

Scott Wilson (Cal. Bar No. 73187)  
Law Offices of Scott A. Wilson  
711 8th Ave., Suite C  
San Diego, CA 92101  
Telephone: (619) 234-9011  
Facsimile: (619) 234-5853  
E-mail: scott@pepperwilson.com

Attorneys for Respondent  
**CASINO PAUMA**

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**WASHINGTON, D.C.**

**CASINO PAUMA,**

and

**UNITE HERE INTERNATIONAL UNION**

Case No.: 21-CA-125450, 21-CA-126528,  
& 21-CA-131428

**BRIEF OF RESPONDENT CASINO  
PAUMA IN SUPPORT OF ITS  
EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

On June 4, 2015, Administrative Law Judge (ALJ) Ariel L. Sotolongo issued his decision in the above-referenced matter. For the reasons below, Respondent Casino Pauma (hereinafter “Respondent”) hereby files its Brief in Support of its Exceptions to the Decision of the ALJ. For the reasons stated herein and noted within the Exceptions. The findings of the ALJ that Respondent violated the Act should be reversed.

## **II. STATEMENT OF THE CASE**

The matter was heard before administrative ALJ on December 15, 16 and 17, 2014 in Temecula, California. Appearing for the General Counsel was Regional Attorney Irma Hernandez. There was no formal appearance at the hearing by the charging party, UNITE-HERE International Union although they had a representative in the hearing room.

The issues before the ALJ were alleged in the Region’s complaint (General Counsel Exhibit 1(m)) which contained allegations that Respondent had violated Sections 8(a)(1) and (3) (29 U.S.C. 154 8(a)(1)) of the National Labor Relations Act (hereinafter “the Act”) by a warning notice issued to an employee, prohibitions on distribution of literature, threatening employees for a concerted activity and engaging in surveillance of protected activity. Respondent’s affirmative defenses were lack of jurisdiction, deferral and denials that its conduct in any way violated the Act.

## **III. STATEMENT OF FACTS**

As noted, the allegations against Respondent by the Region involve issues regarding leafleting/surveillance/interference with protected activities which primarily dealt with employee activity at the entrance to the Casino as well as the issuance of a written warning to a Team Member (Adelia Reyes) as she was off duty.

#### **IV. TESTIMONY OF WITNESSES**

##### **A. Witness Testimony Regarding Leafleting/Alleged Protected Activity/Surveillance**

###### **Victor Diaz Huerta – Engineering Lead**

Victor Diaz Huerta testified that Casino Pauma has employed him for eight years as an “Engineering Lead” where he is responsible for maintaining and repairing plumbing, electric, and air conditioning. (See RT 48: 21 – 49: 9). He became aware of the Unite-Here International Union campaign when it began approximately around May 2012. (RT 50: 8 – 16).

In December 2013, Mr. Huerta was assigned to the graveyard shift from 12am until 8am Sundays through Thursdays. (RT 50: 2 – 5). He testified that on December 14, 2013, he began to distribute the Unite Here flyer (General Counsel “GC” Exh. 2) in front of the casino near the main entrance where customers enter the casino around 11:30 a.m. It was his day off. (See RT 53: 4-6, 16-25; 54:1). According to Mr. Huerta, three others were with him to distribute flyers – Maria Ponce, [Maria] Guadalupe Pineda, and Raul Marquez. (RT 54: 2 – 7). He said that the flyers were given to them by the union to distribute. (RT 55: 23 – 56: 2). Mr. Huerta recognized Joint Exhibits (“JX”) 2 (a) through (c) as photos of the areas where he and his colleagues stood near the front entrance to pass out flyers on December 14, 2013. (See RT 57: 3, 10 – 12). He identified JX 2(a) as the photo that includes the place where he stood by himself. (RT 59: 8-13). Mr. Huerta described that in that photo, he stood right to the flags on the sidewalk that led to the customer main entrance. (See RT 59: 14-17). He stated that neither he nor the others blocked any driveways or entrances when they distributed the flyers. (RT 62: 3-5). During the time that Mr. Huerta stood on the sidewalk by the flags, he distributed approximately 15-16 flyers to customers walking into the casino. (RT 62: 6-13).

Mr. Huerta testified that after distributing flyers for eight (8) to ten (10) minutes (RT 67:21-24), he was approached by Director of Security, Jacob Hanson, who told him in English that he could not distribute flyers at the main entrance. (See RT 62: 14-25). While Mr. Huerta’s primary language is Spanish, he said that he speaks and understands English. He said that Mr. Hansen instructed that although they could not continue passing out flyers at the front, they could give them out at the employee back entrance. (RT 63: 20- 64: 14). Mr. Huerta recalled asking Mr. Hansen why they were not allowed to distribute their flyers in the front and tried to show Mr. Hansen a paper to assert their rights (GC Exh. 3). Again, Mr. Hansen reiterated that they

could not continue their activity but that they were allowed to do so in the back. (RT 64: 15-21). According to Mr. Huerta's testimony, when he asked Mr. Hansen what would happen if they did not stop, Mr. Hansen threatened to report him to Human Resources ("HR"). (RT 64: 22-24). Maria Ponce also joined this conversation after Mr. Hansen signaled her to come over. (RT 66: 23-25; 67: 1-12). She understands English but does not speak it. (RT 67: 13-16).

After Mr. Huerta and Ms. Ponce spoke with Mr. Hanson, they all went to the area where Ms. Pineda was standing by the valet (as seen in JX 2(c)). (RT 67: 17-19). There, another security supervisor named Max and security guard Ricky were speaking with Ms. Pineda and Mr. Marquez. (RT 68: 14-21). Mr. Huerta recalled Ms. Pineda asking Max why they could not distribute flyers and what would happen if they did not stop. Their conversation was in Spanish. (RT 70: 22 – 71:4).

Since Mr. Huerta noticed that Max was not directly answering Ms. Pineda's questions, so they all asked in both English and Spanish the consequences if they did not stop giving away the flyers. (RT 71: 6-9). Max replied in Spanish that if they did not stop, they would be reported to HR and could be disciplined. (RT 71: 18- 24). The group complied and ceased their distribution of flyers and all left casino property around 11:45 a.m. (RT 72: 8-15, 73: 3-6). At that time, he said that he did not see anyone else distributing flyers while they were there that day. (RT 74: 21-25). Mr. Huerta's testimony stated that that was the only day they had distributed flyers at the customer main entrance and that they did not litter or harass any guests. (RT 80: 18-23, 81: 19-20, 82: 15-17). He claimed that the opposite actually occurred and that some guests expressed support for their cause. (RT: 82: 17-19).

Upon cross-examination, Mr. Huerta shared more details about his position at Casino Pauma. He testified that when began working at the casino in June 2005, he worked as a "Housing Supervisor" where he was responsible for arranging the schedules, directing employees to ensure cleanliness by assigning them areas and giving input to the director if an employee did something wrong. (See RT: 84: 25 – 85: 7, 21-25; 86: 12-14). When he assumed the role of "Lead Engineer" in February 2013, he was assigned to the graveyard shift and reported to a director named Mike Chambers. (RT 86: 18 – 87: 1). There are four (4) other employees who work on the graveyard shift. (RT 88: 19 – 89: 1). However, Mr. Chambers does not work the graveyard shift. (RT 89: 2-4). As such, Mr. Huerta is responsible for assigning work duties during that shift. (RT 89: 8-10). He decides who to reassign orders to if a specific employee is out sick that day. He also testified that there are times he reports to or informs Mr.

Chambers that certain employees are not performing their jobs adequately. (RT 90: 8 – 14). While Mr. Huerta does not normally offer input to annual performance reviews, he will provide his opinion on a certain employee's performance if he is asked about them. (RT 90: 18 – 91:3).

With regard to the area he was standing, Mr. Huerta described the sidewalk as being about four feet wide. (RT 94: 2). He said that out of respect to customers walking on the sidewalk, he would move aside as he handed them the flyer. (RT 94: 13-16). He testified that the location where he stood was approximately 100 feet from the door customers use to actually enter the casino. (RT 100: 22-23).

