UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WHOLE FOODS MARKET, INC., **and** **UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 919**	**Case No. 01-CA-096965**

COUNSEL FOR THE GENERAL COUNSEL'S
RESPONSE TO WHOLE FOODS' MOTION FOR RECONSIDERATION

Whole Foods, Inc. (Whole Foods) has filed a Motion for Reconsideration regarding *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), *enforced* 691 F. App'x 49 (2d Cir. 2017). For the reasons explained below, Counsel for the General Counsel respectfully submits that the Board lacks the requisite statutory jurisdiction to consider Whole Foods' Motion for Reconsideration.

I. Procedural History

In *Whole Foods Market, Inc.*, the Board relied upon *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to find, in part, that Whole Foods had violated the Act by maintaining a work rule in its employee handbook prohibiting employees from recording conversations, phone calls, images, or company meetings with a camera or recording device without the prior approval of Whole Foods' management. 363 NLRB No. 87, slip op. at 5. To remedy this violation the Board ordered Whole Foods to, *inter alia*: (1) rescind the unlawful rules,[1] and (2) cease and

[1] The Board's order gives Whole Foods the options of republishing the handbook without the unlawful rules, supplying employees with inserts to the handbook stating that the unlawful rules have been rescinded, or providing employees with a new and lawfully worded rule on adhesive backing that will correct or cover the unlawfully broad rules until it republishes the handbook without the unlawful provisions.

desist from maintaining rules "that prohibit the recording of conversations, phone calls, images, or company meetings with any recording device without prior management approval." *Id.* at 5. Thereafter, Whole Foods sought review, and the Board cross-petitioned for enforcement, of the Board's Decision and Order in the United States Court of Appeals for the Second Circuit. On June 1, 2017, the Second Circuit entered its judgment denying Whole Foods' petition for review, affirming the Board's order, and granting in full the Board's cross-petition for enforcement of the Board's Decision and Order. *Whole Foods Mkt. Grp. v. NLRB*, 691 F. App'x 49, 50 (2d Cir. 2017).[2] The Second Circuit issued mandate on July 24, 2017, and Whole Foods has not filed a motion to recall the mandate. On January 31, 2018, Whole Foods filed its Motion for Reconsideration with the Board asking that it reconsider its decision in light of the Board's subsequent decision in *The Boeing Co.*, 365 NLRB No. 87 (2017), overruling *Lutheran Heritage Village-Livonia*. Whole Foods argues that retroactive application of the *Boeing* decision to this case is appropriate because Whole Foods has yet to comply with the outstanding remedial order and so the case remains "pending" in compliance.

II. Applicable Law Establishes That the Board Lacks Jurisdiction to Reconsider a Court-Enforced Decision and Order

The Board's jurisdictional authority is governed by the Act. Section 10 defines the Board's authority to find unfair labor practice violations and to issue remedial orders. 29 U.S.C. § 160. In this regard, Section 10(d) of the Act states that "[u]ntil the record in a case shall have been filed in a court . . . the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or

[2] In enforcing the Board's Order, the Second Circuit, citing Section 10(e) of the Act, noted that "because neither party challenged the legality of the Board's *Lutheran Heritage* test before the administrative law judge or the Board, we will not consider Whole Foods' challenge to that test for the first time on appeal." 691 F. App'x at 50.

issued by it." 29 U.S.C. § 160(d); *see also* NLRB Rules and Regulations § 102.49. As Section 10(e) of the Act clarifies, however, where, as here, a Board decision has issued and the record on review has been filed with a court of appeals on a petition for enforcement or a request for review, "the jurisdiction of the court shall be exclusive and its judgment and decree shall be final . . . ." 29 U.S.C. § 160(e).

That the Board lacks the jurisdiction to rescind or substantively amend a remedial order that has been enforced by a circuit court has been affirmed both by the circuit courts and by longstanding Board precedent. Of particular relevance, in *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006), the District of Columbia Circuit explicitly rejected the argument that the Board retains jurisdiction during the compliance phase of a case to modify the terms of a remedial order previously enforced by the court, noting that "[t]he Board obviously cannot modify an order over which the court has 'exclusive' jurisdiction or that the court has enforced in a final judgment." *Id*. at 391. More recently, in *Dupuy v. NLRB*, 806 F.3d 556 (D.C. Cir. 2015), the court vacated and remanded a Board compliance settlement that materially modified a circuit-enforced Board remedial order, observing that "[h]owever broad the Board's discretion may be to settle its cases prior to their embodiment in a court order, once the Board turns to the task of ensuring an employer's compliance with a final court judgment, the Board's own precedent has disclaimed any authority to modify the court's order." *Id*. at 562. Accord: *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147, 148 (2d Cir. 1958) ("Plainly the Board has no jurisdiction to modify a decree of this court, and the Board so held.").

