay. It seems to us that it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs. Although later independent detection of them by INS would doubtless have had the same result, we think the Board could fix a time which is the minimum during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer’s unfair labor practice. Although that period of time is obviously conjectural, we think that six months is a reasonable assumption. In any event, we believed six months’ backpay is a minimum amount for purposes of effectuating the policies of the Act.

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We will therefore enforce the Board’s order as modified, but will give leave to the Board, if it sees fit to modify it further by setting a minimum period of six months during which backpay will be awarded in any event, and we will also grant enforcement of the order as so modified. *Id.*

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The Board accepted the Court's suggestions and the final judgment order approved by the Court included the minimum period of six months backpay.⁴⁷

5 The Supreme Court granted *certiorari* and issued its decision (467 U.S. 883) on December 6, 1983 with an opinion written by Justice O'Connor.⁴⁸ Justice O'Connor's opinion affirmed the Board's long standing view that undocumented workers are employees under § 2(3) of the Act, 467 U.S. at 890. In this connection, the Court observed as follows:

10 "If undocumented alien employees were excluded from participation in Union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining. See
15 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 33,57 S.Ct. 615, 622, 81 L.Ed. 893 (1937). Thus, the Board's categorization of undocumented workers as protected employees furthers the purposes of the NLRA." *Id* at 467 U.S. 894.

20 Justice O'Connor then concluded that no conflict existed between applying the NLRA to undocumented aliens and the mandate of INA. She pointed out that since the employment relationship between an employer and undocumented alien is not illegal under the INA, there is no reason to conclude the applying of the NLRA to undocumented aliens would necessarily conflict with the terms of the INA. In this connection, the opinion goes on to observe; (that) "If
25 an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, an incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may be fewer incentives for aliens themselves to enter in violation of the federal immigration laws."⁴⁹ *Id*.

30 The Court also affirmed the decisions of the Board and the Circuit that the conduct of Sure-Tan violated the Act by reporting the employees to the INS in retaliation for their union activities. *Id* at 894-897.

35 The Court also observed that the petitioners (Sure-Tan) do not appear to "challenge the court's modifications of the Board's remedial order conditioning acceptance of the reinstatement offers and the accrual of any backpay upon the discharged employees' legal presence in this country." *Id* at 897.

40 However, the Supreme Court reversed the Court of Appeals' order to award a minimum of six months backpay as too "speculative." The Court then approved the Board's original

⁴⁷ A petition for rehearing with a suggestion for rehearing *en banc* was denied, with three judges dissenting. 677 F.2d 584 (7th Cir. 1982).

45 ⁴⁸ Justice Brennan filed an opinion concurring in part and dissenting in part, which was joined by Justices Marshall, Blackmun and Stevens. Justices Powell and Rehnquist also concurred and dissented in part but on different portions of Justice O'Connor's opinion.

50 ⁴⁹ Justices Powell and Rehnquist dissented from these portions of the Court's opinion, concluding that illegal aliens are not employees since in their view, it is "unlikely that Congress intended the term "employee" to include -- for purposes of being accorded the benefits of that protective statute -- persons wanted by the United States for the violation of our criminal laws. I therefore would hold that the illegal alien workers are not entitled to any remedy." *Id* at 913.

course of action of leaving it to the compliance hearings to determine the amount of backpay, if any due to the discriminatees. The opinion then offered guidelines as to how the compliance investigation is to be conducted, so as to be consistent with Congressional objectives of the INA. The Court stated:

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Nonetheless, as the Court of Appeals recognized, the implementation of the Board’s traditional remedies at the compliance proceedings must be conditioned upon the employees’ legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another “equally important Congressional objectiv[e],” *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47, 62 S.Ct. 886, 894, 86 L.Ed. 1246 (1942) --- to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employee’s legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed “unavailable” for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. *Id* at 901

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Justice Brennan’s partial dissent disagreed with the majority opinion in several respects, including its decision to toll backpay, while the employees were in Mexico and “unavailable” for work, as a matter of law. He viewed that finding as inconsistent with the majority’s earlier finding that the discriminatees are entitled to all of the Act’s protections. According to Justice Brennan, the majority’s decision to foreclose employees from backpay during any period when they were not lawfully entitled to be present in the United States, deprives such employees of any remedy despite clear violations of the NLRA by their employer. *Id* at 913.

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Thus the above quoted language in *Sure-Tan* could be read to foreclose any backpay for any undocumented aliens who were not “entitled to be present and employed in the United States,” whether or not they were actually out of the country. Indeed, Justice Brennan in his partial dissent seemed to interpret the language in that manner. Yet subsequent cases have interpreted the language differently and restricted *Sure-Tan* to its particular facts.

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Just 10 days after it issued *Sure-Tan*, the Supreme Court considered another case involving different immigration issues. The Court characterized its holding in *Sure-Tan* as follows:

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Similarly, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed2d 734 (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien’s illegal presence in this country. Retrospective sanctions against the employer may accordingly be imposed by the National Labor Relations Board to further the public policy against unfair labor practices. But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief – reinstatement and continued employment – that probably would be granted to other victims of similar unfair labor practices. *INS v. Lopez-Mendoza*, 468 U.S. 1032-1043 fn. 4 (1984).

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While this footnote does not define what is meant by “retrospective” as opposed to “prospective sanctions” it did define prospective sanctions as “reinstatement and continued employment.” Thus it appears that backpay, which was not mentioned, would be included as retrospective sanctions, which are possible even for periods of time when employees were not documented.

The issue was precisely decided by the Ninth Circuit in *Local 512, Warehouse & Office Workers v. NLRB (Felbro)*, 795 F.2d 705 (9th Cir. 1986). Interestingly, the Board in *Felbro* had read the Supreme Court’s decision in *Sure-Tan* the same way as Justice Brennan. It modified the administrative law judge’s decision in light of *Sure-Tan* as follows:

Subsequent to the issuance of the [ALJ’s] decision, the Supreme Court issued its decision in *Sure-Tan, Inc. v. NLRB*, [467 U.S. 883], 104 S.Ct. 2803 [81 L.Ed.2d 732] (1984), in which it held, inter alia, that while undocumented alien workers are employees entitled to the Act’s protection, “in computing backpay, the employees must be deemed ‘unavailable’ for work (and the accrual of backpay therefor[e] tolled) during any period when they were not lawfully entitled to the present in the United States.” Because it appears by that a number of employees affected by the backpay order herein were undocumented aliens, we shall leave to the compliance stage the issue of the employees’ entitlement to backpay consistent with the requirements of the Court’s opinion in *Sure-Tan. Felbro Inc.*, 274 NLRB 1268, 1269 (1985).

The Union appealed this portion of the Board’s order and the Court reversed. The opinion concluded that *Sure-Tan* had not addressed the question of whether an undocumented worker, who unlike the illegal entrants in *Sure-Tan* remained in the United States. The Court observed that the thrust of Justice O’Connor’s opinion was directed at the speculative nature of the remedy ordered by the Court and the Board, and that the award was speculative because the discriminatees were indefinitely unavailable for work. It also found that the Supreme Court’s opinion strongly implied that backpay would have been available for the discriminatees had they not left the country since the opinion suggested that a backpay period may be based on the time that the employees have worked before being apprehended by INS. 795 F.2d at 717. Moreover, the Ninth Circuit pointed out that *Sure-Tan* did not overrule a significant line of precedent, including its own decision in *Apollo Tire Co.*, 604 F2d 1180 (9th Cir. 1974), where backpay was ordered despite a legal disability as opposed to availability of work.⁵⁰

The *Felbro* Court concluded further that awarding backpay to undocumented workers, who remain in this country, helps to achieve purpose of the Act to deter unfair labor practices and removing the economic advantages gained by employers that violate the Act. Conversely, the Court reasoned that conditioning backpay for undocumented employees on the demonstration of legal status would, for all practical purposes, deny them an effective remedy. The Court cited *Sure-Tan*’s rationale that such a policy would penalize legal workers because employers would find it financially advantageous to hire undocumented workers, who could be

⁵⁰ *Justrite MFG Co.*, 238 NLRB 57, 65-68, (1978) (Underage discriminatee entitled to backpay); *Local 57 IUOF*, 108 NLRB 1225, 1227-1228 (1954) (Engineer without valid state license awarded backpay); *Robinson Freight Lines*, 129 NLRB 1040, 1042 (1960) (Truck discriminatee awarded backpay despite lack of valid driver’s license).

denied normal labor safeguards. Further, the Court concluded that whereas an award of backpay in *Sure-Tan* might have encouraged discriminatees to re-enter the country presumably in violation of the INA, backpay when the employees are already present in the United States would not promote illegal action on the part of discriminatees and not implicate the INA.

5 Rather, the Court concluded that granting backpay to discriminatees, regardless of immigration status, would equalize an employer's liability for its unlawful conduct toward undocumented workers with that toward lawfully employed workers entitled to the full range of the Board's remedies.

10 The Second Circuit agreed with *Felbro* in *Rios v. Local 638 Steamfitters*, 860 F.2d 1168 (2nd Cir. 1988), a case involving Title VII claims. The Court distinguished *Sure-Tan* since in *Rios*, the claimants never left the country, and were available for work, since such employment would have violated no immigration law. Thus there was no conflict with the INA and the employees were deemed eligible for backpay under Title VII, notwithstanding *Sure-Tan*.

15 The Seventh Circuit however viewed *Sure-Tan* differently in *Del Rey Torilleria v. NLRB*, 976 F.2d 1115 (7th Cir. 1992). The majority opinion read the sentence literally in *Sure-Tan* stating that in order to receive backpay an undocumented worker must be "lawfully entitled to be present and employed in the United States." The Court relied in part on Justice Brennan's dissent in *Sure-Tan* and refused to enforce a Board order awarding backpay to undocumented workers.⁵¹

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In a forceful dissent, Judge Cudahy disagreed with the majority and found that the phrase "lawfully entitled to be present and employed in the United States" was intended to address the specific circumstances in *Sure-Tan*, which Judge Cudahy distinguished from the facts in *Del Rey*. Judge Cudahy observed that he spoke with authority on this point because he had crafted the phrase for the Seventh Circuit majority in *Sure-Tan*. That phrase was copied exactly by the Supreme Court's opinion in *Sure-Tan*. Judge Cudahy concluded that once an individual has crossed the border into the United States, his acceptance of employment or an employer employing him did not constitute a violation of INA, and is not a crime. He noted that the Supreme Court rejected the backpay remedy in *Sure-Tan* on the grounds that it was "speculative" and not because it was prohibited. Judge Cudahy distinguished between "having to break the law to reach the workplace and lacking a formal entitlement to work." 976 F.2d at 1124.

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35 He also noted that the Board does not require discriminatees to prove that they are legally entitled to work before awarding backpay, in that such awards are strictly remedial, designated to provide earnings employees would have earned but for the unfair labor practices. He cited the cases noted in *Felbro* for supporting this view as well as more recent cases such as *De Jana Industries*, 305 NLRB 845 (1991). (Backpay awarded to unlicensed ambulance driver but length of backpay period dependent on driver's efforts to obtain license.) Finally, Judge Cudahy also relied on the Supreme Court's decision in *Lopez-Mendoza supra*, and characterized backpay as used by the Courts as a standard retrospective remedy.

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45 The Board attempted to reconcile the divergent Courts of Appeals' opinions as well as

50 ⁵¹ This decision was issued after IRCA was passed. The decision however was concerned with pre-IRCA events. The Seventh Circuit's opinion noted the passage of IRCA and held that in dicta, that since IRCA makes it unlawful for an employer to hire or continue to employ an undocumented worker, IRCA "clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment." 976 F.2d at 1122.

the effect of IRCA on the rights of undocumented discriminatees to reinstatement and backpay in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995). The Board viewed *Sure-Tan* the same way as the Ninth Circuit did in *Felbro*, and concluded that *Sure-Tan* was concerned with employees, who left the country and with the speculative nature of the backpay award.

5 Therefore, *Sure-Tan*'s language restricting backpay to periods of time that employees must be "lawfully entitled to be present and employed in the United States," must be narrowly construed and applied to the specific facts therein.

10 The Board recognized that IRCA was now the law and that statute established sanctions for the first time of employer conduct prohibiting employers from knowingly hiring or continuing to employ undocumented aliens. The Board recognized that although it has broad authority to remedy violations of the Act that "it must also consider with care Congressional mandates in other areas of public policy." 320 NLRB at 410, citing *Southern Steamship v. NLRB*, 316 U.S. 31 (1942). The Board summarized its approach and conclusions in this area as following:

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In our view, this case raises the issue whether the language and legislative intent of IRCA conflict with or override our statutory authority to remedy unfair labor practices and to exercise our judicially recognized discretion in determining what form such remedies should take. With respect to the remedial issues raised in the instant case, we find that Congress has enacted both the NLRA and the statutes regulating immigration, specifically IRCA, to further virtually identical policy objectives with respect to the American workplace. Furthermore, we find that Congress has expressly indicated that the policies underlying these statutes reinforce each other. Thus, for the reasons below, we believe that we can best achieve this mutuality of purpose and effect by vigorously enforcing the NLRA, including providing traditional Board remedies, with respect to all employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals. 320 NLRB at 411.

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35 In support of the above conclusions, the Board cited IRCA's legislative history, which in its view demonstrated that Congress intends to discourage employers from hiring undocumented aliens. The Board noted that the legislative history expressly approved the Supreme Court's *Sure-Tan* view that undocumented workers are entitled to established labor protections. The Board observed:

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Consistent with its objective to deter the employment of undocumented aliens in preference to American and other documented workers, Congress expressly approved the view of the Supreme Court in *Sure-Tan* that undocumented workers are entitled to established labor protections, and that any other policy would put such workers even more at the mercy of their employers and thus increase the unfair economic advantages gained from hiring them. The House Committee Report stated:

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It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or

5 state labor relations boards, labor standards
 agencies, or labor arbitrators to remedy unfair
 practices committed against undocumented
 employees for exercising their rights before such
 agencies or for engaging in activities protected by
 existing law. In particular, the employer sanctions
 provisions are not intended to limit in any way the
 scope of the term “employee” in Section 2(3) of the
 10 National Labor Relations Act (NLRA), as amended,
 or of the rights and protections stated in Sections 7
 and 8 of that Act. As the Supreme Court observed
 in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)
 application of the NLRA “helps to assure that the
 wages and employment conditions of lawful
 15 residents are not adversely affected by the
 competition of illegal alien employees who are not
 subject to the standard terms of employment.” 467
 U.S. at 893.