### **Guadalupe Pineda - Housekeeper**

Guadalupe Pineda has been an employee of Casino Pauma for three years and works as a housekeeper. (RT 116: 19-22, 117: 4-5). In that role, she is responsible for cleaning slot machines, the floor around the casino, and the bathrooms. (RT 116: 23- 117:3). For the entire duration of her employment, she has been assigned to the graveyard shift (12 a.m. – 8 a.m.) on Thursdays through Mondays. (RT 117: 6-11).

When Ms. Pineda was shown the flyer (GC Exh. 2), she testified that she recognized it as the one she distributed on December 14, 2013. That day was the first time she saw the flyer. (RT 117: 19 – 118: 5). According to her testimony, Ms. Pineda stood at the bus entrance near the main entrance of the casino from 11:20 to 11:45 a.m. (RT 118: 6-15). She said she was with three other casino employees who were also handing out flyers that day – Maria Ponce, Raul Marquez, and Victor Diaz. (RT 118: 21-23, 119: 21-23). Joint Exhibit 2(c) is the photo with the location where she said she stood to pass out flyers. (RT 120: 20 – 121: 2). Ms. Pineda described that she stood to the left of the “Valet Open” sign on the sidewalk near the palm tree. (RT 121: 3-8). From her area, she recalled handing out flyers to two guests before security approached her. (RT 129: 5-11).

According to Ms. Pineda, Security Officers “Max” and “Enrique” approached them and Max told her in Spanish, as she does not speak any English, that she could not stand there and distribute flyers. (RT 129: 12-16, 133: 16-25). She said that Max told her that she would have to go to the back to give flyers and she understood that to mean the employee entrance. (RT 134: 3-10). Ms. Pineda then said that she asked what would happen if she did not leave but Max did not answer. (RT 134: 17-20). After that, her coworkers came and joined the conversation and Mr. Huerta posed the same question. (RT 135: 2-21). Max responded to Mr. Huerta that they



could be disciplined. (RT 135: 25 – 136: 3). She testified that she also showed the security guards a little piece of paper (marked as GC Exh. 3) about their right to distribute the flyers and that Max took it and read it but did not comment about it. (RT 136: 11-24, 137: 14-22). Ms. Pineda said that she and her co-workers left around 11:45 a.m. and that during the time they were handing out flyers that day, they did not litter or upset any customers. (RT 136: 6-10, 138: 10-15).

On cross-examination, Ms. Pineda recalled that she finished her shift at work at approximately 8 a.m. on December 14, 2013 but could not remember where she went after work. (RT 141: 16-23). Contrary to her pre-trial declaration, Ms. Pineda died going to Jilberto's around 9 a.m. to attend a union rally/ gathering. (See 142: 5-16). She understood UNITE-HERE to be a union for employees. (RT 142: 17-22). Later in her testimony, she admitted to attending some type of demonstration or rally at Hilberto's and it was there that she received the flyers (GC Exh. 2) from a union representative. (RT 143: 16-21, 145: 20-25). The representative, Pablo, gave her approximately six flyers to distribute that day. Ms. Pineda recognized the flyer as the one she handed out. She testified that Mr. Huerta's photo is featured on the flyer and that she, too, appears on the flyer in a group photo as third one from the right in the front row. When asked about instructions from Pablo, Ms. Pineda said that she was told to distribute flyers in front of the casino and that Pablo also gave them a piece of paper to assert their rights should they be questioned (GC Exh. 3). (RT 146: 1-6; 147: 21 – 148: 2). She indicated that Pablo did not assign her and her co-workers where to stand but rather that they discussed and decided amongst themselves where they would stand. Each of the places they decided to stand is where customers would walk/ enter. (RT 148: 3 – 149: 4).

Ms. Pineda explained that the purpose of handing out the flyers was to let customers know what they were doing in their efforts to organize a union among the employees. (See RT 149: 11-14). From where she stood on the sidewalk behind the "Valet Open" sign (JX 2(c)), she encountered one guest walking on the sidewalk. (RT 151: 20 – 152: 9). She also made contact with another guest who was in his car as he was leaving the area to the left of the buses pictured. (RT 152: 11; 154: 16 – 155: 4). Ms. Pineda does not drive and could not remember who drove her from Jilberto's to the casino that morning to distribute flyers. (RT 156: 5-9). However, she testified that when they left, they rode in Pablo's car. (RT 156: 23 – 157: 2).

**Maria Ponce - Housekeeper**

Maria Ponce is another employee of Casino Pauma. (RT 159: 4-5). She has been working as a Housekeeper for ten years and generally works the graveyard shift, 12 a.m. to 8 a.m., Monday through Friday. (See RT 159: 6-22). She testified that she was familiar with UNITE-HERE and its organizing campaign at Casino Pauma. (RT 160: 6-8). When shown GC Exh. 2, Ms. Ponce recognized it as the union flyer they distributed at the main entrance of the casino where guests enter. (RT 160: 11-25). She recalled handing out flyers from about 11:20 a.m. to 11:40 a.m. with Victor Diaz, Guadalupe Pineda, and Raul Marquez. (RT 161: 4-6, 22-24). Based on the photos of the entrance, Ms. Ponce indicated that she stood on the sidewalk in the area at the end of the crosswalk next to the curb where the flowers are (JX 2(a) right, center) to distribute flyers on December 14, 2013. (RT 162: 20 – 163: 14).

On that day, she recalled handing out flyers to approximately five casino guests. (RT 170: 15-20). Ms. Ponce testified she and her co-workers were approached by casino personnel who appeared to be security guards. (Parties stipulated to the identity of security guards who approached). (RT 170: 2-12). She said that Jacob Hanson first approached Mr. Huerta and so she went to where he was positioned to listen to the conversation, however she does not understand English. (RT 171: 2-14). Ms. Ponce said that Mr. Huerta handed Mr. Hansen the sheet with their employees' rights (GC Exh. 3), but Mr. Hansen did not want to see it or read it. (RT 171: 18-20). After that exchange, Ms. Ponce explained that she and Mr. Huerta went to see Ms. Pineda and Mr. Marquez because security guard "Max" was with them. (RT 172: 7-10). Max instructed the group in Spanish that they could go to the back to continue distributing their flyers to other employees, but that they should not be handing them out in front. (RT 173: 2-4). Then, according to Ms. Ponce, Mr. Huerta asked what would happen if they stayed and Max replied that he did not know and Mr. Huerta asked if they would be disciplined and Max answered "probably." (RT 173: 6-12). Ms. Ponce remembered another security guard being present and it was settled that it was Ricky. (RT 173: 19-25). In the end, she said the four of them left the casino without littering or upsetting any guests. (RT 173: 14-18, 174: 14-19).

During cross-examination, Ms. Ponce testified that she knows Pablo as being associated with UNITE-HERE and claimed that they did not discuss her testimony in this trial (even though they were seen sitting, waiting in the lobby together). (RT 176: 12-23). She also indicated that she spoke with Mr. Huerta the night before her testimony but that they did not speak about the hearing. (RT 176: 24-25; 177: 3-6, 23-25).

As for the events of December 14, 2013, Ms. Ponce said that Pablo gave her the flyer that

they handed out in front of Casino Pauma around 11:15 a.m. at Jilberto's nearby. (RT 178: 1-4, 16-23). She observed Pablo giving the same flyers to Ms. Pineda, Mr. Huerta, and Mr. Marquez. (RT 179: 1-4). With regard to instructions, Ms. Ponce explained that Pablo gave her the flyers (GC Exh. 2) and the small paper with their rights (GC Exh. 3) and told her just to give the flyers to the clients. (RT 179: 8-21). She said that he told her to be in front of the main entrance but not to obstruct it. (RT 180: 1-2, 21-23). They were not told where to stand but that they split up after the locations near the two entrances in front were selected. (RT 181: 2-10). Ms. Ponce recalled that Pablo dropped them off at the parking lot further from the casino when first enter Casino Pauma property (see JX 3(b), area to far left of parking lot where single bus is parked behind first row of cars). (RT 181: 11-16). She did not remember if Pablo stayed on the property or left before picking them up again from the same location. (RT 184: 4-10).

