Ashford TRS Nickel, LLC a subsidiary of Ashford Hospitality Trust, Inc. *and* UNITE HERE! Local 878, AFL–CIO and Ashford Hospitality Trust, Inc., Ashford Hospitality Limited Partnership, Ashford OP General Partner LLC, Ashford OP Limited Partner LLC, Ashford TRS Corporation, Ashford Anchorage GP LLC, and Ashford Anchorage LP, Parties at Interest and Single Integrated Enterprise with Respondent. Case 19–CA–032761

February 1, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

The issue presented in this case is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by filing and maintaining a state-law based lawsuit against the Union in response to the Union's statutorily protected encouragement of a consumer boycott of the Respondent's hotel. The administrative law judge found the Respondent's lawsuit unlawful on two independent grounds: because certain of the claims asserted were preempted by the Act and because all of the claims were baseless and retaliatory. We affirm the judge's findings for the reasons discussed below.[1]

I.

In December 2006, Ashford TRS Nickel, LLC (the Respondent), a subsidiary of Ashford Hospitality Trust, Inc. (AHT), purchased the Sheraton Anchorage Hotel and Spa (the hotel) in Anchorage, Alaska.[2] The Respondent operated as a Real Estate Investment Trust (REIT), which is material here because that legal status prevented the Respondent from directly operating the hotel. Accordingly, the Respondent contracted with Remington Lodging and Hospitality, LLC (Remington) to operate the hotel and employ its workforce.

The following background details about the relationship between the Respondent and Remington are also relevant to the present case. Remington is primarily owned by two individuals, Archie Bennett and Monty Bennett, both of whom own a 2.3 percent interest in AHT and are on its Board of Directors; as noted, the Respondent and AHT are a single integrated enterprise. Monty Bennett is also the CEO of both AHT and Remington. Under a "Management Agreement" between the Respondent and Remington, the Respondent paid Remington 3 percent of the gross revenue of the hotel, plus an incentive fee of 1 percent of the gross operating profit. All other profits went to the Respondent. Further, the "Management Agreement" required Remington to consult the Respondent "on matters of policy concerning management, sales, room rates, wage scales, personnel, general overall operating procedures, economics and operation and other matters affecting the operation of the Hotels."

At all relevant times, the employees of the hotel were represented by UNITE HERE! Local 878 (Union). The hotel and the Union were parties to a collective-bargaining agreement, effective March 1, 2005, to February 28, 2009. Following the Respondent's acquisition of the hotel, and enlistment of Remington to operate it, Remington and the Union began negotiating a new collective-bargaining agreement in October 2008.

Remington, however, quickly demonstrated its hostility toward the bargaining process and the Union's representation of the hotel's employees. That hostility manifested itself in a series of unfair labor practices, which we shall briefly recount in order to provide appropriate context for the present case. In *Sheraton Anchorage*, 362 NLRB No. 123 (2015) (*Sheraton Anchorage I*), enfd. sub nom. *UNITE HERE! Local 878 v. NLRB*, No. 15-71924, 2017 WL 6617024 (9th Cir. Dec. 28, 2017), the Board found that in 2010 Remington failed to bargain in good faith with the Union and unilaterally changed terms and conditions of employment. The Board also found that Remington unlawfully solicited employees to decertify the Union, retaliated against employees by unlawfully disciplining nine employees and discharging four employees, and committed a host of other unfair labor practices.[3]

[1] On November 18, 2013, Administrative Law Judge Gerald Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order, as modified below.

In adopting the judge's remedy, we do not rely on his citation to *J.A. Croson*, 359 NLRB 19 (2012), and *Federal Security*, 359 NLRB 1 (2012), for the calculation of litigation expenses. Instead we rely on *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 1 fn. 2 (2014), enfd. 653 Fed. Appx. 62 (2d Cir. 2016).

[2] The Respondent and AHT are a single integrated enterprise.

[3] The judge relied on the findings made by the Board in its initial decision in Sheraton *Anchorage I*, 359 NLRB 803 (2013). The panel that decided *Sheraton Anchorage I* included two persons whose appointments to the Board were later determined to be invalid. See *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014). We nevertheless find that the

Subsequently, the Board found that, after the proceedings in *Sheraton Anchorage I*, Remington discharged and disciplined employees for engaging in union activity and testifying at the unfair labor practice hearing in *Sheraton Anchorage I*. The Board also found that Remington unlawfully made additional unilateral changes, engaged in surveillance of employees' union activity, interrogated employees, and otherwise interfered with employees' exercise of their Section 7 rights. *Sheraton Anchorage*, 363 NLRB No. 6 (2015) (*Sheraton Anchorage II*), enfd. No. 16-71194, 2017 WL 6617069 (9th Cir. Dec. 28, 2017).

Against that backdrop, we turn to the events underlying the present case. As indicated, Remington and the Union commenced bargaining in October 2008. In November 2009, bargaining-unit employees signed a petition authorizing a consumer boycott of the hotel, in part to protest Remington's then-ongoing refusal to bargain in good faith with the Union.

In response to the consumer boycott, the Respondent (not Remington) filed a lawsuit against the Union in federal district court alleging six counts of tortious interference with contractual and prospective relations and one count of defamation. Monty Bennett (the CEO of both the Respondent and Remington) made the decision to file the lawsuit, in which the Respondent and Remington have stipulated they shared a community of interest related to their common opponent. The asserted factual bases for the lawsuit were that the Union allegedly had told prospective customers that the hotel was firing workers illegally and was trying to strip employees of core benefits, and that the Union allegedly had informed potential customers that they would have to cross a "vigorous" picket line if they booked a conference at the hotel.

Following a series of motions and amendments to the complaint, the Union moved to dismiss the Respondent's lawsuit. The district court granted the Union's motion and dismissed the lawsuit with prejudice. *Ashford TRS Nickel v. UNITE HERE*, *Local 878*, No. 3:10-cv-00213-HRH (D. Alaska Aug. 8, 2011). With respect to both the tortious interference and defamation claims, the district court found that because the statements attributed to the Union arose from a labor dispute, the Respondent was required to allege (and eventually prove) that the statements asserted or implied an objective fact, that the statements were false, that the statements were made with actual malice, and that the statements were "of and concerning" the Respondent. Id., slip op. at 7-12, citing *Steam Press Holdings, Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996*, 302 F.3d 998, 1004 (9th Cir. 2002), cert. denied, 537 U.S. 1232 (2003) (describing elements of defamation claim arising during the course of a labor dispute) and *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (tortious interference claims are subject to the same First Amendment requirements that govern actions for defamation). The district court found that the Respondent's complaint fell short in multiple ways.

First, the district court found that the Union's alleged statements about the hotel stripping employees of core benefits actually concerned a different hotel—the Anchorage Hilton. Thus, contrary to the complaint allegations, those statements could not have interfered with the Sheraton Anchorage Hotel's contractual and prospective business relations. Second, the court found that even if the Union's alleged statements that the hotel was firing workers illegally implied criminal conduct rather than merely a civil violation, the statements were nothing more than rhetorical hyperbole. Third, regarding the Union's alleged statements that hotel guests would have to cross a "vigorous" picket line, the court found that those statements were protected by Act, that they could not possibly be perceived as threatening, and that the Respondent did not adequately plead that those alleged statements were made with actual malice. In fact, the court found that the Respondent failed to adequately plead actual malice as to all the complaint allegations. Last, the court found that even if the statements attributed to the Union were plausibly tortious, the tortious interference claims were preempted by the Act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).[4]

Notably, the Respondent did not appeal the district court's decision. The Union thereafter filed unfair labor practice charges with the Board alleging that the lawsuit violated Section 8(a)(1) of the Act, and the General Counsel issued a complaint alleging the same.

II.

The administrative law judge in the present case found that the Respondent's lawsuit was unlawful. The judge found, as a threshold matter, that the Respondent could be held liable under the Act for the lawsuit even though Remington (not the Respondent) employed the bargaining-unit employees, because the Respondent exercised "sufficient control" over the employees' terms and conditions of employment. Turning to the merits, the judge found that the Respondent's tortious interference claims

judge appropriately relied on those findings because a three-member panel of a validly confirmed Board subsequently affirmed the Board's initial *Sheraton Anchorage I* decision. See *Sheraton Anchorage*, 362 NLRB No. 123 (2015).