20 This unequivocal statement indicates clearly the Congress
 believed that providing the aliens, once they are hired, the same
 protections, most prominently those provided under the National
 Labor Relations Act, afforded to American employees was the
 most effective means of eliminating the economic incentives for
 25 employers to hire undocumented aliens. We note especially that
 the House Report explicitly disclaims any limitation on the power
 to remedy employers’ avoidance of workplace protections. *Id* at
 414.

30 The Board then attempted to reconcile the statutory aims of IRCA and the NLRA by
 modifying its traditional backpay and reinstatement remedies. In the Board’s view, these
 modifications accommodate and further the immigration policies embodied by IRCA, and to the
 extent possible, provide protections and remedies to undocumented employees in the same
 manner as to other employees. The Board stated in this regard:

35 To do otherwise would increase the incentives for some
 employers to play the provisions of the NLRA and IRCA against
 each other to defeat the fundamental objectives of each, while
 profiting from their own wrongdoing with relative impunity. Thus
 40 these employers would be free to flout their obligations under the
 Act, secure in the knowledge that the Board would be powerless
 fully to remove their violations.” *Id* at 415.

45 Accordingly, the Board ordered conditional reinstatement to the discriminatees, affording
 them a reasonable time to satisfy their obligations to become eligible to work. This approach
 according to the Board is consistent with the Supreme Court’s admonition in *Sure-Tan* that the
 Board not order remedies that entail conduct in violation of immigration status.

50 As for backpay, the Board concluded that such an award, although limited, was
 warranted since it did not require the re-establishment of an employment relationship in
 contravention of the policies of IRCA. It emphasized that the employer knew of the
 unauthorized status of the discriminatees but that their discharge was the result not of their

status, but rather their support of the union. The Board viewed its award of backpay as limited by its decision, as not as inducement to the employer to illegally rehire employees in order to terminate its backpay liability, but rather that it serves to place the employees for a limited time in the position that they would have been but for the employer's unlawful conduct.⁵²

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The limitation on backpay referred to is its order that backpay can be tolled after a reasonable time to produce eligibility to work documents by the discriminatees. More specifically, the employer was ordered to pay from the dates of their discharge to the earliest of the following: "their reinstatement by the Respondent, subject to compliance with the Respondent's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States." *Id* at 416.

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The Board added a footnote to the order referring to established law that if an employer satisfies its burden of establishing that discriminatees engaged in unprotected conduct for which the employer would have terminated employee, reinstatement is not ordered and backpay is terminated on the date that the employer first argued knowledge of the misconduct. *Marshall Durbin Poultry*, 310 NLRB 68, 78 (1993). However, the Board commented that "in this case in view of Respondent's knowledge of the employees' unauthorized immigration status at the time of their initial employment, the Respondent is precluded from alleging that it would have terminated them on this basis." *Id*.

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A.P.R.A. was subsequently enforced by the Second Circuit at 134 F.3d 50 (2nd Cir. 2001). The majority opinion agreed with the Board in all respects, concluding that *Sure-Tan* did not preclude backpay for the reasons expressed in *Felbro* and that the remedies proposed by the Board, including limited backpay and conditional reinstatement promoted the shared policy goals of the NLRA and IRCA. Judge Jacobs filed a vigorous dissent, agreeing with the 7th Circuit's decision in *Del Rey* that *Sure-Tan* precluded backpay and that the Board's backpay award conflicts with IRCA since it awards backpay for a period when the worker is not available for work. Judge Jacobs would award backpay to commencing on the date that the worker obtains authorization to work in the United States and continuing until the date of reinstatement.

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Thus, the above summary described the state of the law when *Hoffman* was decided by the Supreme Court. Before analyzing and interpreting the Supreme Court's opinion, it is essential to review the facts, as well as the long and somewhat convoluted history of the case.

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In May 1988, not long after IRCA became effective, an individual who identified himself as Jose Castro applied for a job with Hoffman Plastic Compounds, in Panorama, California. When he was hired, Castro filled out an application form, which included the following question. "Are you prevented from lawfully becoming employed in this country because of visa or immigration status?" Castro answered yes to that question. Castro also filled out an I-9 Form establishing his immigration status and in connection therewith submitted a birth certificate to Hoffman, which was not his own. Indeed, the birth certificate stated that the individual was an individual born in El Paso, Texas. Castro admitted that "the birth certificate was loaned to me so that I can secure a job because I have no work."

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On July 31, 1989, Hoffman laid off Castro, Moises Gonzalez and several other employees. After NLRB charges were filed, a compliant issued, and ultimately the Board found

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⁵² The Board also noted its agreement with *Felbro* that backpay can be awarded despite a discriminatee's legal disability to work.

that Hoffman had violated Section 8 a(1) and (3) of the Act by laying off Castro and other employees, and ordered reinstatement and backpay. *Hoffman Plastic Compounds*, 306 NLRB 160 (1992). A backpay hearing was subsequently held on several days in March and July of 1993.

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During questioning of Castro by Hoffman's attorney, the above facts concerning how Castro obtained his job first came to light. As a result of these disclosures, Hoffman argued to the ALJ that Castro should be disqualified from reinstatement and backpay based on *Sure-Tan* and IRCA. The ALJ agreed in a decision issued on November 12, 1993. The judge concluded, as argued by Hoffman, that it had attempted to comply with IRCA and only hired Castro based on the false information that Castro supplied. Thus, Hoffman did not knowingly hire him in violation of IRCA. The judge relied on *Sure-Tan* and *Del Rey* and declined to order either backpay or reinstatement for Castro. The judge distinguished the Board's initial *A.P.R.A.* decision (309 NLRB 480 (1992)), on the grounds that the employer in *A.P.R.A.* knew at the time of hire that the employees were unauthorized to work.⁵³

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The Board delayed issuing its *Hoffman* decision for nearly five years. According to Chairman Gould, *Hoffman* was somewhat controversial because of the dispute among Board members over the ALJ's finding that Hoffman did not know of Castro's immigration status. In fact, Chairman Gould had drafted an opinion, which was never issued, disagreeing with the ALJ's finding in that regard.⁵⁴

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The decision issued by the Board (326 NLRB 1060) reversed the judge based on its *A.P.R.A.* decision issued in 1995 that concluded conditional reinstatement and limited backpay for undocumented workers represented an appropriate accommodation with IRCA. The Board noted that *A.P.R.A.* in dictum had stated it would extend that its after-acquired knowledge rule to discharge cases involving undocumented workers. In that connection, the Board concluded that the record supported the conclusion of the judge that Hoffman had attempted to comply with IRCA when it hired Castro, and did not learn until the backpay hearing that Castro has used fraudulent identification in applying for employment. The Board distinguished *A.P.R.A.* in that the employer has been on notice of the employee's ineligibility for employment from the outset of their employment, and was therefore precluded from raising an after-acquired knowledge defense.

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With respect to the questions on Hoffman's employment application about immigration status, the Board viewed that as evidence of Hoffman's compliance with IRCA. The Board dealt with Castro's affirmative answer to that question, which had apparently troubled Chairman Gould, in a footnote as set forth below:

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In his exceptions, the General Counsel points out that Castro answered this question on his application in the affirmative

⁵³ In the initial *A.P.R.A.* case, the majority of the Board rejected *A.P.R.A.*'s exceptions regarding the effect of the discriminatees' alien status on their reinstatement rights. The Board added that it "would leave to another case any reconsideration of the Board's law in this area." That reconsideration occurred in the later *A.P.R.A.* case discussed above (320 NLRB 408), wherein the Board *sua sponte* severed for reconsideration portions of the original order providing for backpay and reinstatement for the two discriminatees, who were "undocumented."

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⁵⁴ See *Labor Law Stories*, Laura Cooper and Catherine Fisk, editors. Foundation Press, 2005. Chapter 10, "The Story of Hoffman Plastics Compounds v. NLRB," p. 416-417, written by Michael Wishnie and Catherine Fisk.

5 and argues that the Respondent was therefore aware of Castro's unauthorized immigration status at the time it hired him. We find no merit in this contention, because the record clearly shows that the Respondent only hired Castro after he had supplied, as the Respondent required, documents that appeared to be genuine and relate to the person presenting them. fn. 10, *Id* at 1062.

10 The Board also in another footnote rejected Hoffman's argument that Castro was not entitled to backpay because he could not make reasonable efforts to find interim employment in light of his undocumented status. The Board noted that Castro had obtained a number of jobs during the backpay period and unsuccessfully applied for others. Thus, Castro satisfied his obligation to make reasonable efforts to find interim work following his unlawful layoff. fn. 11 *Id* at 1060.

15 Accordingly, the Board terminated Castro's backpay on June 14, 1993, the date that Hoffman learned that Castro used fraudulent identification to gain employment, and did not order conditional reinstatement for Castro. This finding resulted in backpay for Castro from January 31, 1989 to June 19, 1993. That totaled \$66,951 through the last quarter of 1992, which would be increased by interest, plus backpay from January 1 through June 14, 1993.

20 Hoffman appealed the Board's decision to the D.C. Circuit Court. The Circuit, in a majority opinion, authored by Judge David Tatel affirmed the Board's decision. 208 F.23d 229 (D.C. Cir. 2000). The opinion spent considerable time on interpreting the language in *Sure-Tan*, and concluded in agreement with the Ninth Circuit in *Felbro* and the Board and the Second Circuit in *A.P.R.A.*, and contrary to the Seventh Circuit in *Del Rey* that *Sure-Tan* did not foreclose a backpay award to undocumented workers. *Id* at 234-238.

30 Judge Tatel then considered Hoffman's argument that even if *Sure-Tan* did not bar backpay to undocumented aliens, IRCA does. As to that issue, Judge Tatel deferred to the Board's view that it has accommodated IRCA in *A.P.R.A.* by modifying its normal remedies by conditioning reinstatement on compliance with IRCA, and terminating backpay when the discriminatees are reinstated or after a reasonable period of time fail to produce the required employment documents. Further, Judge Tatel noted that in *Hoffman*, the Board modified its usual *A.P.R.A.* remedy, by terminating Castro's backpay when Hoffman discovered his true immigration status and denied Castro conditional reinstatement. In the majority's view, these modifications by the Board of its usual remedies ensure that "Castro's award would not conflict with immigration law." *Id* at 242.

40 Judge Sentelle dissented arguing in agreement with the Seventh Circuit in *Del Rey* that *Sure-Tan* definitively foreclosed Castro's claim for backpay.

45 Subsequently, Hoffman requested hearing en banc, which was granted by order on June 16, 2000. On January 16, 2001, the Court by a 5-4 vote decision enforced the Board's award. Judge Tatel wrote the majority opinion, largely repeating the analysis of the panel opinion. Dissents were filed by Judges Sentelle and Ginsburg, again asserting that *Sure-Tan* is controlling.

50 Subsequently, the Supreme Court granted certiorari and issued its decision on March 27, 2002. 535 U.S. 137, 122 S.Ct. 1275 (2002). The majority opinion in the 5-4 decision was written by Chief Judge Rehnquist. The opinion began as follows: "The N-L-R-B-(Board) awarded backpay to an undocumented alien, who has never been legally authorized to work in the United States. We hold that such relief is foreclosed by federal immigration policy, as

expressed by Congress, in the Immigration Reform and Control Act of 1986 (IRCA).” 535 U.S. 138, 122 S.Ct. 1278.

5 After setting forth a summary of facts and the case history, Judge Rehnquist discussed past precedent including *Sure-Tan*. The opinion then made the following observations:

10 It is against this decisional background that we turn to the question presented here. The parties and the lower courts focus much of their attention on *Sure-Tan*, particularly its express limitations of backpay to aliens “lawfully entitled to be present and employed in the United States.” 467 U.S., at 903, 104 S.Ct. 2803. All agree that as a matter of plain language, this limitation forecloses the award of backpay to Castro. Castro was never lawfully entitled to be present or employed in the United States, and thus, under the plain language of *Sure-Tan*, he has no right to claim backpay. The Board takes the view, however, that read in context, this limitation applies only to aliens who left the United States and thus cannot claim backpay without lawful reentry. Brief for respondent 17-24. The Court of Appeals agreed with this view. 237 F.3d at 642-646. Another Court of Appeals however agreed with *Hoffman*, and concluded that *Sure-Tan* simply meant what it said, *i.e.*, that any alien who is “not lawfully entitled to be present and employed in the United States” cannot claim backpay. See *Del Rey Tortilleria, Inc v. NLRB*, 976 F.2d 1115, 1118-1121 (C.A.7 1992); Brief for Petitioner 7-20. We need not resolve this controversy. For whether isolated sentences from *Sure-Tan* definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed. 535 U.S. at 146.

30 Judge Rehnquist then went on to explain why the award of backpay to Castro here, exceeded the Board’s authority since it conflicted with IRCA. He concluded as follows: “We therefore conclude that allowing the Board to award backpay to illegal aliens would only trench upon explicit statutory prohibitions critical to federal immigration policy as expressed in IRCA.” 535 U.S. at 149, 122 S.Ct. at 1284.

40 Justice Breyer filed a vigorous dissent joined by Justices Stevens, Souter and Ginsburg. The dissent disagreed with the majority’s view of the conflict between the award of backpay and IRCA, and concluded that the Court should have deferred to the Board’s reasonable attempt to accommodate any possible conflicts between the two statutes. Justice Breyer argued that in the absence of a backpay award, employers could conclude that they can violate the labor laws at least once with impunity citing *A.P.R.A.* The dissent further discussed issues of incentives of employees to migrate and of employers to hire illegal aliens.