Ms. Ponce indicated that she has passed out leaflets at the back of the casino many times and has never been disciplined for it. (RT 185: 3-12). In fact, on direct, she testified that she had seen others distribute flyers at the employee entrance but this was the first and only time she had seen/ participated in the distribution of them in front. (RT 174: 6-13). Even for that activity, Ms. Ponce said that they were never disciplined for distributing flyers on December 14, 2013. (RT 185: 13-15).

### **Maria Tavarez**

Maria Tavarez has worked for Casino Pauma for eight years and has been on the 2 p.m. to 10 p.m. shift on Wednesdays through Sundays since 2008. (RT 193: 17-19, 194: 2-9). She works in the kitchen areas and pantry to make salads and prepare food for guests' ticket orders. (RT 193: 20 – 194: 1). She testified that she is familiar with UNITE-HERE's organizing campaign and recognized GC Exh. 2 as the flyer she and her co-worker Maria Alba handed out in December 2013. (RT 194: 10-19, 195: 5-6). Ms. Tavarez said that she distributed the flyers at the main guest entrance of the casino around 1 p.m. before her shift started. (RT 194: 23 – 195: 4). She indicated that Joint Exhibits 2 (a) through (c) were photos of the area where they stood to hand out flyers. (RT 195: 10-15). To describe her position for distribution, Ms. Tavarez pointed to JX 2(c) in the area to the right of the bus's rear bumper. (RT 195: 17-24). She described Ms. Alba as standing in JX 2(a) at the corner near the flag poles, in the sidewalk area. (RT 196: 1-9). Ms. Tavarez explained that they intended to pass out flyers to guests who were coming into the casino but that she did not actually hand any out because nobody passed by her

during the time she stood in that location. (RT 196: 22- 197: 1, 5-6). She said that she carried the flyers in her hand, clipped together, not inside anything. (RT 197: 16-25).

Ms. Tavaréz said that she was approached by security guards during this time. (RT 198: 4-8). Parties stipulated that the security officers who made contact with her were Gene Ocegüera and Jesus Solis. (RT 198: 22 – 199: 4). She said she has interacted with Mr. Solis at work because he is the one who interprets for them and the security office. (RT 209: 19-24). For instance, there are times when Ms. Tavaréz's mother, who also works at the casino, does not feel well and Mr. Solis interpreted for them to the EMTs/ first responders. (RT 210: 1-6).

According to Ms. Tavaréz, Mr. Solis told her in Spanish that she could not distribute flyers there. (RT: 199: 8-11). Ms. Alba saw the officers with Ms. Tavaréz so they all joined together at the same time. (RT 199: 18-19). Then Ms. Tavaréz explained that another officer on a bike approached them, but she did not know his name. (RT 199: 22-23). She only described him as 35 years old, 5'5, a little chubby, and white. (RT 200: 3-6). She had seen him working at the casino prior to December 14, 2013 and has seen him since then as well. (RT 200: 7-12). She testified that she has seen him patrolling the casino parking lot on a bicycle on multiple occasions. (See RT 202: 13-15). Ms. Tavaréz said that the bike officer told her in Spanish, 'You guys already know that you cannot hand out flyers here.' (RT 203: 13-16). This was after Mr. Solis and Mr. Ocegüera already told them the same thing. (RT 203: 17-21). Ms. Tavaréz said the bike officer did not sound fluent in Spanish because he had an accent and did not speak it properly, that he was cutting words. (RT 204: 1-7).

In response, Ms. Tavaréz said that she told the officers that it was their right and she showed them the paper with their rights (GC Exh. 3). (RT 204: 15-16). From her recollection, the security officer would not take the paper and gestured his hands up that he would not read it. (RT 205: 6-10). Ms. Tavaréz asked what would happen if she continued and the officer pointed to her badge that she was wearing on her upper left chest area (GC Exh. 4) and told her he would take her name and report her to Human Resources. (RT 205: 13-20). She told the officer, 'Ok fine. We're going to leave.' (RT 206: 24 – 207: 1). Her testimony stated that she saw the flash of a black manual camera and believed the officer took a picture of her and Ms. Alba at that time. (RT 207: 7-9, 17-19). She said she did not know where the camera came from and that the officer was close, about two feet from them, when he took the photo. (RT 207: 11-16). All in all, Ms. Tavaréz said that she and Ms. Alba distributed flyers for approximately five minutes. (RT 209: 8-10). She did not see anyone else around them distributing flyers and claimed not to

have littered on the premises. (RT 209: 11-15; 210: 17-20).

During cross-examination, Ms. Tavaréz described Gene Ocegüera as “Moreno” (brown-skinned) and as tall as Mr. Solís. (RT 211: 25 – 212: 4). She claimed that there were three security guards present and did not know Mr. Ocegüera as bike patrol. (RT 214: 22 – 215: 2). She also said that Mr. Ocegüera weighed less than the bike officer but was approximately the same height as the bike officer. (RT 215: 8-18). She did not notice his hair color because he was wearing a helmet and further indicated that the bike officer did not have a mustache. (RT 215: 19-24; 216: 1-3). Ms. Tavaréz testified that she was positive that the bike officer who took their photo was not Mr. Ocegüera and that the photo was taken with a camera, not a phone. (RT 216: 24-217: 1, 18-19). According to her, the bike officer told her HR would discipline her. (RT 218: 7-16).

She also went on to say that on December 14, 2013, she was scheduled to work at 2 p.m. and had not yet clocked in when she stood at the entrance to distribute flyers and encountered the security officers. (RT 218: 23 – 219: 2). She said she wore her gaming badge at that time, though, because she wanted people to know who she was if they asked or security questioned her presence. (RT 219: 3-7). Ms. Tavaréz testified that she did not receive instructions to wear her badge and that it was her decision to do so. (RT 219: 14-19).

Ms. Tavaréz later indicated that she received the flyers (GC Exh. 2) from Pablo, the union organizer, at Jilberto’s. (RT 220: 3-10). She understood that the purpose of handing out the flyers was to organize a union at Casino Pauma. (RT 219: 24 – 220: 2). Ms. Tavaréz also recalled that Pablo drove her from Jilberto’s to the casino and dropped her at the parking lot for guests. (RT 220: 11-18). The area where Pablo dropped her off can be seen in the photo marked Joint Exhibit 3(b) near the second row of cars to the left of the bus. (RT 221: 14-24). She testified that Pablo told her where to go to hand out flyers at the main entrance but she should not obstruct clients. (RT 222: 4-9). Ms. Tavaréz said that she called Pablo to come get them after their encounter with the security officers and he picked them up and dropped them off again at the Jilberto’s. (RT 222: 10-17).

### **Olivia García - Housekeeper**

Olivia García has been employed by Casino Pauma for ten years as a housekeeper. (RT 242: 14-21). Her shift in December 2013 was from 8 a.m. to 4 p.m. Fridays through Tuesdays. (RT 242: 22 – 243: 1, 5-10). She testified that she is familiar with Unite Here’s organizing

campaign and that she distributed flyers at the front entrance of the casino just once. (RT 243: 11-18). Her testimony indicated that she passed out union organizing flyers on December 14, 2013 from approximately 4:20 p.m. to 4:30 p.m. after her shift ended that day. (RT 243: 19-25, 244: 1-2). She said that she was accompanied by casino co-workers, Catalina Gutierrez and Andres Ramirez during this effort. (RT 244: 13-24). Based upon the photos marked as Joint Exhibits 2(a) through 2(c), Ms. Garcia indicated that she stood alone in the area adjacent to the valet sign near the crosswalk. (RT 245: 5-11). She could not remember where Ms. Gutierrez or Mr. Ramirez stood to pass out flyers that day. (RT 245: 13-18). According to Ms. Garcia, she encountered one to two guests of the casino during that time. (RT 246: 17-22).