[4] The judge did not explicitly consider whether the defamation claims were also preempted.

were unlawful because they targeted protected activity and were preempted by the Act. Further, he found that both the tortious interference and defamation claims were independently unlawful because they were baseless and motivated by a desire to retaliate against the Union. The Respondent filed exceptions to each of these findings. We affirm the judge's decision for the following reasons.

III.

A.

We agree with the judge that the Respondent may be found to have violated the Act even if the Respondent had no employment relationship with the hotel's employees.[5] It is well settled that a statutory employer under Section 2(2) of the Act may be held liable for interfering with the Section 7 rights of statutory employees even if that employer does not employ the affected employees. Section 2(3) of the Act defines employee to "include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." Likewise, Section 2(9) defines "labor dispute" as including any "controversy . . . regardless of whether the disputants stand in the proximate relationship of employer and employee."

Accordingly, the Board, with court approval, has consistently held that third-party employers may be liable for interfering with the protected rights of the employees of another employer.[6] Indeed, the Board has specifically rejected the argument that the lack of an employer-employee relationship absolves a statutory employer of liability for filing a retaliatory lawsuit. See *BE & K Construction Co.*, 329 NLRB 717, 725 (1999) (*BE & K I*), enfd. 246 F.3d 619 (6th Cir. 2001), revd on other grounds 536 U.S. 516 (2002). For those reasons, we find that the Respondent may be held liable for filing a baseless and retaliatory lawsuit even assuming that it had no employment relationship with the hotel's employees.

The Respondent further argues that it should not be held liable for filing the lawsuit because the Respondent was merely trying to protect its investment interest in the hotel and had no control over Remington's collective-bargaining relationship with the Union. We reject this argument. As we explain in more detail below, the Respondent's lawsuit targeted employee activity that plainly was protected by the Act. Moreover, the Respondent's characterization of its role here as somehow tangential to the labor dispute is unpersuasive. As the owner of the hotel, the Respondent not only had a significant financial interest in the hotel's profitability—which was threatened by the employees' protected activity—but it also had taken steps to protect its interest via its "Management Agreement" with Remington, which required Remington to consult the Respondent on various matters, including management, wage scales, personnel, and general overall operating procedures. Indeed, the Respondent stipulated that it and Remington had a shared interest in prosecuting the lawsuit. Nothing in the Act or its policies, then, precludes holding the Respondent liable under Section 8(a)(1) for the filing of its lawsuit.

B.[7]

The judge found that the Respondent's lawsuit was unlawful insofar as it asserted claims for tortious interference with contractual and prospective relations because those claims were preempted by the Act. In its exceptions, the Respondent argues that, even if its lawsuit was preempted, preempted lawsuits are no longer necessarily unlawful under Supreme Court precedent. There is no merit to that argument. And, as explained below, the Respondent's lawsuit clearly was preempted.

1.

The Supreme Court addressed the status of preempted lawsuits in connection with labor disputes in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). There, the Court held that the Board could enjoin baseless litigation, but, in light of the First Amendment, could not enjoin a reasonably based ongoing lawsuit even if the lawsuit interfered with employees' Section 7 rights. The Court, however, was careful to delineate the limited scope of its holding, making clear that preempted lawsuits were a different matter altogether:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor

[5] We need not decide whether the judge correctly found that that there was no employment relationship.

[6] See, e.g., *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013); *Five Star Transportation, Inc. v. NLRB*, 522 F.3d 46, 50 (1st Cir. 2008), enfg. *Five Star Transportation*, 349 NLRB 42 (2007); *QSI Inc*., 346 NLRB 1117, 1118 (2006), enf. denied in part on other grounds sub nom. *Smithfield Packing Co. v. NLRB*, 510 F.3d 507 (4th Cir. 2007); *International Shipping Assn.*, 297 NLRB 1059, 1059 (1990); *Dews Construction Corp.*, 231 NLRB 182, 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978).

[7] Chairman Kaplan finds no need to rely on a preemption analysis in finding that the Respondent's lawsuit was unlawful. Accordingly, he joins his colleagues only with respect to the analysis and finding, set forth in Section C. below, that both the tortious interference claims and defamation claims in the lawsuit were baseless and retaliatory.

> could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, . . . and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field."

461 U.S. at 737 fn. 5 (citations omitted). Thus, *Bill Johnson's* expressly preserved the Board's authority to condemn a preempted lawsuit. As explained below, that authority remains intact today.

Since *Bill Johnson's*, the Board and reviewing courts have consistently held that preempted lawsuits enjoy no special immunity from condemnation under the Act.[8] As the Third Circuit has stated, "[t]he basic holding of *Bill Johnson's* was subject to a large exception, for the Court indicated that it was not dealing with a suit beyond a state court's jurisdiction because of federal preemption or a suit that has an object that is illegal under federal law." *Teamsters Local 776 v. NLRB*, 973 F.2d at 235 (internal quotations omitted).

The Respondent argues that the Supreme Court itself eliminated that "large exception" for preempted lawsuits when it revisited this area of the law some 19 years after *Bill Johnson's* in *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002). The judge rejected this argument, and rightly so.[9] In *BE & K,* the Court held that, even with respect to completed lawsuits, the Board could not declare unlawful a reasonably based but unsuccessful lawsuit, notwithstanding evidence of a retaliatory motive.[10] Rather, the Court concluded that the First Amendment interests at stake warranted shielding even an unsuccessful lawsuit, unless the lawsuit was found to be both baseless and retaliatory. The Court, however, did not revisit or otherwise retreat from its position on lawsuits that are *preempted* by Federal law.

The continued vitality of the *Bill Johnson's* exemption for preempted lawsuits was later recognized by the Court of Appeals for the District of Columbia Circuit in *Can-Am Plumbing v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003). In that case, the court considered whether a state court lawsuit challenging a job targeting program under California's prevailing wage statute violated Section 8(a)(1). Like the Respondent, the employer argued that the Supreme Court in *BE & K* had extended the baseless-and-retaliatory standard to the analysis of preempted lawsuits. The court rejected that argument. First, the court observed that the Board had consistently declined to apply the *Bill Johnson's* analysis to lawsuits that were preempted by the Act. Second, the court endorsed the Board's interpretation that *BE & K* was "not relevant" because it did not affect the *Bill Johnson's* exemption for preempted lawsuits. Id. at 151. See also *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010) (quoting *Can-Am,* "*BE & K* did not affect the footnote 5 exemption in *Bill Johnson's*").

For those reasons, we reject the Respondent's argument that preempted lawsuits must be analyzed under the standard adopted by the Supreme Court in *BE & K*. Rather, we reaffirm the Board's consistently held view that a preempted lawsuit enjoys no special protection under the First Amendment and may be found to violate the Act if it is unlawful under traditional NLRA principles; that is, it may be found unlawful if it has a tendency to interfere with the free exercise of a Section 7 right.[11] And as we explain below, the Respondent's tortious interference claims in fact were wholly preempted by the Act as they targeted conduct that is plainly protected by the Act.

2.

The Respondent's tortious interference allegations were preempted because they were based on, and targeted, the Union's consumer boycott of the hotel. As a general matter, an action brought under state law is preempted when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [Section] 7 of the National Labor Relations Act." *San Diego Bldg. Trades Council v. Garmon,* supra, 359 U.S. at 244. The *Garmon* Court's express concern was that "allow[ing] the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." Id. at 246.

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[8] See, e.g., *Bakery Workers Local 6 (Stroehmann Bakeries*), 320 NLRB 133, 138 (1995); *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[9] Here, the administrative law judge relied upon the Board's decisions in J.*A. Croson*, supra, 359 NLRB 19, and *Federal Security*, supra, 359 NLRB 1, in which the Board restated that preempted lawsuits may be found to violate the Act without regard to their objective merits, notwithstanding the *BE & K* decisions. But both *J.A. Croson* and *Federal Security* were issued at a time when the composition of the Board included two persons whose appointments were later determined to be invalid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Accordingly, we do not rely on the Board's decision in those cases.

[10] The Court did leave open the question whether a *reasonably based* lawsuit filed with the sole purpose of imposing litigation costs on the opposing party could be the basis of an unfair labor practice finding.

[11] See, e.g., *Can-Am Plumbing, Inc.*, 335 NLRB 1217, 1217 (2001), enf. denied on other grounds and remanded 321 F.3d 145 (D.C. Cir. 2003), reaffd. 350 NLRB 947 (2007), enfd. 340 Fed. Appx. 354 (9th Cir. 2009)

Here, the consumer boycott of the hotel clearly was protected by Section 7. The boycott consisted of the Union and its members notifying potential hotel customers of the Union's labor dispute with the hotel and of the prospect of picketing at the hotel in connection with that dispute. Those communications constituted protected activity.[12] The Union also requested that customers not patronize the hotel because of the ongoing labor dispute, and it is well established that such requests are protected by the Act. See, e.g., *Sears, Roebuck & Co.,* 168 NLRB 955, 956–957 (1967).

