UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO, RESPONDENT,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165, CHARGING PARTY.

Case No. 28-CA-14519

RESPONDENT NEW YORK NEW YORK LLC d/b/a NEW YORK NEW YORK HOTEL AND CASINO'S REPLY BRIEF TO THE GENERAL COUNSEL AND CHARGING PARTY'S PRE-ARGUMENT BRIEFS

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I. INTRODUCTION

In defining the scope of Section 7 access rights under the Act, the Supreme Court has established a well-defined dichotomy from which all access rights flow. As set forth in *Lechmere, Inc. v. NLRB,*[1] and subsequent decisions – including the Appellate Court's decision in this case – the primary issue in access cases is whether the individual seeking such access shares a direct employment relationship with the entity that owns or controls the property. If the individual is an employee, his access rights are governed by the standards set forth in *Republic Aviation Corp. v. NLRB* and *Tri-County Medical*, and the individual's Section 7 rights must be balanced against the private property rights of the employer.[2] If he is not an employee of the

[1] *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

[2] *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976).

property owner, the individual's access is governed by *Babcock/Lechmere*, and he is permitted to come onto the employer's premises only upon a showing that alternative methods of disseminating his message are inadequate.[3]

In their Pre-Argument Briefs, both the General Counsel and the Charging Party (also referred hereto as the "Union") virtually ignore this distinction, and thereby fail to consider properly New York New York's property rights. While the General Counsel concedes that *Babcock/Lechmere* is the correct standard to apply, he asserts that the nonemployee handbillers were nevertheless rightfully on NYNY property because they did not have adequate alternative means of communicating their message. In doing so, the General Counsel disregards the differences in rights between employees and nonemployees and urges the Board to resolve these cases by applying the *Jean Country* balancing test – an application specifically rejected by the Supreme Court in *Lechmere* because it encroaches too far on employer property rights.[4] The Union, in contrast, denies that *Babcock/Lechmere* applies, incredulously contending that the outcome of this case was determined three years ago by the Board's decision in *Ark Las Vegas Restaurant Corp.* and the D.C. Circuit's decision in *Stanford Hospital and Clinics v. NLRB.*[5] This assertion ignores the significant factual differences between the cases and the fact that the Board has specifically declined the Union's request to consolidate these cases with *Ark Las Vegas Restaurant Corp*. As set forth in NYNY's previous position statements, the nonemployees in these cases – if they have any access rights at all – must satisfy

[3] For ease of reference, the test for nonemployee access originally articulated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and expanded upon in *Lechmere*, will be referred to as the *Babcock/Lechmere* test.

[4] *Lechmere* explained that the multifactor balancing test adopted by the Board in *Jean Country*, 291 NLRB 11 (1988), did not adequately consider employer property rights and was contrary to Supreme Court precedent. 502 U.S. at 536-39; *see also Loews L'Enfant Plaza Hotel*, 316 NLRB 1111, 1112 (1995) (*Lechmere* abrogated *Jean Country* and its balancing test cannot be applied to nonemployees).

[5] *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281 (2004); *Stanford Hosp. and Clinics*, 325 F.3d 334 (2003).

Babcock/Lechmere's heavy burden to gain entry to NYNY's private property to engage in area standards handbilling. They cannot, and the charges should be dismissed.

II. THE DISPOSITION OF THESE CASES IS CONTROLLED BY APPLICATION OF *BABCOCK/LECHMERE*.

Both the General Counsel and the Union concede – as they must – that the Ark employees did not have a direct employment relationship with NYNY. However, they have different views on how this influences the outcome of these cases. While the General Counsel contends that the supposed "intimate relationship" between the Ark employees and NYNY requires a return to *Jean Country*-style balancing, the Union asserts that the lack of an employment relationship is irrelevant and that NYNY must acquiesce to the conduct of the nonemployees on its property because those employees have Section 7 rights *vis-à-vis* Ark. The General Counsel's position is foreclosed by the clear dictates of Supreme Court precedent, and the Charging Party's position is illogical, results-driven sophistry that disregards the facts of these cases and controlling law. Under the hierarchy of activity protected by Section 7 of the Act, nonemployee area standards activity warrants only minimal protection and must yield to an owner's legitimate prerogative to enforce its private property rights.