Ms. Garcia further testified that casino personnel approached her about five minutes after she started handing out the flyers. (RT 246: 23 – 247:3). Initially, the person who approached her spoke to her in English and so she requested that someone else come speak to her in Spanish. (RT 247: 5-11). Therefore, another security officer named Antonio Alcaraz came to speak with her. (See RT 247: 12-15). Ms. Garcia said that Officer Alcaraz told them in Spanish that they had to leave the area and that they could not pass out flyers there. (RT 248: 2-7). In response, Ms. Garcia asked what would happen to them if they did not leave. (RT 248: 9-10). She said that he replied with asking them to ‘please leave the area, he did not any problems or trouble.’ (RT 248: 12-14). Ms. Garcia then asked Antonio what type of trouble and according to her, he told them that it could escalate to someone getting fired. (RT 248: 16-18). From her recollection, she and Ms. Gutierrez and Mr. Ramirez left after that. (RT 249: 22 – 250: 1). Ms. Garcia did not remember the name of the security guard who spoke to her in English initially but simply described him as “short, white, chubby, probably in his 30s.” (RT 250: 2-9). She did not recall seeing anyone else out there besides them. (RT 250: 10-14).

On cross-examination, Ms. Garcia did not recognize the flyer marked as General Counsel’s Exhibit 2 as the ones she handed out on December 14, 2013 because they were all different but the one she passed out had pictures. (RT 251: 12-23). According to Ms. Garcia, Pablo gave them the flyers to distribute around 4:10 – 4:15 p.m. on December 14, 2013. (RT 251: 24 – 252: 7). She explained that she along with Ms. Gutierrez and Mr. Ramirez were all at the taco shop when they received the flyers. (RT 252: 8-11, 18-20). They were instructed to stand in a place that would not obstruct guests from walking in or entering with their vehicles. (RT 252: 21-25). Then, Pablo drove them from the taco shop and dropped them off at a parking lot on casino property. (RT 253: 1-4, 7-10). She indicated that on the photo marked as JX 3(b),

they were dropped off at the area on the lower left-hand corner between two large vehicles on the far left. (RT 254: 13-22). She also said that that was the same location where Pablo picked them up afterward. (RT 254: 23-25). Ms. Garcia that she was never disciplined for that activity. (RT 255: 5-7).

### **Catalina Gutierrez**

Catalina Gutierrez has worked for Casino Pauma as a housekeeper for twelve years. (RT 266: 20 – 267: 8). In December 2013, she worked the day shift from 8 a.m. to 4 p.m., Tuesday through Saturday. (RT 267: 9-13). She testified that she distributed the union flyers (GC Exh. 2) on December 14, 2013. (RT 267: 19-25). Ms. Gutierrez explained that she passed them out in the front of the casino at the public entrance for clients around 4:30 p.m. after her shift ended that day. (RT 268: 1-14). She said that she was with her co-workers, Olivia Garcia and Andres Ramirez, when she distributed the fliers. (RT 17-20). When Ms. Garcia looked at JX 2(a)-(c), she described the location where she stood alone in passing out the fliers as the area in JX 2(a) on the exit side to left of the flagpoles on the sidewalk. (RT 269: 5-20). She testified that she gave fliers to about five people who were customers of the casino. (RT 272: 4-10). According to her, none of those customers appeared to be angry or upset about receiving the flier. (RT 272: 11-13).

Ms. Gutierrez then said that Brian Linderman approached her and Mr. Ramirez but that Mr. Linderman did not speak Spanish. (RT 272: 14 – 273: 3). As such, they told him to call someone who spoke Spanish and so Officer Antonio Alcaraz was called. (RT 274: 1-2). Ms. Garcia's testimony stated that Officer Alcaraz told them in Spanish that they could not pass out fliers because the customers did not need to know the problems of the casino. (RT 274: 2-3, 16-19). He directed them to the back where they could pass out fliers at the back door at the employee entrance. (See RT 274: 24 – 275: 4). They (Ms. Gutierrez, Ms. Garcia, and Mr. Ramirez) asked what would happen if they continued their activity, and Ms. Gutierrez claimed that Officer Alcaraz told them that he could tell their supervisor and that it could get to upper management and they could lose their jobs. (RT 274: 7-12). After that, the three of them left the casino around 4:45 p.m. (RT 275: 16-21).

Before that, on the same day, Ms. Gutierrez stated that she had seen other co-workers distributing fliers at the customer main entrance in the morning while she was working. (RT 276: 9-17). She described seeing Mr. Huerta and Ms. Ponce passing out fliers while she was

cleaning the doors of the main customer entrance. (RT 276: 23 – 277: 3). Ms. Gutierrez testified that she has not distributed fliers at that entrance any other time besides December 14, 2013. (RT 277: 11-13). With regard to the actual flier (GC Exh. 2), Ms. Gutierrez said that she was included in the group photo along with Audelia [Reyes]. (See RT 277: 21 – 278: 12).

She also said she knew who Mr. Linderman was before their contact in December 2013 because they were in the same social/ wellness committee together that met once a month. (RT 278: 15 – 279: 5). (GC Exh. 5 introduced to indicate they were on same committee and knew each other). According to Ms. Gutierrez, she handed out fliers after her shift and did not have her badge on. (RT 280: 16-23). She said that they did not litter during their distribution. (RT 283: 6-9).

During cross-examination, Ms. Gutierrez said that they got the flyers from Pablo Aguilar around 4 p.m. at Jilberto's. (RT 286: 2-7, 9-10, 14-18). Parties then stipulated that the flyers came from the union and were given to employees to distribute and that Mr. Pablo Aguilar is the one who provided them that day. (RT 288: 17 – 289: 3). Ms. Gutierrez testified that she had never received any discipline or warning for handing out flyers that day. (RT 290: 20-24).

### **Jacob Hanson – Director of Security**

Jacob Hanson is the Security Director of Casino Pauma and reports to Harry Taylor, General Manager of Casino Pauma. (RT 367: 17-21; 370: 18-19). He supervises 34 security officers and three (3) supervisors. (RT 368: 8-11). In December 2013 and still currently, the other supervisors included Max Ortiz (assistant manager), Jaysen William Frakes, and Alec Hasty. (RT 13-16). Mr. Hanson said that there are generally three shifts that security officers work: Day (8 a.m. to 4 p.m.), Swing (4 p.m. to 12 a.m.), and Graveyard (12 a.m. to 8 a.m.). (RT 369: 1-16). On any given day, Mr. Hanson indicated that six to eight security officers are normally on day shift. (RT 369: 17-19). He explained that an "Incident Report" is a report involving a more serious event outside of what is included in a "Daily Activity Report." (See RT 370: 3-13).

On December 14, 2013, it came to Mr. Hanson's attention that there were people distributing flyers at the front public entrance of Casino Pauma. (RT 370: 23-25). He said that his understanding of casino policy is that there is no solicitation allowed in public areas of the property. (RT 371: 1-8). Mr. Hanson testified that this policy does not apply only to union organizing but for any type of solicitation activity. (RT 371: 9-12). He acknowledged that



employees were allowed to leaflet in their break areas. (RT 371: 13-15). To his recollection, employees have engaged in solicitation in the employee smoking area. (RT 371: 16-21). On this particular day, they made contact with the employees a few times, the first made occurred around 11:30 a.m. and then later again around 12:30 p.m.). (See RT 371: 22 – 372: 15).