To be sure, as the Respondent argues, there are circumstances in which otherwise protected conduct concerning a labor dispute may be deemed unprotected or lose the protection of the Act. In those situations, a state court lawsuit may not be preempted. For example, in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), the Court concluded that defamatory statements made in connection with a labor dispute may be actionable under state law *if* the complainant establishes that the statements were made with actual malice, meaning that the statements were made "with knowledge of their falsity or with reckless disregard of whether they were true or false." Id. at 65. Likewise, state law actions may proceed against conduct marked by violence or conduct presenting an imminent threat to the public order. See *San Diego Building Trades Council v. Garmon*, supra, 359 U.S. at 247. These exceptions are potentially applicable to state law based tortious interference claims.[13] But there is no basis for applying an exception in the present case.[14]

Notably, the Respondent's complaint filed in state court did not even plead actual malice until it was amended a third time. And even then, the complaint utterly failed to articulate any ground for finding that the Union acted with actual malice or otherwise engaged in conduct that was so outrageous or violent as to fall outside the protection of the Act. Under *Linn*, those circumstances cripple the Respondent's attempt to avoid a preemption finding.

Nor may the Respondent find relief in its further argument that its complaint adequately pled that the Union threatened violence or committed acts of intimidation. The complaint alleged that the Union threatened violence by telling potential hotel customers that they would face a "vigorous picket line" at the hotel. But we agree with the judge that the Union's description of the picket line as "vigorous" was merely a rhetorical flourish that did not raise the specter of violence. The statement was therefore not so outrageous or threatening as to exceed the protections of the Act.

The Respondent's complaint also included a declaration from its general manager, Denis Artiles, with an attached letter addressed to Artiles from Laura Badeaux of the Louisiana Center for Women in Government (Center) alleging that certain individuals who were scheduled to attend a Center sponsored event at the hotel had received "threatening phone calls" from the Union. The district court found, however, that the phrase "threatening phone calls" was too vague and inconclusive to satisfy the Respondent's burden. We agree. Indeed, the alleged "threats" may have been protected speech, such as a "threat" that panelists would have to cross a "vigorous" picket line.[15]

For those reasons, we find, in agreement with the administrative law judge, that the Respondent's lawsuit was based on activity that was protected by the Act, and that the Respondent failed to articulate any basis for concluding that the Union may have forfeited that protection by acting with actual malice or threatening violence. Accordingly, we affirm the judge's finding that the Re-

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[12] See *Edward J. DeBartolo Corp. v. Florida Building & Construction Trades Council,* 485 U.S. 568 (1988); *D'Alessandro's, Inc.*, 292 NLRB 81, 83 (1988) (holding that Sec. 7 protects peaceful distribution of handbills informing the public that the employer does not employ union members, or have a contract with the union, and asking customers not to patronize the employer); *NLRB v. Servette*, 377 U.S. 46, 57 (1964) (providing customers with notice that lawful conduct, such as a consumer boycott, will occur is also protected under the Act).

[13] See, e.g., *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (applying the *Linn* requirement of actual malice to tortious interference claims); *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre*, 647 F.2d 372, 381-382 (3d Cir. 1981), cert. denied 454 U.S. 1143 (1982) (recognizing that "where parties to a labor dispute are charged with tortious interference with a collective bargaining agreement, at least in the absence of outrageous or violent conduct, state law causes of action are preempted").

[14] The Respondent argues that under Alaska state law, tortious interference claims do not require a showing of actual malice. But the cases it cites do not involve labor disputes and have no bearing on the question whether an Alaska state law tortious interference claim stemming from a labor dispute is federally preempted absent evidence of actual malice. In those circumstances, federal courts have required a showing of actual malice to avoid preemption. *Chicago District Council of Carpenters Pension Fund v. Reinke Insulation Co.*, 464 F.3d 651, 657 (7th Cir. 2006); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Local 655*, supra, 39 F.3d at 196.

[15] Artiles' declaration also stated that Badeaux had told him that a prospective panelist at the event had told Badeaux that she, the prospective panelist, had received a phone call warning her to be concerned for her safety. This additional statement is not meaningful evidence of a threat of violence. As to this statement, Artiles' declaration is double hearsay: it describes what Badeaux told Artiles about what a panelist had told Badeaux. As such, the district court judge did not find this evidence reliable and neither do we. In any event, the statement at issue bears on only one of the six counts of tortious interference. For the five remaining counts, the Respondent points only to the description of a "vigorous picket line."

spondent's lawsuit, insofar as it asserted claims of tortious interference with contractual and prospective relations, was preempted by the Act. Further, because those claims plainly had a tendency to interfere with conduct that is protected by Section 7 (the Union's consumer boycott), the Respondent violated Section 8(a)(1) of the Act by filing and maintaining them.

C.

We also agree with the judge that those tortious interference claims, as well as the Respondent's defamation claim, violated Section 8(a)(1) on the independent ground that they were baseless and retaliatory.

1.

Following the Supreme Court's decision in *BE & K*, discussed above, the Board, on remand, clarified the standard for determining whether a lawsuit was "baseless." In *BE & K Construction Co.*, 351 NLRB 451 (2007) (*BE & K II*), the Board explained that it would find a lawsuit objectively baseless if "no reasonable litigant could realistically expect success on the merits." Id. at 457 (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)). In *Ray Angelini, Inc.*, 351 NLRB 206 (2007), a decision issued concurrently with *BE & K II*, the Board further explained that in applying this standard it would be "guided by the Supreme Court's discussion, in *Bill Johnson's*, of the reasonable-basis inquiry in the context of ongoing suits." Id. at 208. There, the Court observed that a lawsuit would lack a reasonable basis if "the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous." *Bill Johnson's*, above, 461 U.S. at 747. The *Bill Johnson's* Court also provided that, "[i]n making reasonable-basis determinations, the Board may draw guidance from the summary judgment and directed verdict jurisprudence." Id. at 745 fn. 11.

Applying the "baseless" standard here, we find in agreement with the judge that no reasonable litigant could realistically have expected success on the merits of the Respondent's lawsuit. As discussed, because the Respondent's lawsuit was based on Union activity protected by the Act, the Respondent was required to establish that the Union acted with actual malice. But not only did the Respondent fail to adequately plead actual malice, the Respondent did not assert any facts that, if proven, would have established actual malice, despite multiple opportunities to amend its complaint. Thus, from the beginning, an essential element of the lawsuit was lacking, preordaining the lawsuit's failure. See *Milum Textile Services Co.*, 357 NLRB 2047, 2050 (2011).[16]

Moreover, as did the judge, we find it significant that the Respondent's defamation claim was based in part on information contained in a flyer that was *not about the hotel involved in this case.* The Respondent alleged that the Union had informed potential customers that the hotel had stripped employees of their core benefits. But the documentary evidence submitted to support this claim showed that the relevant statement actually concerned a different hotel, not owned by the Respondent - the Hilton Anchorage, which also was involved in a labor dispute. An essential element of a defamation claim is that the challenged statement be "of and concerning" the plaintiff. See *Steam Press Holdings, Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996*, supra, 302 at 1004. Plainly, the Respondent's defamation claim was fatally flawed to the extent it relied on the Union's statements about a different hotel. See *Atelier Condominium*, supra, 361 NLRB No. 111, slip op. at 4 (the General Counsel may demonstrate baselessness by showing that there is an absence of evidence to support an element in the plaintiff's claim); *Milum Textile Services*, supra, 357 NLRB at 2050.[17]

Last, we reject the Respondent's argument that its lawsuit may be found baseless only if it was sanctioned under Rule 11 of the Federal Rules of Civil Procedure. The Respondent's view obviously is contrary to controlling Supreme Court and Board precedent.

For all of those reasons, we find that the Respondent's lawsuit against the Union was baseless.

2.

We also agree with the judge's finding that the Respondent's lawsuit was filed with a retaliatory motive. The judge thoroughly analyzed this element of the General Counsel's case, so we need only briefly summarize the judge's key findings. As found by the judge, the Respondent's lawsuit plainly targeted protected conduct; chiefly, the consumer boycott and the Union's related communications with the public. Thus, the lawsuit was retaliatory on its face.