A. Because The Ark Employees Did Not Have A Direct Employment Relationship With NYNY, Their Section 7 Rights To Access NYNY Property, If Any, Were Governed By *Babcock/Lechmere.*

These cases concern Ark employees engaged in area standards activity in the NYNY *porte cochere* and the interior of the hotel/casino. As set forth in NYNY's previous position statements, "the critical question in a case of this sort is whether [the] individuals [seeking access] … should be considered employees or nonemployees of the property owner." *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002); *see also* NYNY Supplemental Statement of Position on Remand ("Supplemental Statement") at Sec. IV.A-D; NYNY Statement

of Position on Remand at Sec. III.A; *First Healthcare Corp. (Hillhaven)*, 336 NLRB 646, 648 (2001); *ITT Remand Decision*, 341 NLRB 937, 940-41 (2004), enfd. *ITT II*, 413 F.3d 64, 73 (2005). This distinction is critical because "the scope of § 7 rights depends on one's status as an employee." *Id.* at 588; Supp. Statement at 10-18.

1. The General Counsel's attempt to reformulate *Babcock/Lechmere* to accommodate *Jean Country* – style balancing is inappropriate because the handbillers in these cases were not NYNY employees.

In defining the scope of Section 7 access rights, the determinative issue is whether the individuals seeking access are employees in the narrow sense, that is, employees of the entity that seeks to exclude them from the property.[6] *See* Supp. Statement at 10-23; *Lechmere*, 502 U.S. at 537; *New York New York*, 313 F.3d at 589. Under controlling law, these categorizations are inflexible: if an individual is a nonemployee, the individual's right to access is governed by *Babcock/Lechmere*. *See id.* In his Pre-Argument Brief, the General Counsel concedes that *Babcock/Lechmere* and its attendant "alternative means of communication test" applies. However he attempts to circumvent the result of his conclusion – that Ark employees have no Section 7 access right to handbill in the *porte cochere* or in NYNY's casino aisleways – by urging the application of the defunct *Jean Country* balancing test rejected by the Supreme Court in *Lechmere*.

The General Counsel's argument has no merit. In support of his startling request to disregard Supreme Court precedent and ignore the absence of a direct employment relationship

[6] With respect to the *amicus* brief of Professor Dannin, which evaluates the legislative history of the definition of "employee" found in Section 2(3) of the Act, NYNY respectfully states that, at this stage of the inquiry, the legislative history of that term is unpersuasive in light of the Supreme Court's existing interpretation of the Act. *See Lechmere*, 502 U.S. at 536-7 ("Once [the Supreme Court] ha[s] determined a statute's clear meaning, it adhere[s] to that determination under the doctrine of *stare decisis*, and [it] judge[s] an agency's later interpretation of the statute against [its] prior determination of the statute's meaning."). The Board does not have authority to author an interpretation of the Act that is contrary to existing Supreme Court precedent. *See id.* (affirming the holding in *Babcock* and rejecting the Board's creation of the *Jean Country* balancing test for nonemployees).

between NYNY and the Ark employees, the General Counsel alleges only that NYNY had a "close" relationship with the Ark employees and that it was "interested" in the Ark employees' efforts to organize Ark because Ark was a NYNY contractor.[7] *See* Pre-Argument Brief at 15-22. However, the Ark employees were not NYNY employees and did not share any of the qualities that are indicative of either a traditional or a joint-employment relationship under the Act.[8] Both of these facts are underscored by the General Counsel's decision to withdraw its joint employer allegations after these cases commenced. *See* Supp. Statement at 18-23. In attempting to gloss over these substantial differences, the General Counsel is simply relabeling old arguments that failed before the D.C. Circuit. *See id.*

Moreover, the argument is barred by the law of the case and controlling precedent. As the D.C. Circuit noted, *Jean Country* balancing cannot be used to evaluate the exercise of Section 7 rights by nonemployees. *New York New York*, 313 F.3d at 588-9; *Lechmere,* 502 U.S. at 538. "[T]he very point of *Lechmere* [is that] the § 7 rights of employees entitle them to engage in organization activities on company premises. Nonemployees do not have comparable rights." *New York New York*, 313 F.3d at 589 (internal citations omitted); *see also* Supp.