With regard to the these incidents, Mr. Hanson testified that he made contact with people who were standing near the flagpoles and valet area by the front main entrance pictured in JX 2(a)-(c). During the second instance, Mr. Hanson remembered encountering three employees who were trying to distribute flyers. (RT 374: 13-16). He instructed those team members that they were not allowed to distribute flyers in that area. (RT 374: 21-23). A directive had been given to other officers throughout the day that they were to let those who were distributing flyers know that they were not allowed to do so in public areas. (RT 375: 12-18). Officers were directed to notify the people handing out flyers that they were allowed to distribute them in the back instead. (RT 375: 19-21).

Further, Mr. Hanson indicated that he had had an encounter with a non-employee involved in this leafleting activity. (RT 375: 25 – 375: 2). He said that he recognized an older gentleman who was not an accompanying the casino team members. (RT 376: 3-4). While security officers were talking to the employees, the non-employee asked why they could not leaflet at the entrance and officers responded with stating company policy – that solicitation was not allowed in that area, and welcomed the employees to continue their activity in the break areas. (RT 376: 9-12). That is when the man was asked for his ID and he refused to show it. Consequently, security offices asked the non-employee to leave. (RT 376: 12-14). According to Mr. Hanson, the other security officer who was with him during this encounter was Gene Ocegüera. (RT 376: 15-19). Mr. Hanson testified that Officer Ocegüera was the only security guard on bike patrol that day. (RT 376: 24-25; 377: 1-2).

The encounter with the non-employee occurred around 12:30 pm. at the exit pictured in JX 2(a), and the non-employee was not passing out leaflets. (RT 377: 8-22). Instead, Mr. Hanson's testimony indicated that the non-employee was encouraging team members to pass out leaflets. (RT 377: 24-25). Mr. Hanson said that he saw the person he did not recognize dropping employees off near a row of cars closest to the bus. (RT 378: 20-23). He believed that the person who was driving employees was Pablo because Casino Pauma security has encountered him multiple times with union activity. (RT 379: 7-14). Mr. Hanson said that he saw Pablo at least three to four different times on December 14, 2013 in that area. (RT 381: 22-24). He

described them gathering in the parking lot so he observed the group for five minutes. (RT 382: 8-13). Mr. Hansen recalled that some members of the group dispersed while others stayed there and Pablo left. (RT 382: 14-18). This type of conduct continued a couple of more times where Mr. Hanson observed Pablo dropping employees off and then questioning security why the employees could not pass out their flyers. (See RT 382: 24 – 383: 17). He described Pablo's car as a green vehicle. (RT 383: 18-19).

The incident reports introduced by the Respondent were described as records of when security officers made contact with employees that day. The first log was when contact was made with a female employee at the front entrance (Resp. Exh. 1). (RT 385: 20-22; 386: 6-8). The second one was when Officer Gene Ocegüera made contact with a female employee on the right side of the valet area, who was passing out flyers. The report also indicated that one male was asked to leave for no ID (Resp. Exh. 2). (RT 387: 13-17). The third one was when Officer Ocegüera along with Officer Jesus Solis made contact with an employee around 1:05 p.m. (RT 389: 2-6). The time on the logs are when an officer calls the incident into dispatch. (RT 386: 22 – 387:4; 388: 20-23; 390: 14-17). The call is completed when the officer calls dispatch again to tell them contact is complete and he is available again for other calls. (RT 390: 20-25).

### **Eugenio "Gene" Ocegüera – Security Officer**

Mr. Ocegüera has been employed as a Security Officer for Casino Pauma for the last five years. (RT 392: 5-10). On December 14, 2013, he said he was working a bike patrol officer when he encountered employees leafleting. (Rt 393: 4-7). He explained that as the only officer who patrols the parking lot, he carries a camera in case of incidents that may occur in that area (particularly for vehicles or bikes). (RT 393: 22 – 394: 4). He described the camera as being a small, black Sony portable camera, not a cell phone. (RT 394: 12-18).

According to Officer Ocegüera's testimony, he encountered a male employee leafleting near the exit of the "Valet entrance" close to the flagpoles and a female employee near the flowers at the end of the crosswalk as seen in JX 2(a). (RT 395: 7-22). As he was advising the employees of the casino's distribution policy, a male came from the parking lot (which was his 12:24 p.m. contact). (RT 396: 7-12; 13-14, 19). The male claimed that the policy was not correct and that the employees had a right to be there. (RT 397: 7-10). Officer Ocegüera then asked the male for identification to conduct a field interview for reporting purposes, as he was getting involved in the encounter, but the male refused. (RT 397: 10-15). Officer Ocegüera instructed

the male about their policy that without producing ID he would have to leave. (RT 397: 16-18). The male turned away and walked to the parking lot and Officer Ocegüera watched him get into his vehicle and drive off property. (RT 398: 16-19). The entire conversation lasted for approximately four or five minutes. (RT 398: 8-13).

As for the photos from the camera, Officer Ocegüera said that he was only going to use the camera for identification purposes to fill out the field interview card later in the office. (RT 399: 6-7). In order to use the photos, he would have to upload them onto the computer and attach it onto the field interview card. (RT 399: 17-20). He said that the camera has an automatic flash that does not come on in daylight unless used in a darker area. (RT 399: 21 – 400: 6). Officer Ocegüera testified that he uses the camera on a daily basis. (RT 400: 7-8).

#### B. The Discipline of Audelia Reyes

The following testimony was offered regarding the discipline of Audelia Reyes for soliciting/leafleting during work time.

Audelia Reyes has been an employee of Casino Pauma since 2003. (RT 304: 17-18; 304: 25 – 305: 2). She works as a Buffet Attendant where she assists in the preparation of salads, cakes, and other foods to have ready for buffet guests. (RT 304: 19-24). For the past four years, Ms. Reyes has worked the day shift from 8 a.m. to 4 p.m. Tuesdays through Saturdays. (RT 305: 4-10).

Ms. Reyes testified that she started getting involved with Unite Here's organizing campaign in May 2012. (RT 306: 1-2). To show her support for the union campaign, she engaged in activities such as passing out flyers and wearing a button at work twice. (RT 306: 3-11). She brought the button with her and said that she wore it on her work shirt in her upper left chest area. According to Ms. Reyes, Barbara and Maria Perez talked to her about wearing the button and instructed her that she could no longer use it.

With regard to the distribution of flyers between May 2012 and March 2014, Ms. Reyes said that she passed them out approximately seven times. (RT 306: 12-16). In those instances, she described her locations as outside the casino at the employee entrance, in the employee cafeteria, and then one time near the punch clock for their time cards. (RT 306: 17-19). She generally did this from 7:30 a.m. until right before her shift began at 8 a.m. (RT 308: 2-8). She said that she usually handed out the flyers to other co-workers and that there were usually four of them distributing them. (RT 308: 9-13). Her testimony stated that managers, including the

bakery sous chef Dennis, had observed Ms. Reyes and her colleagues distributing flyers outside and did not do anything, they only came out to look. (RT 308: 14-19; 308: 23 – 309: 1-8).

Between January to March 2014, Ms. Reyes said that she passed out flyers once at the employee entrance in January. (RT 310: 13-16).

In March 2014, Ms. Reyes received a warning (JX 6) for an incident that occurred in the hallway near the punch clock. (See RT 317: 2-4). She explained that on January 24, 2014, she was in the employee cafeteria area at 3:59 p.m. right before she clocked out when she distributed flyers to employees. (RT 318: 5-14). She said she was there because she was on her break, which began around 3:30 p.m. (RT 318: 23 – 319: 1). Ms. Reyes arrived with the rest of her co-workers, including Inez and Griselda Rizo, to punch out. (RT 319: 3-6). A group of employees were gathered there waiting for them time to punch out. (RT 319: 13-14, 21). Ms. Reyes said that she took advantage of that time to give the other employees the union flyers. (RT 319: 24-25). She claimed not to have been working anymore at that time since she started her break at 3:30 p.m. during the last half hour of her shift. (RT 320: 1-3). She said that this practice of taking the break at the end of a shift has been done before by other co-workers. (See RT 321: 14-24). If nobody is in charge, the employees just take turns taking a break and “if you’re last, you’re last.” (RT 322: 8-10). At that time, they were not required to punch out or sign out for their breaks. (RT 323: 10-21).