45 Nor can the Court comfortably rest its conclusion upon the immigration laws’ purposes. For one thing, the general purpose of the immigration statute’s employment prohibition is to diminish the attractive force of employment, which like a “magnet” pulls illegal immigrants toward the United States. H.R.Rep. No. 99-682, pt. 1, p. 45 (1986), U.S.Code Cong. & Admin. News 1986, p. 5649. To permit the Board to award backpay could not significantly increase

the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally. See *A.P.R.A. Fuel Oil Buyers Group, Inc.*, *supra*, at 410-415 (no significant influence from so speculative a factor); *Tatel v. Quality Inn South*, 846 F.2d 700, 704 (C.A. 11 1988) (aliens enter the country "in the hope of getting a job," not gaining "the protection of our labor laws"); *Peterson v. Neme*, 222 Va. 477, 482, 281 S.E.2d 869, 872 (1981) (same); *Arteaga v. Literski*, 83 Wis.2d 128, 132, 265 N.W.2d 148, 150 (1978) (same); H.R.Rep. No 99-682, at 45, U.S.Code Cong. & Admin.News 1986, p. 5649 (same).

To deny the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees. Were the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today, see 237 F.3d 639, 648 (C.A.D.C.2001)—this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious. But even if limited to cases where the employer did not know of the employee's status, the incentive may prove significant—for, as the Board has told us, the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations. See Brief for Respondent, 30-32; Tr. Of Oral Arg. 41, 47; cf. also General Accounting Office, *Garment Industry; Efforts to Address the Prevalence and Conditions of Sweatshops 8* (GAO/HEHS-95-29, Nov. 1994) (noting a higher incidence of labor violations in areas with large populations of undocumented aliens.) The Court has recognized these considerations in stating that the labor laws must apply to illegal aliens in order to ensure that "there will be no advantage under the NLRA in preferring illegal aliens" and therefore there will be "fewer incentives for aliens themselves to enter." *Sure-Tan*, *supra*, at 893-894, 104 S.Ct. 2803. The Court today accomplishes the precise opposite. 535 U.S. 153-157.

As I have noted above, Judge Davis issued his recommended decision in *Mezonos* in 2006, in which he distinguished *Hoffman*, and concluded that where, as in *Mezonos* (and as I have found here), the employees did not violate IRCA and the employer did, backpay is appropriate. Whether that conclusion is valid, in view of the seemingly unequivocal language of the Supreme Court in *Hoffman*, is an open question. Based on my analysis of the Supreme Court's opinion, the dissent, the statute, the relevant authorities, as well as legal commentary on *Hoffman*, I am in agreement with my colleague that backpay is not foreclosed by *Hoffman* in the circumstance of this case.

While I readily concede that the language of the majority opinion on its face⁵⁵ appears to support the position of the Respondents that no backpay is warranted, the Supreme Court itself has observed that “language in an opinion” must be “read in context” and not “parsed” like a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2226 (1979), cited in *Hoffman* supra, 535 U.S. at 161.

Judge Tatel, in both opinions that he filed in *Hoffman supra*, discussed this issue in connection with interpreting the language in *Sure-Tan* that caused a prior Circuit split as to the Supreme Court’s meaning. Judge Tatel observed as follows:

We begin with Hoffman’s argument, embraced by our dissenting colleague, that this case is controlled by a single sentence from the Supreme Court’s opinion in *Sure-Tan v. NLRB*: “[I]n computing backpay, the employees must be deemed ‘unavailable’ for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.” *Sure-Tan*, 467 U.S. at 903, 104 S.Ct. 2803. This sentence, Hoffman claims, “plainly prohibits” the NLRB from awarding even limited backpay to undocumented workers victimized by unfair labor practices. Read literally and divorced from its context, the sentence could well be interpreted to support that view. But determining whether particular Supreme Court language amounts to binding precedent is not so simple. The Court itself has warned against “dissect[ing] the sentences of the United States Reports as though they were the United States Code.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed2d 407 (1993). Instead, we must read the allegedly controlling sentence in context, taking account of the facts of the case, the issues presented, and the Court’s reasoning and holding. “The Court’s every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court’s apparent intentions and with other language in the same opinion.” *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1291 (D.C.Cir. 1998) (en banc): 208 F.3d at 234, 237 F.3d at 642 (en banc).

I recognize, of course, that Judge Tatel’s ultimate conclusion in *Hoffman* (that backpay was appropriately awarded by the Board) was reversed by the Supreme Court. However, this portion of Judge Tatel’s opinions was not reversed or contradicted by the Court, nor were the principles that he set forth disputed. The majority opinion carefully declined to rule on the issue (which had been the primary focus of the lower court’s litigation, and indeed as well as in the Supreme Court) of whether *Sure-Tan* precluded backpay in all circumstances to undocumented workers.

I find therefore that it is appropriate and essential to carefully evaluate the Supreme

⁵⁵ The opinion stated that “we hold that such relief is foreclosed by the federal immigration policy as expressed in the Immigration Reform and Control Act of 1986 (IRCA).” 535 U.S. at 138.

Court's holding in *Hoffman*, in light of the context and language in its opinion. Indeed in *Sure-Tan*, as detailed above, the language that employees must be deemed unavailable for work (and backpay tolled) during any period when they were not lawfully entitled to be present and employed in the United States, on its face appears to foreclose backpay for all undocumented workers. The Seventh Circuit so concluded, but the Second and Ninth Circuit Courts, as well as the Board disagreed, and followed the above principles and applying an analysis of the context and language of the Supreme Court's opinion, concluded that such language was meant only to apply, where the workers were out of the country. I note once more that the Supreme Court in *Hoffman* did not overrule any of these decisions on this point and did not resolve the Circuit split on the issue. I am therefore free to interpret *Hoffman* based on the context, facts and language in other parts of its opinion to evaluate its holding. I shall do so.

A careful evaluation of the Court's opinion reveals a prominent emphasis on the fact that Castro had submitted a fraudulent document to Hoffman (a birth certificate not his own). The majority opinion in reaching its conclusion that the backpay to Castro "unduly trenches" on IRCA, mentions this conduct of Castro no less than five times. "There is no dispute that Castro's use of false documents to obtain employment with Hoffman violates these provisions." 535 U.S. 149. Later on, the opinion refers to the fact that an alien directly contravenes explicit Congressional policies⁵⁶ "when an undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism." *Id*

Further, the opinion criticizes the Board for asking the Court to overlook this fact and "allow it to award backpay for an illegal alien for years of work not performed for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."⁵⁷ *Id*

Most significant of all, the majority opinion discussed the Board's contentions that it had "reasonably accommodated" IRCA because the backpay was closed when Hoffman learned of Castro's legal status, and that IRCA did not make violations ineligible for backpay. The Court observed:

What matters here, and what sinks both the Board's claims, is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from "accommodating" IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it. *Id* at 149.

Furthermore, when the Court discussed the problem of mitigating damages, a subsidiary

⁵⁶ Referring to Sections 1324c(1) & (3) and U.S.C. § 1546 (18).

⁵⁷ I note that the first two comments by the Court have little significance. Indeed all backpay awards encompass backpay for work not performed. Further, the Court's assertion that wages could not lawfully have been earned is questionable since IRCA does not make it illegal for an undocumented alien to work. That leaves the latter portion of the opinion that the job was obtained through criminal fraud as the cornerstone of the decision.

reason for its conclusions, it made the following comment, concerning the Board’s failure to consider the tension between mitigation and the IRCA. “See 326 N.L.R.B. at 1063 n 10 (finding that Castro had adequately mitigated damages through interim work with no mention of the ALJ finding that Castro secured interim work with false documents.)” *Id* at 149.

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I also note in this regard, Justice Rehnquist’s discussion of prior precedent. He distinguished *ABF Freight System v. NLRB*, 510 U.S. 317, 114 S.Ct. 835 (1994), a case where the Board awarded backpay and reinstatement to a discriminatee, who lied in his testimony before the ALJ. The Supreme Court upheld the Board’s decision to do so, essentially on the grounds of deference to the Board’s choice of remedy. The Board (and the *Hoffman* dissent), relied heavily on *ABF Freight* in support of its assertion that the Court should defer to the Board’s remedial choices in *Hoffman* as well. The *Hoffman* opinion distinguished *ABF Freight* on several grounds, including its view that the employee misconduct at issue (in *ABF Freight*) “although serious was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law.” *Id* at 146. The misconduct referred to therein, which renders the employment relationship illegal, was clearly Castro’s submission of false documents in order to obtain his job. The Court then stated that it believed that the *Southern S.S. Co.* lines of the cases rather than *ABF Freight* is controlling.

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An examination of *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46-47 (1942) and *NLRB v. Fansteel Metallurgical Coop.*, 306 US 240, 257-258 (1939), discussed in detail by the majority opinion further confirms my conclusions. The Court reaffirmed its view that the Board’s discretion to select remedies for violations of the NLRA, through generally broad, is not unlimited. It then observed as follows:

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Since the Board’s inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment. In *Fansteel*, the Board awarded reinstatement with backpay to employees who engaged in a “sit down strike” that led to confrontation with local law enforcement officials. We set aside the award saying:

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“We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer’s property, which they would not have enjoyed had they remained at work.” 306 U.S., at 255, 59 S.Ct. 490.

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Though we found that the employer had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts. Two years later, in *Southern S.S. Co.*, *supra*, the Board awarded reinstatement with backpay to five employees whose strike on shipboard had amounted to a mutiny in violation of federal law. We set aside the award, saying:

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“It is sufficient for this case to observe that the

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Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives.” 316 U.S., at 47, 62 S.Ct. 886.

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Although the Board had argued that the employee’s conduct did not in fact violate the federal mutiny statute, we rejected this view, finding the Board’s interpretation of a statute so far removed from its expertise merited no deference from the Court. *Id* at 40-46. 535 U.S. 142.

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Thus, once more, the *Hoffman* opinion emphasized the misconduct of Castro, in its decision not to defer to the Board’s choice of remedy and to find that the Board’s choice conflicted with the federal statute (IRCA).

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My conclusion that the fraud committed by Castro was a controlling factor in the Court’s decision is supported by at least two commentators. Kati L. Griffith⁵⁸, in the Cornell International Law Journal, Winter 2008, opined as follows: “The Hoffman Court held that the National Labor Relations Board could not grant backpay (lost future earnings) to a worker who had violated the IRCA by submitting fraudulent documents as a remedy for his employer’s NLRA violation.” 41 Cornell Int’l L.J. 127 at p.2.

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More significantly, Professor Michael Wishnie, writing in the University of Pennsylvania Journal of Labor and Employment Law, Spring 2004, wrote as follows: “The Supreme Court resolved this split,⁵⁹ in *Hoffman Plastic*, holding that the Board is precluded from awarding backpay to an undocumented worker who has fraudulently obtained employment by tendering false documents, even if the worker is still within the United States.” 6. U Pa. Lab & Emp. L. 497 at p.3.⁶⁰

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Later on in the same article, Professor Wishnie, after criticizing the *Hoffman* decision and opining that it could affect other statutes as well, observed as follows: “Nevertheless, *Hoffman Plastic* is now law and absent legislative amendments, at a minimum, undocumented workers, who defraud their employers with false papers are ineligible for backpay under the NLRA.” *Id* at p. 4.

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Furthermore, there is support for distinguishing *Hoffman* on this basis in various court decisions, albeit enforcing different statutes, but still emphasizing the misconduct of the employee as the determinative factor in *Hoffman. Madiera v. Affordable Housing Foundation*

⁵⁸ Professor Griffith became an Assistant Professor of Employment and Labor Law, Collective Bargaining Labor Law and Labor History at Cornell University’s ILR School in 2007.

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⁵⁹ Referring to the Circuit split regarding the availability of backpay for undocumented workers involving the Ninth and Second Circuits, (*A.P.R.A.* and *Felbro*, granting backpay) and the Seventh Circuit (*Del Rey*, denying backpay).

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⁶⁰ I note that Professor Wishnie is a Professor of Law at Yale Law School, a former law clerk to two Supreme Court justices, and graduated from Yale University, as well as Yale Law School. See Yale Law School website. He is also a nationally known expert in immigration and labor law, and most importantly participated in *Hoffman* as Counsel of Record for an employer association, who filed an amicus brief in the case. See *Labor Law Stories* supra at p. 423. Thus, his view on this issue carries some weight.

469. F.3d 219 (2nd Cir. 2006), dealt with the issue of whether the New York State labor law providing for backpay to workers injured on the job, is preempted by IRCA and whether *Hoffman* precluded backpay for the workers. The Court of Appeals found no preemption and relied heavily on the fact that the employee in *Madiera*, unlike Castro in *Hoffman*, had not committed any fraud in obtaining his job. The Court referred to the *Hoffman* opinion, which held that “the alien’s criminal procurement of employment with false documents as the fact that “sinks” the NLRB’s argument in defense of the backpay remedy, observing that “far from accommodating IRCA, the (NLRB’s) position, recognizing employer misconduct (under the NLRA) but discounting the misconduct of alien employees (under IRCA) subverts it.” 469 F.3d at 335.

Later on in the decision, the Court repeated this distinction. “Further, in *Hoffman Plastic*, the employment relationship originated in the worker’s own criminal violation of IRCA, prompting the Supreme Court to observe that it would “subvert” IRCA to penalize the employer’s unfair labor practice but to discount the worker’s immigration violation.” *Id* at 149-150 122 S.Ct. 1275 (citing employee’s criminal conduct in procuring employment as factor that “sinks” Board’s argument that backpay award reasonably accommodates IRCA.) No comparable worker misconduct is evident in this case.” 469 F.3d at 237. Similarly here, there is no worker misconduct on the part of either Tsai or Chen.

Additionally, the New York Court of Appeals ruled the same way⁶¹ on a lawsuit for common law negligence and violations of the state labor law by an undocumented alien. The Court of Appeals observed in summarizing *Hoffman*:

The Court emphasized that the salient factor in the case was that “Congress has expressly made it criminally punishable for an alien to obtain employment with false documents” and that the alien had in fact, committed this crime (*Id* at 149, 122 S.Ct. 1275). Thus, the Court determined that “awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations” because the alien would qualify for an NLRB award “only by remaining inside the United States illegally” and could not “mitigate damages...without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers” (*Id.* at 150-151, 122 S.Ct. 1275). 812 N.Y.S. 2d at 424.

In its conclusions, the Court emphasized this important distinction between its decision and *Hoffman*, which would be equally applicable here.