[7] In a similar vein, the Union alleges that NYNY had the authority to direct and discipline Ark employees by virtue of certain authority reserved to NYNY in the lease agreement. The Union cites **no** direct evidence in support of these allegations, and the actual wording of the lease provisions relied upon establishes that Ark and NYNY had nothing more than a typical landlord-tenant arm's length relationship. Sections 6.1 and 8.9 of the America lease require only that Ark maintain employment policies that ensured NYNY's continued operation as a first-class hotel/casino. Section 11 refers only to Ark's license to use the employee parking lot. None of this means that NYNY had day-to-day direct control over Ark's employees. In fact, Sections 6.5 and 6.6 of the lease provide that Ark has sole authority to set salaries and benefits and that Ark has complete responsibility for establishing the terms and conditions of employment for Ark employees. This is the crucial factor that distinguishes these cases from the situations in *Republic Aviation* and *Tri-County Medical*, where employees were permitted onto the property because they were subject to immediate control by the owner of the premises because of their employment relationship. The corollary of the principle that there are no quasi-employees, *see* Supp. Statement at 10-23, is that there are no quasi-employers.

[8] The Union's equation of Ark's lease payments, which are based on a percentage of the restaurant's receipts, with a joint venture is at best naïve. Ark and NYNY do not share control over the fundamental direction of the businesses, nor do they share the risks of transacting business, elements that are the sin qua non of a joint venture. As set forth in NYNY's Supplemental Statement, NYNY and Ark are not joint employers, and the Union's consistent accusations in this regard are nothing more than innuendo.

Statement at 20-31; *ITT I*, 251 F.3d at 1001-02 (noting that in cases involving *employee* activities, the Board must balance Section 7 rights against property rights, but that "[i]n cases involving *nonemployee* activities … the Board was not permitted to engage in that same balancing" and was reversed for doing so); *Waremart Foods v. NLRB*, 354 F.3d 870, 872 (D.C. Cir. 2004); *L'Enfant Plaza Properties*, 316 NLRB at 1112 (*Lechmere* abrogates *Jean Country*); *Oakland Mall II*, 316 NLRB 1160, 1162 (1995) (applying *Babcock/Lechmere* to employees of a mall tenant picketing on mall property and noting that balancing under *Babcock/Lechmere* is only appropriate once nontrespassory access is "infeasible").

2. The General Counsel and the Charging Party's conclusions are flawed because they fail to consider that the nonemployees who were engaging in area standards activity were attempting to exercise rights that are low in the Section 7 hierarchy.

Both the General Counsel and the Charging Party consistently speak about the issues in these cases in general terms, and discuss the concept of Section 7 access for contractor employees in a very broad sense. This is a mistake. The Board must resolve these cases on the facts and circumstances presented in this record. Because the Ark employees are not directly employed by NYNY, the Board must consider the kind of message they sought to broadcast, and to whom. The Board previously found that the Ark employees were engaged in area standards handbilling, not organizing activity. *See* Supp. Statement at 27. Nevertheless, throughout its brief, the General Counsel incorrectly refers to the conduct of the Ark employees as an "organizing campaign" or "core nonderivative § 7 organizing activity." *See, e.g.*, Pre-Argument Brief at 17. For its part, the Union asserts that the nature of the activity is inconsequential under *Stanford Hospital*.[9] Both positions are incorrect and these errors are significant. It is well-

[9] *Stanford Hospital* is discussed in more detail below, however it is clear that the case does not stand for the proposition that area standards activity and organization activity by nonemployees are equivalent Section 7 rights. 325 F.3d at 346.

established that there is an important difference between organizing activity, which is a core Section 7 right, and area standards activity, which is one of the weakest Section 7 rights, and that the Board must consider the nature of the Section 7 activity in determining the scope of Section 7 access. *See* Supp. Statement at 26-32. Accordingly, the failure of the General Counsel and the Union to account for the differences between areas standards and organizing activity means that their conclusions rely on a flawed premise.

