

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL	CASES	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
and		
HTH CORPORATION d/b/a PACIFIC BEACH HOTEL,		
and	CASE	37-CA-7470
KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL		
and	CASE	37-CA-7472
PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL		
and	CASE	37-CA-7473
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142		

**ILWU'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE DECISION**

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**ILWU'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE DECISION**

**I.
INTRODUCTION**

On October 28, 2009, Respondents HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC (hereinafter collectively referred to as "Respondents") filed its Exceptions to Administrative Law Judge James Kennedy's Decision on September 30, 2009 (Decision). The Respondents seek the Board's review by raising seventeen (17) exceptions to the ALJ's Decision (See, Exceptions "A" through "Q").

The International Longshore and Warehouse Union, Local 142 (hereinafter "ILWU" or "Union" or "Charging Party"), pursuant to Section 102.46(d)(1) of the National Labor Relations Board's (NLRB) Rules and Regulations, as amended, and hereby submits its Answering Brief Opposing Respondents' Exceptions. It is the position of the Union that the Decision of the Administrative Law Judge is fully supported by credible record evidence and case law with respect to the exceptions filed by Respondents and that the arguments in its Brief are without merit. As correctly found by Administrative Law Judge James Kennedy, Respondents unlawfully withdrew recognition of the Union from about December 1, 2007 and thereby violated § 8 (a)(5) and (1) of the Act; committed numerous unfair labor practices during the period of negotiations for a first contract, warranting all of the remedies ordered by the judge.

Further, the ILWU seeks a Board decision affirming the portions¹ of the Administrative Law Judge James Kennedy's September 30, 2009 Decision to which Respondents have taken exceptions.

¹ The General Counsel and the Union have filed limited cross exceptions to the ALJ's September 30, 2009 Decision.

II. **STANDARD OF REVIEW**

The Boards established policy is not to overrule an administrative law judge's credibility resolutions, unless a clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Drywall Products, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3rd Cir. 1951). The Board's (NLRB) determination to affirm findings of administrative law judge will be upheld when supported by substantial evidence on the record as a whole. ITT Lighting Fixture, Div. of ITT Corp. v. NLRB, 719 F.2d 851 (6th Cir. 1983). With respect to unfair practices, Court of Appeals is bound to affirm administrative factual findings and inferences drawn from facts when they are supported by substantial evidence contained in the record as a whole and such standard of review requires deference to administrative law judge's interpretation of what can be characterized as fairly conflicting accounts of events presented on the record. NLRB v. Brooks Cameras, Inc., 691 F.2d 912 (9th Cir. 1982).

The Board's interpretation and application of the NLRA is entitled to considerable deference and its determinations will be confirmed if the fact findings are supported by substantial evidence, giving special weight to administrative law judge's credibility determinations, and if the Board correctly applied the law, Board's findings would not be disturbed unless a clear preponderance of evidence shows that the findings are incorrect. General Teamsters Local No. 162, Intern. Broth. of Teamsters, Chauffeurs, Warehouseman And Helpers of America v. NLRB, 782 F.2d 839 (9th Cir. 1986).

III.
STATEMENT OF UNDISPUTED FACTS SUPPORTING JUDGE'S
FINDING THAT RESPONDENTS ARE THE SINGLE TRUE-EMPLOYER.

Respondents' exceptions do not contest the following facts:

1. The judge's findings that HTH Corporation, Pacific Beach Corporation, and Koa Management LLC constitute a single employer. (Decision, 4:38-44)
2. Under Article III, §3.1 of the Management Agreement ("MA") Respondents retained "reserved rights" over PBHM's authority of the management services at Pacific Beach Hotel that are the subject to the terms and conditions of the master lease and the loan documents. (GC Exh. 38, p.6).
3. Under Section 3.3.f of the MA, Respondents required PBHM to offer employment to all bargaining unit employees employed by Respondents as of September 7, 2006. (GC Exh. 38, p.9-10)²
4. Under Section 3.3(e) of the MA, Minicola had been kept informed about PBHM's progress in respect to the negotiations with the Union through discussions with PBHM executive Melvin Wilinsky. (Tr. 499).
5. Under Section 3.3(e) of the MA, PBHM assumed all previously negotiated agreements that Respondents had reached with the Union. (GC Exh 38) (Tr. 493).³
6. Under Section 3.3(c) of the MA, if PBHM wanted to hire another person or if they wanted to change the general manager, PBHM needed prior approval from Respondents. (GC Exh. 38)(Tr. 96).
7. Under Section 3.3(d) of the MA, Minicola arranged to have John Lopianetzky, the Food and Beverage (F&B) Director at Pacific Beach Hotel, brought in as the "Consultant," the person in charge of all F&B outlets at a Hotel. (GC Exh. 38)(Tr. 94, 1193, 1959-61).⁴
8. Lopianetzky remained under Respondents' payroll and PBHM was required to reimburse the Respondents for his salary. (Tr. 1959-61).

² The judge's findings refer to Section 3.3.f of the MA, which: "required PBHM to hire all the current hotel staff in their same jobs and with the same rates of pay and benefits. Second, it obligated PBHM to honor the employees' seniority dates. (Decision, 10; 10-12)

³ The judge's findings refer to Section 3.3(e) of the MA as "bearing upon the nature of Respondents approach to collective bargaining." (Decision, 10:13-21).]

⁴ The judge found that § 3.3d of the MA, "obligated PBHM to provide employment to John Lopianetzky" and that "clause 3.3 c gave KOA right to determine who the hotel's general manager was to be."(Decision, 11:38-39; 12:4-5).

9. PBHM agreed to have Lopianetzky as a consultant to advise Bill Comstock (general manager) for a time period of approximately one year to eighteen months. (Tr. 95, 1957-59).
10. In his Consultant role, as Respondents' representative in the F&B Department, Lopianetzky interviewed job applicants and recommended the hiring of employees for various F&B outlets. (GC Exh. 73)(Tr. 1201-03).
11. As the Consultant, reports made on the operations for the F&B outlets would be provided to Lopianetzky on a weekly basis. (Tr. 1139).
12. Under Paragraph 3.3 (a) of the MA, Respondents were responsible for reimbursing PBHM for all wages and contractual benefits of employment including the wage level of pay and vacation, sick leave and other benefits PBHM could offer to the bargaining unit employees.(GC Exh. 38).
13. Under Article X of the MA, the total cost of operating the Hotel must be approved by Respondents through Respondents' review of the annual operating budget.. (GC Exh. 38,p.15).
14. Restrictions were placed on PBHM through cost limitations in operating the Hotel; which could not exceed the approved annual budget by more than 5% or a line item by more than 10% without Respondents' approval. (GC Exh. 38, p.15).
15. Section 25.17 of the MA between Respondents and PBHM contained a confidentiality clause, which required Respondents' consent before PBHM could disclose any information regarding the contents of the MA to the Union. (GC 38, p.36).
16. PBHM attempted several times to secure Respondents' consent to release the contents of paragraph 3.2.c, because it believed that the MA constituted a limit on PBHM's authority, and that PBHM believed that the principles of good-faith bargaining required PBHM to disclose the MA and its contents to the Union. (GC Exhs. 42 & 44).⁵
17. Instead of providing consent to disclose the MA to the Union, Minicola transmitted the August 3, 2007 letter to PBHM, which formally terminated the MA. (GC Exh. 46).
18. Shortly after the Respondents received the Union's April 17, 2007 request, Minicola contacted Mori and informed him that he (Minicola) had been advised by his attorney that Respondents had no obligation to respond because they were not involved in negotiations with the Union. (Tr. 260)

⁵ The judge noted these finding when he referred to the Union's information request "seeking information about which entity had control of the negotiations." (Decision, 14: 38-39). The ILWU had sought information from the Company to substantiate the correct corporate entity which has the control "over contract negotiations as well as terms and conditions of employment for the bargaining unit members represented by the ILWU, Local 142."(Decision, 14: 1-4)(Under score in original.)

19. Following this exchange of letters, and a second information request, Mori still had doubts as to which corporate entity really was the controlling entity or entities of Pacific Beach Hotel. (Tr. 264-67) (GC Exhs. 31 and 33).

20. Mori's doubts were soon confirmed when Minicola threatened an employee with termination following an investigation regarding an anonymous letter which Minicola believed to be a threat to the owner Corinne Hayashi. (Tr. 271-73).

21. Minicola was conducting an investigation on who actually delivered the anonymous letter to the Bell Desk. (Tr. 268-69).

22. Minicola's investigation triggered concerns on Mori's part, which he expressed to PBHM's negotiator Melvin Wilinsky asking why Minicola was being allowed the right to interview or investigate the employees at the Pacific Beach Hotel. (Tr. 268).

23. Mori next asked General Manager Bill Comstock whether PBHM was allowing Minicola to conduct the employer's investigation. Comstock shrugged his shoulders and said, "That's the owner!" (Tr. 272).⁶

24. PBHM executives Barry Wallace and Melvin Wilinsky testified that Minicola decided to replace hallway carpets without consulting with PBHM and that Minicola remained involved in the daily operations of the Hotel through the review of daily revenue reports.(Tr. 417-18; 507-08).⁷

25. On July 30, 2007 and again on August 2, 2007, PBHM sought consent (under §25.5 of the MA) from Respondents for the approval of a contract proposed by PBHM that included proposals on "wages; on substance abuse; vacations; subcontracting and no bumping; "limited use of supplemental employees; agency shop and dues check off, duration of two (2) years; as well as all proposals previously agreed. (GC Exh. 44 & GC Exh. 45).

26. Under Paragraph 3.2(c) of the MA, before PBHM can enter into a binding contract (CBA) with the Union, PBHM would need to seek the approval from Respondents. (Tr. 98-99). (GC Exh. 38, p.8).

27. The clear language of paragraph 3.2.c of the Agreement reserves for the Respondents final approval any contract, of which a CBA between PBHM and the Union would be covered under the MA. (GC Exh. 38, p.8).

⁶ The judge found that Mori's "principal point" was the "that Minicola instituted an independent investigation concerning who wrote it (anonymous letter) and how it got to Ms. Hayashi. (Decision, 16:13-15).

⁷ In addition to the above facts, the judge found that there was also evidence from Barry Wallace that Minicola insisted upon inserting himself into nearly every management decision, which PBHM wished to make. (Tr. 419-20) (Decision, 16:42-51, fn. 13).

28. On August 3, 2007, Respondents refused PBHM's request to consent to a collective bargaining agreement with the ILWU and later terminated the MA on November 30, 2007. (See, GC Exh 46).⁸

29. Minicola's cancellation letter proposed that December 1, 2007 be the transition date where the Owner would once again be the manager of the hotel. (GC Exh. 46)⁹

30. The transition was memorialized in a hotel management and service agreement between Koa Management and Pacific Beach Corporation.¹⁰ It is dated December 1, 2007, and is signed by Corine L. Watanabe on behalf of both entities. (GC Exh. 78).¹¹

⁸ The judge found that under ¶ 3.2(c) of the MA, Minicola/HTH's August 3, 2007, cancelled the Management Agreement. That termination was based upon clause 18.3 of the agreement that said the Owner "may terminate this Agreement for any reason whatsoever in the exercise of its sole discretion at any time from the commencement date to and including June 1, 2008...." (Decision, 18:5-9)

⁹ The judge found that Koa Management was the "lock box" corporation setup for the benefit of UBS bank. It is also the entity which Corine Hayashi used to make the arrangement with Outrigger's PBHM to operate the hotel, even though until that time Pacific Beach Corporation was the operator and subsidiary to HTH. (Decision, 18:10-16)

¹⁰ The judge found that unlike the PBHM Management Agreement, which microscopically detailed all matters, this document consists of only of four pages. In large part it is Watanabe speaking to Watanabe authorizing or limiting Watanabe's operation of the Hotel. (Decision, 18:18-23)

¹¹ Arguably, the judge's factual determination that Respondents are the single "true employer" is akin to a determination of whether a corporation possesses the indicia of control to qualify as a joint employer, since it involves a factual issue. See, e.g., Boire v. Greyhound Corp., 376 U.S. 473,481 (1964). Here, the judge chose to find Respondents as the single "true-employer"; however under the circumstances, the judge could very well have found that Respondents to be a "joint-employer." Considering that Respondents have challenged the judge's findings of a single "true-employer" and the Board will conduct its own review of the same set of facts; it is probable that the Board may instead find that Respondents qualify as a "joint-employer."