The following month on February 20, 2014, Ms. Reyes spoke with Director of HR, Annelle Lerner in her office around 1 or 2 p.m. about giving flyers by the time clock. (RT 324: 14 – 325: 4, 18-22). She said that also present in Ms. Lerner’s office were Jorg Limper, Director of Food and Beverage, and Maria Perez from Human Resources. (RT 325: 23 – 326:7, 21-25). Ms. Reyes said that she was called into Ms. Lerner’s office while she was working in the cake area – Sous Chef Pepe Gonzalez approached her and told her to leave all of her work and accompany him to the office. (RT 327: 5-8). Once there, Mr. Gonzalez simply said, “She’s here” and then Ms. Perez told her that Ms. Lerner would ask her some questions and that she (Ms. Perez) would translate the conversation in Spanish. (RT 327: 9-14).

Ms. Reyes acknowledged that they are surrounded by cameras in the casino and said she was encouraged to tell the truth because she had been working there for many years and they did not want to lose a good worker. (See RT 328: 4-8). Ms. Reyes then said that Ms. Lerner was looking to play something on the computer. (RT 328: 9-10). That is when she remembered that she gave out flyers at the punch machine. (RT 328: 10-13). She reported this before the video

was played. (RT 328: 14-16). During that time, she was also asked who authorized her to distribute flyers and she replied that she was authorized by the committee for the Union. (RT 329: 12-15; 330: 10-16).

Ms. Reyes was then asked by HR if she knew where she could pass out information and she said yes, she knew that she could give out information outside of work, in the parking lot, or employee dining hall. (RT 330: 19-25). She recalled that Ms. Lerner did not respond and just said, "Ok." Ms. Reyes said that they also asked her whether she knew of their policies and she said that she did not receive nor remember anything. (RT 331: 10-12). Following that, Ms. Perez took out a paper (JX 8, Employee Handbook Acknowledgement Form) and showed it to Ms. Reyes and it had her signature on it. (See RT 331: 12-14). Ms. Reyes replied that she did not remember the form since she could not read or understand it in English. (RT 331: 14-16). Ms. Reyes then asked if someone could read it to her so she could become aware of the policy and Ms. Lerner gave her the paper and said she would try to have someone read it to her. (RT 331: 17-22).

Following all of this, she was told that she had to write a report of what happened during the incident by the punch clock. (RT 332: 14-18). Ms. Reyes testified that she apologized for what she had done and acknowledged that although it was easy for her to hand out at the time, it may have been a mistake for her to give out flyers before she punched out. (RT 332: 21-25). Ms. Perez was instructed by Ms. Lerner to take Ms. Reyes to another small room to write the report and submit it to her (JX 7, handwritten note from Audelia Reyes). (RT 333: 10-11). Ms. Reyes said that she was alone in the room while she wrote the note and that Ms. Lerner had thanked her for being honest and telling her that truth. (RT 333: 24 – 334: 10). Ms. Reyes was also told that everything they discussed was confidential. (RT 334: 10-12). (JX 7a is the Spanish version of Ms. Reyes's report and JX 7b is the English translation).

At this point in the trial, the surveillance video from January 24, 2014 was played on a computer in front of Ms. Reyes, counsel for both parties, a representative of Casino Pauma, and a representative of the charging party. Once the video was played, Ms. Reyes explained who the others were in the video (JX 9, Casino Surveillance Video from Jan. 24, 2014). The first person to the right was Alicia, who works in the deli. (RT 338: 16-20). Next was Griselda and Inez who assist in the employee cafeteria. (See RT 338: 21 – 339: 10). Jim, another worker from the deli, was also present in the video. (RT 339: 21-4). The person behind Inez in the white is Adriano, who works as a Buffet Attendant. (RT 340: 5-8; 341: 3-4). The person in the back of

the line was Fernando Rhodas, and he works as a dishwasher. (RT 341: 5-11). At the 1:37 mark of the video, six individuals were pictured in the area waiting for time to clock out at 4:00 p.m. (RT: 12-19). Ms. Reyes handed out a flyer (GC Exh. 6) to the first person in line who was Griselda at the 1:45-1:47 mark on the video. (RT 342: 3-8). She walked further in the hallway, handing out flyers (GC Exh. 6) to others in line. (RT 342: 17-19). Then the video displayed employees beginning to clock out. (RT 343: 1-6, 16-21). The video ends at 3:35 when the last person punches out. Ms. Reyes's testimony indicated that the hallway where this video was taken is restricted to employees only. (RT 344: 19-21).

On March 6, 2014, Ms. Reyes was given a warning (JX 6) by Dennis around 1 p.m. (RT 344: 22 – 345: 3). She said that she was just given the paper and told to sign it. (RT 345: 14). She refused to sign the paper since she could not understand what was on it nor what it was about. (RT 345: 14-16). As such, Dennis called Ms. Perez and she arrived shortly to explain the paper to her. (RT 345: 17). Ms. Reyes's testimony states that Ms. Perez told her that the paper was about the prior conversation they all had with Ms. Lerner. (RT 345: 19-20). Ms. Reyes then remembered that conversation and signed the paper. (RT 345: 20-21). Ms. Reyes requested a copy of the warning and was told that she would be given one once the rest of the other employees signed it. (RT 345: 21-22).

On cross-examination, Ms. Reyes testified that she had passed out flyers in the outside break area for casino employees. (RT 347: 24 – 348: 6). She said that this back entrance area included an employee smoking area. (RT 348: 10-16). Ms. Reyes acknowledged seeing Mr. Taylor (General Manager of Casino Pauma) in that area as well as Dennis there. (RT 348: 21-25; 349: 12-13). In 2012, Ms. Reyes said she passed out flyers in the employee break area and dining hall, and then once in the parking lot. (RT 349: 22 – 350: 7). In 2013, she said she also distributed flyers about three times in the employee break area. (See RT 350: 8-16). In 2014, she said that she knew the areas where could hand out leaflets and was not given authority pass out leaflets anywhere else other than what was indicated on that section of the flyer. (RT 354: 1-12). In the end, Ms. Reyes testified that she had never been disciplined for the previous instances when she distributed leaflets in employee areas. (RT 355: 15 – 356: 3).

#### **Maria Perez – Human Resources, Records Specialist**

Ms. Perez has been employed at Casino Pauma for seven years as an HRIS Records Specialist where she handles data entry and filings for new hires. (RT 402: 25 – 403:5, 10-11). She testified that she also assists with translations, as she is fluent in both English and Spanish.

(RT 403: 6-9). Ms. Perez acknowledged knowing Audelia Reyes prior to their February 20, 2014 meeting. (RT 404: 4-7). She said that she translated the entire meeting between Ms. Reyes and Ms. Lerner and her role was strictly for translation not discipline. (RT 404: 24 – 405: 5). Ms. Perez has been at other HR meetings translating for other employees. (RT 403: 19-24; 406: 10-13). Their policy is that all HR disciplinary meetings are kept confidential within their department. (RT 405: 6-20; 406: 1-8).

## **V. QUESTIONS PRESENTED**

1. Should the conduct of the Respondent be controlled by the California Tribal Labor Relations Ordinance, as opposed to the Act?
2. Did the Respondent violate the Act by its rule regarding “Circulation of Petitions”?
3. Did the Respondent violate the Act by prohibiting off-duty employees from distributing leaflets at the entrance to the Casino?
4. Did the Respondent violate the Act by disciplining employee Adelia Reyes for distribution of flyers at or near the time clock prior to clocking out?