3. If the Ark employees have a right to access NYNY's property, that right is governed by *Babcock/Lechmere* because they are not NYNY employees.

A strong argument can be made that the charges should be dismissed because nonemployees engaged in area standards activity have no right to access a third-party's property. *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997-98 (9th Cir. 1992); *see also United Food and Commercial Workers Union v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996); Supp. Statement at 26-32; Brief of Amicus Curiae Venetian Hotel & Casino at 3-6. However, even if the Board chooses not to apply the *Sparks Nugget* rationale, it must adhere to the analysis set forth in *Babcock/Lechmere* under which nonemployees like the Ark employees are, at the very least, required to satisfy the heavy burden of demonstrating that the targets of their area-standards message were beyond the reach of ordinary means of communication. *See* Supp. Statement at 20-24; 29-31. It is well-established that *Babcock/Lechmere* applies to nonemployees engaged in both organizational and areas standards Section 7 activity. *See id.*; *see also ITT II*, 413 F. 3d at 68-69; *Leslie Homes*, 316 NLRB 123, 127-131 (1995); *Victory Markets, Inc.*, 322 NLRB 17, 20-21 (1996); *United Food and Comm. Workers Union*, 74 F.3d at 298.

B. Under *Babcock/Lechmere,* The Ark Employees Had Adequate Alternative Means Of Communication.

1. The burden under *Babcock/Lechmere* is heavy.

As demonstrated above, in order to justify the Ark employees' presence in the *porte cochere* and the interior aisleways next to the America and Gonzales restaurants, the General Counsel must carry the heavy burden of establishing that the intended targets of their area standards message were isolated and not reasonably accessible by methods that did not require the Ark employees to be on NYNY's property. *See id.*; *see also Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 205-6 n.42 (1978). This burden cannot be "satisfied by mere conjecture or the expression of doubts concerning the effectiveness of non-trespassory means of communication." *Lechmere*, 502 U.S. at 540.

2. The Ark employees did not face unique obstacles to nontrespassory communications.

The Ark employees cannot satisfy this burden. The General Counsel asserts that there were no reasonable alternative means of accessing Ark's customers because handbilling in public areas away from NYNY's premises would make it difficult to identify Ark customers, the handbilling would enmesh neutrals and disturb traffic, and because it would be less effective if not carried out in these areas.

The first of the General Counsel's contentions is simply not supported by the facts. Significantly, the Board has already determined that the Ark employees made no effort to distinguish between Ark and NYNY customers and handbilled whomever passed them by at the *porte cochere* and in front of the Ark restaurants inside the hotel/casino. Thus, the Ark employees could have stationed themselves at the perimeter of NYNY's property and distributed their handbills to the same individuals. *See* Supp. Statement at 4. The second contention is

similarly without merit. Given the nature of the area standards message and that the Union handbilled indiscriminately, it is not clear who the "neutral" parties would be who would become enmeshed in the activity. Moreover, the Union *did* picket along Las Vegas Boulevard and there is no evidence in the record that the picketing created any of the hypothetical problems noted by the General Counsel. The third contention, that handbilling outside of the hotel/casino would be less effective, is not a viable objection because the Union is not entitled to the most effective means of communication that is available. *See, e.g., Lechmere*, 502 U.S. 539-40 (mailings, signs, picketing and advertisements are adequate); *Leslie Homes*, 316 NLRB at 128-131; *NLRB v. Visceglia*, 498 F.2d 43, 48-50 (3d Cir. 1974) (denying enforcement of Board's order in *Peddie Buildings*, 203 NLRB 265 (1973)). In truth, the General Counsel's proffered justification for trespassing on NYNY property is conjecture, and fails to identify "'unique obstacles' to nontrespassory communications, such as employees 'isolated from the ordinary flow of information that characterizes our society.'"[10] *Oakland Mall II*, 316 NLRB at 1163, quoting *Lechmere*, 502 U.S. at 540.