The Board will find that a joint employer relationship exists between two or more separate business entities where those entities "share or codetermine those matters governing the essential terms and conditions of employment." Laerco Transportation and Warehouse, 269 NLRB 324, 325 (1984) (citing cases). To establish this relationship, there must be evidence that one employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction" of the other employer's employees. Id. The question of joint employer status turns on the facts of each particular case. Southern California Gas Co., 302 NLRB 456, 461 (1991). The Ninth Circuit Court of Appeals has determined that "[a] joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining." Tanforan Park Food Purveyors, Council v. NLRB, 656 F.2d 1358,1361 (1981); Sun-Maid Growers of California v. NLRB, 618 F.2d 714,717-18 (9th Cir. 1979). Here, the Board is directed to "Statement of Undisputed Facts

IV.
ARGUMENT

A. THE JUDGE CORRECTLY FOUND AND CONCLUDED THAT RESPONDENTS UNLAWFULLY WITHDREW RECOGNITION ON DECEMBER 1, 2007 VIOLATING §§ 8(A)(5) AND (1) OF THE ACT.

Exceptions A through D, Exception I: These five exceptions relate to the findings and conclusions concerning the judge's order for Respondents to recognize and bargain with the ILWU. Contrary to Respondents exceptions, Administrative Law Judge James Kennedy (hereinafter "judge") correctly ordered the Respondents to recognize and bargain with the ILWU, considering the judge's findings and conclusion that Respondents unlawfully withdrew recognition of the Union from about December 1, 2007 and thereby violated § 8 (a)(5) and (1) of the Act. See, Decision at 45:42-44. (hereinafter "Decision at page-line").

1. Respondents' Contend That The Judge's Rulings Demonstrate Bias In Favor Of The General Counsel.

In support of Exceptions A and B, Respondents contend that the judge's ruling at the hearing of not allowing employees to testify on a union disaffiliation petition demonstrated bias of "already making up his mind" in favor of the General Counsel and ordering Respondents to recognize and bargain with the Union." See, Brief in Supp. of Exceptions ("BSE") p.4, footnote 2. Specifically, Respondents argue, "it appears the judge had tipped his hand that he already planned to rule against the Respondents." Id.

Further, in Exceptions A and B, Respondents cite to the Judge's ruling of not

Supporting Judge's Finding That Respondents Are The Single True-Employer," at pps.3-6 of this Brief.) and supported by the arguments and case law referred to above.(See, SECTIONS C.1 to C.8 at pps. 25 to 35 of this Brief.) to establish a "joint employer" relationship where Respondents have retained and exercised authority in the operation of the hotel and exercised control over wages and other employment conditions which are within the area of mandatory collective bargaining

allowing testimony regarding Hotel employees' anti-union sentiment on the issue of whether the ILWU had lost a majority support in the work force. (BSE at 5-8).. Respondents cite to an "offer of proof" that employees were prepared to testify that they were "upset or displeased" with the ILWU because of the boycott and some employee decided to create and circulate a petition, signed by 62% of the employees, that denounced support of the ILWU. (BSE at 6-11). Respondents excepted to the judge's ruling that such evidence was "irrelevant" despite previously allowing a petition signed by 70% of hotel employees' in or about April 2006. (BSE at 8).

A second and related argument was modified in Exception C, when Respondents allege that the Judge's ruling of not allowing an "'un-coerced' disaffiliation petition" is "befuddling," "particular" and "one-sided" because as mentioned in the preceding section, that was "exactly the type of evidence Respondents were seeking to admit into the record." (BSE at 11-13). In Exception C, Respondents repeated its argument that several employees were prepared to testify that the majority of hotel employees have become disgruntled by the ILWU's antics (i.e. the boycotts), and therefore did not want to be represented by the ILWU. Id.

2. Respondents' Exceptions Raise An Untimely Challenge Of Bias.

The Board should reject the Respondents' Exception A - C based upon alleged bias that the Judge had "tipped his hand that he already planned to rule against" the Respondents and that the judge's rejecting any evidence of the Union' loss of majority support is "befuddling," "particular" and "one-sided" for two reasons.

First, it is untimely. The Respondents alleged bias for the first time in its brief in support of exceptions (BSE) to the Judge's Decision. However, under § 102.37 of the Board's Rules and Regulations, the Respondents were required to first raise its bias contention to the

judge and move that he disqualify himself and withdraw from the proceedings. See, Pioneer Natural Gas Co., 253 NLRB 17 fn. 2 (1980). Having failed to do so, Respondents are precluded from raising the issue now in its Exceptions.

3. Respondents' "Offer Of Proof" Failed To Establish A Lawful Withdrawal Of Recognition Under Levitz Furniture.

Second, even assuming that the Respondents may initially raise the issue of bias in its exceptions, the Board should find no merit in its contention. A careful review of the record shows that the judge allowed Respondents' counsel (Mr. Sanada) to make an elaborate and detailed pro-offer concerning whether Respondents satisfied Levitz Furniture Co. of the Pacific, Inc., 333 NLRB 717 (2001). Transcript of the hearing at pps. 1830 through 1853 (hereinafter "Tr" and page "_"). (See, also Respondents' Exhibit 12). Respondents were allowed to argue and to prove that the Union had in fact lost majority support at the time the Respondents withdrew recognition. Levitz Furniture, at 725. Respondents offered no evidence that existed at the time of the unlawful withdrawal of recognition in December 2007 (Tr. 1847-50). If the Respondent cannot prove this, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate §8 (a)(5). Levitz Furniture, at 725. During the exchange between Respondents' Counsel (Mr. Sanada) and the judge it became painfully clear that Respondents could not identify any Hotel employee to offer proof of the Union's actual loss of majority support prior to December 3, 2007. (Tr. 184-53). Respondents simply failed to produce evidence showing that an actual numerical majority of bargaining unit employees did not support the Union prior to December 3, 2007. In other words, Respondents failed to make a showing of "actual loss" or "actual numerical loss" of the ILWU's majority support as a December 3, 2007. Id.

In reference to the Respondents' "offer of proof" at the hearing, the judge noted:

Connected to that aspect of Board law, Respondents sought to prove a loss of majority by anecdotal evidence concerning the number of employees who actually participated in the demonstrations outside the hotel. See Mr. Sanada's offer of proof in volume XI; he also proffered in RExh. 12 and 12(a) (found in the Rejected Exhibit envelope), evidence to the effect that the employees perceived some sort of "general consensus" that they were against the Union's boycott and therefore against the Union. Such evidence is entirely conjectural and in any event is belied by Respondents' own actions when they (unlawfully) interrogated its employees in April 2008. The numbers it unearthed at that time did not come close to disestablishing the Unions' majority status, even 5 months after it withdrew recognition. Moreover, it never conducted a lawful poll, nor was it presented with an uncoerced disaffiliation petition.

For those reasons, I rejected the offer of proof and the evidence supporting it and barred Respondents from presenting the hearsay evidence some of its employee witnesses might have provided. More specifically, see Port Printing Ad and Specialties, 344 NLRB 354,357-358 (2005), enfd. per curiam 192 Fed.Appx. 290 (5th Cir. 2006). (Decision, 37: 4-17)(emphasis added.)

Respondents also contend that it had a right to rebut the presumption of "taint" and that it could show "unusual circumstances" which led the employees to sign the anti-union petition and rely upon Lee Lumber, 322 NLRB 175 (1996).(BSE at 10-11). Respondents contend that the "unusual circumstances" were boycotts instigated by the Union and employees reaction to such boycotts. (Id.). However, Respondents have failed to recognize that in Lee Lumber, 332 NLRB at 178, fn. 24; the Board and Courts have construed "unusual circumstances" that would permit a challenge to a newly certified union during the certification year "narrowly," only to three(3) circumstances: (1) a union dissolved or became defunct;(2) a schism; or (3), the size of a bargaining unit fluctuated radically within a short time. See, Ray Brooks v. NLRB, 384 U.S. 96, 98-99(1954). None of these narrow exceptions of "unusual circumstances" exist in the present case. For these reasons, the Board should reject Respondents' contentions that the "boycotts" instigated by the Union qualified as "unusual circumstances" allowing for employees to testify on the disaffiliation petition.

4. Respondents' Offer Of Evidence Was Not Sufficiently Specific To Prove That The Union Had Actually Lost Majority Support As Of December 1, 2007

Exception I raises a related challenge to the judge's finding that Respondents' unlawfully withdrew recognition of the Union on December 1, 2007. (Decision, 43:42-44). In this exception, Respondents excepted to the judge's findings that it withdrew recognition from the Union based upon generalized statements of employees speaking to Mr. Minicola that they did not want to be represented by the Union based upon a large contingency of employees who had voted at the 2005 election for the Hotel and not the Union. (BSE at 29). Keeping in mind that Respondents withdrew recognition of the Union from or about December 1, 2007, the judge properly discounted further proof offered by Respondents at the hearing based on "post-withdrawal" generalized testimony of antiunion employees made to Minicola (Tr. 2196-04), and an anti-union petition submitted to Minicola by hotel employees sometime around June 2008. (Tr. 1835-47).

A careful review of the record establishes that the judge was correct in ordering the Respondents to recognize and bargain with the ILWU and concluding that that Respondents unlawfully withdrew recognition of the Union from about December 1, 2007 and thereby violated § 8 (a)(5) and (1) of the Act. (Decision, 45:42-44). The judge had determined that Respondents' proffered evidence was not sufficiently specific to prove that the union had actually lost majority support as of December 1, 2007, and therefore appropriately rejected it as irrelevant. Levitz Furniture, 333 NLRB at 725.

5. Belief That Employees Did Not Support The Union In August 2005 Was Properly Rejected By The Judge.

Further, no error was committed by the judge when he rejected Respondents' attempt through the testimony of Robert Minicola to establish a "good faith doubt" as to the

union's majority status. (Tr. 125). Minicola also claimed that his observations at a union rally, formulated a part of the reason for his (good faith) doubt as to the employees' support for the Union. (Tr. 133-34).

As background, the Union filed its petition in 2002 and the first election was set aside by the Board because it found that Respondents had engaged in objectionable conduct by coercively interrogating employees and maintaining an overly broad no solicitation policy.¹² The Union prevailed in the second election, after the Board again found objectionable conduct through Respondents' actions of conferring economic benefits during the critical period and directed that certain challenge ballots be counted.¹³ After the challenge ballots had been opened and counted, a revised tally issued showing that the Union had won by one vote. Accordingly, on August 15, 2005, the Regional Director issued a certificate of representative in favor of the Union. (Decision, 3:33-43).

Minicola's bitter feelings of defeat festered within and formulated the basis for his testimony three and a half (3 ½) years later in the hearings when Minicola testified that he believed the true majority of the workers do not show up to vote. (Tr. 124) Minicola's belief was based upon "the union winning (the election) by one vote." *Id.* As the judge correctly found, there is no dispute that Minicola was referring to a time period 3 ½ years ago, in August 2005 when the Union was certified and not when Respondents withdrew recognition from about December 1, 2007. (Decision, 43:42-44).

In the latter of part of 2005 negotiations were held with Respondents through the end of December 2006. Contract negotiations continued with PBHM through October 31, 2007.