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[16] There is no merit to the Respondent's argument that the district court judge wrongly denied it discovery to support its claims. As described, the district court judge dismissed the Respondent's lawsuit on a motion filed pursuant to FRCP 12(b)(6); in other words, on a prediscovery motion. If the Respondent disagreed with that disposition, it could have appealed the judge's decision. It did not, however, and cannot complain about that decision now.

[17] We do not rely on the judge's additional rationale that the lawsuit was objectively baseless because the Sheraton Anchorage hotel did not suffer actual damages from the boycott, but rather led the region in sales during the time in question. It is possible that, absent the boycott, the hotel's sales would have been even greater.

The Respondent's unlawful motive is also supported by our finding that its lawsuit was objectively baseless. As discussed, the lawsuit failed to adequately plead actual malice, a necessary element for each claim, and was partially predicated on conduct that did not concern the hotel involved in this case. Under our precedent, "a genuine desire to obtain [judicial relief] on baseless grounds barring clearly protected conduct is a retaliatory, not a proper motive." *Milum Textile Services,* supra, 357 NLRB at 2051 fn. 17.

Finally, in agreement with the judge, we find that the record of widespread unfair labor practices directed at the Union and the hotel's employees strongly supports finding that the Respondent's lawsuit was retaliatory.[18] Indeed, we agree with the judge that the Respondent's lawsuit was just another instance of unlawful retaliation in response to the hotel employees' continued support for the Union.[19]

IV.

In sum, we find that the Respondent may be held liable under the Act for the consequences of filing its lawsuit against the hotel employees' protected activity, even assuming that the Respondent had no employment relationship with those employees. As to the lawsuit itself, the Respondent's tortious interference claims were preempted by the Act, and both those claims and the Respondent's defamation claim were baseless and retaliatory. Accordingly, we affirm the judge's finding that the lawsuit violated Section 8(a)(1) of the Act.

[18] The Respondent argues that this record of "bad acts" is attributable to Remington, not the Respondent. We agree with the judge, however, that in the circumstances of this case, Remington's "bad acts" are probative of the Respondent's motive in filing the lawsuit. As described, Monty Bennett, the CEO of both the Respondent and Remington made the decision to file the lawsuit and the Respondent and Remington stipulated that they shared a community of interest in the lawsuit.

In finding that the Respondent filed its lawsuit with an unlawful retaliatory motive, Chairman Kaplan relies on the fact that the lawsuit, on its face, targeted conduct protected by Sec. 7 of the Act, and on the record of widespread unfair labor practices committed in response to the hotel employees' support for the Union. He does not rely on the finding that the lawsuit was objectively baseless as evidence of an unlawful retaliatory motive.

[19] Contrary to the Respondent's argument, the Sixth Circuit's decision in *NLRB v. Allied Mechanical Services*, 734 F.3d 486 (2013), does not preclude a finding that the Respondent's lawsuit violated the Act. On the facts of that case, the court simply disagreed with the Board's finding that the employer's lawsuit lacked a reasonable basis. As the Respondent points out, the court did note Justice Scalia's suggestion in *BE & K* that the Court might someday raise the standard for finding retaliatory motive to require evidence that an employer filed its lawsuit solely to impose litigation costs on the union. But the court expressly found no need to decide that question because the evidence failed to show such a motive in any event.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ashford TRS Nickel, LLC, Ashford Hospitality Trust, Inc., and all AHT affiliated enterprises, a single business enterprise and single employer, Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 1, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT file or maintain any lawsuit that is preempted by federal labor law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL reimburse UNITE HERE! Local 878 for all legal and other expenses incurred in the defense of our September 23, 2010 Federal District Court Lawsuit filed against the Union, with interest compounded daily.

ASHFORD TRS NICKEL AND ITS AFFILIATED ENTERPRISES

The Board's decision can be found at www.nlrb.gov/case/19-CA-032761 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rachel Cherem and *Mara Anzalone,* for the Acting General Counsel.
Karl M. Terrell (Stokes Wagner Hunt Maretz & Terrell), for the Respondent.
Larry Schwerin (Schwerin Campell Barnard Iglitzin & Lavitt), for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Seattle, Washington, on July 16, 2013. UNITE HERE! Local 878, AFL–CIO (the Union) filed the charge in case 19–CA–32761 on September 27, 2010. The Union filed an amended charge in the same case on May 8, 2012. On June 14, 2013, the Acting General Counsel issued a second amended complaint (the complaint) setting hearing for July 16, 2013.

The complaint alleges that Ashford TRS Nickel, L.L.C., a subsidiary of Ashford Hospitality Trust, Inc. (AHT), and a member of AHT's affiliated entities (collectively known here as "Respondent or Ashford")[1] violated Section 8(a)(1) of the National Labor Relations Act (the Act)-when on September 23, 2010, it filed and maintained a lawsuit in the Federal District Court for the District of Alaska (Federal District Court Lawsuit) against the Union alleging defamatory statements and tortious interference related to the Union's boycott of Respondent's hotel. The complaint further alleges that this Federal District Court Lawsuit is preempted, lacks reasonable basis, and was motivated by a desire to retaliate against activity protected by Section 7 of the Act.

On July 1, 2013, Respondent filed its answer denying that it violated the Act through its filing of the Federal District Court Lawsuit.

The parties entered into numerous stipulations of fact, which I approved. They are in the record as Joint Exhibit 1 as well as Joint Exhibits 2 and 3.[2] (Tr. 8–14.)

On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following.

FINDINGS OF FACT

A. Jurisdiction

The parties stipulate and I find that Respondent owns and/or leases hotel properties throughout the United States including Anchorage, Alaska, where it annually derives gross revenues in excess of $500,000. (Jt. Exh. 1 at 3.) Respondent further admits and I find that at all material times, it is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Exh. 1 at 2–5.) I further find and the parties stipulate that at all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Id.

B. Background

Respondent, a Delaware limited liability corporation with its principal office and place of business in Dallas, Texas, is a subsidiary of AHT, a publicly traded Maryland company engaged in the investment ownership of hotels. (Jt. Exh. 1 at 1–2; Tr. 21:9–12, 21–23.) AHT and its affiliated entities, including Respondent, constitute an integrated business enterprise or single employer, which operates as a real estate investment trust (REIT). (Tr. 31:8–13; Jt. Exh. 1 at 2.)

In December 2006, Respondent purchased the Sheraton Anchorage Hotel (Hotel) and contracted with Remington Lodging & Hospitality, LLC (Remington), also a Dallas based company that shares the same office building location in Dallas with

[1] The parties stipulated and I find that Respondent, AHT, and AHT's affiliated entities, other than Remington and its successor, constitute a single-integrated business enterprise and a single employer within the meaning of the Act because they have common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services and made sales to each other; have interchanged personnel with each other; have interrelated operations regarding the ownership and/or leasing of hotel properties; and have generally held themselves out to the public as a single-integrated business enterprise. Jt. Exh. 1 at 2-3.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "R. Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "GC Br." for the Acting General Counsel's brief; "R. Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

Respondent, to operate the Hotel under a Hotel Master Management Agreement (Management Agreement). (Jt. Exh. 1 at 3; Jt. Exh. 2 at 61–71; Tr. 23, 58–59.) Since January 1, 2011, Respondent has engaged Remington Anchorage Employers, LLC ("Remington Anchorage") to succeed Remington in operating the Hotel pursuant to the same Management Agreement. (Jt. Exh. 1 at 4.)

The Management Agreement provides that Respondent "appoints Manager [Remington] as its sole, exclusive and continuing operator and manager to supervise and direct, for and at the expense of [Respondent], the management, and operations of the premises." (Jt. Exh. 2 at 17.) The Management Agreement further provides that Remington "shall consult with [Respondent] on matters of policy concerning management, sales, room rates, wage scales, personnel, general overall operating procedures, economics and operations." (Jt. Exh. 2 at 31–32.)

Remington is privately held and owned primarily by two individuals, Archie Bennett and Monty Bennett. (Jt. Exh. 2.) The Bennetts each own a noncontrolling 2.3 percent interest in AHT and serve on AHT's Board of Directors. Id. Monty Bennett, an admitted agent of Respondent, serves as CEO of AHT and CEO of Remington. (Tr. 116:1–117:9; R Exh. 1, pp. 5–6; Jt. Exh. 2 at 56; Tr. 58:24–59:1.)