3. The evidence already in the record establishes that the targeted guests and customers were within reach of nontrespassory communications.

As set forth in more detail in NYNY's Supplemental Statement, there is no question that the consumer boycott message of the Union and the Ark employees could have easily been disseminated to potential NYNY guests and customers in a number of ways such as radio, television, computer and newspaper advertisements, as well as handbilling on public sidewalks and in public locations, such as the airport. *See* Supp. Statement at 21-31; *Victory Markets, Inc.*,

[10] The Union concedes as much in its Pre-Argument Brief, where it states that there is no evidence that "the Las Vegas Strip is equivalent to a remote logging camp or an Alaskan fish cannery, or that the Ark employees would have any chance of gaining access if the nonemployee standards of [*Babcock/Lechmere*] applied." Pre-Argument Brief at 17.

322 NLRB 17, 20-21 (1996) (employer did not violate the Act by ejecting nonemployees because handbilling interfered with access to its property); *Oakland Mall II*, 316 NLRB at 1163-4 (mass media adequate means of communicating consumer boycott message); *Leslie Homes*, 316 NLRB at 128-131 (picketing and handbilling on public way adequate); *Sparks Nugget, Inc.*, 968 F.2d at 998; *Visceglia*, 498 F.2d at 48-50 (finding that third party property owner properly excluded picketers). The evidence already in the record is sufficient to make this finding, and for that reason, these cases should be resolved in NYNY's favor.[11]

C. The Charging Party's Position That There Are No Issues Upon Which The Board Should Rule Is Untenable.

While the General Counsel has taken the position that *Babcock/Lechmere* applies, the Charging Party contends that these cases have already been resolved by the Board's decisions in *Ark II* and *Stanford Hospital*. That position is an illogical misreading of those cases and strains the doctrine of collateral estoppel to the breaking point. By focusing on the Union's desired result to the exclusion of the facts and holdings of *Ark II* and *Stanford Hospital*, the argument assumes away the critical issue in these cases: whether it matters that the Ark employees did not have a direct employment relationship with NYNY. *Ark II* concerned the legality of a handbook provision of a different employer, not trespassory handbilling on NYNY property. Moreover, if, as the Union suggests, a nearly three-year-old case disposed of the issues presently before the Board in these cases, this second round of briefing as well as the upcoming oral argument are totally unnecessary and an exercise in futility. As discussed in detail below, neither *Ark II* nor *Stanford Hospital* control these cases.

[11] At a minimum, the cases should be remanded for further consideration of whether alternative means of communication were available. This is the position taken by the General Counsel in his first statement of position on remand, and given that there is no additional citation to the record in his pre-argument brief, there is no explanation for his changed conclusion.

1. The Board rejected the Charging Party's previous attempts to consolidate these cases with *Ark II*.

In arguing here that these cases have somehow been resolved by *Ark II*, the Charging Party is attempting to resurrect a contention that it unsuccessfully made three years ago when it asked the Board to consolidate these and the *Ark* cases. The Board acted correctly then and should not now effectively reverse that determination.

According to the Board's case manual, cases should be consolidated under Rules 102.33(c) and 102.72 (c) when the respondents are the same in each case and where the facts are sufficiently related. *ULP Case Handling Manual* § 11716. This is similar to the normal formulation of the test for collateral estoppel. *See, e.g., In re Strack and Van Til Supermarkets*, 340 NLRB 1410, 1418 n.12 (2004) (application of collateral estoppel requires identical issues and respondents); *Park Lane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (same). On January 5, 2004, the Union requested that the Board give these cases related case status with the case underlying the *Ark II* decision, *Ark Las Vegas Corporation*, Case Nos. 28-CA-14228 *et al.* NYNY opposed the request on January 14, 2004, and the Board denied the request when it issued *Ark II*, noting that consolidation was not necessary to ensure the consistency of its determinations. 343 NLRB at 1285 n.11.