¹² HTH Corporation d/b/a Pacific Beach Hotel, 342 NLRB 372(2004)

¹³ Pacific Beach Corporation, 344 NLRB 1160 (2005).

Respondents withdrew recognition on December 1, 2007. Respondents argue that it has rebutted the presumption of majority support, and contended at the hearing that it has “demonstrated a good faith, reasonable doubt” about the ILWU’s continued majority support, consistent with Allentown Mack Sales & Service v. NLRB, 522 U.S. 359, 361 (1998). (Tr. 1844-46). However, Minicola cited none during his conversation with ILWU President Fred Galdones on December 3, 2007. (Tr. 577-78). Further, Respondent provided no evidence that existed at the time of the unlawful withdrawal of recognition from or about December 1, 2007 (Tr. 1847-1850). The record evidence submitted through Minicola’s testimony did not establish a valid basis sufficiently specific to prove that the Union had actually lost majority support as of December 1, 2007 and were simply irrelevant and appropriately rejected by the judge. Levitz Furniture, 333 NLRB at 725.

Accordingly, consistent with NLRB precedent, the Board should affirm the judge’s findings that Respondents had no proper evidence either through the elaborate and detailed pro-offer by Respondents’ Counsel (See, Respondent Exh. 12 rejected by the Judge) or through Minicola testimony on which to base a lawful withdrawal of recognition from the Union from about December 1, 2007 and therefore appropriately rejected as irrelevant. Levitz Furniture, 333 NLRB at 725. On this point, the Board will affirm an evidentiary ruling of an administrative law judge, unless that ruling constitutes an abuse of discretion. PPG Industries, 339 NLRB 821, 821 (2003)

Consequently, the judge correctly concluded that at no time during August 15, 2005 and December 1, 2007, has the Union lost its majority status in [the] bargaining unit. (Decision, 43:18-20). Also, the judge correctly concluded that at no time between August 14, 2006 (the end of the certification year) and December 1, 2007 have Respondents offered to prove

that the Union had actually lost its majority status. (Decision, 43:22-24). Further, the judge correctly concluded that on December 1, 2007, Respondents withdrew recognition of the Union as the §9(a) representative of the employees in the bargaining unit and thereby violated §8 (a)(5) and (1) of the Act. (Decision, 43:42-45).

6. Respondents Are “Time-Barred” To Challenge The Union's Original Majority Status.

Exception D: To the extent that Respondents are questioning the ILWU’s original majority status in Exception “D”(BSE at 13-14) and that the judge erred in finding that the Union has represented a majority of hotel employees since August 15, 2005; Respondents’ contentions rests upon a distortion of facts. First, Respondents’ exception is time-barred by Section 10(b) of the Act. 29 U.S.C. §160(b). The case law interpreting Section 10(b) requires that any challenge to the initial majority status of a union be made within six months of recognition by the Board or the employer. See, Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 423(1960).

Second, the record supports the judge's findings that there existed no reliable evidence to support Respondents’ claim that the Union had lost a majority support of hotel employees at the time of Respondents withdrawal of recognition. As stated above, Respondents simply failed to produce evidence showing that an actual numerical majority of bargaining unit employees did not support the Union prior to December 1, 2007. Even if employees testified that they did not want to be represented by the Union and their sentiment was confirmed in a “post-withdrawal” antiunion petition signed by 62% of employees, some time in June 2008(BSE at 6-8); such evidence is inadequate to support a lawful withdrawal of recognition in December 2007 under Levitz Furniture, supra. In other words, the judge was correct in making this finding, and Respondents’ Exception D is without merit.

Therefore, by following the Board's analysis, expressed in Levitz Furniture Co., 333 NLRB 717, 725 (2001),¹⁴ the judge concluded that Respondent violated Section 8(a) (5) by unlawfully withdrawing recognition from about December 1, 2007. (Decision, 43:42-45) The record supports the judge's recommended order "extending the certification period by one full year" and ordering Respondents to "immediately resume recognition of the Union as the exclusive representative of the employees certified in the bargaining unit and, upon the Union's requests, to bargain in good faith." (Decision 45:41 – 47). As such, Respondents' Exceptions A through D and Exception I should be rejected in the entirety as all being without merit.

B. THE JUDGE CORRECTLY FOUND AND CONCLUDED THAT RESPONDENTS ENGAGED IN BAD FAITH IN VIOLATION OF § 8 (a) (5) OF THE ACT.

Exception E and Exception G: Exception E is to the judge's findings that Respondents bargained in bad faith. (BSE at 16-18). Respondents argue that they met with the Union for approximately 36 negotiation sessions and reached tentative agreement on 170 different issues and when negotiations ended only a few issues were left unresolved. (BSE at 16). Respondents then cited to the judge's reference to the "ground rules" for negotiations which were never stated to be unlawful and then argued that it was incongruous for the judge to find that Respondents bargained in bad faith. (BSE at 116-17). Respondents then focus upon negotiations dealing with the "open shop" provision has been presented for good reason, and rejected by the union, which does not evidence bad faith bargaining. (BSE at 17). Respondents completely miss the point with its arguments here.

¹⁴ The Board applies the Levitz Furniture standard even in situations involving the refusal of a Burns successor to recognize and bargain with an incumbent union. Siemens Building Technologies, Inc., 345 NLRB 1108, 1108 & fn. 5 (2005). If a successor employer refuses to recognize and bargain with an incumbent union, the employer must demonstrate that the union lost actual majority support. Id.

Initially, the “good faith” bargaining analysis begins with Section 8(d) of the Act, which defines the duty to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.” Good-faith bargaining “presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” NLRB v. Insurance Agents’ Union, 361 U.S. 477, 485 (1960)

1. Respondents’ Never-Changing Effort To Impose Unlawful Proposals Is Strong Evidence Of Bad Faith.

A careful review of the record show that Respondents’ exception to the judge’s findings and conclusions of bad faith bargaining fails to focus upon “the strong evidence that Respondents were seeking to evade their obligation to negotiate in good faith” as found by the judge. (Decision, 37:19). The judge specifically noted:

There are several factors in play concerning this point. First is its never-changing effort to impose an illegal recognition clause on the Union, forcing it to abandon its lawfully won bargaining unit description. This is closely connected to its management rights clause and its virtually absurd dispute resolution proposals. (Decision, 37:21-24).

The record evidence referred to by the judge starts on January 5, 2006, when Robert Minicola handed out the Respondent's contract proposals at the collective bargaining session (GC EXH. 19)—(Tr. 211). Dave Mori identified the following sections and confirmed that Respondents never changed their initial proposals throughout the entire bargaining sessions for recognition; management rights; open shop, union dues and complaint procedures from January 2006, which never changed through December 2006. (Tr. 211-13, 230, 233-34). (See, GC Exh. 19 compared with GC Exh. 24). Regarding the Complaint Process, Minicola called it a

complaint procedure without arbitration. (Tr. 213). Concluding on December 7, 2006, Minicola presented the Respondent's proposals that consisted of the very same proposals submitted back in January 2006 regarding recognition, open shop, dues deduction, and management rights. Within a month, management of Pacific Beach Hotel was contracted to the Outrigger Group (PBHM) effective January 1, 2007. (Tr. 237-38).

In Public Service of Oklahoma v. NLRB, 318 F.3d 1173 (10th Cir. 2003), the court enforced the Board's decision and order in Public Service Company of Oklahoma, 334 NLRB 487 (2001) finding a violation of §8(a) (5), where the employer's contract proposals "would have given the employer extraordinarily broad control over employee benefits and discipline and discharge." The Board found that the employer's proposals "taken as a whole required the union to cede substantially all of its representational function." The Board concluded that the employer violated the Act by "insisting on these proposals throughout the negotiation as a price for any collective bargaining agreement." 334 NLRB at 507. See also, Capitol Steel & Iron Co. v. NLRB, 89 F.3d 692, 696(10th Cir. 1996) (explaining an employer may violate its duty to bargain in good faith if its conduct "reflects a design to undermine the Union in its role as the employees' sole bargaining representative").

Therefore, given this "never changing" effort to impose an illegal recognition clause upon the ILWU closely connected with its management rights clause as found by the judge (Decision, 37:22-25), clearly evidenced bad faith bargaining on the part of the Respondent and, therefore, a violation of Section 8(a) (5) and (1) of the Act. See Borden, Inc. v. NLRB, 19 F.3d 502, 512 (10th Cir. 1994) (where the court noted that "rigid adherence" to disadvantageous proposals may provide a basis for inferring bad-faith), Colorado-Ute Electric Ass'n v. NLRB, 939 F.2d 1392, 1405 (10th Cir. 1991) (noting that maintaining a "rigid position" throughout

negotiations... could potentially be the basis for a finding of bad faith).

2. Evidence Of Minicola's Continuous Reference To The Union's One-Vote Win Demonstrates Respondents' Intent Never To Reach An Agreement.

Further evidence of Respondents' intent to never reach an agreement with the Union is clearly established in the record. At the hearing, Minicola admitted that he brought up the fact that the union won by a single vote upon his belief that the actual majority were not known, because 25% of employees did not vote. (Tr. 124). Additionally, Minicola repeated his statement to almost anyone who would listen. At the first meeting with the union negotiator Dave Mori, Minicola stated to Mori that the union had "won by one vote." (Tr. 225). Minicola repeated the statement at every bargaining session, up to April 27, 2006, when Mori presented to Minicola an employee petition was signed by a majority of employees. (Tr. 225-26). Barry Wallace also testified that he heard Minicola refer to the one vote margin by which the Union won the representation election. (Tr. 314).

Outrigger's Melvyn Kaneshige testified that while in a May 19, 2006 negotiations with Respondents over a joint venture and/or a management agreement, that he had taken notes of Minicola's statements that Respondents had lost by one vote. (Tr. 1050-51) (GC Exh. 77). In addition, Kaneshige's notes reflect Minicola's statement that the certification year ended in August 2006 and there could be a move to decertify the Union. (Tr. 1057-58)(GC Exh. 77). Also at this meeting, Minicola stated that hotel owner Corine Watanabe was "pissed off" with the employees, because she felt the employees had been disloyal to her and her family for voting for the union. (Tr. 1050)(GC Exh. 77). All of these facts were referred to by the judge in his findings of fact. (Decision, 11:19-29).

The fact of Minicola's never ending reference to the Union's winning the

representation election by only one vote, clearly illustrates union animus and bad faith. Hydrotherm, 302 NLRB 990, 995. (Observing that in opposing union's proposals, employer representative pointed to a "slender margin" of union's victory ... "as simply a continuation of the campaign it had been waging for 4 years to keep the union out of the plant entirely.")

3. Respondents' Management Rights and Union Recognition Proposals Further Demonstrate Evidence of Bad Faith.

Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. Reichhold Chemicals, 288 NLRB 69 (1988), aff'd. in relevant part, 906 F.2d 719 (D.C. Cir. 1990), cert. denied, 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. A-1 King Size Sandwiches, 265 NLRB 850, 859-861 (1982), enf'd., 732 F.2d 872, 877 (11th Cir. 1984). cert. denied, 469 U.S. 1035 (1984); NLRB v. Johnson Mfg. Co. of Lubbock, 458 F.2d 453, 455 (5th Cir. 1972); Eastern Main Medical Center, 658 F.2d 1, 12 (1st Cir. 1981), enf'g., 253 NLRB 224, 246 (1980); South Carolina Baptist Ministries, 310 NLRB 156, 157 (1993; see also Logemann Bros Co., 298 NLRB 1018, 1021 (1990).

Here, Respondents submitted the following two (2) contract proposals, which clearly demonstrate that the Respondents could not seriously have expected meaningful collective bargaining.

Section 1. UNION RECOGNITION

The Employer has and shall maintain at any and all times its sole and exclusive right to unilaterally and arbitrarily change, amend, and modify the certified bargaining unit set forth in Case 37-RC-4022, and any and all hours, wages, and/or other terms and conditions of employment at-will.