When the underlying Federal District Court lawsuit was filed by Respondent against the Union in September 2010, Remington was managing the Hotel and was the employer of the employees. Remington Anchorage has also been the manager of the Hotel and the employer of the employees since January 1, 2011. (Jt. Exh. 1 at 3–4.) Respondent is not an employer of the employees of the Hotel. (Jt. Exh. 1.)

C. Consumer Boycott, Prior Litigation, and Bad Acts Against Union

When Respondent purchased the Hotel, the Union was party to a collective-bargaining agreement (CBA), effective March 1, 2005, to February 28, 2009, with the Hotel's former operator. (Jt. Exh. 1 at 5; GC Exh. 4, p. 12). In October 2008, the Union and Remington began negotiations for a new CBA (Jt. Exh. 1 at 20.) In light of Remington's then-alleged failure to bargain in good faith and unilateral implementation of changes to working conditions, unit employees signed a petition authorizing a consumer boycott in protest in November 2009.[3] (Jt. Exh. 1 at 5–6; GC Exh. 2; GC Exh. 4, p. 27).

On November 17, 2009, during a Union rally for the boycott, Remington issued unlawful discipline to employees. (GC Exh. 4, pp. 27, 49–51). Remington also unlawfully suspended and fired Unit members who had distributed boycott flyers to hotel guests and others entering and exiting the Hotel on February 2, 2010. (GC Exh. 4, p. 30.) In the subsequent months, Remington's managers unlawfully solicited signatures for a decertification petition at the Hotel, conducted extensive surveillance of employees, and disciplined employees for participating in union activity (GC Exh. 4, pp. 63-66; GC Exh. 5, pp. 6–12, 19–21, 25–28). In July of 2010, Remington illegally withdrew recognition of the Union, unilaterally and unlawfully barred union representatives from Hotel grounds, ceased making payments to the Union Pension Plan, and changed long-established scheduling practices in the banquet department. (GC Exh. 4, pp. 63–66; GC Exh. 5, pp. 6–12, 19–21, and 25–28)

The above-mentioned unfair labor practices were addressed at the hearing in *Sheraton Anchorage*, 359 NLRB 803 (2013) (Remington I,) before Administrative Law Judge Gregory Meyerson in Anchorage, Alaska, between August 17, 2010, and January 28, 2011 (GC Exh. 4, p.11). The Board affirmed Judge Meyerson's decision and found that Remington, as operator of the Hotel, engaged in numerous unfair labor practices, including unlawful withdrawal of recognition from the Union, unlawful discipline to nine employees for violating the Hotel's employee handbook when delivering the boycott petition to the General Manager, unlawful refusal to bargain, enforcement of overbroad and unlawful work rules, multiple unlawful disciplinary actions and terminations, intentional misrepresentation of financial records and multiple unilateral changes in terms and conditions of employment without notice to or bargaining with the Union. *Remington I*, 359 NLRB 803, at 828–832, 848–353, 865–868 (2013).[4]

Respondent's counsel admits that it is "hard to untangle" the *Remington I* litigation from the instant proceeding and that Remington and Respondent share a community of interest related to the Union, their common opponent. (Tr. 61:7-17; 77:9-24.) Respondent and Remington have shared counsel with regard to proceedings involving the Union. (Tr. 60:5-21; 57:13-58:10; 23:3-6). Respondent's counsel further admitted and opined that "We're dealing with one hotel as to which [Re-

[3] Respondent incorrectly states in its posthearing brief that the Union's consumer boycott started in November of 2010 rather than in November 2009. R. Br. at 7. The Federal District Court Lawsuit was filed in late September 2010.

[4] As has been argued frequently over the past year, the Respondent also argues that the Board's Order denying Respondent's motion for summary judgment and the Board's affirming of Judge Meyerson's decision in Remington I are void because the Board lacked a valid quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc*., 359 NLRB 1015 (2013); *Belgrove Post Acute Care Center*, 359 NLRB 633, slip op. at fn.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). This argument obviously has no merit since, at present, the Board has five members, all of whom were confirmed by the Senate on July 30, 2013, and duly sworn in on various dates in August 2013. In making this finding, I have taken administrative notice of Board's Press Release dated July 31, 2013, and August 12, 2013, publicly announcing these facts. Also, while there is a current valid Board to review this decision, if applicable, this valid quorum question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. Earlier in the hearing, I orally rejected the same argument by Respondent for the same reasons and I cited many of these cases. Tr. 14-18. Consistent with Board precedent, the Respondent's affirmative defenses based on *Noel Canning* and a lack of valid Board quorum arguments are rejected.

spondent] is the owner, Remington is the management company." (Tr. 63:15-18.)

Remington and the Union were again opposite each other before Administrative Law Judge John J. McCarrick in a second case tried in Anchorage, Alaska between October 16 and December 14, 2012 (Remington II). Judge McCarrick further found that Remington violated the Act in numerous ways, including maintaining and enforcing unlawful employee conduct rules, interrogating employees about their union activities, engaging in surveillance of employees' union activities, unlawfully disciplining and discharging employees involved with union activities and the adverse NLRB hearing testimony. *Sheraton Anchorage*, 19–CA–32599, et. al., [JD(SF)-22-13(ALJ McCarrick, June 6, 2013)](*Remington II*).

D. The Federal District Court Lawsuit

On September 23, 2010, Respondent filed the Federal District Court Lawsuit, a lawsuit (Initial complaint or Respondent's complaint) in the Federal District Court of Alaska (District Court) against the Union alleging tortious interference with the Hotel's existing and prospective clients and defamation against Hotel management in an alleged scheme to damage the Hotel. (Jt. Exh. 3 at Doc. 1, p. 2.) Respondent filed the suit based on the decision of Monty Bennett, CEO to AHT and Remington. (Tr. 116; Jt. Exh. 3; Tr. 63.) Respondent's counsel conceded that they discussed this filing with Remington.[5] (Tr. 63.)

In this initial filing, Respondent defined "Plaintiff" as the "Hotel" or the "Sheraton Anchorage" and did not distinguish itself from Remington. (Jt. Exh. 3 at Doc 1, p. 2.) In the initial complaint, Respondent claimed that through its consumer boycott the Union threatened and harassed individuals in and around the Hotel with the aim of damaging the Hotel's business and bringing the Hotel back to the bargaining table. Id. Respondent did not allege "malice" on the part of any union representative at all and also did not specify who made the alleged threats and did not mention when or where these events took place. (GC Br. at 8-9.) The initial complaint also sought damages in an amount to be proven at trial, and its litigation expenses, including reasonable attorney's fees under Alaska state law.

On the same day the Initial Complaint was filed, during the ongoing *Remington I* hearing, Remington filed a Petition for Writ of Mandamus in the District Court against the Regional Director of Region 19 of the NLRB. The Writ, which was denied, sought to stay the *Remington I* hearing until a vote on the decertification petition, reopen Remington's unfair labor practice charges due to new evidence, and dismiss unfair labor practice charges relating to the discharge of 4 employees who had been subsequently reinstated and delay further unfair labor practice hearings to allow Remington to participate in the investigation of new charges filed by the Union (the litany of unlawful acts alleged and proven in *Remington I* and *Remington II* along with the filing of the denied writ of mandamus referred to above are collectively referred to hereafter as "Bad Acts"). (Jt. Exh. 3, Doc. 46 at 43.)

On October 25, 2010, the Union filed a motion to dismiss the initial complaint, arguing that the defamation and tortious interference claims lacked sufficient specificity and failed to demonstrate plausible entitlement to relief given the pleading standard for First Amendment rights. The Union argued that the tortious interference claims should be independently dismissed because they are preempted by the Act. (Jt. Exh. 3 at Doc. 20, p. 8.)

On November 24, 2010, Respondent filed its First Amended Complaint to clarify its relationship with Remington (Jt. Exh. 3 at Doc. 23, p. 2). Respondent filed an opposition to the Union's motion to dismiss, arguing that Alaska tort and defamation law governed because the Union's conduct removed the consumer boycott from the bounds of protected activity. (Jt. Exh. 3 at Doc. 24, pp. 1-16.) In addition to the opposition, Respondent included a sworn statement from the Hotel's general manager, Dennis Artiles, who described a conversation with a representative for the Louisiana Center for Women in Government and included a flier entitled "Anchorage Hotel Workers Rising Fight," which discussed the ongoing labor disputes at both the Hotel and the Anchorage Hilton, a nearby hotel not involved here. (Jt. Exh. 3, Doc. 31-4 at 15.) Artiles referenced and attached 3 letters dated December 2009, February 2010, and May 2010, received by the Hotel from potential customers; none of the letters mention violence or specific threats. (Jt. Exh. 3, Doc 24-1 at 5-7.) The representative purportedly told Artiles that a union representative told her that their attendees would be required to cross "vigorous picket lines" and Artiles stated he believed that the individual understood this to be a threat to the safety of her attendees.