The reasons for the Board's rejection of the Union's request are obvious. *Ark II* involved a different employer and NYNY did not participate in the litigation or otherwise have the opportunity to assert its position. And, contrary to the Union's assertions that it involves the same employees, the same areas of the hotel and the same Section 7 rights as those at issue in these cases, *Ark II* concerned allegedly overly broad provisions of an employee handbook rather than a manifest conduct-based violation of the Act, which means by definition it involved no specific employees whatsoever. Moreover, it involved the rights of Ark employees under *Tri-*

County Medical vis-à-vis Ark rather than access rights for nonemployees seeking to engage in consumer handbilling on the property of NYNY. In sum, the cases had virtually nothing in common for purposes of consolidation or collateral estoppel, other than the fact that Ark is a subcontractor of NYNY. This is grossly insufficient to support the Union's claim that "the outcome of this case has been decided in [*Ark II*]." In this regard, the absence of *Ark II* from the General Counsel's Pre-Argument Brief is telling. Significantly, the General Counsel did not join in the Union's earlier misguided effort at consolidation, and, in his Pre-Argument Brief, the General Counsel does not even mention the decision in *Ark II*, let alone contend that it controls the outcome here.

2. *Ark II* is not persuasive precedent.

After the *Ark II* decision issued, the Union requested that the Board take notice of the decision in these cases as well. However, *Ark II* is not persuasive precedent in these cases for reasons that are similar to why its holdings do not warrant the imposition of direct or indirect issue preclusion against NYNY. As noted above, *Ark II* concerns only handbook provisions, which it invalidates on the basis that they are overly vague and insufficiently tailored to protect Ark employees' rights under *Tri-County Medical vis-à-vis* Ark. *Ark II*, 335 NLRB at 1289-90. The Board found that the handbook provision could chill the expression of the Ark employees' Section 7 rights while they were on duty in Ark restaurants or when they were off duty and accessing exterior areas of the hotel property, such as the employee parking lot. *Id.* The divided panel did not specifically address the extent, if any, of the access rights of off-duty Ark employees to NYNY's premises; it only addressed Ark's individual authority to limit such access. *See id.* at 1283-85.

In applying *Ark II* to these cases, the Union divorces these cases from the record and discusses the Section 7 access rights of contractor employees in the broadest possible terms. It assumes that *Ark II*, a case governing the access rights of *employees* applies to these cases. This disregards the most important fact before the Board on remand: the Ark handbillers were not NYNY employees. *Ark II* cannot be viewed as persuasive authority when it involves different legal issues and different factual considerations. The Board must resolve these cases based on the narrow facts and circumstances contained in *this* record. *See New York New York*, 313 F.3d at 590.

Moreover, to the extent that *Ark II* does discuss the exercise of *Tri-County Medical* rights by Ark employees, it does not set forth the manner and locations in which Ark employees should be allowed to exercise those rights against their own employer, let alone NYNY. The Union completely fails to articulate a consistent version of the areas of the NYNY complex to which *Ark II* purportedly grants nonemployees access. On most occasions the Union imprecisely refers to exterior and external areas of the hotel, concluding that *Ark II* primarily stands for the proposition that Ark employees have "exterior access" to parking lots and employee entrances. Union's Brief at 25. In another portion of its brief, it contends that Ark employees may exercise *Tri-County Medical* rights in "surrounding hotel areas." *Id.* at 38. It is not clear what either of these statements mean, but as noted above, both of these views stretch the holding of the case too far. It only concerned the legality of two Ark handbook provisions. The Board's order in *Ark II* does not hold that Ark employees have access to any specific areas of NYNY's premises because the case simply did not address the propriety of Ark employees' access to NYNY property. 343 NLRB at 1284-85.

As set forth in NYNY's Supplemental Brief, if the Union's contention that the Ark decision mandates that Ark employees could access interior areas of NYNY were given credence, it would lead to the absurd result of NYNY employees having more limited access to NYNY than Ark's employees. Supp. Statement at 32-36. Whatever rights the Ark employees may have, neither *Ark II* nor *Tri-County Medical* grant them the right to handbill within the interior premises of a third-party with whom they have no direct employment relationship, such as NYNY. *See, e.g., Nashville Plastic Prods.*, 313 NLRB 462, 463 (1993). In short, the only reasonable conclusion is that *Ark II* in no way resolves these cases.