## **VI. LEGAL ARGUMENT**

### **A. Respondent’s Conduct Is Controlled by the California Tribal Labor Relations Ordinance, as Opposed to the Act.**

The ALJ found that the Board had jurisdiction over Respondent’s operations, citing the decision in the earlier case involving Casino Pauma. (Casino Pauma, 362 NLRB No. 52 (2015)). And, the ALJ further relied on the Board decisions in *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), and *Soaring Eagle Casino and Resort*, 361 NLRB No. 73 (2014). All three cases were based upon the Board’s initial decision in *San Manuel Indian Bingo and Casino*, 341 NLRB 1005 (2004), *enfd.* 475 F.3d. 1036 (D.C. Cir 2007).

The ALJ rejected Respondent’s argument that the Tribal-State Compact (Respondent’s

Exhibit 4) and its collective bargaining ordinance, the Tribal Labor Relations Ordinance (TLRO) (Respondent's Exhibit 6) should be controlling under these circumstances. Instead, the ALJ ruled that the Compact was "preempted," citing *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773-774, 746 (1947), *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-243 (1959), and *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 150-151 (1976).

There are two problems with the administrative law judge's argument. First, the issue is not "preempted." The TLRO is negotiated under the auspices of federal law, i.e., the Indian Gaming Regulatory Act, 25 U.S.C. 2710 *et seq.* Secondly, even if the Board has jurisdiction, it can decline to assert it over a particular class of employers, particularly when there is appropriate "local control" regarding those employers, as is the case here, i.e., the TLRO.

1. The Tribal-State Compact is not "Preempted" by Federal Law

This is not a matter of NLRA jurisdiction. It is the matter of the Board recognizing the reach of an equal federal statute, i.e., the Indian Gaming Regulatory Act. Such statute contains a procedure for union organizing and collective bargaining, including employee protections (see Respondent Exhibit 4).<sup>1</sup>

In *Hoffman Plastic Compounds, Inc. v. NLRB*<sup>2</sup>, the Supreme Court determined that the NLRB could not award an employee backpay because the award exceeded the NLRB's remedial discretion. In a 5-4 decision, former Chief Justice Rehnquist wrote for the majority and explained that a backpay award to an employee who was never legally authorized to work in the United States undermined Congress's intent to regulate federal immigration under the Immigration Reform and Control Act of 1986 (IRCA).

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<sup>1</sup> See also TR 412-423, where Exhibits 4 through 13 are explained by Respondent's counsel.

<sup>2</sup> 535 U.S. 137 (2002) questioned by *Hernandez v. GPSDC* (New York) Inc., 2006 U.S. Dist. LEXIS 9172 (S.D.N.Y. Mar. 9, 2006) on other grounds.



This case relied on a previous case where the Supreme Court found that although an “...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 a serious criminal act.”<sup>3</sup>

[T]he 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 congressional objectives.<sup>4</sup>

...[T]he Board’s interpretation of a statute so far removed from its expertise entitled no deference from this Court.<sup>5</sup>

The majority in *Hoffman Plastics* stated that since deciding *Southern S.S. Co. v. NLRB*, it had “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.”<sup>6</sup>

Accordingly, the Supreme Court has:

- Precluded the Board from enforcing orders in conflict with the Bankruptcy Code.  
(“While the Board’s interpretation of the NLRA should be given some deference, the proposition that the Board’s interpretation of statutes outside its expertise is likewise to be deferred to is novel.”)<sup>7</sup>

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<sup>3</sup> *Id.* at 143 citing *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46-47 (1942).

<sup>4</sup> *Id.* citing 316 U.S. at 47.

<sup>5</sup> *Id.* citing 316 U.S. at 40-46.

<sup>6</sup> 535 U.S. at 144.

<sup>7</sup> *Id.* citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-34, 529 n. 9 (1984). Superseded by statute in *Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064, 1066 (9th Cir. 1995)(Congress enacted section 1113 of the Bankruptcy Code in response to the Supreme Court decision in *Bildisco*. In *Bildisco*, the Court held that a Chapter 11 debtor-in-possession could unilaterally reject a collective bargaining agreement. Unhappy with this result, Congress enacted §1113 which imposes several procedural requirements that trustees and debtors must follow in order to reject a collective bargaining agreement. The final provision of §1113 states: No provision of this title shall be construed to permit a trustee to unilaterally

- Rejected claims that federal antitrust policy should defer to the NLRA.<sup>8</sup>
- Precluded the Board from selecting remedies to its own interpretation of the Interstate Commerce Act.<sup>9</sup>

The Court further went on to explain that “[t]he *Southern S.S. Co.* line of cases established that where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”<sup>10</sup>

It is also worth noting the Court’s discussion regarding the Board’s argument in *Hoffman Plastics*. In its brief, the Board cited to a case where the Supreme Court held that an employee’s false testimony did not preclude it from awarding reinstatement with backpay.<sup>11</sup> The majority indicated that one of the reasons why that argument was not persuasive was because the challenged order in the previous case (*ABF Freight System*) “did not implicate federal statutes or policies administered by other federal agencies, a ‘most delicate area’ in which the Board must be ‘particularly careful in its choice of remedy.’”<sup>12</sup>

In the end, the majority concluded:

‘[I]n light of the practical workings of the immigration laws,’ any ‘perceived deficiency in the NLRA’s existing remedial arsenal,’ must be ‘addressed by congressional action,’ not the courts.<sup>13</sup>

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terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.).

<sup>8</sup> *Id.* citing *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975).

<sup>9</sup> *Id.* citing *Carpenters v. NLRB*, 357 U.S. 93, 108-110 (1958).

<sup>10</sup> 535 U.S. at 147.

<sup>11</sup> 535 U.S. at 145 citing *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994).

<sup>12</sup> *Id.* citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962).

<sup>13</sup> 535 U.S. at 152 citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984).

Likewise, in *Brown v. Hotel and Restaurant Employees Union*, 468 U.S. 491 (1984) and *Hotel Employees and Restaurant Employees International Union v. Nevada Gaming Commission*, 984 F.2d 1507 (9th Cir. 1993) both the U.S. Supreme Court and the Ninth Circuit held that exercise of jurisdiction by state gaming commissions regarding good character requirements of union officials was permitted.

From the cases above, it is very clear that the matter is not “preempted” and the Board has to recognize other statutory schemes that have equal weight and may overlap with Board jurisdiction.

## 2. The Board Can Decline to Assert Jurisdiction over Respondent

As explained at the hearing, Casino Pauma is subject to a California Tribal-State Gaming Compact, which contains the TLRO.<sup>14</sup> And, as noted, the Compact of Casino Pauma (and all California compacted tribes) contain TLROs. And, as noted, the TLRO provides protection of employee rights as well as representation and collective bargaining procedures. In fact, in its relationship with Casino Pauma in years past, Charging Party UNITE-HERE in fact utilized such TLRO procedures. (See Respondent’s Exhibits 10-13.)

Presently, there is no Board and/or appellate case law contrary to the initial jurisdictional ruling of the Board in *San Manuel, supra*. So Respondent has no basis to argue that the Board lacks jurisdiction.<sup>15</sup> However, it is Respondent’s contention that, while the Board under existing law has jurisdiction over Respondent’s operation, the Board within its discretion should refuse to exercise such jurisdiction.

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<sup>14</sup> The Board can take judicial notice of not only the Casino Pauma Compact, but the Compacts of 73 California tribes, also negotiated pursuant to IGRA, at the website of the California Gambling Control Commission.

<sup>15</sup> Obviously, Respondent reserves the rights to make such an argument should there be contrary Circuit Court and/or Supreme Court decision or contrary legislation.