Aside from the compatibility of federal immigration law and our state Labor Law, plaintiffs here—unlike the alien in **Hoffman**—did not commit a criminal act under IRCA. Whereas the undocumented alien in **Hoffman** criminally provided his employer with fraudulent papers purporting to be proper federal work documentation, there is no allegation in these cases that

⁶¹ *Balbuena v. IDR Realty Co.*, 812 N.Y.S. 2d 416 (2006).

5 plaintiffs produced false work documents in violation of IRCA or
 were even asked by the employers to present the work
 authorization documents as required by IRCA. Notably, IRCA
 does not make it a crime to work without documentation. Hoffman
 is dependent on its facts, including the critical point that the alien
 10 tendered false documentation that allowed him to work legally in
 this country (see Hoffman, 535 U.S. at 149, 122 S.Ct. 1275). This
 was a clear violation of IRCA. We see no reason to equate the
 criminal misconduct of the employee in Hoffman to the conduct of
 the plaintiffs here since, in the context of defendant’s motions for
 partial summary judgment, we must presume that it was the
 employers who violated IRCA by failing to inquire into plaintiffs’
 immigration status or employment eligibility (see Wishnie,
 15 Emerging Issues for Undocumented Workers, 6 U Pa. J Lab &
 Emp. L at 512). 812 N.Y.S. 2d at 428.

20 Accordingly, based on the foregoing analysis and authorities, I conclude that a
 reasonable argument can be made that the absence of fraud by the discriminatees here, is
 sufficient in itself to distinguish *Hoffman*, but I also find that the fact that Respondent Imperial
 Buffet violated IRCA in several areas, making it a “knowing” employer provides further support
 for the conclusion that *Hoffman* does not preclude backpay in the instant case.

25 Analyzing this issue must start with Justice Breyer’s dissenting opinion in *Hoffman*,
 which crystallizes the problem. He argued that the backpay remedy is necessary to discourage
 employers from violating the nation’s labor laws and that in the absence of such a remedy,
 employers could conclude that they can violate labor laws with impunity. Justice Breyer then
 goes on to observe that IRCA forbids employers from knowingly employing illegal aliens and
 questions whether an employer may violate IRCA “with impunity at least once, secure in the
 knowledge that the Board cannot assess a monetary penalty.” 535 U.S. at 153. Judge Breyer
 30 then referred to the attractive force of employment, which like a “magnet” pulls immigrants
 toward the U.S., but argues that the award of backpay would not increase the strength of this
 magnetic force, “for so speculative a future possibility could not realistically influence an
 individual’s decision to migrate illegally.” *Id.*

35 Justice Breyer then raised the issue of the knowing employer as follows:

40 To *deny* the Board the power to award backpay, however, might
 very well increase the strength of this magnetic force. That denial
 lowers the cost to the employer of an initial labor law violation
 (provided, of course, that the only victims are illegal aliens.) It
 thereby increases the employer’s incentive to find and to hire
 illegal-alien employees. Were the Board forbidden to assess
 backpay against a *knowing* employer—a circumstance not before
 us today, see 237 F.3d 639, 648 (C.A.D.C.2001)—this perverse
 45 economic incentive, which runs directly contrary to the
 immigration statute’s basic objective, would be obvious and
 serious. 535 US at 157.

50 Significantly, the majority opinion did not disavow or contradict Justice Breyer’s
 assertion cited above, implicitly conceding that the case of a knowing employer was not being
 decided in *Hoffman*.

In this regard, Respondent Imperial argues that the ALJ in *Hoffman* had relied on the fact that Hoffman was not a knowing employer since it had attempted to comply with IRCA, in his decision not to award backpay. It argues that the Supreme Court did not address this question in its decision despite being aware of the issue. While I agree with the Respondents that the majority opinion did not address the issue, I do not agree that it establishes that a different result might not have occurred had Hoffman been a knowing employer. The Board reversed the ALJ, based on its prior *A.P.R.A.* decision, but attempted to accommodate IRCA, unlike its *A.P.R.A.* decision, by cutting off backpay at the time that Hoffman found out about the fraud of Castro and not ordering conditional reinstatement. The Supreme Court's majority opinion largely ignored the Board's attempt to accommodate IRCA in this fashion, implicitly concluding that these efforts were insufficient.

However, the failure of the majority opinion to address the issue of the knowing employer is not conclusive since Judge Breyer clearly raised it, and the majority did not disavow or disapprove of Justice Breyer's observation. Therefore, I conclude that the issue is a best ambiguous.

Respondents also cite General Counsel's memorandum GC 02-06 issued on July 19, 2002 dealing with *Hoffman*. Respondents are correct that this memo does state that the "clear thrust of the majority opinion precludes backpay for all unlawfully discharged workers regardless of the circumstances of their hire," and does state that "backpay should not be sought." However, it is noted that the memo does raise the issue of the knowing employer by stating that *Hoffman* "arguably does not affect the Board's remedy in *A.P.R.A.* because the employer in *Hoffman* was unaware that the discriminatee was undocumented when it hired him." While the memo rejected that contention, it did consider the issue to be an arguable distinction and also noted that the Court had emphasized the wrongdoing of the employee, another distinction with the present case. Most importantly of all, the General Counsel's memo is not authority, nor determinative, and has obviously been superseded by General Counsel's subsequent decision to change its position and litigate *Mezonos*, as well as the instant case concerning the distinctions between *Hoffman* and both cases.⁶²

I also conclude that while the majority may not have mentioned the issue in its decision that the case was litigated on the theory that Hoffman was not a knowing employer. Indeed, the attorney for Hoffman emphasized this fact throughout the litigation including at the Supreme Court. As Professors Wishnie and Fisk observed in *Labor Law Stories*, "McCortney's⁶³ theory was that he had to distinguish his client, who he claimed did not know he had hired an undocumented worker—from employers, who did know. He decided to label his client as the "innocent employer" to distinguish him from the unscrupulous employer." *Labor Law Stories supra* at 425.

⁶² Although I am reluctant to do so, I feel it incumbent upon me to comment on the failure of the General Counsel to issue a new memo after 2002, explaining its decision to change its position, even after *Mezonos* was issued. I find it perplexing and disappointing that it has not done so. While it may not be required that General Counsel document every change in position from prior memos, I think that it is wise to do so. I certainly believe that it is appropriate here in view of the significance of this issue. I note in this regard that the Supreme Court in *Hoffman* made specific reference to prior General Counsel memos interpreting *Sure-Tan*. fn. 2, 535 U.S. at 142.

⁶³ Ryan McCortney was the attorney for Hoffman. The account of McCortney's theory and strategy was based on phone conversations between Wishnie and McCortney.

During oral argument, Paul Wolfson, the Assistant Solicitor General representing the Board, continued to argue that employers had a strong economic and competitive incentive to hire illegal workers, and that awarding backpay by the Board is therefore consistent with IRCA.

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Chief Justice Rehnquist responded as follows:

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You say it comes down on both sides, and it makes certain acts by illegal immigrants illegal, the entry, and it makes certain acts by the employer illegal. Here, the worker, the alien was violating the law. The employer was not violating the law. So you say it comes down on both sides. If both were violating the law I could see your point, but the employer was not violating the law. 2002 WL 77224 at 19.

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Interestingly, the Board as I have detailed above did attempt to accommodate IRCA in both *A.P.R.A.* and *Hoffman* by ordering conditional reinstatement and limited backpay in *A.P.R.A.*, and cutting off backpay at the time Hoffman became aware of the fraud, as well as not ordering conditional reinstatement in *Hoffman*. However, this accommodation was not sufficient for the majority, and as the oral argument made clear, may have backfired on the Board. Thus, Justice O'Connor became concerned that the Board's attempt at accommodation resulted in a position that illegal workers hired by unknowing employers could in some circumstances be awarded more backpay than workers hired by knowing employers. Thus an "innocent employer" like Hoffman is liable for backpay until it became aware that Castro had provided documents. However, this was a period of 4 ½ years. Under *A.P.R.A.*, where a "knowing employer" is involved, the Board orders backpay only for a "reasonable time" to enable the discriminatee to obtain authorization to work. Since the Board did not in *A.P.R.A.*, and has not since defined a "reasonable time," it is conceivable that a discriminatee of the knowing employer could receive less backpay than one terminated by the unknowing employer. For example, if Hoffman was a knowing employer as in *A.P.R.A.*, it could have been liable for less backpay if a reasonable time was defined as less than 4 ½ years. This prospect was most disturbing to Justice O'Connor, who, as was the case in many Supreme Court cases, was one of the pivotal swing votes in *Hoffman*. At one point in the oral argument, she observed in reference to the Board's rule "that's a strange calculus." This prompted a reply by McCortney as follows. "Well, your Honor, that's the problem with the rule, is that it in some ways rewards the unscrupulous employer in *Sure-Tan* and penalizes the innocent employer as in *Hoffman*." 2002 WL 77224 at p. 7. Later on in the argument, Justice O'Connor returned to the issue in questioning Wolfson, and according to Wishnie and Fisk, her vote was assured.

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McCortney had expected his "innocent employer" strategy to be successful, but only in the middle of the government's presentation did he feel it had truly delivered the case. Justice O'Connor asked Wolfson, "What [the Board's rule is] doing, though, really is kind of odd, because the result is that backpay awards to illegal workers are likely to be greater than to legal ones under this Board's policy, and that's so odd, and it gives the illegal alien an incentive to try to phony up more documents and to extend for the longest possible time the charade that the worker is here lawfully, and that's surely strongly against the policies of the immigration act at the very least." At this question, McCortney suspected he had the fifth vote he needed. *Labor Law Stories supra* at 427.

Accordingly, I find that the fact that Hoffman was an “innocent” or “unknowing” employer was an important fact in *Hoffman*, despite the majority’s failure to make reference to that fact in its opinion.

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I also believe that this fact is a significant difference between Hoffman and Respondent Imperial, and further enhances my conclusion that a different result is required here. Support for this conclusion can be found in both case law and commentaries. *Madeira v. Affordable Housing supra* distinguished *Hoffman* several times on this basis. The court emphasized that the claimant’s employer, unlike in *Hoffman*, had hired him “in knowing violation of IRCA.” 469 F.3d at 237. It then goes on to conclude in language applicable to the instant case as well. “In this case, the challenged remedy would be assessed against parties at least one of whom violated IRCA and not awarded the to IRCA violator himself as in *Hoffman Plastic*.” *Id.*

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The Second Circuit opinion returned again to the issue later in its decision, during which it also quoted State Court opinions, consistent with its views.

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Third, insofar as an undocumented worker’s employment necessarily originates in a past IRCA violation that would presumably have continued but for the injury, the Supreme Court has thus far recognized a backpay or lost earnings award to conflict with federal immigration law only when the IRCA violation prompting employment was committed by the employee, not as in this case, by the employer. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. at 149-50, 122 S.Ct. 1275. See *supra* pp. 237, 244.

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Fourth, when as in this case, both the illegal employment relationship and the personal injury are attributable to the wrongful conduct of persons other than the undocumented worker, a denial of lost earnings compensation, like a denial of worker’s compensation, see *supra* pp. 244-45, is more apt to subvert both federal and state law than a grant of such compensation is apt to place the two in direct and positive conflict with one another. As the New Hampshire Court of Appeals observed in recently rejecting a *Hoffman Plastic*-based challenge to its state law allowing an undocumented worker to recover lost United States earnings for workplace injuries: “To refuse to allow recovery against a person responsible for an illegal alien’s employment who knew or should have known of the illegal alien’s status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions.” *Rose v. Partners in Progress, Inc.*, 868 A.2d 994, 1000, 152 N.H. 6, 13 (2005).

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Allowing such recoveries would not trench on federal immigration policy because, although the compensatory awards would stem from illegal relationships, employers could avoid the result by complying with IRCA and refusing to hire illegal aliens in the first place. See *id.* at 1001, 152 N.H. at 14, 868 A.2d 994.

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Balbuena v. IDR Realty supra, which was cited favorably several times in *Madeira*, also provides support for distinguishing *Hoffman*, where a “knowing” employer is involved. The New

York Court of Appeals observed.

As the Second Department cogently observed, a different conclusion would not only diminish the protections afforded by the Labor Law, it would also improvidently reward employers who knowingly disregard the employment verification system in defiance of the primary purposes of federal immigration laws. An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens (see generally *Patel v. Quality Inn S.*, 846 F.3d 700, 704 [11th Cir 1998], cert. denied 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 182 [1989]; *Dowling v. Slotnik*, 244 Conn. 781, 796, 712 A.2d 396, 404 [1998]; *Nizamuddowlah v. Bengal Cabaret*, 69 A.D.2d 875, 876, 415 N.Y.S.2d 685 [2d Dept.1979], lv. dismissed 48 N.Y.2d 609, 424 N.Y.S.2d 1026, 400 N.E.2d 372 48 N.Y.2d 883 [1979]). This, coupled with the fact that illegal aliens are willing to work in jobs that are more dangerous and undesirable—and for less money—than their legal immigrant and citizen counterparts, would actually increase employment levels of undocumented aliens, not decrease it as Congress sought by its passage of IRCA (see *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 893, 104 S.Ct. 2803; see also HR Rep. No. 99-682, Part I, 99th Cong., 2d Sess., at 58, reprinted in 1986 U.S.Code Cong. & Admin. News, at 5662). 812 N.Y.S.2d at 428.

Further, the court responded to the dissent's comments by observing that the dissent "does not acknowledge that Congress expressly indicated that IRCA was not intended to undermine existing statutory labor protections. The dissent's bar to an alien's recourse under the labor law actually rewards IRCA violations by employers, and thereby promotes the employment of undocumented aliens. In the end, we believe that rewarding avoidance of the employment verification system under IRCA while at the same time denying relief to a worker injury as a result of a workplace violation of state labor laws constitutes that which is "unseemly." *Id* at 427.

Further, the District Court in *Singh v. Jutla*, an FLSA case involving retaliation claims, also distinguished *Hoffman* in part based on the knowing employer issue. The judge characterized *Hoffman* as holding that "allowing backpay to an illegal employee, who was hired by an unknowing employer, then runs contrary to immigration policy. 214 F.Supp. 1056 at 1061 (N.D.Calif. 2002).