The judge determined that Respondents' proposal identified above:

"... eliminates in its entirety, the language of the Board certification . . . This language clearly seeks to deprive the union of the certification itself and to assign the scope of the unit to its sole discretion. . . . Therefore, the proposal is, from the very outset, a rejection of collective bargaining. *Standard Register Company*, 288 NLRB 1409, 1410 (1988) (insistence to impasse on deletion of unit description from collective bargaining contract violates §8(a)(5)); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 551 (1973), *enfd.* in relevant part 495 F.2d 1384 (8th Cir. 1974) (holding that the bargaining representative is entitled to have description of the appropriate unit embodied in the contract.) Also, *Bremerton Sun*, 311 NLRB 467, 468 and 474 (1993). (Decision, 5:25-31; 6: 1-6)

Respondents also submitted the following proposal on management rights:

Section 1.A MANAGEMENT RIGHTS

1.A.a The Hotel has and shall retain the sole and exclusive right to manage its operation and direct its work force at will. All management rights, powers, authority and functions, to manage its operations and direct the working force, regardless of frequency or infrequency of their exercise, shall remain vested exclusively in the Hotel. It is expressly recognized that such management rights, powers, authority and functions include, but are not limited to, the right to select, hire, discipline and discharge employees at-will; transfer, promote, reassign, demote, layoff and recall employees; establish, implement, and amend rules and regulations, and policies and procedures; determine staffing patterns; establish and change work hours and work schedules; assign overtime; assign and supervise employees; establish service standards and the methods and manner of performing work; determine and change the duties of each job classification; add or eliminate job classifications; determine and change the nature and scope of operations; determine and change the nature of services to be provided and establish the manner in which the Hotel is to be operated; and any and all other functions of management. The Union shall not abridge these rights or any residual rights of management. The Union shall not directly or indirectly oppose or otherwise interfere with the efforts of the Hotel to maintain and improve the skill, efficiency, ability and production of its work force, the quality of its product, or the method and facilities of its services.

1.A.b It is agreed and understood between the parties hereto that the management rights, powers, authority, and functions referred to herein shall remain exclusively vested in the Hotel except insofar as specifically surrendered by express provisions contained in this Agreement (See GC Exh. 19 and GC Exh. 24). (Emphasis added).

By examining both of the above proposals (together with a Complaint Procedure found in section 24) submitted by the Respondents, the judge correctly determined “there is strong evidence that Respondents were seeking to evade their obligation to negotiate in good faith.” (Decision, 37:20-21). It became obvious to the judge that the Respondents sought to undermine the ILWU’s ability to function as employees’ bargaining representative and to leave the employees no better off than without a union. “[T]he unlawful refusal of an employer to bargain collectively with its employees’ chosen representatives disrupts the employees’ morale, deters their organizational activities, and discourages their membership in unions.” Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944). Both proposals would have effectively eliminated the ILWU’s representational rights of employees at the Pacific Beach Hotel and clearly evidenced that the Respondent violated its obligation to “bargain in good faith” with the ILWU over the terms of a new collective bargaining agreement and, therefore, a violation of Section 8(a) (5) and (1) of the Act. See, e.g., Summa Health System's, 330 NLRB 1379, 1393-94 (2000)(unilateral discretion to determine wages and unrestrained license to dissipate bargaining unit work seriously denude the union of its significance as employee representative).

4. Sudden Cancellation Of The Management Agreement Evidences Bad Faith Bargaining.

Exception G: This exception is to the judge’s findings that Respondents canceled the management agreement with PBHM for antiunion purposes. (BSE at 21-27). Respondents cite to monthly meetings with PBHM to review monthly financial reports and revenue generated from visitors arriving from the mainland United States, international travel and Japan. (BSE at 22). Respondents also cite to the deteriorating business arrangement with PBHM, beginning with the revenue projections made by the PBHM, Stellax issue, low occupancy numbers, low

revenue from room reservations, issue of 2.5% commission to the Japan office; all causing Minicola to be “not satisfied with PBHM’s new budget proposal.” (BSE at 23-25). However, the judge discounted each of the above contentions in his detailed findings (Decision, 37-38), and found that Minicola’s testimony must be “regarded as disingenuous” in so far as being the reasons for “canceling the PBHM agreement.” (Decision, 38:21-22)

Further, Respondents make no mention of the judge's findings regarding PBHM’s negotiations, which were coming to terms with the ILWU and “seeking permission” from Respondents to enter into a collective bargaining agreement with the Union. For example, the critical record evidence leading to the judge’s findings that Respondents canceled the management agreement with PBHM for antiunion purposes began as soon as:

...PBHM began asking for permission to enter into a collective bargaining agreement, Respondents canceled its arrangements with PBHM, effectively sabotaging all the progress PBHM had made. Indeed, the entire concept of bringing PBHM into the situation as some sort of surrogate would appear to be bad faith in and of itself. (Decision, 37 :26-29).

Based upon the record evidence, the judge found “bad faith bargaining” from the sudden cancellation of the MA after Respondent learned that PBHM was close to reaching an agreement for a bargaining agreement with the ILWU. Regarding Minicola's assertion that the Oceanarium fish tank incident involving a massive loss of Mrs. Watanabe's beloved tropical salt water fish collection to be a valid reason for terminating the MA (Decision, 37: 42-48); the judge found that the incident occurred in May, and that by August 3, 2007 when Minicola canceled the M.A, the issue was essentially resolved, even if not forgotten. (Decision, 37:49-51). Further, the judge did not credit Minicola's explanation that the fish tank incident was not in his affidavit because “... that the investigator did not ask him the question”; instead determined it to be “lame in the circumstances. If it had been a significant factor in the decision to cancel the management

agreement, Minicola would not have omitted it.”(Decision, 38:1-3). Accordingly, the judge concluded that the fish tank incident had little to no bearing on Respondents’ decision to terminate the PBHM management agreement. (Decision, 38:6-7). The other two reasons, PBHM’s supposed to finagling the budget, and its failure to timely install the Stellax reservation system were “unimpressive” as well. (Decision, 38:12-43).

The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable.” Overnite Transp. Co., 335 NLRB 372, 375 (in part finding 8(a) (5) violation supported by circumstantial evidence); see also V&S ProGalv, Inc. v. NLRB, 168 F.3d 270, 277 (“circumstantial evidence, such as the presence of the envelope containing the decertification petition appearing in Griggs’ truck, may be considered substantial evidence sufficient to support a finding of a § 8(a) (1) violation.”); Victor Mfg. & Casket Co. v. NLRB, 174 F.2d 867 (7th Cir. 1949) (finding Congress gave NLRB power to draw inferences from the facts and to appraise conflicting and circumstantial evidence); NLRB v. Blevins Popcorn Co., 117 LRRM 2425 (D.C. Cir. June 29, 1984) (finding bad faith can be shown by circumstantial evidence). Contrary to Respondents’ contention the judge properly discounted each and every proffered economic based concern raised by Respondents as follows:

In sum, the reasons as cited by Respondents for canceling the management agreement are not especially persuasive. Standing alone, one might consider them to be justifications. However, they did not stand alone. The elephant in the room was the Union.

(Decision, 38: 44-47).

5. Refusal Of PBHM's Request To Consent To A CBA Evidences Bad Faith When Viewed In The Totality Of Circumstances.

Respondents exceptions, not contest the facts that on August 3, 2007, Respondents refused PBHM’s request to consent to a collective bargaining agreement with the ILWU and later terminated the Management Agreement (hereinafter “MA”) on November 30,

2007. (See, GC Exh 46). Earlier, on July 30, 2007 and again on August 2, 2007, PBHM sought consent (under §25.5) from Respondents for the approval of a contract proposed by PBHM that included proposals on “wages; on substance abuse; vacations; subcontracting and no bumping; “limited use of supplemental employees; agency shop and dues check off, duration of two (2) years; as well as all proposals previously agreed. (See, GC Exh. 44 & GC Exh. 45). Under Section 3.3(e) of the MA, Minicola had been kept informed about PBHM’s progress in respect to the negotiations with the Union through discussions with PBHM executive Melvin Wilinsky. (Tr. 499). Upset with losing control of PBHM, Minicola sought to terminate the Management Agreement so that PBHM could not reach the final terms for a collective bargaining agreement with the ILWU. (See, GC Exh. 46). Respondent’s termination of the MA “without consultation with the ILWU would constitute a breach of Respondents’ duty to bargain in good faith.” See, Ref-Chem Company and El Paso Products Co., 169 NLRB 376,380 (1961).

As correctly noted by the judge:

. . . PBHM was succeeding too well with the Union. It was about to enter into an agreement that would last at least two years and would give the Union significant authority over the manner in which Respondents dealt with its employees. That had been intolerable since the one-vote win in 2005 and remained so in 2007.
(Decision: 38: 47-50,39:1)

Thus, when the “totality” of Respondents’ conduct as examined by the judge, beginning in January 2006 through December 2006 and continuing through the November 30, 2007 termination of the MA; the “total” picture of “bad faith bargaining” is revealed. The “total” record evidence correctly, led the judge to find bad faith bargaining in violation of §8(a) (5) of the Act. See, e.g. Overnite Transportation Co., 296 NLRB 669, 671 (1989), enfd., 938 F.2d 815 (7th Cir. 1991); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984) (In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the

totality of the party's conduct, both at and away from the bargaining table.).

Accordingly, Exception E and Exception G are both without merit and both should be rejected by the Board. The judge correctly found that beginning in January 2006 and continuing through the end of December 2006 Respondents' bargained collectively with the Union with no intention of reaching an agreement, evidencing "bad faith bargaining" in violation of § 8(a)(5) of the Act. The judge also correctly found that Respondents canceled the management agreement with PBHM for antiunion purposes evidencing "bad faith bargaining" in violation of § 8(a)(5) of the Act. Both exceptions should be rejected as lacking merit.

C. THE RECORD EVIDENCE OF RESPONDENTS' SCHEME TO WASH THE UNION FROM THE HOTEL ESTABLISHES RESPONDENTS AS THE SINGLE TRUE EMPLOYER OBLIGATED TO BARGAIN WITH THE UNION

Exceptions F and Exception H: These two exceptions relate to the findings and conclusions that Respondents constitute a single employer under the Act and are jointly and several liable for the unfair practices found herein. In Exception F: Respondents argue that the judge erred by finding that Respondent used PBHM as a middleman as part of a "scheme" to thwart the Union. (BSE at 19). In Exception H, Respondents argue that the judge erred when finding that Respondents were obligated to bargain with the union while PBHM was under contract to operate the hotel. (BSE at 28).

1. Respondents' Order Of A Seamless Transition Evidences Control Over Initial Terms And Conditions Of Employment.

Contrary to Respondents' exceptions, the judge correctly found that Respondents retained control as the single "true employer" of bargaining unit employees at the Pacific Beach Hotel. (Decision, 13: fn. 10; 16:19-20). The record evidence includes Respondents' Management Agreement (GC Exh 38) creating KOA Management, LLC a "mystery" entity, which secretly

imposed upon PBHM contractual limitations demonstrating control over the operation of the Hotel and in negotiations with the union. (Decision, 10:2-8).