3. *Stanford Hospital* does not support the conclusion that NYNY improperly denied the nonemployee handbillers access to its property.

According to the Union, the Board's decision in *Stanford Hospital* renders irrelevant the fact that the Ark employees were communicating with Ark customers rather than Ark coworkers. *See* Union's Brief at 13. This is incorrect and unhinges the case's holding from its facts. *Stanford Hospital* deals only with the question of the rights of Stanford employees to solicit nonemployee visitors and patients of Stanford Hospital. It in no way addresses the rights of employees of Stanford Hospital contractors to solicit nonemployee visitors and patients, nor does it discuss the rights of Stanford Hospital employees to solicit customers of another hospital at that hospital's premises. To the extent the case addresses the access rights of nonemployees at all, it applied *Babcock/Lechmere* to hold that the employer properly evicted a nonemployee from the premises. *See Stanford Hospital*, 325 F.3d at 346. The only way that *Stanford Hospital* would be relevant here is if the Union assumes away the issue in these cases and equates Ark employees with those of NYNY.

In an attempt to extend the analysis of *Stanford Hospital*, the Union cites other access cases such as *Wolgast Corp.* for the proposition that the NYNY's limitation of access to its

property interferes with the Section 7 rights of Ark employees. 334 NLRB 203, 213 (2001), enf'd *Wolgast Corp. v. NLRB*, 349 F.3d 250 (6th Cir. 2003). As with *Stanford Hospital*, the Union mischaracterizes the holding in *Wolgast.*

In *Wolgast*, the Board found that a general contractor, who did not have a collective bargaining agreement with the union, had violated the Act when it prohibited union officials from coming onto the property to inspect the working conditions of a subcontractor. In its decision, the Board determined only that the union officials had the right to come onto the premises for the purpose of communicating with employees it already represented and pursuant to a provision in a collective bargaining agreement.[12] *Wolgast*, 334 NLRB at 213. Its limited ruling does not grant nonemployees like the Ark handbillers broad Section 7 access rights *vis-à-vis* NYNY. The *Wolgast* Board did not hold that the union officials were entitled to expansive access to the entire property for the purposes of organization, handbilling customers, boycotting, or other similar Section 7 activity that is accorded to employees under *Republic Aviation* or *Tri-County Medical*. *See* 349 F.3d at 256. Much like *Ark II*, *Wolgast'*s holding is inapposite to the issue of whether NYNY could eject nonemployees engaging in area standards handbilling from the property.

III. CONCLUSION

For the reasons set forth above and in Respondent's prior pleadings to the Court of Appeals and Board, the standard in *Babcock/Lechmere* controls these cases on remand because

[12] *Wolgast* and the case on which it bases its analysis, *CDK Contracting Co.*, 308 NLRB 1117 (1992), rely heavily on an earlier Board decision, *Villa Avilla*, 253 NLRB 76, 81 (1980), enfd. as modified *NLRB v. Villa Avilla*, 673 F.2d 281 (1982). *Villa Avilla* was decided prior to the Supreme Court's decision in *Lechmere*, and in a decision issued after *Wolgast*, the Board noted that the limited right of access for union officials to work areas depends on the language contained within the collective bargaining agreement and cannot be read as an exception to *Lechmere*. *See In re Nortech Wash*, 336 NLRB 554, 571-2 (2001). For purposes of these cases, this means that *Wolgast* is inapplicable because the Ark employees were not union officials on the property by virtue of an access clause contained in an existing agreement.

the workers at issue were not employed by Respondent, were off duty and were engaging in consumer handbilling. Consequently, the Complaints in the instant cases should be dismissed in their entirety.

Dated this 16th day of October, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **Respondent New York New York Hotel & Casino's Reply Brief to Charging Party and General Counsel's Pre-Argument Briefs** was filed electronically on October 16, 2007, and additional copies were sent to the Executive Secretary *via* UPS overnight mail, pursuant to Rule 102.114. In addition, other parties were served as follows:

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