To the knowledge of the undersigned, California is the only state with tribal gaming operations which are subject to statutorily mandated employee rights of organizing and collective bargaining. For example, in the *Little River Band* case, the Tribe had adopted its own internal alternative union organizing ordinance. But that was an ordinance adopted by the Tribe, i.e., the employer. This is contrary to the Respondent (and other California tribes) who are subject to a TLRO that has been negotiated under the auspices of a federal law, approved by the California Legislature and the U.S. Department of Interior. Consequently, the TLRO is an obligation statutorily imposed on Respondent (and other California tribes) as opposed to a purely internal procedure adopted by a particular tribal employer. In these circumstances, the Board should decline to exercise its jurisdiction over the operations of Respondent under the circumstances of this case.<sup>16</sup>

Section 14(c)(1) of the Act gives the Board discretion to decline jurisdiction over “any class or categories of employers.” In fact, the Board has declined jurisdiction over another gaming-related industry, i.e., horse- and dog-racing (*see* 29 CFR 103.3). Part of the declination of jurisdiction was based on the concept of “local control” of such activity. The same circumstances exist here, where Respondent (and other California Indian tribes) is subject to a Tribal-State Compact containing an ordinance addressing representational and collective bargaining rights. Consequently, the Board should decline jurisdiction over the operations of Respondent and remand this matter back so that these issues can be addressed appropriately under the TLRO.<sup>17</sup>

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<sup>16</sup> Respondent has no authority to seek a declination of jurisdiction on behalf of the other 72 compacted tribes and is not requesting this.

<sup>17</sup> Respondent asks that the Board take judicial notice of its own internal documents regarding the rationale for declining jurisdiction over the horse- and dog- racing industries.

**B. Indian Tribes Have a Right to Control Movement on Their Entrance and Movement of Person on Their Reservation Property.**

With respect to ALJ's findings that Respondent violated the Act by restricting distribution or solicitation in "guest areas" and/or prohibiting employees from leafletting in front of the Casino, the ALJ fails to take into account the unique attribute of Respondent operating on reservation property. Indian tribes retain protected rights in determining who enters and/or moves about on its reservation property. Once again, this is an area where the Board must balance the rights of employees under Section 7 to the property rights of Indian tribes.

The Ninth Circuit has ruled that Indian tribes have unique authority to control who enters their reservation land. *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. Ariz. 2011). While *Water Wheel Camp* involved a landlord/ tenant issue, it stands for the authority granted to Indian tribes as sovereign nations who have unique property rights. Here are some notable passages from the Court's decision there that could be used generally in other contexts:

Indian tribes possess inherent sovereign powers, including the authority to exclude. A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is well established, unless Congress clearly and unambiguously says otherwise. The Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that are consistently described as plenary and exclusive.<sup>18</sup>

"From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate

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<sup>18</sup> *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 804 (9th Cir. Ariz. 2011) citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *United States v. Lara*, 541 U.S. 193, 200 (2004).

non-Indians on tribal land.”<sup>19</sup>

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Second, a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. These exceptions are known as the two *Montana* exceptions.<sup>20</sup>

A tribe's power to exclude exists independently of its general jurisdictional authority. Even where tribes lack criminal jurisdiction over a non-Indian defendant, they possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them.<sup>21</sup>

Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with

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<sup>19</sup> *Id.* citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993).

<sup>20</sup> *Id.* (citations omitted).

<sup>21</sup> *Id.* (citations omitted).

the initial conditions of entry. A tribe's inherent authority to condition the entry of non-Indians on tribal land is a separate matter from whether a tribe may condition the entry of non-Indians on non-Indian land. Because the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty.<sup>22</sup>

The authority to exclude non-Indians from tribal land necessarily includes the lesser authority to set conditions on their entry through regulations. The power to exclude necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. Regulatory authority goes hand in hand with the power to exclude. A tribe has inherent authority to condition the entry of non-Indians on tribal land through regulations.<sup>23</sup>

Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.<sup>24</sup>

Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government: although no longer possessed of full attributes of sovereignty, they remain separate people, with power of regulating their internal and social relations; Indian tribes have power to make their own substantive law in internal matters, and to enforce that law in their own forums.<sup>25</sup>

The cases relied on by the General Counsel and the Administrative Law Judge – *Lutheran Heritage Village*, 343 NLRB 646 (2004), *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), *NLRB v. Babcock and Wilcox*, 351 U.S. 105 (1956), *Santa Fe Hotel and Casino*, 331

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982).

<sup>25</sup> *Santa Clara Pueblo v. Martinez*, 436 US 49, 56 (1978).

NLRB 723 (2000) – do not involve employers who are Indian tribes with operations on Indian reservations. The cases cited by Respondent clearly hold that tribes have rights in terms of allowing persons on its property, i.e., they may restrict off-duty employees from solicitation solicit as well as controlling the movement of persons on their property, i.e., mandating employees solicit in the designated area provided by the tribe.

**C. Respondent Did Not Violate the Rights of Adelia Reyes**

The ALJ found that Respondent violated the rights of Adelia Reyes as a result of giving her a warning notice for distributing literature adjacent to the employee time clock right before Ms. Reyes clocked out. (See ALJD, page 16.)

In reviewing this issue, it is important to note the finding of the ALJ that “Respondent has a valid no-solicitation/distribution rule, to the extent that it prohibits employees from distributing literature in working areas during working time, and General Counsel has not alleged, nor contends that such rule is invalid.” (ALJ Decision 14:5-10.)

Consequently, when addressing this issue, there is no dispute that Respondent’s policy in this regard is valid. However, the ALJ still finds a violation and simply decides to “second guess” the Respondent’s application of the rule. First, the ALJ determines that a time clock is not a “working area.” Employees must report to and leave work and record their time. This is a mandatory procedure. It is not for the Board to make an arbitrary decision that a time clock is not a working area. The employees are paid before they clock out and are paid as soon as they clock in. It’s not like the cafeteria, where they may or may not decide to frequent it. Consequently, Respondent disputes the ALJ’s characterization.

Secondly, the ALJ determines that Ms. Reyes was not on “working time” because she was about to clock out and there was “no interruption” of work. Once again, it is not for the Board to second guess and substitute its judgment for employers as to what is work time. In this



case, the question would be how much time is enough? If it were two minutes before she clocked out, would that be working time? Or does it have to be five minutes before she clocks out? Whether it is 30 seconds or 30 minutes, she is “on the clock” and to invalidate the rule because someone is about to clock out essentially creates an exception that is not justified.

For the reasons stated, the ALJ determination in this respect should be reversed and the warning given to Ms. Reyes be deemed legitimate.

## **VI. CONCLUSION**

For the reasons stated, the Respondent respectfully requests that all findings of the ALJ that Respondent violated the Act should be reversed.

RESPECTFULLY SUBMITTED this 30th day of July, 2015.

Respondent **CASINO PAUMA**

By: /s/ Scott Wilson  
Scott Wilson  
scott@pepperwilson.com  
Law Offices of Scott A. Wilson  
711 Eighth Ave., Suite C  
San Diego, CA 92101  
Telephone: (619) 234-9011

## CERTIFICATE OF SERVICE BY MAIL

I, Dawn M. Eastman, declare and state as follows.

I am an employee of the Law Offices of Scott Wilson, which represents the Pauma Band of Mission Indians in the above-entitled action. My business address is 711 Eighth Avenue, Suite C, San Diego, CA 92101.

I am a citizen of the United States and reside in San Diego County, California. I am over the age of eighteen (18) years and not a party to the within case or proceeding.

On August 1, 2015, I served a copy of the following documents:

### **BRIEF OF RESPONDENT CASINO PAUMA IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

on the parties to the action and/or their attorney of record by placing said document in a sealed envelope, postage prepaid, and depositing same in a box or office of the United States Postal Service in San Diego, California addressed as follows:

Olivia Garcia, Regional Director, Region 21  
National Labor Relations Board  
888 So. Figueroa Street, 9th Floor  
Los Angeles, CA 90017

Irma Hernandez, Counsel for General County  
National Labor Relations Board  
888 So. Figueroa Street, 9th Floor  
Los Angeles, CA 90017

Kristin Martin  
Davis Cowell & Bowe  
595 Market Street #1400  
San Francisco, CA 94105

I declare the above to be true under penalty of perjury. This Declaration is signed on August 1, 2015 in San Diego, California.

LAW OFFICES OF SCOTT A. WILSON

By: /s/ Dawn M. Eastman  
Dawn M. Eastman