Here, the Management Agreement (hereinafter “MA”), established Respondents’ “reserved right” under Article III, §3.1 to exercise control over PBHM’s authority of the management services at Pacific Beach Hotel that are the subject to the terms and conditions of the master lease and the loan documents. (GC Exh. 38, p.6). From the beginning, Respondents dictated the initial terms and conditions requiring a seamless transition by the hiring of all Hotel employees when PBHM first began managing the Hotel on January 1, 2007. Under the MA, Respondents required PBHM to offer employment to all the bargaining unit employees employed by Respondents as of September 7, 2006, and dictated all of the initial terms and conditions of employment for those employees. Section 3.3.f of the MA states:

Owner and Operator further agree as follows:

Operator agrees to offer employment to the BU Employees at their respective same or equivalent positions and at their respective same or equivalent rate of pay and benefits;

Operator agrees to honor all seniority accrued prior to the Commencement Date by the BU Employees employed for the purposes of layoff, transfers, recalls, downgrading, leave of absence, medical and dental plans, vacation entitlements, sick leave entitlements and work opportunity; i.e., Operator shall honor the BU Employee's date of hire with Owner for such purposes;

(GC Exh. 38, p.9-10)

By requiring PBHM to hire all of the Hotel's bargaining unit employees through a seamless transition and to maintain the status quo with regard to the terms and conditions of their employment, Respondents dictated the terms and conditions of employment of the bargaining unit employees thereby continuing to exercise control over them. The judge’s findings refer to these evidentiary facts, which:

“required PBHM to hire all the current hotel staff in their same jobs and with the same rates of pay and benefits. Second, it obligated to PBHM under the employees’ seniority dates.

(Decision, 10; 10-12)

2. Retention Of Ultimate Authority To Approve Or Reject Any CBA Evidences Control Over Contract Negotiations.

Respondents’ loan document with the UBS/Wachovia required that Respondents retain control over contract negotiations and control over the operations of the Pacific Beach Hotel because “approval” was needed on all major contracts. (Tr. 104-05, 1946-47). Respondents retained control over the continuing terms and conditions of employment for all Hotel bargaining unit employees, because the MA gave it ultimate authority to approve or reject any proposed collective bargaining agreement. By retaining this ultimate authority under the MA, Respondents also retained control over contract negotiations.

The judge's findings correctly refer to the record evidence that established further limitations on PBHM’s authority in contract negotiations with the Union. For example, Paragraph 3.2(c) of the MA required that before PBHM can enter into a binding contract (CBA) with the Union, PBHM would need to seek the approval from Respondents. (Tr. 98-99). PBHM was required to obtain approval from Respondents before entering any agreement for any contract which: (i) terms goes beyond one (1) year in length, (ii) or if the costs of the contract exceeds the amount of \$350,000, or (iii) that extends beyond the initial term and cannot be terminated upon thirty (30) days' notice by PBHM. (Tr. 99-100, 1957-1959) (GC Exh. 38, p.8). The clear language of paragraph 3.2.c of the Agreement reserves for the Respondents final approval any contract, of which a CBA between PBHM and the Union would be covered under the MA.

Also, PBHM executive Melvin Wilinsky kept Minicola informed about PBHM’s

progress in respect to the negotiations with the Union. (Tr. 499). Under Section 3.3(e) of the Management Agreement, PBHM assumed all previously negotiated agreements that Respondents had reached with the Union. (GC Exh 38) (Tr. 493). The Management Agreement established that Respondents retain full authority over PBHM in the critical area of good faith bargaining with the Union. (Tr. 364). Since a collective bargaining agreement would detail the wages, hours, terms and conditions of employment for all bargaining unit members, the veto power possessed by Respondents on the MA allowed Respondents ultimate control over Hotel bargaining unit members' core terms and conditions of employment. The judge's findings reflect these evidentiary facts as "bearing upon the nature of Respondents approach to collective bargaining." (Decision, 10:13-21).

3. Withholding Information Of The MA Establishes Continuing Control Over PBHM's Negotiations With The Union.

Section 25.17 of the Management Agreement between Respondents and PBHM also contained a confidentiality clause, which required Respondents' consent before PBHM could disclose any information regarding the contents of the MA to the Union. (GC 38, p.36). PBHM attempted several times to secure Respondents' consent to release the contents of paragraph 3.2.c, because it believed that the MA constituted a limit on PBHM's authority, and that the principles of good-faith bargaining required PBHM to disclose the MA and its contents to the Union. (GC Exhs. 42 & 44). Instead of providing consent to disclose the MA to the Union, Minicola transmitted the August 3, 2007 letter to PBHM, which formally terminated the MA. (GC Exh. 46). Respondents effectively controlled the outcome of negotiations between PBHM and the Union through its control of the information PBHM could disclose to the Union.

The judge correctly noted this finding when he referred to the Union's information

request "seeking information about which entity had control of the negotiations." (Decision, 14: 38-39). The Union negotiator (Dave Mori) submitted his information request because he had an incomplete understanding due to Respondents' secrecy of a new entity, KOA Management, LLC and being involved in contract negotiations, first with HTH Corporation, and continuing with PBH Management, LLC/Pacific Beach Corporation dba PBH:

The ILWU has sought information from the Company to substantiate the correct corporate entity which has the control "over contract negotiations as well as terms **and** conditions of employment for the bargaining unit members represented by the ILWU, Local 142."

(Decision, 14: 1-4)(Under score in original.)

In reference to the Union's information request, the judge's findings determined that the:

. . information concerning the true employer was highly relevant to not only the recognition clause, but also the signature clause as well. Therefore, I find that information relating to the true nature of the Respondents and their relationship with PBHM was information that was highly relevant, could not be kept from it by a claim of confidentiality.

(Decision, 40:31-34)(emphasis added.)

4. Minicola's Investigation Of Hotel Employees Is Further Evidence Of Control Over Bargaining Unit Employees.

Shortly after the Respondents received the Union's April 17, 2007 request, Minicola contacted Mori and informed him that he (Minicola) had been advised by his attorney that Respondents had no obligation to respond because they were not involved in negotiations with the Union. (Tr. 260) Following this exchange of letters, and a second information request, Mori still had doubts as to which corporate entity really was the controlling entity or entities of Pacific Beach Hotel. (Tr. 264-67) (GC Exhs. 31 and 33). Mori's doubts were soon confirmed when Minicola threatened an employee with termination following an investigation regarding an anonymous letter which Minicola believed to be a threat to the owner Corinne Hayashi. (Tr. 271-73). Minicola was conducting an investigation on who actually delivered the anonymous letter to the Bell Desk. (Tr. 268-69).

Respondent's exceptions do not contest that fact that Minicola's investigation triggered concerns on Mori's part, which he expressed to PBHM's negotiator Melvin Wilinsky asking why Minicola was being allowed the right to interview or investigate the employees at the Pacific Beach Hotel. (Tr. 268). Mori said that the Union did not condone this type of activity and also raised concerns where Minicola had earlier said that the Respondents were not the Employer. (Tr. 271-72). Nor do Respondents contest that Mori next asked General Manager Bill Comstock whether PBHM was allowing Minicola to conduct the employer's investigation. Comstock shrugged his shoulders and said, "That's the owner!" (*Id.*). Mori then transmitted a letter to Minicola (GC Exh. 35), requesting a meeting with all hotel employees and Corinne Hayashi. (*Id.*). Minicola never responded. (Tr. 273-74). This caused more concern to Mori because PBHM had no control over Minicola's direct access to employees when conducting an investigation as the Employer. (Tr. 272-73).

The judge correctly found that Mori's "principal point" was the "fact that Minicola instituted an independent investigation concerning who wrote it (anonymous letter) and how it got to Ms. Hayashi. (Decision, 16:13-15). The record evidence supports the judge's findings that Respondents retained control over bargaining unit employees through Minicola's investigation of hotel employees:

He learned, by interviewing employees (putatively employed by PBHM) directly. He spoke to members of the bell staff to try to identify who had dropped the letter off at the bell desk and who had transmitted it to Ms. Hayashi. His purpose was not benign; it was to prevent employees from contacting someone they believed had ultimate authority over collective bargaining. Indeed, I find here, that the employees were correct. Ms. Hayashi's enterprises are in fact the true employer of the entire Hotel staff. (Decision, 16: 17-20)(Emphasis added.)

5. PBHM Obligated To Employ F&B Director And General Manager Evidences Control Over The Bargaining Unit.

Further, Respondent's exceptions do not contest that under Section 3.3(d) of the

MA, Minicola arranged to have John Lopianetzky (hereinafter "Lopianetzky"), the Food and Beverage (F&B) Director at Pacific Beach Hotel, brought in as the "Consultant," the person in charge of all F&B outlets at a Hotel. (GC Exh. 38)(Tr. 94, 1193, 1959-61). PBHM did not have the experience to manage the size of a hotel such as Pacific Beach Hotel. (Id.) Lopianetzky remained under Respondents' payroll and PBHM was required to reimburse the Respondents for his salary. (Tr. 1959-61). PBHM agreed to have Lopianetzky as a consultant to advise Bill Comstock (general manager) for a time period of approximately one year to eighteen months. (Tr. 95, 1957-59). In his Consultant role, as Respondents' representative in the F&B Department, Lopianetzky interviewed job applicants and recommended the hiring of employees for various F&B outlets. (GC Exh. 73)(Tr. 1201-03). As the Consultant, reports made on the operations for the F&B outlets would be provided to him (Lopianetzky) on a weekly basis. (Tr. 1139).

Also, Respondent's exceptions do not contest that under Section 3.3(c) of the MA, if PBHM wanted to hire another person or if they wanted to change the general manager, PBHM needed prior approval from Respondents. (GC Exh. 38)(Tr. 96).

The judge found that the credited evidence that the terms of the MA (§ 3.3d), described above, "obligated PBHM to provide employment to John Lopianetzky" and that "clause 3.3 c gave KOA right to determine for the hotel's general manager was to be."(Decision, 11:38-39; 12:4-5). Paragraph 3.3.c. of the MA states: "Operator shall, prior to selecting or replacing the general manager for the Hotel, obtain Owner's approval of such new general manager." Wallace testified that PBHM has never given up its right to ultimately decide who will be the general manager of a property managed by PBHM, and found this provision to be unique. (Tr. 417) In addition, PBHM informed Minicola through a copy of an electronic message addressed to Comstock of the hiring of Director of Housekeeping Christine Ko and Human

Resource Manager Clarisse Eguchi. (Tr. 1352-53; GC Exh. 67) If PBHM were truly and solely responsible for the day-to-day operation of the Hotel, it should be PBHM's decision as to who would run the Hotel and whom it hires as department managers. The judge findings based upon the record above correctly identified additional evidence of Respondents' belief that it retained control of the bargaining unit employees and of Respondents' refusal to relinquish control of the operation of the Hotel to PBHM. (Decision, 12:1-8).

6. Restrictive Control Over Employees' Wages And Benefits Evidences Control Over Contract Negotiations.

Respondents also retained control over another core subject of bargaining, that being the wages and benefits of all bargaining unit employees, by including a cost restrictive provision into the Management Agreement. Under Paragraph 3.3. (a)¹⁵ of the MA, Respondents were responsible for reimbursing PBHM for all "wages and contractual benefits" of employment.

Further, under Article X, Respondents exercised another restrictive control over

¹⁵ 3.3.a.

wages; salaries; bonuses; benefits or rights granted to the Hotel Employees, whether under the terms of any pension, profit sharing, employee benefit and similar plans, if any, applicable to the Hotel Employees, or any existing employment or consulting contract with regard to the Hotel Employees;

the employer's portion of social security taxes, employer unemployment insurance contributions and assessments;

(iii) workers' compensation insurance;

temporary disability insurance (TDI);

prepaid healthcare; vacation and sick leave pay; and

employee benefit plan contributions earned by the Hotel Employees for service during the term.

Owner shall also pay to Operator, together with the Wages and Benefits, general excise tax, if any, imposed thereon. Operator shall have the right during the Term to direct, supervise, train and assign work schedules, duties and assignments to the Hotel Employees in connection with the operation of the Hotel.

(GC Exh. 38, pp.8-9)

the total cost of operating the Hotel through its review of the annual operating budget, which, under the MA, must be approved by Respondents. (GC Exh. 38,p.15). Restrictions were placed PBHM through cost limitations in operating the Hotel; which could not exceed the approved annual budget by more than 5% or a line item by more than 10% without Respondents' approval. (GC Exh. 38, p.15). Since employee expenses (i.e. wages and benefits) are included in an annual budget, Respondents continue to exercise ultimate control over the core subjects of bargaining, including the wage level of pay and vacation, sick leave and other benefits PBHM could offer to the bargaining unit employees.