Respondent then moved to file a second amended complaint, which was filed on January 18, 2011, in order to further specify its allegations. (Jt. Exh. 3 at Docs. 36-37.) The Respondent added that the Union told Hotel guests and clients that the Hotel was "doing illegal things," by firing workers and that the Hotel intended to "strip its employees of their core benefits." Respondent also added that the Union made repeated, uninvited and harassing phone calls to the Alaska Primary Care Association. (Jt. Exh. 3 at Doc. 31-1, p. 13.)

On May 5, 2011, in response to the Union's statement of supplemental authority, Respondent filed its third amended complaint, which the Union moved to dismiss, again arguing that Respondent failed to allege unlawful statements or conduct.

E. District Court Findings Regarding the Federal District Court Lawsuit

On August 4, 2011, the District Court granted the Union's motion to dismiss the third amended complaint and dismissed the lawsuit (the "Federal District Court Lawsuit") with preju-

[5] Respondent's attorney admits that "this [was] a situation where it's obviously logical that the Ashford [Respondent] and Remington [Hotel] people are coming together to discuss this with counsel" and that there was "communication back and forth between Remington [Hotel] and Ashford [Respondent] related to this underlying lawsuit." Tr. At 63. Specifically, Respondent's counsel identified emails dated July 16, 2010, and September 14, 2010. Tr. 57. Respondent's counsel further admitted that "the initial discussion of the idea of bringing this [Federal District Court [L]awsuit . . . didn't arise until July of 2010, didn't arise back in November 2009, when the boycott first began. Tr. 53.

dice. (Jt. Exh. 3 at Doc. 58.) With regard to the defamation claims, the District Court found the statements were made during the course of a labor dispute and that traditional Alaska state law standards do not apply. The District Court further found the amended complaint lacking and that the Respondent, as operating lessee of the Hotel, must prove that a statement, made during the course of a labor dispute, of or concerning the complainant, contained an actual or implied assertion of objective fact, which was not true and was made with actual malice. (Jt. Exh. 3 at Doc. 58, pp.1 & 7.) The District Court dismissed the claim that the statement that the Hotel "proposed to strip [the employees] of their core benefits" because the statement was referencing the Anchorage Hilton, not the Respondent. (Jt. Exh. 3 at Doc. 58, p. 7-8.) The District Court also concluded that the statement that the Hotel was "guilty of doing illegal things, by illegally terminating workers" would be understood as nothing more than rhetorical hyperbole and as the Union's subjective view rather than a statement of fact given the context of a labor dispute. (Jt. Exh. 3 at Doc. 58, p. 8-9.) The District Court found that even if the statement were a statement of fact, the Respondent failed to sufficiently allege the element of actual malice. (Jt. Exh. 3 at Doc. 58, p. 10-11.)

As with the defamation claim, the District Court found that in the context of a labor dispute, tortious interference claims must be a statement of or concerning the complainant, containing an actual or implied assertion of objective fact, which was false and made with actual malice. (Jt. Exh. 3 at Doc. 58, at 7, 12.) The District Court found that the Union's statements about vigorous picket line, and repeated unwelcome phone calls were protected by the First Amendment and the National Labor Relations Act. (Jt. Exh. 3 at Doc. 58, p. 12.) The District Court also noted that the Respondent did not provide any factual support for the essential element of actual malice and the tortious interference claims were found to be facially implausible. (Jt. Exh. 3 at Doc. 58, p. 12.)

The District Court further found that even if Respondent had alleged plausible tortious interference claims, the claim would be dismissed as preempted by federal labor law under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and that no exception to preemption existed, particularly because Respondent failed to identify any specific conduct marked by violence and imminent threats to the public order. (Jt. Exh. 3 at Doc. 58, p. 13-16.) Respondent decided to forgo its appeal of these District Court findings and so they have become final. (Tr. 96.)

II. Issues

1. Whether Respondent can be held liable under Section 8(a)(1) of the Act, even though it is not the immediate employer of the employees of the Sheraton Anchorage Hotel?

2. Whether Respondent's tortious interference state law claims are preempted by the Act and therefore their filing violates Section 8(a)(1) of the Act?

3. Whether Respondent's defamation claim is objectively baseless and filed with retaliatory motive and therefore in violation of Section 8(a)(1) of the Act?

III. Analysis

1. Respondent can be held liable under Section 8(a)(1) because of its control over the employees of Sheraton Anchorage Hotel.

Respondent argues that it cannot be held liable for the alleged 8(a)(1) charge asserted here because it is not the employer of the employees of the Sheraton Anchorage Hotel.

That an employer is not the employer of the employees claiming 8(a)(1) protection, does not relieve them of statutory responsibility under the Act. *Fabric Services, Inc.,* 190 NLRB 540, 542 (1971). In *Fabric Services*, Respondent Fabric Services, Inc. owned the plant facility on which Southern Bell Telephone and Telegraph Company, a New York corporation, conducted its operations. Id. at 541. A Fabric Services personnel manager ordered Gerald Smoak, a Southern Bell employee at this plant, to remove union supporting insignia on his pocket protector. Id. Fabric Services defended itself against the alleged unfair labor practice charge by relying entirely and solely on the grounds that it cannot be found to have violated Section 8(a)(1) because it was not Smoak's employer. Id. The Board held that Fabric Services was liable because by virtue of its ownership of the plant facility and its power to evict Smoak from its premises, Fabric Services was in a position of "sufficient control" to remove his union supporting pocket protector or otherwise directly interfere with his ability to show such support while performing his work. Id. at 542. To support its broad reading of the Act, the Board cited Section 2(3) of the Act, which states "The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act specifically states otherwise." Id. In addition, Section 2(9) of the Act defines "labor dispute" as including "any controversy . . . regardless of whether the disputants stand in the proximate relationship of the employer and employee." Id. The Board emphasized that Fabric Services, "having knowingly participated in the effectuation of an unfair labor practice, [Fabric Services] placed itself within the orbit of the Board's corrective jurisdiction." Id.

Here, as in *Fabric Services*, I find that sufficient control is met because Respondent owns the Hotel that Remington is operating per their Management Agreement. Beyond merely owning the Hotel, Respondent was the operating lessee of the Hotel. (Jt. Exh.3, Doc. 58 at 1.) Moreover, the Management Agreement states that Remington is required to consult with Respondent in matters of policy concerning management, sales, room rates, wage scales, personnel, general overall operating procedures, economics, and operations.[6] The management agreement also provides for Respondent's involvement and management and thus presents an even more compelling case of sufficient control over Hotel employees than the relationship scrutinized in *Fabric Services*.

[6] Respondent argues that the Respondent "turned all management duties–including all matters related to the employment of the employees–over to Remington [the Hotel]." R. Br. at 36. I reject this argument based on the aforementioned management agreement language and the consulting requirement between the Hotel and Respondent and due to the admitted "community of interest," the Union being a common opponent, the joint privilege, and overall interconnected relationship between the two.

While it is not necessary to prove an interconnected relationship between Respondent and Remington, their proximity and overlapping dealings in litigation add legitimacy to the argument that Respondent exercised sufficient and significant control over Remington employees. Respondent's counsel, Mr. Terrell, represented Remington in *Remington I* and the Writ of Mandamus. Remington's in house counsel, Todd Stoller, is designated custodian of records here. Respondent's counsel also asserted a joint privilege with Remington with regard to documents and communications, recognizing the Union as a common opponent and that Respondent and Remington also shared a community of interest for this "common opponent." (Tr. 23, 57, 60, 63, 77.) As Acting General Counsel notes, Respondent defined "Plaintiff" as the "Hotel" or "Sheraton Anchorage" in its Initial Complaint in the Federal District Court Lawsuit.

Moreover, as stated above, Respondent's counsel admits that it is "hard to untangle" the *Remington I* litigation from the instant proceeding and that Remington and Respondent share a community of interest related to the Union, their common opponent. (Tr. 61:7-17; 77:9-24.) Respondent and Remington have shared counsel with regard to proceedings involving the Union for almost 5years now. (Tr. 60:5-21; 57:13-58:10; 23:3-6.) Respondent's counsel further admitted and opined that "We're dealing with one hotel as to which [Respondent] is the owner, Remington is the management company." (Tr. 63:15-18.) "It's the employees in the [H]otel and the collective bargaining relationship that is at issue." (Tr. 72.)