Professor Michael Wishnie, who as I have detailed above, was a participant in the *Hoffman* litigation, argues strangely that *Hoffman* does not apply, where as here, the employer violated IRCA and the employee did not.

Where an employee does not defraud an employer by tendering false documents, as in *A.P.R.A. Fuel Oil Buyers Group* or *Singh v. Jutla*, the worker violated no law; only the employer is liable under IRCA. In such a circumstance, the animating concern of the *Hoffman Plastic* majority—that awarding backpay would condone criminal conduct by an employee—is absent; the very same concern with "criminally punishable" conduct, however,

5 should lead to the conclusion that an employer who fails to verify
work authorization status or who knowingly hires an
undocumented worker cannot thereby evade ordinary backpay
liability. In short, where an employer knowingly hires unauthorized
workers, or fails to verify their status, the *Hoffman Plastic* rationale
does not bar backpay. To the contrary, it is consistent with both
immigration and labor policy to conclude that such an employer
had waived, and is estopped from raising, any objection to an
award of backpay based on an employee's immigration status.
10 Footnotes omitted. 6.U.Pa. Lab and Emp. L. at p.5.

I agree wholeheartedly with Professor Wishnie's analysis, which is consistent with
Mezonos and is also supported by other commentators.⁶⁴

15 I also agree with Professor Estland's observations, cited in the footnote below, that an
"unclean hands," estoppel or balancing of the equities argument is applicable here. Indeed, in
my view that is what the Supreme Court did in *Hoffman*, without using those terms. It concluded
that awarding backpay to undocumented aliens would "unduly trench" upon federal immigration
policy expressed in IRCA based on a comparison of the conduct of the employee in fraudulently
20 obtaining his job as against the employer, who did not violate IRCA, but did violate the NLRA. In
those circumstances, the court viewed the IRCA violations by the employee as more
substantial, and found that the Board was foreclosed from awarding backpay.

25 Here in contrast, not only did Respondent Imperial violate the NLRA, but it also violated
IRCA itself, the very statute that the court in *Hoffman* found that the Board had not sufficiently
accommodated when it awarded backpay to the employee, who also had violated IRCA. Here,
as previously observed, the discriminatees did not violate IRCA in any respect.⁶⁵

30 Furthermore, in both *Fansteel* and *S&S Steamship*, the cases relied upon by the
majority in *Hoffman*, also balanced the equities by concluding that the conduct of the
employees in these cases, which were violative of other federal statutes, outweighed the
conduct of the employers in violation of the NLRA. I note further *ABF Freight System v. NLRB*,
510 U.S. 317 (1994), a case relied on by the dissent and the Board in *Hoffman* but
distinguished by the majority. There the court upheld the Board's decision to award backpay to
35 a discriminatee, who had lied on the stand in his testimony before the ALJ. The court concluded
that the remedy issued by the Board was "well within its broad discretion" despite the employee
having provided false testimony, which violated federal perjury statutes. Once again, the court
balanced the equities by pointing out the following: "Notably, the ALJ refused to credit the
testimony of several ABF witnesses see, e.g. 304 NLRB at 598 and the Board affirmed these
40 credibility findings. "The unfairness of sanctioning Manso while indirectly rewarding those

⁶⁴ See Orrin Baird in *Undocumented Workers and the NLRA: Hoffman Plastic Compounds
and Beyond*, 19 Lab Law 153 at 164 (2003). (*Hoffman's* "prohibition on backpay for
undocumented workers should not be applied to the knowing employer.); See also Professor
45 Cynthia Estland's comments in the *Daily Labor Reports* of August 13, 2002. In commenting on
Hoffman, Professor Estland observed that "the result could and should be different where the
employer violated IRCA by knowingly hiring the undocumented workers. Some form of unclean
hands or estoppel argued might be invoked against the wrongdoing employer's using the
employee's undocumented status to escape backpay liability." *Id* at p. 11.

50 ⁶⁵ I note once more that IRCA does not provide for or make it unlawful for an undocumented
employee to work in this country.

witnesses' lack of candor is obvious." 510 U.S. at 324.

Similarly, here as in *ABF Freight*, the unfairness of sanctioning the discriminatees (who did not violate IRCA or any other federal statute but who were victims of unfair labor practices), while indirectly rewarding Respondent Imperial (who violated IRCA as well as the NLRA) is obvious.

I also conclude that this balancing of the equities approach ties into the concerns expressed by Justice Breyer in his dissent and his observation that the employer's incentive to hire illegal alien employees, which runs directly contrary to IRCA's basic objective in the case of a knowing employer, would be "obvious and serious." 535 U.S. at 157. It is also consistent with the Supreme Court's statement in *Sure-Tan* where it held:

Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens is correspondingly lessened. In turn if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. 467 U.S. at 894.

While this quotation from *Sure-Tan* was in the context of discussing the NLRA *vis a vis* the INA, the principles expressed are still applicable here, even though IRCA is now in force. There is likely to be an incentive for employers to hire undocumented aliens if they know that such employees are not subject to the NLRA, and there is no backpay liability should such employees be discriminatorily discharged. However, such an incentive it could be argued, as it was by the employer in *Hoffman*, is speculative and questionable, where as in *Hoffman*, the employer was an "innocent employer," who did not violate IRCA. Here, as I have detailed above, Respondent Imperial was a knowing employer, who failed to inquire about the employees' immigration status at hire, failed to verify documents within three days, and only asked for documents over month after hire in connection with tax filings, not immigration status. Further, it continued to employ Tsai and Chen, even after finding out that they were not authorized to work in this country. Thus, Respondent Imperial has violated IRCA, and the incentive to hire undocumented workers is serious and contrary to IRCA's objectives. *Hoffman supra*, 535 U.S. at 157.

It is significant, as mentioned several times above, that IRCA did not make it illegal for employees to work in this country but penalizes them only if they submit fraudulent documents, as did the employee in *Hoffman*. The scheme of IRCA is centered on penalties and prohibitions on the employer for knowingly employing undocumented workers, and sets forth detailed requirements to enforce these prohibitions. Thus, Congress has made a conscious decision that the primary enforcer of IRCA is the employer. Where, as here, the employer is violating IRCA and the employees are not, it is hard to see any conflict between the NLRA and IRCA *vis a vis* an award of backpay. As the Board correctly observed in *A.P.R.A.* "To do otherwise (not award backpay) would increase the incentive for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity. Thus, these employers would be free to flaunt their objectives under the Act, secure in the knowledge that the Board will be powerless to remedy their violations." 320 NLRB 415.

I note further that the Board did attempt in *A.P.R.A.* (as well as in *Hoffman*) to accommodate its remedy with IRCA by ordering limited backpay and conditional reinstatement. The majority opinion in *Hoffman* found these attempts of accommodation insufficient, finding that the Board's position of recognizing employer misconduct (under the NLRA) but discounting the misconduct of illegal alien employees "subverts" IRCA rather than accommodating it. That conclusion cannot be made here. Respondent Imperial is the party that has "subverted" both the NLRA (by discriminating against the employees) and IRCA (by violating its provisions in several respects contrary to Congressional intent.) Further, the employees have violated neither statute, and have been the victims of unfair labor practices, which would not be fully remedied should backpay not be awarded. I again emphasize that the Board has accommodated IRCA by its modification of its normal remedies, as detailed above. While the *Hoffman* Court found these modifications insufficient, I believe that it would rule differently here, where the employees have not violated IRCA, while Respondent Imperial has as well as having violated the NLRA. The modifications ordered by the Board in *A.P.R.A.*, which I will apply to the instant case, are more than sufficient to accommodate IRCA. The conditional reinstatement remedy is consistent with IRCA since Respondents may not knowingly employ an undocumented alien. By providing for reinstatement only when, and if the employees present within a reasonable time, documents to permit them to work in the United States, IRCA's provisions are satisfied. 320 NLRB at 415. Similarly, in *A.P.R.A.*, the Board limited the backpay remedy by providing that it ends when the employees are reinstated (subject to compliance with IRCA), or the employees "failure after a reasonable time" to provide documents that verify their eligibility for employment. *Id.* This accommodation does not induce the employer to illegally rehire the discriminatees to reduce its backpay liability, and instead serves to place the employees for a limited time in the position that they would have been but for the unlawful conduct. *Id.* at 416.

It is also important to note that a majority of courts and agencies (including to some extent the NLRB) have narrowly interpreted *Hoffman* and confined its application to the specific facts therein. *Drawing the Line after Hoffman Plastics Compounds: Strategies for Protecting Undocumented Workers, the Title VII Context and Beyond*, Jennifer Chung and Christopher Ho, 22 Hofstra Lab 8 Employ L.J. 473 at 497. See also *Labor Law Stories supra* at 434-435.

In that regard, it is fairly well settled that *Hoffman* does not apply to compensation awarded for work performed by the undocumented worker. *Tuv Taam Corp.*, 340 NLRB 756, 759 (2003). (Backpay to employees where wages were unlawfully reduced, not foreclosed by *Hoffman*); *Lin v. Donna Karan Int'l Inc.*, 207 F.Supp.2d 191, 192 (3.D.N.Y. 2002) (Immigration status irrelevant to FLSA claims for time actually worked.); *Flores v. Amigos*, 233 F.Supp.2d 462, 463-465 (E.D.N.Y.) (same); *Flores v. Albertsons Inc.*, 2002 WL 11663623 at 5 (C.D. Cal 2002); *Martinez v. Mecca Farms*, 213 F.R.D. 601, 604-605 (S.D.F.2Ca 2002) (Farm workers under Migrant and Seasonal Agricultural Protection Act eligible for compensation for work performed regardless of immigration status, even after *Hoffman*). Further *Hoffman* does not bar remedies based on the anti-retaliation provisions of the FLSA. *Singh v. Jutla, supra*, 241 F.Supp.2d at 1060. Courts have also generally held that *Hoffman* does not preclude undocumented immigrants from recovering for lost wages based on state labor laws, tort laws, or workers compensation statutes. *Madiera, supra*, 469.F.3d at 244 (Observing that unlike in *Hoffman*, it was the employer, who violated both federal and state law); *Balbuena v. IDR Realty, supra*, 812 N.Y.S.2d at 427-429 (Noting that denying backpay would reward employers, who knowingly disregard the employment verification system in defiance of the primary purposes of federal immigration laws, as well as the fact that the alien did not commit a criminal act under IRCA.); *Tyson Foods v. Guzman*, 116 S.W.3d 233, 242-244 (Tex.App.2003) (Undocumented worker may seek damages for lost wages in negligence action for injuries suffered in forklift collision); *Rosa v. Partners in Progress*, 868 A.2d 994, 997 (N.H. March 4, 2005) (Lost wages under tort law recoverable regardless of immigration status); *Asgar Ali v. Hilton Hotels Corp.*, 4

Misc. 3d 1026 (A) (N.Y. Sup Ct. 2004) (*Hoffman* does not make plaintiff's immigration status relevant to claim for lost future earnings stemming from workplace accident); *Tapo v. DHR*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (Federal Alien Tort Claims Act); *Rajeh v. Steel City Corp.*, 2004 Ohio 3211, 2004 WL 1374829 (Ohio App. 7 Dist. June 15, 2009) (Undocumented immigrant under order of deportation eligible for Ohio workers' compensation benefits); *Correa v. Waymouth Farms*, 664 N.W.2d 324, 328-330 (Minn 2003) (Undocumented worker eligible for benefits under Minnesota workers' compensation law); *Safeharbor Employer Services Inc. v. Velazquez*, 880 So.2d 984 (2L.Ct.App. 2003) (same).

Moreover, even in Title VII cases, which are most closely similar to the NLRA, Courts have limited *Hoffman*'s application. *Rivera v. NIBCO*, 364 F.3d 1059, 1066-1070 (9th Cir. 2004) ("The overriding national policy against discrimination would seem likely to outweigh any bar against the payment of backpay wages to unlawful immigrants in Title VII cases. Thus, we seriously doubt that *Hoffman* applies in such actions.") *Id* at 1069; *Dela Rose v. Harvest Furniture*, 210 F.R.D. 237, 238 (C.D.Ill) (same); *EEOC v. First Wireless Group Inc.*, 225 F.R.D. 404, 406-407 (E.D.N.Y. 2004) (Following *Rivera supra*.)

In this connection, I do recognize that the Board has strictly applied *Hoffman* in cases, even subsequent to *Mezonos*, and denied or tolled backpay to undocumented discriminatees. *Domsey Trading Corp.*, 351 NLRB 824, 828-829 (2007); *Domsey Trading II*, 353 NLRB AJD #12 slip op p.1, ALJ slip op p.5 (2008) (Backpay tolled for period of time that discriminatees did not have authorization to work.); *Case Farms of North Carolina*, 353 NLRB #26 slip op p.7 (2008) (Board indicates that backpay is tolled for period when discriminatee is not lawfully entitled to work. Remands to compliance for determination of issue.) *Concrete Farm Wall*, 346 NLRB 831, 833-836 (2006) (Pre-*Mezonos* decision where Board again reads *Hoffman* as foreclosing backpay but leaves issue to compliance.)

However, it does not appear that the issues raised by *Mezonos* were before the Board in any of these cases. Not does it appear that General Counsel argued in any of these decisions that *Hoffman* does not apply. Thus, the Board has not passed on the theory espoused in *Mezonos* that read in context, *Hoffman* does not foreclose backpay in all cases of undocumented discriminatees.

Most importantly, *Mezonos* has been before the Board since 2006, and has not been decided as yet. Clearly, there has been some dispute amongst Board members as to whether to approve Judge Davis's attempts to distinguish *Hoffman*. It also appears that in view of the fact that there has not been a full membership on the Board for several years, that *Mezonos* will not be decided unless and until there are five Board members. I therefore conclude that the position of the Board on this issue is unsettled, and I find the cases cited (*Domsey I & II, supra; Case Farms, supra; Concrete Walls, supra*) not to be dispositive.

The court and agency cases cited above, including the Board's decision in *Tuv Taam*⁶⁶, distinguished *Hoffman* on various grounds and read the literal language therein narrowly in order to award compensation to undocumented workers. Thus, none of the workers in these cases were authorized to work in the United States, and a broad reading of *Hoffman* could be argued to bar compensation for them. However, these decisions did not read *Hoffman*'s language literally and awarded compensation and backpay to undocumented workers.