7. Respondents' Unrestricted Right To Cancel The MA Evidences Control Over Negotiations And Bargaining Unit.

Respondents retained another right establishing control over contract negotiations and control over the bargaining unit employees is found in Paragraph 18.3 of the MA. Under this provision, Respondents reserved for themselves the unrestricted right to cancel the agreement for the first 18 months “for any reason” and without penalty.

Paragraph 18.3 of the Agreement states:

Termination On or Before June 1, 2008. Notwithstanding anything to the contrary contained herein, Owner may terminate this Agreement for any reason whatsoever in the exercise of its sole discretion at any time from the Commencement Date to and including June 1, 2008. . . .
(GC Exh. 38, p.26)

No such reciprocal right was afforded to PBHM. Instead, the MA placed limitations upon PBHM to terminate the Agreement. Specific limited circumstances were spelled out, such as a “breach of the Agreement” by Respondents, and only after Respondents are afforded an “opportunity to cure such default.” (GC Exh. 38, pp. 26-27).

Further, the record evidence clearly established that Respondents ultimately invoked paragraph 18.3 of the Agreement when they terminated the MA by letter dated August

3, 2007.(GC Exh. 46). By retaining the unrestricted right to terminate the MA with PBHM, and including many other restrictive provisions of the MA (GC Exh. 38); there was no question in the mind of the judge that Respondents were the single “true employer” under the Act and remained obligated to bargain with the Union while PBHM was under a Management Agreement to manage the Hotel.(Decision, 16:19-20; 40: 31-32).

8. Minicola’s Conduct As The Representative Of The Hotel Owner Evidences Retention Of Control Over Hotel Operations.

Respondents also exercised continued control over daily operations of the Hotel through its conduct as the owner of the Hotel. PBHM executive Barry Wallace testified that hallway carpet replacement and some renovations to one of the restaurants, not ordered by PBHM, occurred during PBHM's management of the Hotel.(Tr. 417-18). PBHM’s Executive VP/CFO Melvin Wilinsky testified that the replacement of carpets must have been done by Minicola as the Owner Representative since he was responsible for capital spending.(Tr. 507-08). Respondents never disputed this fact. In addition, Minicola was involved with monitoring and providing input into the Hotel operations through the review of daily revenue reports.(Tr. 2051, 2298). Wallace testified that in their relationship with Respondents, “every single decision that we wanted to make wound up becoming a source of further discussion” with Minicola. (Tr. 419-20).

Further, Director of Housekeeping, Christine Ko testified that PBHM continue to utilize Respondents personnel forms and honored vacation and perfect attendance earned prior to PBHM's management of the Hotel.(Tr. 1586-88) (GC Exh. 75). Minicola also confirmed that Respondents continued to honor employee's original dates of hire and perfect attendance earned during PBHM's management of the Hotel. (Tr. 1351-52) (GC Exh. 68). The judge referenced the

above facts as additional evidence of Respondents belief that it retained control over PBHM's management of the Hotel and further evidence that Respondents were the “true-employer” of the entire Hotel staff. (Decision, 16:19-22; 16:42-51,fn. 13).

9. Retention And Exercise Of Authority To Operate The Hotel and To Control Wages And Conditions Of Employment Qualifies Respondents To Be A Single “True Employer.”

In Exceptions F and H, Respondents contend that they did not retain control over the operations and negotiations, instead PBHM was in charge(BSE at 19-21) and at the judge's findings that Respondents were obligated to bargain with the union while PBHM was the employer at the hotel was erroneous. (BSE at 28-30).

The record evidence proves otherwise, and the judge was correct in his findings and conclusions that Respondents, not PBHM, were the single “true employer” under the Management Agreement. Also, the record clearly established that Respondents retained and exercised full authority and control over the wages, terms and conditions of employment of bargaining unit employees under the terms of the Management Agreement. (See, Statement of Undisputed Facts Supporting Judge's Finding That Respondents Are The Single True-Employer, at pps.3-6 of this Brief.) and supported by the arguments and case law referred to above.(See, SECTIONS C.1 to C.8 at pps. 25 to 35 of this Brief.). Consequently, the Board should affirm the judge’s findings and conclusions that Respondents, as the single “true employer” remained obligated to bargain with the Union by retaining authority and control over PBHM in the critical area of good faith bargaining with the Union. (Decision, 40: 31-32; 43: 3-10).

Also a record evidence supports the judge’s finding “Ms. Hayashi’s enterprises are in fact, the true employer of the entire hotel staff.” (Decision,16:19-20).Also,the judge correctly found that he had:

No difficulty in concluding that the reason Respondents canceled the PBHM agreement was to avoid having a union representing the Hotel's employees. (Decision,39:5-7) (emphasis added.)

Indeed, in reviewing the management agreement and Respondents' general behavior toward the Union, it seems clear that the entire concept of inserting an "independent" manager such as PBHM was nothing more than a long-term scheme to wash the Union from the Hotel. (Decision,39:7-10) (emphasis added.)

It was designed to make it appear that Respondents were a bona fide successor to PBHM where it could also claim that the Union's one-vote majority of two years before had become dissipated. If so, it reasoned, it could simply treat all of the employees as if they were new hires and set the new terms and conditions. (Decision,39:10-13) (emphasis added.)

Even if it could not rid itself of the Union entirely, at the very least it could ignore all of the collective bargaining that had gone before and set initial terms and conditions of employment under cover of the holding in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). (Decision,39:13-16) (emphasis added.)

Undeniably, the record establishes that when PBHM was close to reaching a collective bargaining agreement (CBA) with the Union, that PBHM was required to first seek and obtain approval from Respondents.(GC Exh. 38, ¶ 3.2(c) of the MA). Respondents gave no approval and the judge correctly found:

The response, as we have seen, was Minicola/HTH's August 3, 2007, cancellation of the Management Agreement. That termination was based upon clause 18.3 of the agreement which said the Owner "may terminate this Agreement for any reason whatsoever in the exercise of its sole discretion at any time from the commencement date to and including June 1, 2008...." (Decision, 18:5-9)

Minicola's cancellation letter proposed that December 1, 2007 be the transition date where the Owner would once again be the manager of the hotel. He asked for a meeting of appropriate persons to begin the "unwinding" process. It should be recalled at this point that Koa Management was the so-called "lock box" corporation setup for the benefit of UBS bank. It is also the entity which Corine Hayashi used to make the arrangement with Outrigger's PBHM to operate the hotel, even though until that time Pacific Beach Corporation was the operator and subsidiary to HTH. (Decision, 18:10-16)(emphasis added.)

Eventually, the transition was memorialized in a hotel management and service agreement between Koa Management and Pacific Beach Corporation. It is dated December 1, 2007, and is signed by Corine L. Watanabe on behalf of both entities. Unlike the PBHM Management Agreement, which microscopically detailed all matters, this document consists of only of four pages. In large part it is Watanabe speaking to Watanabe authorizing or limiting Watanabe's operation of the Hotel. (Decision, 18:18-23)(emphasis added.)

It seems self-evident from this fact pattern that Minicola and Ms. Watanabe née Hayashi were taking this step in order to create the appearance of successorship. Under successorship rules as established by decisions under the Act, a successor corporation may set the initial terms and conditions under which the employees of a continuing operation would be obligated to work. And, of course, where supported by proof that the incumbent Union has lost its majority status, it could lawfully refuse to recognize the Union. Frankly, this has all the ingredients of a sham.¹⁶(Decision, 18:24-31)(emphasis added.)

Therefore, as established above, Respondents Exception F and Exception H, challenging the judge's findings and conclusions are without merit. The record evidence supports the judge's conclusion that beginning January 2006 and continuing through the end of December 2006, Respondents bargain collectively with the union had no intention of reaching an agreement. (Decision, 43:26-27) Contrary to Respondents' contentions, the Board should find that the judge was correct in concluding that Respondents used PBHM as a middleman as part of a "scheme" to thwart the Union and that Respondents were obligated to bargain with the Union while PBHM was under contract to operate the hotel.(Decision, 43:29-32; 49:33-37); 43:39-40). The Board should affirm the findings by the judge, which clearly establishes that the entity which Corine Hayashi used to make the arrangements with Outrigger's PBHM to operate the hotel in order to create the appearance of a successorship "has all of the ingredients of a

¹⁶ In Fugazy Continental Corp. v. NLRB, 725 F.2d 1416 (D.C. Cir. 1984) and O'Dovero v. NLRB, 193 F. 3d 532 (D.C. Cir. 1999), the DC Court of Appeals affirmed NLRB findings of "sham transactions" motivated by anti-union animus. In each of these cases, the transactions occurred between the employer and an "alter-ego" that allowed the "disguised continuance" of the employer's operations. Fugazy, 725 F.2d at 1419.

sham” and a “long-term scheme to wash the Union from the hotel.” (Decision, 18:24-31, 39:7-10).

Accordingly, where the record establishes that under the terms of the Management Agreement, (1) Respondents dictated the initial terms and conditions of employment for all bargaining unit employees and (2) exercised continuing control over hotel operations, together with (3) limitation on PBHM's authority in contract negotiations with the Union; the Board should affirm the judge’s findings, rulings and conclusions that Respondents remain obligated as the “single” true employer to bargain with the union while PBHM was under contract to operate the hotel. (Decision, 18:5-31; 39:5-16; 43:7-9; 43:28-31 43:33-37).

D. THE JUDGE CORRECTLY CONCLUDED RESPONDENTS COMMITTED NUMEROUS ULP’S VIOLATING §§ 8(a) 1, 3, 5 OF THE ACT.

1. Respondents Refusal to Provide Information On the MA Evidences A Violation Of §8(a)(5) and (1) Of The Act.

Exception J: Respondents have excepted to the judge’s findings and order that it had a duty to provide information to the Union in April, May, September and October 2007.(See, BSE at 30). This exception is based upon the repeated argument (See, Exceptions F and H), that Respondents were not the “employer.” This exception refers to the January 1, 2007 - October 31, 2007 time covered by the judge’s findings and conclusions that Respondents constitute a single “true employer” under the Act and are jointly and several liable for the unfair practices found herein. (BSE at 30-31).

Generally, an employer's duty to bargain collectively established in §8(a) (5) of the National Relations Act, obligates it to provide a labor union with relevant information necessary for the proper performance of the union’s duties as the employees’ bargaining representative. Detroit Edison Co. v. NLRB, 440 U.S. 301, 99 S.Ct. 1123, 1125 (1979). The

Supreme Court, in NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 76 S.Ct. 753 (1956) held that employers have an obligation to furnish relevant information to union representatives during contract negotiations. The Supreme Court reasoned as follows:

Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims...If... an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.
351 U.S. at 153.

The failure to provide such information constitutes an unfair labor practice in violation of §8(a) (1), and (5) of the Act. On the same subject, the Board has long held that intertwined with the duty to bargain in good faith is a duty on the part of the employer to supply the union, upon request, with sufficient information to enable it to understand and to intelligently discuss the issues raised in bargaining. See, S.L. Allen & Co., 1 NLRB 714 (1936) (“Interchange of ideas [communications of facts within the knowledge of either party are] of the essence of the bargaining process.”); see also Industrial Welding Co., 175 NLRB 477 (1969); Oregon Coast Operators Ass’n., 113 NLRB 1338 (1955), aff’d, 246 F.2d 280(9th Cir., 1957); Southern Saddlery Co., 90 NLRB 1205(1950). The employer's duty to furnish information is imposed because without such information the union would be unable to perform its statutory duties as the bargaining agent. Aluminum Ore Co. v. NLRB, 131 F.2d 485(7th Cir., 1942). The duty to furnish information is a statutory obligation, which exists independent of any agreement between the parties. See, United Aircraft Corp., 204 NLRB 879(1973), aff’d, 525 F.2d 237 (2nd Cir. 1975).