As the Court observed in *Dupuy*, longstanding Board precedent also establishes that the Board lacks the authority and jurisdiction to modify a court-enforced remedial order. *See, e.g.*, *Willis Roof Consulting, Inc.*, 355 NLRB 280, 280 n.1 (2010) ("The Board has no jurisdiction to

modify a court-enforced order."); *D.L. Baker, Inc.*, 351 NLRB 515, 525 n.31 (2007) (the Board is "not at liberty to modify an Order that has been enforced by a court of appeals"); *Convergence Commc'ns, Inc.*, 342 NLRB 918, 919 (2004) ("Under Section 10(e) of the Act, we are without jurisdiction to modify a court-enforced Board Order."); *Grinnell Fire Prot. Sys. Co.*, 337 NLRB 141, 142 (2001) ("because . . . the Board's Order has already been enforced by the Fourth Circuit, and the Supreme Court has denied certiorari, we no longer possess jurisdiction to modify that Order"); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997) ("the Board's Order has already been enforced and accordingly we no longer have jurisdiction to modify that Order"); *Haddon House Food Products*, 260 NLRB 1060, 1060 (1982) (same).

Whole Foods' assertion (Motion p. 6) that the Board must reconsider this case because the *Boeing* decision indicated that it is to be given retroactive application to all pending cases[3] fails to recognize the critical distinction between orders that have not been judicially enforced and those that have. As the above statutory and case law establishes, the Board simply does not have the requisite statutory jurisdiction to reconsider and materially modify or otherwise abrogate a court-enforced remedial order.[4] Whole Foods' further assertion that this case somehow remains "pending" before the Board because of Whole Foods' deliberate non-compliance with the outstanding remedial order is also misplaced. Thus, unlike backpay or reinstatement orders, the Board's enforced order here leaves nothing to be determined through supplemental compliance proceedings. In short, this case is not in any "pending" administrative

[3] 365 NLRB No. 154, slip op. at 18.

[4] Notably, not one of the cases that Whole Foods cites in support of its motion for reconsideration involves a post-judgment remedial order. *The Wang Theatre, Inc.*, 365 NLRB No. 33, slip op. at 2 (2017); *The Mcburney Corp.*, 352 NLRB 241 (2008); *In re United Food,* 338 NLRB 1074, 1074 (2003); *Int'l Hod Carriers,* 135 NLRB 1153, 1168 (1962).

status before the Board simply because it remains open pending compliance in NxGen; the only pending matter according to the Act is Whole Foods' compliance with the Second Circuit's order.[5]

For the above reasons, Counsel for the General Counsel suggests that the Board does not have jurisdiction to reconsider or modify its earlier decision or remedial order in this case.

Respectfully submitted,

WILLIAM MASCIOLI
Assistant General Counsel
Tel: (202) 273-3746
Bill.Mascioli@nlrb.gov

DAWN L. GOLDSTEIN
Deputy Assistant General Counsel
Tel: (202) 273-2936
Dawn.Goldstein@nlrb.gov

DIANA ORANTES EMBREE
Supervisory Trial Attorney
Tel: (202) 273-1082
Diana.Embree@nlrb.gov

[5] The suggestion (Motion at 6) that the *Boeing* decision's reference to "all pending cases in whatever stage" encompasses orders that, as here, have been judicially enforced is misleading for two additional reasons. First, it ignores the Board's express statement in *Boeing* that "[o]ther than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* 'reasonably construe' standard." 356 NLRB No. 154, slip op. at 12 n.51. Second, it ignores the applicable context of the original case from which the "pending cases in whatever stage" language derives, *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). In *Deluxe Metal*, the Board's reference to pending proceedings "at whatever stage" follows its observation that "in establishing revisions of precedent there is always the likelihood that such revisions will bring about a different result in some pending proceeding than would have obtained under a prior policy or procedure. *This is true not only of the case in which such revisions are first announced and applied, but also with respect to any other case which has not yet been decided, because it has not reached the Board's level or is at one of the other stages of the administrative process such as the hearing*." 121 NLRB at 1006 (emphasis added). Given this explanation, the subsequent reference to cases pending "at any stage" cannot be read to include cases in which the administrative process has closed and the order enforced by a court of appeals, as the Board has no jurisdiction over such cases.

/s William R. Warwick
WILLIAM R. WARWICK
Trial Attorney
Tel: (202) 273-3849
William.Warwick@nlrb.gov

COUNSEL FOR THE GENERAL COUNSEL
National Labor Relations Board
Contempt, Compliance, and Special Litigation Branch
1015 Half Street, SE
Washington, DC 20570
Fax: (202) 273-4244

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2018, a copy of the foregoing Response to Motion for Reconsideration was served via:

By E-Filing
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

By Electronic Mail
Barry Bennett
Dowd Block Bennett Cervone
Auerbach & Yokich
8 S. Michigan Ave., Suite 1900
Chicago, IL 60603-3315
(312) 372-1631
bbennett@dbb-law.com

J. William Gagne, Jr.
J. William Gagne, Jr. & Associates
15 N. Main St., Floor 2
West Hartford, CT 06107-1957
(860) 522-5049
jwgagne@snet.net

Megan Miller
Compliance Officer
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, MA 02222-1001
(857) 317-7816
Megam.Millar@nlrb.gov

Kathleen M. McKenna
Steven J. Porzio
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000
(212) 969-2900
KMcKenna@proskauer.com
Sporzio@proskauer.com

/s William R. Warwick
WILLIAM R. WARWICK
Trial Attorney
Tel: (202) 273-3849
William.Warwick@nlrb.gov