⁶⁶ Excluding the Board decisions in *Domsey I & II supra, Case Farms supra, and Concrete Walls supra*, which as I have noted above are not dispositive since the issue of possible distinctions from *Hoffman* was neither raised nor decided.

Similarly, here I find it appropriate to read *Hoffman* in context and not to apply its language literally. *Hoffman, supra* 237 F.3d at 642 1291; *Aka, supra* 156 F.3d at 1291; *St. Mary's v. Hicks, supra* 509 U.S. 515. As I have detailed above, a literal reading of the language in *Sure-Tan* would preclude backpay for undocumented aliens, but the Board in *A.P.R.A.* and the 2nd and 9th Circuits in *A.P.R.A.* and *Felbro* respectively, read *Sure-Tan* in context and found backpay to be appropriate. I do the same here, and for the reasons detailed above, I conclude that read in context and considering the other language in the decision that the *Hoffman* Court would not foreclose backpay based on the facts in the instant case. I believe that where as here, Respondent Imperial has violated IRCA, contrary to the proscriptions of the statute, as well as the Congressional intent that employers be responsible for enforcing the law, and the employees have not violated the statute, as well as being the victims of Respondent Imperial's violations of the NLRA, the Court would be likely to find the Board's attempt to accommodate IRCA sufficient. Therefore, the Court would and should find that the award of backpay to Tsai and Chen would not "unduly trench" upon explicit statutory prohibitions critical to federal immigration policy as expressed in IRCA, and permit the Board under the principles set forth in *A.P.R.A.* to award limited backpay to the employees. I so find. *Mezonos, supra*.⁶⁷

I shall therefore award backpay to Tsai and Chen as well as to Tan. However, as to Chen and Tsai, it is necessary to prospectively award limited backpay to them based on *A.P.R.A.* as well as *Case Farms, supra*. See also *Regal Recycling*, 329 NLRB 355, 357 (1999). Similarly, based on *A.P.R.A. supra*, *Case Farms, supra* and *Regal Recycling, supra* conditional reinstatement for Chen and Tsai is appropriate.⁶⁸

In this regard, I note that even if I am reversed on the issue of backpay for Tsai and Chen based on *Hoffman*, the conditional reinstatement remedy would still be required for both employees even if back pay is tolled. *Hoffman* did not decide issues of conditional reinstatement and therefore the Board's remedy in *A.P.R.A.* is still the law. See *Case Farms, supra*, slip op at 7, ordering conditional reinstatement to discriminatees, and leaving backpay issue of undocumented discriminatee to compliance stage of case. I would also observe that if the compliance investigation here determines that either or both of the discriminatees became authorized to work at any time subsequent to the close of the hearing, then their backpay would commence at that time irrespective of whether they were awarded backpay for periods prior to that date, and the obligation to conditionally reinstate them would change to an obligation to offer unconditional reinstatement to them, similar to the obligation concerning Tan.

The compliance investigation here, consistent with the *A.P.R.A.* remedy, shall also determine the issue of "reasonable time" to obtain documents verifying their eligibility for employment in the U.S., in measuring what additional backpay, if any, is due to Tsai and Chen.

⁶⁷ I recognize that the Court also argued as an additional basis for foreclosing backpay that the undocumented worker could not mitigate his damages. However, I find that argument to be a minor and insignificant portion of the opinion. More importantly, the court emphasized in discussing that issue that Castro had secured interim work with false documents. That finding cannot be made here. The record revealed that although both Tsai and Chen did secure interim work, they did not use false documents to do so. Further, they were both able to secure such interim work without any hindrance from their undocumented status.

⁶⁸ The obligation to reinstate Tan, who was and is authorized to work in this country, remains as reflected in the earlier decision.

E. Gross Backpay

5 The gross backpay figures utilized by General Counsel in its specification as amended in its brief utilized average weekly tip earnings based on the tip records for 2005 of Chen and Tsai.⁶⁹

10 For Tan, the specification as amended based on its calculations on Tan's testimony concerning her average tip earnings, her lost tip records, and the estimated tip earnings that she submitted to her accountant. This figure came to \$31,200 annually or \$600 per week.

15 None of the Respondents' answers provided any alternative calculations or alternative amounts that they believe were appropriate for any of the discriminatees. Nor were such alternative figures provided in their briefs, although Respondent Imperial argued that Tan's gross pay at most should be \$22,892, the amount specified in the W-2 supplied by Respondent Imperial.

20 Initially, I agree with General Counsel that the failure of Respondent Imperial to provide alternative calculations constitutes an admission under the Board's rules that the General Counsel's calculations are accurate.⁷⁰

25 Since the evidence concerning the employees' gross earnings is under Respondent Imperial's control, its failure to furnish alternative calculations is contrary to the Board's Rules and Regulations and precludes the litigation of the gross backpay issue. *Caribe Inn Tennis Club & Casino*, 320 NLRB 113, 114 (1996).

30 While the Respondents Majestic and New Majestic do not have control over evidence concerning the earnings of the discriminatees, they are bound by Respondent Imperial's deficient answer if it is established that they are *Golden State* successors. If not, they will not be liable for any backpay. *Caribe Inn*, *supra* fn. 4 at 114.

35 Moreover, Respondents were permitted to litigate the issue of gross backpay. I conclude based on the evidence adduced on the record that the formula selected by the General Counsel is reasonable and must be accepted. *Cable Car Charters*, 336 NLRB 927, 932 (2001), particularly, where as here, Respondents have offered no alternative formulas and adduced no credible evidence that General Counsel's formula was unreasonable or arbitrary.

40 The General Counsel's formula based on an average of tips earned by the discriminatees is clearly reasonable. *Hacienda Hotel*, 274 NLRB 601 (1986). The amounts are based on the credible and mutually corroborative testimony of the discriminatees,⁷¹ and the tip records of Tsai and Chen, and indeed is also corroborated by the testimony of Respondents' own witnesses, who indicated that the average earnings of restaurant workers in the area is between two and three thousand dollars a month. Further, David Ho and Paul Huang told Chen and Tan respectively, at hire that they could make \$2500 a month or more.

45 ⁶⁹ For Chen, these records showed earnings of \$30,457, which averaged \$585.71 per week. For Tsai, the records revealed earnings of \$30,963, averaging \$595.44 per week.

⁷⁰ 102.56(b) and (c) of the Board's Rules and Regulations

50 ⁷¹ *Met Food*, 337 NLRB 109, 110 (2001) (Gross backpay based on recollection of employees of their earnings reasonable, in absence of records or written documents).

While these figures discounted the fact that the tax returns of the discriminatees revealed higher earnings, these facts are not conclusive. Discrepancies between the tax returns and the testimony of the employees are matters for the IRS to assess. *Hacienda Hotel supra* at fn. 4. I would note in this regard that the tax returns of the employees revealed higher figures for the employees, and their use by General Counsel would have resulted in higher figures. To the extent that Respondents argue that the employees signing “false” tax returns, reflects poorly on their credibility. I disagree.

I find that their explanations that the accountant supplied by the Union prepared the returns based on erroneous assumptions by the Union after evaluating Respondent Imperial’s obviously inaccurate W-2s is plausible, and accounts for the tax returns not being accurate. I also reject all other assertions by Respondents that the discriminatees’ testimony in regard to gross backpay as well as interim earnings be discredited. I found all three discriminatees on the whole to be believable and candid. They each were subject to withering extensive and sometimes duplicative cross examination from three different attorneys, and their testimony was essentially consistent throughout.

Most importantly, as I have noted above, Respondents submitted no alternative calculations and submitted no credible evidence contradicting the General Counsel’s formula. In this connection, Respondents do point to the W-2 form submitted by Respondent Imperial for Tan of \$22,892, and argues that this document, prepared in the ordinary course of business, should be accepted over the testimony of Tan. I cannot agree. Despite this document being received in evidence, neither Respondent Imperial nor any of the other Respondents presented any witnesses or other evidence explaining how this W-2 was prepared and what documents, if any, Respondent Imperial relied on in preparing this document. In these circumstances, I cannot and do not place any reliability on Tan’s W-2.

Moreover, the W-2s of Tsai and Chen had the identical figures of \$10,623 as their earnings. Interestingly and significantly, Respondents have not claimed that these W-2s should be utilized to measure Tsai’s and Chen’s gross backpay. That is not surprising since these figures are so far below record evidence concerning earnings of employees, as detailed above, that Respondents did not have the nerve to argue that they are accurate. However, I can and do rely on Chen’s and Tsai’s clearly inaccurate W-2s to conclude that Tan’s was similarly inaccurate as it reveals the general inaccuracy of the W-2s that Respondent Imperial sent to its employees.

Respondents also argue that tax returns for Tan for 2006 revealed earnings of \$22,264, which demonstrated that the similar W-2 form submitted by Respondent Imperial is accurate. Once more, I cannot agree with Respondents’ contention. In 2006, Tan worked at two part-time jobs for the Shing Kee Restaurant from 9/1/06 to 12/31/06, and for the Taj Mahal from 5/26/06 to the end of the year. Thus, the \$22,264 consists of the W-2s for both of these restaurants, and provides an incomplete comparison to Tan’s earnings at Respondent Imperial, which consisted of full time work for the entire year.

Respondents also point to Tan’s 2007 W-2 from the Taj Mahal, which showed earnings of \$25,809. While this figure is somewhat less than the gross backpay in the specification of \$31,000 for 2005, this can be explained by the credited testimony of Tan that while working for Respondent Imperial, she and other wait staff worked an average of 60 hours per week.⁷²

⁷² Chen and Tsai corroborated Tan’s testimony in this regard, which was not contradicted by any evidence or testimony from Respondents.

When Tan began working “full time” at Taj Mahal, she worked only 35 hours per week.

Respondents cite *Buchner v. NLRB*, 1968 U.S.App Lexis 6320 68 LRRM 2603 (3rd Cir. 1968) that it is not sufficient for the trial examiner to reject the employer’s evidence because it appears to be self-serving or subjective, *Id* at 8, and that the Board’s approximation must have a “rational basis” and be able to “stand on its own.” *Ibid*. However, this case is clearly inapposite. Most significantly, there the 3rd Circuit panel rejected the Board’s calculations as “arbitrary” and “unreasonable,” but in *Buchner* the employer had submitted detailed alternative calculations, which shed doubt in the panel’s view of the Board’s use of a seniority system to calculate backpay. Here, in contrast, as I have explained above, Respondents have submitted no alternative calculations or convincing evidence that shed any doubt on the calculations in the specification as amended. Moreover, the *Buchner* panel decision was in fact reversed in an *en banc* opinion, 405 F.2d 787, 790-791 (3rd Cir. 1969).

Respondents also assert that General Counsel has not established the backpay amounts due “with specificity.” Again, I disagree. The calculations are reasonable based on the tip records of Tsai and Chen, and Tan’s credited testimony, which is consistent with that of Tsai and Chen as well as with the testimony of Respondents’ own witnesses. Moreover, as emphasized above, Respondents have not adduced any alternative calculations.

Accordingly, the gross backpay figures proposed by General Counsel are reasonable and I so find.

F. Mitigation

The applicable law with respect to mitigation of damages by discriminatees is aptly summarized by the Board in *Midwestern Personnel Services*, 346 NLRB 624 at 625 (2006).

In a backpay proceeding, the General Counsel must first show the amount of gross backpay due to each discriminatee. The respondent then has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 573 (2004); *Chem Fab Corp.*, 275 NLRB 21 (1985), *enfd mem.* 774 F.2d 1169 (8th Cir. 1985). To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995) (citing *Mastro Plastics*, 136 NLRB 1342 (1962), *enfd. in relevant part* 354 F.2d 170 (2d Cir. 1965), *cert. denied* 384 U.S. 972 (1996)). It is the respondent’s burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. *Id*. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful. *Chem Fab Corp. supra*. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973). The “sufficiency of a discriminatee’s efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period.” *Wright Electric, Inc.*, 334 NLRB 1031 (2001) (quoting *Electrical Workers Local 3 (Fischbach & Moore)*, *supra*, *enfd.* 39 Fed. Appx. 476 (8th Cir. 2002).

In *St. George Warehouse*, 351 NLRB 961 (2007), the Board modified its burden shifting approach in mitigation situations. The Board held that “when a respondent raises a job search defense and satisfies its burden of coming forward with evidence that there were substantially
 5 equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee’s job search.” 351 NLRB at 967.

I find it unnecessary however to utilize the burden shifting approach suggested by *St. George*
 10 *George* in this case. My reading of *St. George* is that the principles therein have significance only when, as in *St. George*, the General Counsel fails to call the discriminatees as witnesses or to present evidence pertaining to their job search.

Since here, General Counsel has presented all three discriminatees as witnesses and
 15 adduced evidence concerning the reasonableness of their job search, I find it unnecessary to decide whether as argued by General Counsel and Charging Party that Respondents’ evidence concerning the availability of jobs in the relevant geographic area is insufficient to meet their burden of proof. I will consider and discuss that evidence however, when evaluating the issue of
 20 whether Respondents have met their burden of demonstrating that the discriminatees failed to seek interim employment with reasonable diligence. *Midwestern Personnel, supra* at 625.⁷³

Here the testimony of the three discriminatees, detailed above in the facts, which I credit, establishes that all of them engaged in extensive efforts to find employment throughout
 25 the backpay period. These efforts consisted of reading newspaper advertisements, answering some ads when appropriate, visiting employment agencies, consulting with friends or acquaintances, including representatives of the Union, and at times visiting restaurants to inquire if there were any openings. These efforts are more than sufficient to establish a reasonable job search by each of the discriminatees. *St. George Warehouse II*, 353 NLRB #50, ALDJ slip at p. 5-6 (2003); *Essex Valley Nurses Assn.*, 352 NLRB 427, 437 (2008); *Tower Industries, supra* 352 NLRB at 880-881; *Allegheny Graphic*, 320 NLRB 1141, 1145 (1996);
 30 *Amshu Associates*, 234 NLRB 791, 794 (1978); *United Aircraft*, 204 NLRB 1068, 1074 (1973).