In starting the analysis of whether Respondent violated §8(a) (5) of the Act, the judge correctly found that one of the principal demands the Union was making at the start of contract negotiations was to determine who the actual employer was. The judge found that the

Union knew that PBHM was doing the bargaining and was the direct employer at least for the moment. (Decision, 40: 17-20). The Union through its chief negotiator Dave Mori, sought direct information from the Respondents seeking which corporate entity (Respondent or PBHM) had the control over contract negotiations as well as terms and conditions of employment for the bargaining unit members represented by the ILWU.” (GC Exh. 28 & GC Exh. 31). Here, the ILWU and Respondent were embroiled in negotiations to establish a “first contract” for the employees at the Pacific Beach Hotel. See NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 152-53 (1956) (if “argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.”); Weinreb Management, 292 NLRB 428, 432 (1989) (finding 8a5 violation for failure of employer to provide union information relating to the relationship between two entities that constituted single employer). In this case, the ILWU’s request was related to its function as the bargaining representative and the information sought was reasonably necessary for the ILWU to perform that function. See, NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955).

In addition, the Board has found that information about terms and conditions of employment of employees actually represented by a union is presumptively relevant and necessary and is required to be produced. Ohio Power Co., 216 NLRB 987(1975). Following Board law, the ILWU had sent request letters to Respondent seeking relevant and necessary information from Respondent (and PBHM) to establish “which entity” had control over the employees of the Hotel. (i.e. relationship between Respondent and PBHM) (See, GC Exhs. 28 & 31).

On June 7, 2007 Minicola responded by letter, refusing to provide any information to the Union. (GC Exh. 32). On September 11, 2007, the Union sent a third request

for information to Respondents, which went unanswered by Minicola. (GC Exh. 36). The judge correctly found that the “information relating to the true nature of the Respondents and their relationship with PBHM was information that is highly relevant” and “clearly relevant to the intelligent negotiation of a collective bargaining contract.” (Decision 40: 32-36)

Next, the judge correctly concluded that Respondents violated §8(a)(5) by never replying to any of the Union’s demand for relevant information concerning the legal relationship between PBHM and Respondents; and by not providing the information requested, including the relevant portions of the management agreement.(Decision, 44, 23-29). Cf. Leonard B. Herbert, Jr. & Co., 259 NLRB 881, 883 (1981) (Employer required to produce information about ‘double-breasting’ at his companies as it is presumptively relevant to collective bargaining.) Also cases cited therein: Associated General Contractors of California, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980) and Doubarn Sheet Metal, 243 NLRB 821 (821 (1979). Blue Diamond Co., 295 NLRB 1007 (1989) (demand for information to determine whether multiple companies were actually a single employer.)(Decision 40: 36-44)

Accordingly, the judge’s findings, conclusions and order that Respondents had a duty to provide information to the Union in April, May, September and October 2007 is supported by the record. Respondents Exception J, challenging the judges findings and conclusions that it had a duty to provide information to the Union in April, May, September and October 2007 is contrary to the record evidence and should be rejected as lacking merit.

2. Evidence Of Unilateral Changes In Wages, Terms And Conditions Of Employment Violated §8(a)(5) & (1) Of The Act.

Exception K: This exception is to the judge’s findings that Respondents made unilateral changes to wages, and other terms and conditions of employment, in violation of

Section 8 (a) (5) and (1) of the Act. The judge findings and conclusions are based upon the Katz unilateral change doctrine expressed by the Supreme Court in NLRB v. Katz, 369 U.S. 736 (1962), where an employer violates §8(a)(5) and (1) by unilaterally imposing new and different wages, hours, or other terms and conditions of employment upon bargaining unit employees without first providing their collective bargaining representative with notice and an opportunity to bargain regarding the change. The topics over which such an employer must bargain are those that are regarded as mandatory bargaining subjects -- wages, hours, and other terms and conditions of employment. Specifically see NLRB v. Borg-Warner Corp., Wooster Div., 356 U.S. 342 at 349 (1958). (Decision, 39:39-48).

The record evidence established that on December 1, 2007, Respondents (1)unilaterally implemented a wage scale at an hourly wage lower than the hourly wages received from PBHM for certain housekeepers;(2) unilaterally implemented wage increases for housekeepers(room attendants), banquet stewards, tipping category employees; (3)unilaterally increased the number of rooms to be cleaned by a housekeepers(room attendants), without prior notice to the Union and without affording the Union the opportunity to bargain with respect to wages, hours and other terms and conditions of employment; and (4) unilaterally implemented without bargaining with the Union, an application process requiring employees to submit applications;(5) required employees to undergo and pass drug testing as a term and condition of employment;(6) permanently terminated certain employees;(7) implemented a 90-day introductory period for its employees and engaged in conduct which denied the Union an opportunity to bargain on mandatory subjects relating to wages, hours and other terms and conditions of employment.

At the hearing, the unilateral implementation of the above described changes to

employees' wages, hours, and working conditions" by the Respondent affecting all employees (especially housekeeping employees) working at the Pacific Beach Hotel as of December 1, 2007 were established by both Respondents and Union witnesses.

One of the first things, Respondents did when reestablished itself as the single "true employer" on December 1, 2007 was to implement unilateral changes to hotel employees wages, and other terms and conditions of employment. (Tr. 281). On December 1, 2007, Mori got word (from the workers) that Respondents announced that workers would be getting a raise. Housekeepers and the Steward department employees were given a raise of \$1.00; other employees were given \$0.75; and tipping category employees \$0.10. (Id.). The Union made several requests for formal bargaining over these subjects. (Tr. 280-81). Respondents did not bargain over these wage increases and changes to terms and conditions of employment. (Tr. 283). Minicola encouraged Mori to file ULP charges against the Respondents. (Tr. 329) He also said "go ahead" and conduct your rallies and said that "the Union got to do it on its own." (Id.).

Guillerma Ulep described in detail the changes made to wages and other terms and conditions of employment for housekeepers effective December 1, 2007. (Tr. 947-48). Guillerma received the Hotel's offer (of employment) letter in the mail. (Tr. 949). She was told that her employment would be effective December 1, 2007 with an introductory rate of \$11.67, a 3-month probationary training period, as well as being employed "at will." (Tr. 950-51). She started working December 1, 2007 and her years of service were recognized by the Hotel to determine her seniority, the amount of vacation time, as well as other benefits. (Tr. 951).

Guillerma described how the Hotel explained (to the housekeepers) the introductory wage rate and a \$1.00 wage increase. (Tr. 952). Minicola came to one of their morning briefings at the housekeeping department. Other managers John L. and Christine Ko

were present with at least 20 housekeepers. (*Id.*). Minicola said that the Hotel would be giving them a \$1 raise and in return, to please help them with two (2) more rooms, which the housekeepers had to clean per day. (Tr. 953).

Previous to December 1, 2007, housekeepers, assigned to the Ocean Tower Building had 16 rooms to clean and in the Beach Tower, housekeepers were required to clean 15 rooms. (*Id.*). Minicola stated that after December 1, 2007, housekeepers were now required to clean two (2) more rooms per each housekeeper (room attendant). (Tr. 953-54). As a result, housekeepers were required to clean “8 rooms for Ocean Tower and 17 rooms for Beach Tower. (Tr. 952-54). Dave Mori also was told of this unilateral increase for the housekeeping/room attendants in their workload. (Tr. 281-82). The housekeepers were saying “2 for 1,” meaning they had 2 more rooms to clean for one more dollar. (*Id.*).

In starting the analysis of whether Respondent violated §8(a) (5) of the Act, basic Board law establishes that unilateral changes by an employer affecting its employees’ wages, hours, or working conditions during bargaining is often a strong indication that it is not bargaining in good faith. *See, e.g., Hoover Enterprises*, 293 NLRB 654 (1989) (§8(a) (1) and §8(a) (5) (violations found where an employer improperly withdrew recognition, then implemented unilateral changes in terms and conditions of employment); *NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir.1989), *enf’g.*, 286 NLRB 511 (1987) (employer engaged in bad faith bargaining by making changes in employees’ work schedules without prior bargaining: “compelling economic circumstances” duty to bargain not applicable after union is certified.). The Second Circuit has noted that a “wage increase [during bargaining] is by far the most important ‘unilateral act.’” *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 267(2d Cir. 1963). The court considered such an action, a deliberate attempt by the

employer to deal directly with its employees and to convince them that benefits comes solely from the employer. 313 F.2d at 268. Similarly, the Board has found that an employer is required to bargain with a Union concerning the wages of employees because it is a mandatory subject of bargaining. Without any bargaining prior to December 1, 2007, the judge correctly concluded that Respondents violated Sections 8(a)(5) and (1) of the Act by unilaterally implementing wage increases for certain employees.(Decision, 44,19-21). See, e.g., McCormick-Shires Millwork, 286 NLRB 754, 759 (1987) (employer's unilateral decrease in wages violated Section 8(a)(5)).

3. Respondents' Employee Handbook Effective December 1, 2007 Unilaterally Restricted Employees' Conduct.

When the Hotel workers chosen by Respondents returned back to work on December 1, 2007, they received the Employee Handbook (See Jt. Exh. 1B). The Employee Handbook included the following standards and policies:

Page 39 of the handbook:

If the media contacts you, please refer the inquiry to the General Manager's office immediately and inform your supervisor. It is important that you do not discuss your job or any aspect of the Company's operations or corporate business with the press or anyone not employed by our Company.

Page 44 of the handbook:

It is the Company's policy to protect its property and sensitive information. Confidential information must not be used for any unauthorized purpose and must not be disclosed to any unauthorized person in or out of the Company. The unauthorized use or disclosure of confidential information constitutes a violation of company policy and will result in disciplinary action, up to and including suspension and/or discharge. "Confidential information" includes and is not limited to the following:

- Sales figures
- Marketing goals and/or margins
- Profit margins
- Merchandise mark-up
- All hotel reports such as sales reports, operating reports
- Names and addresses of employees and hotel guests
- Employee handbook

Your compensation also is confidential information and should not be discussed with anyone.

As a condition of your employment, you agree not to use or disclose, during the term of our employment and at all times thereafter, any confidential information about the Company, its operations, guests, customers and employees, except as authorized by the Company. When in doubt, act in the interest of non-disclosure and consult Human Resources.

Page 51 of the handbook:

LEAVING PROPERTY DURING WORKING HOURS

Employees are not allowed to leave the property during work hours, including breaks and meal periods, unless it is for a work-related duty. Your immediate supervisor must authorize you to leave the property. You must "swipe out" when you leave the property and "swipe in" when you return to the property. Failure to abide by this rule will result in disciplinary action up to and including termination.

"List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Leaving the hotel or work areas during your working hours without the knowledge and prior consent of your supervisor."

"List of Unacceptable Conduct" on page 49 of the handbook prohibiting:

"The making of derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation."

Page 51 of the handbook:

EMPLOYEE ENTRANCE AND EXIT

You may not be on Company premises earlier than 30 minutes prior to the onset of your scheduled shift. You must leave Company premises no later than 30 minutes at the end of your scheduled shift or final work. Exceptions to this rule must be approved in advance by your supervisor.

Page 51 of the handbook:

ON PROPERTY DURING NON-WORK TIME

Employees are not allowed on Company property during non-scheduled workdays and hours without prior authorization and a property pass. You may not use company facilities more than one-half hour after your scheduled shift. The only exception is if you are using the 24 Hour Fitness Center facilities in which case you will be allowed two hours before or after your scheduled shift. You must submit your property pass request—which includes the date, hour and purpose for being on the property—in advance to your supervisor. The property pass must be authorized by your supervisor or the manager-on-duty.