Respondent contends that *Fabric Services* is outdated and should be reversed. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board. I am bound to follow Board precedent that has not been reversed by the Supreme Court or the Board itself. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

Thus, while Respondent is not the direct employer of the employees of Sheraton Anchorage, I find that Respondent is liable under the Act as an employer for the 8(a)(1) charges asserted here for the reasons explained below.

2. Respondent's allegations of tortious interference of: (1) contractual relations; and (2) prospective economic advantage under Alaskan state law are preempted by the Act and its filing violates Section 8(a)(1) because consumer boycott activity is protected under Section 7 of the Act.

The Supreme Court concluded that the Act does not prohibit lawsuits filed in state or federal courts, unless they are both objectively baseless and contain retaliatory motive. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's v. NLRB*, 461 U.S. 731 (1983). However, footnote 5 in *Bill Johnson's* creates an exception for lawsuits beyond the jurisdiction of the state courts due to federal preemption. (Id. at 737, fn. 5.) Moreover, the Board has interpreted this footnote to mean that preempted lawsuits are outside the scope of First Amendment protection. *Federal Security, Inc*., 359 NLRB 1 slip op. at 13 (2012).

The threshold question in any preemption analysis involving the Act is whether "it is clear or may fairly be assumed" that the activity which a State purports to regulate is protected or prohibited by the Act. *Federal Security, Inc*. at 7, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). If that question is answered in the affirmative, the inquiry is at an end and "state jurisdiction must yield." Id.

Section 7 of the Act provides that Employees shall have the right to self-organization, to join, form, or assist labor organizations, to bargain collectively through representation of their choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. Section 157. The Board has held that the protection of consumer boycott activity falls within Section 7 of the Act. *Sears, Roebuck & Co.,* 436 U.S. 180 at 206 fn. 42, 98 S.Ct. 1745 (1978); *NLRB v. Calkins*, 187 F.3d 1080, 1086 (9th Cir. 1999). As pointed out by the General Counsel, the Board has long held that a request that customers not patronize an employer in the context of a labor dispute constitutes Section 7 activity (*Valley Hospital Medical Center, Inc*., 351 NLRB 1250, 1252–1254 (2007); *Arlington Electric*, 332 NLRB 845, 846 (2000)) and that providing notice that lawful conduct, such as a protected consumer boycott, will occur is also protected under the Act (*NLRB v. Servette, Inc*. 377 U.S. 46, 57 (1964).

Respondent's Federal District Court Lawsuit did not merely involve some peripheral concern of the Act because it targeted the Union's consumer boycott activity that, as stated above, contacting an Company's customer's, giving notice, and participating in a consumer boycott are protected within Section 7 of the Act. See *Federal Security, Inc*., at 10 ("We cannot construe the Respondents' lawsuit as 'a merely peripheral concern' of the Act, because it targets activities that are 'at the heart of Board processes.'").

I note that, in the past, the Board has found unlawful under the Act union conduct such as throwing of rocks and placing tacks in the roads, assaulting employees and supervisors, damaging vehicles, preventing people and vehicles from entering onto company premises, threats from pickets, fights; beatings, and mass picketing activity that, when directed at employees, would unlawfully restrain and coerce them. In contrast, I note the Board has found that lesser conduct directed at employees, where "[n]o one is injured, nothing was thrown, no one was prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises," remains protected under the Act. In the context of strikes and boycotts, the Board has only found extreme conduct, such as actual physical violence, threats of actual violence, outrageous behavior; or maliciously untrue or reckless statements to lose Section 7 protection under the Act. *Detroit Newspaper Agency*, 342 NLRB 223 (2004); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Absent outrageous or violent conduct, tortious interference claims are wholly preempted in the context of labor disputes. *Milum Textile Services Co.,* 357 NLRB slip op. at 4 (citing In re *Sewell,* 690 F.2d 403, 408 (4th Cir. 1982)).

Respondent's argument is that the Union's consumer boycott lost its Section 7 protection because its representatives threatened the Hotel's actual and prospective clients. Respondent's only specific example is Remington Hotel General Manager

Artiles' unsubstantiated belief that the remark to potential guests about having to cross vigorous picket lines was perceived as a threat.[7] The District Court found that the statement about crossing "vigorous" picket lines cannot possibly be perceived as threats and were protected under the Act because they did not constitute outrageous or violent conduct. (Jt. Exh. 3, Doc. 58 at 13.) Since the only statement specified was not a threat, the Union's consumer boycott remained protected by the Act. See also GC Exhs. 2-3.

The filing and maintenance of a preempted lawsuit may violate Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, regardless of motive or whether the lawsuit is objectively baseless. *J.A. Croson Co.*, 359 NLRB 19, 25 (2012); *Webco Industries*, 337 NLRB 361, 363 (2001). Lawsuits that punish and deter conduct protected by Section 7 are unlawful. *Federal Security, Inc.*, 359 NLRB 1 (2012).

Here, in filing its Federal District Court Lawsuit claiming economic injury due to the consumer boycott, notice thereof, and the Union's contact with the Hotel's customers which sought to impose damages including Respondent's attorney's fees against the Union, I find that Respondent intended to punish and deter employees from participating in the protected activity as the lawsuit, though ultimately proven unsuccessful, imposed a costly and prohibitive burden on the Union's invocation of and participation in the protected consumer boycott. As a result, I find that the Federal District Court Lawsuit was barred by Federal labor law in the absence of any evidence of actual malice. Thus, Respondent's filing and maintenance of its preempted tortious interference claims as part of its Federal District Court Lawsuit violates Section 8(a)(1) of the Act.

3. Respondent's Federal District Court Lawsuit also violates section 8(a)(1) because the lawsuit is both objectively baseless and filed with retaliatory motive

As stated above, when a lawsuit lacks a reasonable basis of law or fact and contains retaliatory motive, the Board may prohibit it as an unfair labor practice. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's v. NLRB*, 461 U.S. 731, 748–749 (1983). To avoid chilling the First Amendment right to petition, the Board in *BE&K* concluded that the Act only prohibits lawsuits that are both objectively and subjectively baseless. *BE&K* at 528.

A lawsuit is objectively baseless or lacks a reasonable basis of law or fact if no reasonable litigant could realistically expect success on the merits. *BE&K II*, 351 NLRB 451, 457 (2007) (quoting *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993)). The Board has held that retaliatory motive may be inferred from, among other things, the fact that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the lawsuit obviously lacked merit. *Allied Mechanical Services*, 357 NLRB 1223, 1232–1233 (2011), enforcement denied, *NLRB v. Allied Mechanical Services, Inc*., ___F.3d ___ (6th Cir. Oct. 30, 2013).[8]

In *Milum Textile Services Co.*, 357 NLRB 2047, 2050–2051 (Dec. 30, 2011), the Board found that an employer's failure to present any factual evidence of actual malice is an indication of a baseless suit where libel and tortious interference claims were alleged. The Board concluded that no reasonable litigant could reasonably expect success on the merits when a litigant has no evidence to establish a critical element of its case. Id. at 2051.

Here, as in *Milum*, I find that Respondent had no hope of success on its equally baseless claims against the Union as it failed to properly allege actual malice with factual support. The term 'actual malice' did not appear in the Federal District Court Lawsuit until the Third Amended Complaint was filed. One of the allegedly defamatory statements did not even relate to the Hotel, but rather to the Anchorage Hilton. After Respondent's numerous attempts to allege defamation, the District Court granted the Union's Rule 12(b)(6) motion and found that Respondent did not sufficiently allege actual malice and finally dismissed the amended complaint with prejudice. The Respondent decided to forgo its appeal of these District Court findings and so they have become final.[9] (Tr. 96.)

As stated above, the tortious interference claims were obviously preempted by Federal labor law and never had merit. In addition, the defamation cause of action was also objectively baseless as there was a similar lack of actual malice on the part of the Union in publishing any statements. Furthermore, there was the lack of actual damage suffered by the Respondent as the result of any statements or acts by the Union given the fact

[7] Artiles' credibility was further shown to be unreliable in *Remington I*, where the Board affirmed ALJ Meyerson's credibility finding that in November 2009, Artiles instructed the Hotel's former director of catering "to fabricate numbers" or "pad" and intentionally misrepresent the Hotel's loss because of the Union boycott when, in fact, instead of losing money, the Hotel was making money and leading the region in sales at the time of the boycott. (GC Exh. 4 at 27-28.) As discussed further in the next section of this decision, I find that this misleading conduct on the part of Respondent's Hotel's management before the filing of the Federal District Court Lawsuit is extraordinary and when combined with the litany of Bad Acts alleged and found against the Hotel and its management from 2009-2013 evidence Respondent's retaliatory motive in filing its baseless Federal District Court Litigation.