Respondents’ primary basis in arguing that the discriminatees have not engaged in a
 35 reasonable search for work is their assertion that the discriminatees should not be credited. In that regard, they argue that since much of the testimony of all three discriminatees of their efforts to find work in the areas set forth above, did not appear on the job search forms supplied by the NLRB to the discriminatees, such testimony should not be credited. I disagree.

I do not find it particularly significant or disqualifying that some of the testimony of the
 40 discriminatees concerning their efforts did not appear on their search forms. For example, it is not surprising that the employees would not name friends or acquaintances that they spoke to about possible job openings since the form is not clear that such efforts are requested. Further, the Board has long concluded that poor recordkeeping or poor memory does not disqualify an employee from receiving backpay. *United States Can*, 328 NLRB 334, 344 (1999); *Tilden Arms*,
 45 307 NLRB 13, 16 (1992); *Allegheny Graphics supra* at 1145.

⁷³ I note that *St. George, supra* specifically stated that its decision make no change in its
 50 prior long standing position that the ultimate burden of persuasion remains on Respondents to prove that discriminatees did not mitigate damages by using reasonable diligence in seeking alternate employment. 351 NLRB at 964.

Moreover, Respondents failed to adduce any evidence that contradicted any of the discriminatees, concerning the friends they spoke to, employers they visited and applied for jobs with, agencies they visited, or ads that the discriminatees answered. *Tower Industries supra* (Employer did not challenge employee’s testimony concerning job search); *Millennium Maintenance and Electrical Contracting*, 344 NLRB 516, 517 (2005) (Respondent had opportunities to test the veracity of testimony that employee contacted 12 contractors, but did not do so.); *U.S. Can supra* at 350 (“While Respondent may doubt that Harris contacted the employers...mentioned by her at the hearing, it offered no evidence of its own to contradict Harris’ claim that such contacts were indeed made.”)

Indeed, as I have related above, I found all three discriminatees to be credible and believable witnesses. They each spent several days on the stand, and were subject to extensive cross examination by three different attorneys, primarily concerning mitigation issues. Yet, the employees were responsive throughout their testimony, and answered questions in a direct and thoughtful manner. They candidly acknowledged failures to record some details of their search efforts or the inability to recall such details. I therefore credit their testimony concerning their job search efforts, and found it more than sufficient to establish a reasonable and diligent job search. All three discriminatees obtained a number of interim jobs during the backpay period, albeit some being part-time. Eventually, all three obtained full time positions.

Respondents also have raised several specific issues concerning some particular aspects of the discriminatees’ job searches. Concerning Tan, Respondents claim that Tan’s conduct at several interim jobs require a reduction in her backpay. They point to Tan’s testimony that she was given the opportunity to work at the Szechuan Star Restaurant, where the manager allowed her to work for an hour (without pay) on a trial basis, and then informed her that the job was “not suitable” for her. Respondents assert that Tan never explained why the job was not suitable for her. In February 2006, Tan obtained a full time job at the East Coast Buffet Restaurant. She worked there for a “little over a week.” At that time, the boss of the restaurant told Tan that he “did not want me to stay.” Respondents again fault Tan for not elaborating on why she was let go from that interim employer.

However, a discharge from substantially equivalent interim employment does not constitute a willful loss of employment. The Respondents must show deliberate or gross misconduct by the discharged employee to prove a willful loss of employment. *Baker Electrics, supra* 351 NLRB at 534 and 565; *Minette Mills*, 316 NLRB 1009, 1011 (1995); *Ryder Systems*, 302 NLRB 608, 613 fn. 7 (1991), enfd. 983 F.2d 705 (1993).

Thus, Respondents have misperceived the burdens of proof on this issue. It is not the burden of Tan or the General Counsel to explain why the employers at these restaurants did not wish to retain or to hire Tan. It is Respondents’ burden to prove that Tan engaged in gross or deliberate misconduct in order to meet its burden of establishing a willful loss of employment. Clearly, Respondents have not done so here. Thus, Tan’s backpay will not be reduced because of the events at these two restaurants. *Baker Electrics, supra*; *Ryder System supra*.⁷⁴

Respondents also assert that Tan incurred a willful loss of earnings when she quit her

⁷⁴ I note that it does not even appear that Tan was ever even hired by the Szechuan Star Restaurant since she was merely given a one hour trial period. Assuming without deciding that the same principles would apply to a refusal to hire by an interim employer as termination, I find again that Respondents have not established that Tan engaged in any misconduct, much less gross or deliberate misconduct during her trial period.

interim jobs at the nail salon and at Shing Kee. The law with respect to quitting interim employment differs in some respects from terminations. Where a discriminatee quits a substantially equivalent interim job, the burden shifts to General Counsel to prove that the decision to quit was reasonable. *Parts Depot*, 348 NLRB 152, 154 (2006); *Minette Mills*, *supra* at 1010. However, a discriminatee is under no obligation to retain nonequivalent employment. *Alaska Pulp*, 326 NLRB 522, 532 (1998); *Glover Bottled Gas*, 313 NLRB 43 (1993), *enfd.* 47 F.3d 1230 (D.C. Cir. 1995); *Ryder Systems*, *supra* at 609. Therefore, if the interim position is not substantially equivalent, the discriminatee may quit for any reason without incurring any reduction in backpay. *Met Food*, *supra* at 109; *Glover*, *supra*; *Ryder Systems*, *supra*; *Newport News Shipbuilding*, 278 NLRB 1030, 1033 (1986).

In applying the principles of these cases here, I find initially that neither of the interim positions, from which Tan resigned, can be construed as substantially equivalent to the job with Respondent Imperial Buffet. The job at the nail salon resulted in payments to her of \$180 for a month of work. There can be no doubt that this was not a substantially equivalent position to her waitress position at Respondent Imperial, where she earned approximately \$600 per week and performed significantly different work. *Baker Electrics*, *supra* at 565. (Job not equivalent where it paid discriminatee 80% of his prior wages.) *Met Food*, *supra* (Job not equivalent that paid 68% of prior wages.)

Similarly, Tan's interim job at Shing Kee was part-time only, wherein she worked 10 hours a day, two days a week, with a salary of \$11.00 per hour with no tips. Thus, this position was also not substantially equivalent to her full time job at Respondent Imperial with substantially higher earnings. *Baker Electrics*, *supra*; *Met Food*, *supra*.

Therefore, Tan was under no obligation to retain either of these jobs, and her decision to quit, regardless of the reason, does not serve to reduce her backpay. *Baker Electrics*, *supra*; *Met Food*, *supra*; *Glover Gas*, *supra*; *Ryder Systems*, *supra*.

Moreover, even if the jobs were found to be comparable, resulting in a shifting of the burden to General Counsel to prove that the quits were "reasonable" (*Parts Depot*, *supra* at 159), I find that General Counsel has done so.

Tan quit the nail salon position because the smell caused her breathing difficulty and caused her eyes to be tired. These kinds of considerations have long been held to be sufficient reasons for discriminatees to quit interim employment. *Parts Depot*, *supra* at 160 (quit because of exposure to environmental hazards and health concerns); *Pope Concrete Products*, 312 NLRB 1171, 1173 (1993) (exposure to dust exacerbated psoriasis condition); *United States Can*, *supra* at 346-347 (work strenuous and aggravated diabetic condition); *Airports Bus Service Co.*, 231 NLRB 1272, 1273 (1977) (allergic condition caused discriminatee to quit job at health spa); *Big Three Industrial Gas*, 263 NLRB 1189, 1207 and 1216 (1982) (two discriminatees quit same interim employer because of concerns about handling and breathing hazards chemicals); *Chem Fab Corp.*, 875 NLRB 21, 24 (1985) (discriminatee quit because he "could no longer stand" the work of washing bed linen of elderly and disabled patients).

Tan quit her part-time position at Shing Kee because by December 2006, she had obtained a full time position with the Taj Mahal, and the 20 hours at Shing Kee plus 35 hours at the Taj Mahal became "too much" for her, particularly considering the locations involved. In this regard, Respondents argue that Tan's decision was unreasonable since she had worked 60 hours at week while employed by Respondent Imperial. However, Respondents overlook the

obvious differences that the job with Respondent Imperial involved working at one location 60 hours a week.⁷⁵ In contrast, the distance between Atlantic City, New Jersey and Brooklyn, New York is considerable, and I find that Tan’s decision to quit in these circumstances was clearly reasonable, even if the Shing Kee job was substantially equivalent.⁷⁶

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I note that Chen during part of the backpay period took a six week course to learn to become a sushi chef, during which time he received no pay. However, this conduct does not disqualify Chen from receiving backpay. His efforts to increase his employment opportunities by learning a new skill was a reasonable attempt to increase his employability. *E&L Plastics Corp.*, 314 NLRB 1056, 1058 and 1059 (1994). Moreover, Chen continued to search for work even while he was learning to become a sushi chef. *J.L. Holtzendorff Detective Agency*, 206 NLRB 483, 485 (1993); *American Compress Warehouse*, 156 NLRB 267, 275 (1965). Therefore, Chen’s backpay will not be reduced due to his decision to learn to be a sushi chef.

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Respondents also assert that Tsai unjustifiably turned down an offer of comparable employment at East Market Restaurant in November 2007. The facts reveal that Tsai had applied for a job with that restaurant along with Chen in November 2006. Neither Tsai nor Chen was hired at that time. Subsequently, an unfair labor practice was filed against East Market, and as a result of that charge, in November 2007, a number of employees were offered jobs including Chen and Tsai. Chen accepted the job, while Tsai did not since he had changed careers and started working for NMAS in January 2007. Respondents argue that Tsai turned down the offer from East Market so that Chen could be employed, and this conduct disqualifies Tsai from further backpay. However, the record does not disclose the Tsai refused the offer so that Chen could receive a job. In any event, even if true that would not make Tsai’s action unreasonable. In fact, the reason that Tsai turned down the job at East Market was because he had been employed full time at NMAS since January 2007. Thus, he was not obligated to accept the offer of East Market in November 2007.

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Respondents also argue that Tsai’s backpay should terminate in January 2007, when he admittedly stopped looking for work as a result of his full time job at NMAS. Respondents are incorrect in this assertion. A discriminatee need not continue to search for work when he has obtained a full time job with another employer. Tsai should not be penalized for changing careers, even though his salary is less than he was earning while working for Respondent Imperial.

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Respondents also argue that Tsai did not make “reasonable efforts to find employment” because he admitted that he confined his search to Chinese restaurants. In this regard, Respondents contend that in Tsai’s testimony that he made that decision due to his limited English language skills is not credible, since Tsai was able to testify at this trial without an interpreter and that he earned a college degree.

45

However, Respondents overlook portions of Tsai’s testimony, which credibly establish other reasons for his decision to confine his search to Chinese restaurants. Tsai testified without contradiction or refutation that in addition to not being confident of his language skills, he had no prior experience in non-Chinese restaurants and that “American” restaurants generally have higher service requirements including knowledge of cocktails. I find the latter

⁷⁵ Further, while working at Respondent Imperial, she worked five days a week. While employed by both Taj Mahal and Shing Kee, she worked seven days a week.

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⁷⁶ I note again my conclusion set forth above that the Shing Kee job was not substantially equivalent to Tan’s position at Respondent Imperial.

factors to be a reasonable and plausible explanation for Tsai’s decision to limit his search for work and find that his backpay should not be reduced because of this conduct.

5 Respondents also contend that the evidence adduced by Respondent Imperial from the employment agencies detailing the availability of work for waitstaff demonstrates that all three discriminatees did not make a reasonable job search. Once more, I disagree.

10 The three employment agency representatives all testified that there were available waitstaff positions at their agencies in 2006 and 2007.⁷⁷ All three witnesses testified that their agencies regularly had available waitstaff positions for Chinese restaurants in the metropolitan area. They also testified that if an applicant stayed at their agency all day for periods of one to two weeks, their agencies would be able to place that applicant in such a position.

15 I note also that Kuang Hsai, a representative from the People’s Employment Agency, testified that 80% of the restaurants that use his services are a-la-carte restaurants and 20% buffets. He added that an applicant need not be able to speak English to be referred to a buffet restaurant, but it would be required for referrals to an a-la-carte restaurant.

20 According to Li Er Kong, a representative from the Yi Far Agency, it was important even for buffet positions for someone to know English. Thus, Kong testified that she would ask applicants about their English skills, and “if the person did not speak English, the employer would not hire this person.”

25 The third witness for the Respondents did not furnish any testimony about English skills, but I will presume that his testimony would be similar to that of the other witnesses concerning this issue.⁷⁸

30 I find little probative significance to the generalized, conclusionary, and non-specific testimony of the three witnesses from the employment agencies. As I have related above, I need not and do not decide whether this testimony would be sufficient under *St. George supra* to meet Respondents’ burden of proving the existence of available jobs in the relevant geographic area, so as to shift the burden to General Counsel to produce evidence of search for work.

35 Since General Counsel has produced all three discriminatees as witnesses, who offered extensive credible testimony of their job search efforts, the issue is whether Respondents’ evidence is sufficient to meet their burden of proving that these efforts of the discriminatees was not reasonable. As to that, I conclude that this evidence has fallen far short of meeting Respondents’ burden in this regard.

40 I note that generally, the Board places little significance on the type of testimony offered by Respondents since it is little different than evidence of newspaper ads or expert testimony concerning general job availability. Such evidence is insufficient to prove either that positions were available or that the discriminatees would have been successful in obtaining one. *Essex Valley, supra* at 438; *Parts Depot, supra* at 152 fn. 1; *E&L Plastics, supra* at 1058; *Midwestern*

⁷⁷ One of the agencies, Yi Far, closed at the end of 2006. Thus, the testimony of the representative from that agency referred only to 2006.

50 ⁷⁸ In this regard, Tan testified that in some of the jobs that she applied for from newspaper ads, she was informed that the jobs required fluency in English. Chen testified that at one of the jobs that he applied for, he was told that his “English was not so good,” and he was not hired.

Personnel Service, supra at 626; *U.S. Can, supra* at 343. See also *Taylor Machine Products Inc.*, 338 NLRB 831, 832 (2003), *enfd.* 98 F.2d App. 424 (6th Cir. 2004), quoting *Lundy Packing* as follows:

5 It is well settled that the reasonableness of a discriminatee’s
 efforts to find a job and thereby mitigate loss of income resulting
 from an unlawful discharge need not comport with the highest
 standard of diligence, i.e., he or she need not exhaust all possible
 10 job leads. Rather, it is sufficient that the discriminatee make a
 good-faith effort. In determining the reasonableness of this effort,
 the discriminatee’s skills, experience, qualifications, age, and
 labor conditions in the area are factors to be considered. The
 existence of job opportunities by no means compels an inference
 that the discriminatees would have been hired if they had applied.
 15 The respondent’s obligation to satisfy its affirmative defense is to
 show a “clearly unjustifiable refusal to take desirable new
 employment.” Uncertainty in such evidence is resolved against the
 respondent as the wrongdoer. *Lundy Packing Co.*, 286 NLRB 144,
 146 (1987); *enfd.* 856 F.2d 627 (4th Cir. 1988) [footnotes omitted].
 20 338 NLRB at 832.

I recognize that *St. George supra* could cast some doubt on the above precedent and how the Board looks at evidence of general job availability by Respondents.⁷⁹ Nonetheless, I still believe that the main significance of *St. George* and its reliance on job availability is evidence to shift the burden to the General Counsel to produce evidence of a reasonable job search. I also would agree that there are some circumstances where evidence of job availability could impact on the reasonableness of job searches by employees. However, here in view of the credited evidence of extensive efforts by all three discriminatees to search for work, Respondents’ evidence falls short of meeting Respondents’ substantial burden of proof in this regard.

I note in this regard the testimony of Respondents’ witnesses concerning the importance of fluent English in referrals to the available jobs that they testified about at their agency. Thus, their testimony is virtually worthless *vis a vis* Tan and Chen since neither of them were fluent in English.

While Tsai is fluent in English, Respondent’s evidence is still insufficient to prove lack of a reasonable and good faith effort on his part to search for work. In this respect, Respondents emphasized the testimony of the witnesses that if an individual would remain at the facility for a full day, everyday, they believed that such an individual would be placed in a waitstaff position within one to two weeks. Aside from the speculative and conclusionary nature of this testimony, I find that even if credited, it fails to meet Respondent’s burden of proof. It is simply not appropriate to conclude that Tsai or the other discriminatees were obligated to go to these agencies and remain there exclusively for two weeks, in order to conclude that they made a reasonable job search. “The Board simply is not, and cannot be in the business of micromanaging discriminatees’ mitigation efforts.” *Baker Electric, supra*, 351 NLRB at 533. Moreover, in order to meet a discriminatee’s obligation to conduct a reasonable job search, “he is not required to spend 8 hours a day, 5 days of week searching for work.” *Baker Electric supra*

⁷⁹ But see *St. George II*, 353 NLRB #50 ALJD *slip op* at 8, applying these principles in the remand of *St. George I*.

at 535; *St. George II*, supra ALJD slip op at 6; *December 12 Inc.*, 282 NLRB 475, 477 (1986),
 enfd 838 474 (9th Cir. 1988); *Laidlaw Corp.*, 207 NLRB 591, 603 (1973), enfd. 507 F.2d 1381
 (7th Cir. 1974); *American Medical Insurance*, 235 NLRB 1417, 1419-1422 (1978). Thus, the
 5 discriminatees are certainly not required to spend 8 hours a day, 5 days a week at a particular
 agency in order to search for work.

Accordingly, based on the foregoing analysis and authorities, I conclude that
 Respondents have failed to meet their burden of establishing that the discriminatees failed to
 10 conduct a reasonable search. Indeed, to the contrary, I conclude that the credited evidence
 more than establishes that each of the discriminatees conducted a diligent and substantial job
 search, and have successfully mitigated their damages.

Thus, I find that no reductions should be made from the backpay calculations set forth in
 the General Counsel's amended backpay specifications, which have correctly deducted the
 15 interim earnings of the discriminatees. I shall therefore recommend that Respondents Imperial
 and New Majestic, jointly and severally, pay the amounts specified to the discriminatees, plus
 interest.

The Remedy

20 As I have stated above, I shall recommend that Respondents Imperial and New
 Majestic, jointly and severally, reimburse the discriminatees, plus interest as set forth in the
 amended specifications.⁸⁰

25 I have found above that General Counsel has not proven Respondent Majestic was
 subject to the Board's jurisdiction. Therefore, I shall recommend dismissal of the specification
 as to that Respondent.

30 General Counsel asserts, and I agree, that conditional reinstatement is still an
 appropriate remedy under *A.P.R.A.*, regardless of *Hoffman*. *Hoffman* did not decide whether
 conditional reinstatement was appropriate for undocumented alien, since that issue was not
 before it. *A.P.R.A.* is therefore still undisturbed by *Hoffman*. The Board has, subsequent to
Hoffman, continued to order conditional reinstatement pursuant to its previous decision in
 35 *A.P.R.A. Case Farms supra*, 353 NLRB at p.7.⁸¹ I shall therefore recommend that Respondent
 New Majestic offer conditional reinstatement to Tsai and Chen.

I also note that in *A.P.R.A.*, where as here, the employer knowingly employed
 undocumented workers, the Board ordered a limited backpay remedy by tolling backpay as of
 40 the date the employees are reinstated (conditionally) or when, after a reasonable period of time,
 they are unable to produce the documents enabling the Respondent to meet its obligations
 under IRCA to verify their eligibility for employment in the United States. I shall recommend
 such a remedy here for Tsai and Chen concerning the continuing backpay obligation of
 Respondents, i.e., subsequent to January 31, 2008.

45 Therefore, the compliance investigation will determine how to measure "reasonable
 time" for these two discriminatees, as well as other outstanding compliance issues, subsequent

⁸⁰ The amounts are \$40,697.47 for Tsai, \$44,056.49 for Chen, and \$14,125.76 for Tan.

50 ⁸¹ I note that this recommendation would be made even if I had found that *Hoffman*
 precluded backpay for Tsai and Chen.

to January 31, 2008.

I would also observe that if either Tsai or Chen, during the period subsequent to the close of the hearing, become authorized to work in this country, the reinstatement obligation would no longer be conditional, but become unconditional, and backpay would no longer be limited for such discriminatees.

Respondents assert however that backpay be cutoff and no conditional reinstatement be ordered because Respondent New Majestic closed the restaurant on January 4, 2009. In that regard, Respondent Imperial attached an affidavit to its brief dated January 15, 2009 from Jane Ho stating that she is a member of Win Win LLC, the owner of the property in Wayne, New Jersey, where the restaurant is located, and that on January 4, 2009 Respondent New Majestic closed and vacated the tenant space at the property, and that at present Win Win has no other tenant for the space at the property.

However, this assertion in the affidavit by Ho is insufficient to warrant the modification of the remedy sought by Respondents. There is no record evidence concerning the details of the alleged closing, nor whether any other entity has or will be operating the restaurant.

I shall therefore recommend the remedies that I have detailed above. I will leave to the compliance investigation to assess whether and when the restaurant has closed, and if so, whether anyone else has taken over the operations of the restaurant, and whether that entity is responsible for remedying the unfair labor practices herein as a successor, alter ego, or on any other basis. *Whorton's Food Market*, 176 NLRB 656, 667, fn. 29 (1969).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸²

ORDER

1. The Respondent Imperial and Respondent New Majestic, Wayne, New Jersey, their officers, agents, successors, and assigns, shall jointly and severally pay the sums set forth below to the discriminatees, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) minus tax withholdings required by Federal and state laws:

Fong Chun Tsai	\$40,697.47
Ming Xing Chen	\$44,056.49
Hua Ying Tan	\$14,056.49

2. Respondent Imperial and Respondent New Majestic, their officers, agents, successors, and assign, shall jointly and severally make whole Tan, Chen, and Tsai for the discrimination against them for the period starting on February 1, 2008, in the manner set forth in this decision.

3. Respondent New Majestic, its officers, agents, successors, and assigns shall offer Fong Chun Tsai and Ming Xing Chen immediate and full reinstatement to their former positions

⁸² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of employment or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow Respondent New Majestic to meet its obligations under the Immigration Reform and Control Act of 1986.

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4. Respondent New Majestic, its officers, agents, successors, and assigns shall offer reinstatement to Hua Ying Tan to her former position of employment, and if that position does not exist, to a substantially equivalent position.

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5. The compliance specification against Respondent Majestic shall be dismissed.

15 Dated, Washington, D.C. , September 4, 2009.

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Steven Fish
Administrative Law Judge

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Case 22-CA-27468

DATE OF SERVICE 9/4/2009

AFFIDAVIT OF SERVICE OF ALJ Decision

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

CERTIFIED MAIL

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EXCERPTS FROM NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS

Sec. 102.46 *Exceptions, cross-exceptions, briefs, answering brief; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.* -(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to Section 102.45, any party may (in accordance with Section 10(c) of the Act and Sections 102.111 and 102.112 of these rules) file with the Board in Washington, D.C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in Sec. 102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

(d)(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of paragraph (j) of this section.

(2) The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding.

(3) Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties.

(e) Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (b) and (j) of this section.

(f)(1) Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions.

(2) Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties.

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

(h) Within 14 days from the last date on which an answering brief may be filed pursuant to paragraph (d) or (f) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this subsection shall be limited to matters raised in the brief to which it is replying, and shall not exceed 10 pages. No extensions of time shall be granted for the filing of reply briefs, nor shall permission be granted to exceed the 10 page length limitation. Eight copies of any reply brief shall be filed with the Board, copies shall be served on the other parties, and a statement of such service shall be furnished. No further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.

(i) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of this section with a statement of service on the other parties. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(j) Exceptions to administrative law judges' decisions, or to the record, and briefs shall be printed or otherwise legibly duplicated. Carbon copies of typewritten matter will not be accepted. Eight copies of such documents shall be filed with the Board in Washington, D.C., and copies shall also be served promptly on the other parties. All documents filed pursuant to this section shall be double spaced on 8-1/2 by 11-inch paper. Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 10 days prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Sec. 102.47 Filing of motion after transfer of case to Board.--All motions filed after the case has been transferred to the Board pursuant to Section 102.45 shall be filed with the Board in Washington, D.C., by transmitting eight copies thereof to the Board, together with an affidavit of service upon the parties. Such motions shall be printed or otherwise legibly duplicated: *Provided, however,* that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

Sec. 102.48 Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions. --(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations contained in the administrative law judge's decision shall, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

(b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in Section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case.

(c) Where exception is taken to a factual finding of the administrative law judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this subsection shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly thereof on the other parties.

(3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies.

Sec. 102.111 Time computation. - (a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day. (*The closing time of the Board in Washington, D.C. is 5 p.m. local time*). When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) When the Act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the official closing time of the receiving office on the last day of the time limit, if any, for such filing or extension of time that may have been granted. A request for an extension of time to file a document shall be filed no later than the official closing time of the receiving office on the date on which the document is due. Requests for extensions of time filed within three days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. Provided, however, the following documents must be received on or before the official closing time of the receiving office on the last day for filing:

- (1) Charges filed pursuant to section 10(b) of the Act (see also Sec. 102.14).
- (2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.
- (3) Petitions to revoke subpoenas.
- (4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) The following documents may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

- (1) In unfair labor practice proceeding, motions, exceptions, answers to a complaint or a backpay specification, and briefs; and
- (2) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents. A party seeking to file such documents beyond the time prescribed by these rules shall file, along with the documents, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document shall not commence until the date a ruling issues accepting the untimely document. In addition, cross-exceptions shall be due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

Sec 102.112 Date of service; date of filing. - The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111.

Sec 102.113 Method of service of process and papers by the Agency; proof of service.

(a) Service of complaints and compliance specifications. Complaints and accompanying notices of hearing, compliance specifications, and amendments to either complaints or to compliance specifications, shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(b) Service of final orders and decisions. Final orders of the Board in unfair labor practice cases and administrative law judges' decisions shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(c) Service of subpoenas. Subpoenas shall be served upon the recipient either personally or by registered or certified mail or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(d) Service of other documents. Other documents may be served by the Agency by any of the foregoing methods as well as regular mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

(e) Proof of service. In the case of personal service, or delivery to a principal office or place of business, the verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same. In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(f) Service upon representatives of parties. Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party shall satisfy this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of service permitted by these rules, including regular mail.

Sec. 102.114 *Service of papers by parties; form of papers; proof of service; filing and serving documents and papers by facsimile transmission* (a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically) or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of §§ 102.113(a) or 102.113(c) provide otherwise.

(b) When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made by a private delivery service, the receipt from this service showing delivery shall be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(c) Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either:

(1) a rejection of the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8-1/2 by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Carbon copies shall not be filed and will not be accepted. Non-conforming papers may, at the Agency's discretion, be rejected.

(e) The person or party serving the papers or process on other parties in conformance with sections §102.113 and paragraph (a) of this section shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in section (a) of this section shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(f) Unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if transmitted to the facsimile machine of the office. Other documents, except those specifically prohibited in paragraph (g) of this section, will be accepted by the Agency if transmitted to the facsimile machine of the office designated to receive them only with advance permission from the receiving office which may be obtained by telephone. Advance permission must be obtained for each such filing. At the discretion of the receiving office, the person submitting a document by facsimile may be required simultaneously to serve the original and any required copies on the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by facsimile transmission pursuant to this section, receipt of the transmitted document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(g) Facsimile transmissions of the following documents will not be accepted for filing: Showing of Interest in Support of Representation Petitions, including Decertification Petitions; Answers to complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

(h) Documents and other papers filed through facsimile transmission shall be served on all parties in the same way as used to serve the office where filed, or in a more expeditious matter, in conformance with paragraph (a) of this section. Thus, facsimile transmission shall be used for this purpose whenever possible. When a party cannot be served by this method, or chooses not to accept service by facsimile as provided for in paragraph (a) of this section, the party shall be notified personally or by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service or overnight delivery service.

(i) The Agency's Web site (<http://www.nlr.gov>) contains certain forms that parties or other persons are permitted to file with the Agency electronically. Parties or other persons choosing to utilize those forms to file documents electronically are permitted to do so by following the instructions described on the Web site, notwithstanding any contrary provisions elsewhere in these rules. In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.