[8] On application for enforcement to the U.S. Court of Appeals for the Sixth Circuit, the Appellate Court on October 30, 2013, in a 2-1 decision denied the petition for enforcement of the Board's order and disagreed with the Board's earlier analysis in the same case. For the same reason stated earlier in this decision challenging the ongoing validity of the Board's *Fabric Services* decision, the Board's *Allied Mechanical Services* decision remains binding legal precedent and any questions concerning the legal integrity of the October 2011 Board Decision in *Allied* are properly addressed to the Board. I am bound to follow Board precedent that has not been reversed by the Supreme Court or the Board itself. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

[9] "The showing of lack of merit required in order to prevail on a Rule 12(b)(6) motion to dismiss is more demanding than the showing required for summary judgment or a directed verdict in that the allegations of the complaint are assumed to be true for purposes of a motion to dismiss, while a plaintiff must have evidence to support its material allegations in order to survive a motion for summary judgment or directed verdict." *Allied Mechanical Services*, slip op. at 7, fn. 37.

that the Hotel and Respondent did not actually lose money from the protected activities referenced in the lawsuit but, instead, made money and lead the region in sales at the time of the protected consumer boycott.[10] (See GC Exh. 4 at 27-28; fn. 4 herein.) Thus, Respondent's Federal District Court Lawsuit which challenges the Union's consumer boycott through its allegations of preempted tortious interference claims and defamation is objectively and subjectively baseless as these legal theories are not colorable and no reasonable litigant could realistically expect success on the merits of the lawsuit especially when Respondent had no evidence to establish actual malice - a critical element of each claim in its Federal District Court Lawsuit.

Respondent argues that because its Federal District Court Lawsuit was reasonably based, its motive for filing the lawsuit is irrelevant and its filing protected by the First Amendment. As stated above, I find that Respondent's filing of it Federal District Court Lawsuit was not reasonably based and was, instead, baseless. Moreover, I further find that Respondent is not entitled to First Amendment protection in the filing of its lawsuit because it is both objectively and subjectively baseless.

Here, Respondent demonstrates the requisite retaliatory motive in multiple ways. First, the lawsuit was retaliatory on its face as it targeted protected conduct and sought money damages and attorney fees from the Union based on its statutorily protected conduct–conducting a consumer boycott and complaining about unlawful suspensions for collective-bargaining purposes. See *Allied Mechanical Services*, slip op. at 10 (lawsuit that on its face addressed protected strikes and job targeting programs unlawful and supports a finding of retaliatory motive). See also *Petrochem Insulation*, 330 NLRB 47, 50 (1999), enf. 240 F.3d 26 (D.C. 2001) (Because the litigant could have no realistic expectation of prevailing on the merits of its lawsuit, it must have filed the lawsuit for some other reason.). The pleading itself makes mention of a series of union acts, including participation in and advertising of the consumer boycott and complaints of illegal suspensions, allegedly to bring the Hotel back to the bargaining table. (Jt. Exh. 3 at 2-5.)

Secondly, as established above, the lawsuit was not simply "unsuccessful," it was baseless and obviously lacked merit because a necessary element of each claim was consistently deficient despite multiple opportunities to amend. See *Allied Mechanical Services*, slip op. at 12 (Filing of baseless action though not in and of itself dispositive suggests a retaliatory motive.). Finally, the timing of the Federal District Court Lawsuit filing in September 2010, in light of the filed ULP charges, the 2009 consumer boycott, numerous NLRB hearings and testimony, and prior findings that the Hotel and its management acted unlawfully against the Union through its litany of Bad Acts beginning in 2009 through at least 2011, strongly suggests an extraordinary type of unlawful animus against the Union, an admitted common opponent, as an added tactic to further punish and financially injure the Union and restrict its protected activities. I find that Respondent had a retaliatory motive in bringing the Federal District Court Lawsuit against the Union under these unique circumstances.

Stated differently, I find that Respondent's Federal District Court Lawsuit was nothing more than one more baseless, yet retaliatory, act in the Respondent's and the Hotel's continued retaliatory efforts to conduct an extraordinary full out financial war against the Union to punish it and deplete its resources as part of their overall strategy of nonstop unfair labor practices and Bad Acts against the Union in 2009-2011. While it may not be uncommon for ill will or animus to exist between litigants in a single garden variety legal dispute or when a new owner/employer inherits the presence of an unwanted union at its establishment, the admitted "community of interest" retaliatory motives displayed here by Respondent and its Hotel against the Union as evidenced by the multitude of Bad Acts and the filing of the unsupported Federal District Court Litigation are extreme, unique, and extraordinary. I further find that Respondent's unlawful animus against the Union became known as part of Respondent's strategy once charges were filed by the Union alleging and later proving unlawful acts and continued to be proven with alarming regularity as the NLRB hearings commenced and Union members testified from 2010-2012. In particular, the filing of the Federal District Court Litigation was the well-orchestrated retaliatory response to the Union's attempt to bargain in good faith for a new CBA, the continuing ULP's, the Union's protected consumer boycott, the NLRB hearings, the failed attempt to illegally withdraw recognition of the Union, the general manager's misstatement of Hotel sales over the 10 month period leading to the lawsuit, and the denied filing of a Writ of Mandamus. Thus, I am convinced beyond all doubt and find that Respondent's retaliatory motive has been proven and Respondent violated Section 8(a)(1) when it filed and maintained its baseless Federal District Court Lawsuit.

CONCLUSIONS OF LAW

1. Ashford TRS Nickel, LLC, Ashford Hospitality Trust, Inc., and the AHT affiliated entities, a single business enterprise and single employer (Respondent) is and has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, UNITE HERE!, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instituting and pursuing its Federal District Court Lawsuit against the Union on September 23, 2010, that is preempted by federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair

[10] Respondent argues that "the evidence points only to a non-employer hotel owner which filed a lawsuit because it had suffered, over the preceding 10 months, real losses as a consequence of an overzealous boycott by [the Union's] national and local leadership. R. Br. At 36. I dismiss this argument as it is baseless and contrary to the fact that Respondent and the Hotel actually led the region in sales during the stated time period.

labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designated to effectuate the policies of the Act.

The Respondent, having unlawfully instituted and pursued a lawsuit against the Union, shall also reimburse the Union for any litigation expenses directly related to its defense in the Federal District Court Lawsuit filed on September 23, 2010, plus interest. *J.A. Croson Co.*, 359 NLRB 19, 31 (2012). Interest is to be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011). Such a remedy is standard in cases, where the respondents have filed unlawful lawsuits or arbitrations under Board law. *Federal Security*, supra, 359 NLRB at 14; *Standard Drywall*, supra, 357 NLRB at 5; *Duane Reade*, supra, 342 NLRB at 1015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Ashford TRS Nickel, L.L.C., Ashford Hospitality Trust, Inc. (AHT), and all AHT affiliated enterprises, a single business enterprise and single employer, its officers, agents, and representatives shall

1. Cease and desist from

(a) Instituting and pursuing any lawsuit against the Union that is preempted by Federal law or that lacks a reasonable basis and is motivated by intent to retaliate against activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse the Union for all legal and other expenses incurred related to the defense in the Federal District Court Lawsuit filed by Respondent against the Union on September 23, 2010, with interest compounded on a daily basis as described in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its Sheraton Anchorage, Alaska Hotel (Hotel), copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current Hotel employees and former Hotel employees employed by the Respondent at any time since September 23, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act (the "Act").

WE WILL NOT institute, pursue, and/or maintain any lawsuit against UNITE HERE! Local 878 (the "Union") that instituting and pursuing its Federal District Court Lawsuit against the Union on September 23, 2010, that is preempted by Federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act.

WE WILL reimburse the Union for all legal and other expenses incurred in the defense of our September 23, 2010, Federal District Court Lawsuit filed against the Union, with interest compounded daily.

ASHFORD TRS NICKEL AND ITS AFFILIATED ENTERPRISES

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-032761 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the

[11] 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.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.