When the property pass is approved, the supervisor/manager-on-duty must submit a copy of the pass to the Security department. The original form should be kept with the

employee while on Company property. Failure to comply with this procedure will result in disciplinary action up to and including termination

"List of Unacceptable Conduct" on page 48 of the handbook prohibiting:
Arriving more than one-half hour prior to your scheduled start time and/or leaving more than one-half hour following the end of your shift without permission from your supervisor.

"List of Unacceptable Conduct" on page 48 of the handbook:
Failure to obtain an authorized Property Pass to be anywhere on hotel premises during non-scheduled hours. (The one-half hour grace period before and after scheduled work hours shall be confined to Employees' Entrance, Employees' Locker Room and Employees' Cafeteria). Employees will not be required to have a property pass to use the 24 Hour Fitness facilities at Pacific Beach Hotel (two hours before or after their shift).

"List of Unacceptable Conduct" on page 48 of the handbook prohibiting:
Loitering or straying into areas not designated as work areas, or where your duties do not take you.

"List of Unacceptable Conduct" on page 49 of the handbook prohibiting:
Discussing business, personal, or unauthorized matters in public areas where guests may be able to overhear the conversation.

(Emphasis added).

The Board has found the maintenance of similar employee handbook rules as found in Respondent's Employee Handbook (See, Jt. Exh. 1B) issued to all employees on December 1, 2007 to violate Section 8(a) (1) of the Act. Here, under the "List of Unacceptable Conduct" at page 49 of the handbook, "[t]he making of derogatory statements concerning any employee, supervisor, the hotel and/or parent corporation" is strictly prohibited. Such language was found unlawful in Cincinnati, Suburban Press, 289 NLRB 966, 975 (1988) (prohibited employees from making "false, vicious or malicious statements concerning any employee, supervisor, the company, or its products.").

Here, Respondent's Employee Handbook restricts Hotel employees from (1) being "on property during non-work time" (at page 51); (2) "restrictions on off-duty employee access," "loitering" and/or "restrictions on discussions in public areas"(at pages 48,49 & 51). Again this type of language is unlawful under the Act. See, e.g., Tri-County Medical Center, 222 NLRB 1089(1976) (found unlawful, employees required to leave the premises immediately after

completion of their shift and not return until their next scheduled shift). Mediaone of Greater Florida, 340 NLRB 277(2003) (found unlawful, prohibition of entering company property after hours without authorization.).

Also, Respondent's Employee Handbook at pages 44 places an unlawful restriction on "confidentiality." See, e.g., Lafayette Park, 326 NLRB 824 (1998) (employer rule prohibiting "confidential Hotel private information to employees or other individuals or entities that are not authorized to receive that information" found unlawful.); Super K-mart, 330 NLRB 263(1999) (employer rule stating that "company business and documents are confidential" and "disclosure of such information is prohibited" found unlawful.); Flamingo Hilton-Laughlin, 330 NLRB 287, 288 n.3 (1999) (rule prohibiting revealing "confidential information regarding our customers, fellow employees, or hotel business" found unlawful.); IRIS USA, Inc., 336 NLRB 1013, 1016 (2001) (rule prohibiting disclosure of trade secrets or confidential information "whether about [the company]' its customers, suppliers, or employees" found unlawful); Pontiac Osteopathic Hospital, 284 NLRB, 422, 465-466 (1987) (unlawful rule characterizing "hospital affairs, patient information, and employee problems" as "absolutely confidential," and prohibiting employees from discussing them.)

When questioned about these rules and policies (Jt. Exh 1B), John Lopianetzky confirmed that the Hotel employees could be disciplined for violating these policies and rules (Tr. 1260-12610. He also confirmed that Respondents never announced to the employees that it would not enforce the policies against the employees. (Tr. 1261-62).

The Board has determined that disciplinary aspects of rules obligates an employer to bargain over the rules itself because the disciplinary aspects have an effect on employees' overall job security. See, e.g., Tenneco Chemicals, 249 NLRB 1176, 1180 (1980) (performance standards that can be enforced by discipline have an effect on employees' job security and are

mandatory subjects of bargaining). “Rules or codes of conduct governing employee behavior with constituent penalty provisions for breach necessarily fall well within the definitional bounds of ‘terms and conditions’ of employment.” Peerless Publications, Inc. (Pottstown Mercury), 283 NLRB 334, 335 (1987).

Accordingly, as the single “true employer” with a duty to bargain with the Union or even as the “successor employer”; Respondents had an obligation to provide notice to, and bargain with, the ILWU before implementing the wage increases for certain bargaining unit employees and increased workload for housekeepers effective December 1, 2007. The judge found that the record evidence to be “undisputed” that the unilateral changes to wages and other terms and conditions of employment occurred on December 1, 2007. (Decision, 41:16-27). He also found that all of the unilateral changes “. . .are mandatory subjects and all of them were imposed or implemented without first bargaining the Union.”(Decision, 41:8-9). The judge then concluded “that the number of unilateral changes in the terms and conditions of employment. . . accomplished by promulgating rules through employment offers and/or issuance of the new employee handbook . . . these rules are overbroad and thereby discourage employees from engaging in union and or other protected activity . . . constitute unilateral changes in violation of §8(a)(5) and(1) of the Act.(Decision,43:46-51;47:1-3).

The judge also concluded that the unilateral changes to the housekeepers work loads and Respondents’ unilateral implementation of wage increases in both its tipping and non-tipping category employees, on December 1, 2007 violated Section 8(a) (5) and (1) of the Act.(Decision, 44:3-7; 44:19-21).

Additionally, the judge concluded that “as a predicate in resuming operations themselves, Respondents unilaterally and without bargaining with the Union imposed as a

condition of continued employment new conditions on its employees, including requiring them to apply for their own job and treating them as new employees, requiring a drug test, and imposing a 90 day probationary period all in violation of §8(a)(5) and (1) of the Act.(Decision, 44:9-13). There being no dispute that these unilateral changes, under Katz are mandatory subjects and all of them were implemented without first bargaining with the Union (Decision, 41:5-8), the record evidence clearly supports the judge's findings and conclusions that the unilateral changes violated §8(a)(5) and(1) of the Act. Therefore, Exception K, should be rejected by the Board as lacking merit.

E. THE JUDGE CORRECTLY CONCLUDED THAT THE GENERAL COUNSEL SHOWED THE 7 UNION ACTIVISTS' PROTECTED CONDUCT WAS A MOTIVATING FACTOR IN THE DISCHARGE UNDER WRIGHT LINE.

The judge correctly found that on December 1, 2007 Respondents discharged Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte because they were Union activists and thereby violated §8(a)(3) and (1) of the Act. (Decision 44:31-34). In Exception L, Respondents excepted to the judges findings of Union animus and conclusions of discriminatory discharge of the seven (7) union committee members. (BSE at 32-37).

Further, the Respondents contend that the judge ignored testimony by Robert Minicola, Linda Morgan, Christine Ko and John Lopianetzky of relying upon a "six-factor" test to help determine which employee would be rehired. (BSE at 32-34). Although the judge did not explicitly cite to each of the "six-factors"(i.e., attitude, job performance, flexibility in scheduling, attendance, customer service and teamwork), it is clear that the judge implicitly discredited testimony by Minicola, Ms. Morgan, Ms. Ko and Mr. Lopianetzky that the "six-factor" test was uniformly followed and objectively used in the rehired process. See, Electri-Flex Co. v. NLRB,

570 F.2d 1327, 1331 (7th Cir. 1978)(explicit credibility findings are unnecessary when a judge has “implicitly resolve conflicts and the testimony by accepting and relying on the testimony of [one party’s] witnesses”) cert. denied 439 U.S. 911 (1978).

1. The Hearing Record Of Respondents’ Application Review/Rehiring Process Establishes Substantial Evidence Of Union Animus.

The record evidence established the Respondents’ “application-review/rehiring” process was not adhered to uniformly. Union animus was established through the inconsistent testimony of Respondents’ managers admitting an overall failure to follow the “six factors” in the rehiring process decision. For example, when asked to provide the “numbers” reduced for each department, Minicola said they were highly confidential and were not written down when disclosed to John L. and Linda Morgan. (Tr. 1359). When questioned further, Minicola reversed himself and said that he did not communicate the numbers to John L. and Morgan because they were “confidential between the Comptroller and me.” (Tr. 1361). The inconsistency of Minicola statement was disclosed when Linda Morgan testified that Minicola told John Lopianetzky and herself exactly how many employees they could hire for every department. (Tr. 1521-22). Lopianetzky's testimony is consistent with Morgan, but he says that the “numbers” were based upon “projected revenues.” (Tr. 1164). It was per position per department. (Tr. 1165).

Additionally, Lopianetzky testified that they (Minicola, Morgan and himself) would gather the applications, put them in folders, first by departments, then by classification, and then review the applications. (Tr. 1120). Linda Morgan testified differently, and stated that the applications were first segregated into different parts and sent out to their respective departments for review. (Tr. 1512). Morgan further confirmed that she sent the applications to the housekeeping department and believed that Minicola and Lopianetzky did the same for all

other departments. (Tr. 1516, 1529-30). Directly contrary to Morgan's testimony, Christine Ko denied receiving any applications. (Tr. 1762). On October 15, 2007, Christine Ko provided Linda Morgan with six (6) names of housekeeping employees. (Tr. 1714-16). Ko admitted that she did not have enough time to rate each person and therefore just used her memory. (Tr. 1740-43). Ko has no idea and/or no knowledge of how Morgan chose "six" as the number of employees to be reduced from housekeeping. (Tr. 1730-31).

2. Respondents' Unwritten "Six-Factor" Criteria Supports The View That The Refusal To Rehire Was Pretextual.

The record established that Respondent introduced no evidence showing that the "six factors" existed in written form or was consistently applied. Unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination. Dunning v. National Industries, 720 F.Supp. 924, 931(M.D.Ala.1989); see also Planned Bldg Services, 347 NLRB No. 64 at 46 (2007) (the fact that a putative policy is unwritten, and not strictly adhered to, lends support to a finding that it is pretextual); Kentucky General, Inc., 334 NLRB 154, 161(2001) (policy on which union applicants were rejected is pretextual, where, inter alia, policy was unwritten); Sioux City Foundry, 241 NLRB, 481, 484(1979) (alleged policy relied on to reject applicants who were strikers from other employers "is a mere pretext" where, inter alia, this 'policy' was not written down anywhere"). Indeed, the inconsistency in John Lopianetzky's and Christine Ko's "use of" the unwritten six factors supports the view that the reasons for not hiring the seven (7) union committee members/applicants were pretextual. See Clock Electric, Inc., 323 NLRB 1226, 1232 (1997) enforced in part and remanded, 162 F.3d 907 (6th Cir.1998) ("The inconsistent application of the unwritten rule supports the view that this reason for refusal to hire was pretextual").

The record evidence of inconsistencies in the “use” of the “six factors” by Respondents’ managers and the lack of any written list of the criteria leads to a logical conclusion that the “application-review/rehiring” process was in actuality a “pretext to discrimination.” See, e.g., NLRB v Castaways Management, 870 F.2d 1539, 1542-1543(11th Cir. 1989) (in assessing credibility, judge properly considered the consistency and straightforwardness of the testimony and whether it related to the “logical consistency” of the record).

3. Credibility Findings In Review Of The Record Evidences The Subjective Nature Of Respondents’ Re-Hire Process

Instead of specific reference to each of the “six factors,” the judge discredited testimony on the “use” of the “six-factors” by Respondents. The judge first determined that the management team involved in the rehiring process had “ignored the personnel jackets of applicants” and that “there was no evidence that the individuals who compiled the data, which he (Minicola) says he relied on contributed to the staffing level numbers he selected. (Decision,28:35-37). No detailed analysis of Minicola's thinking was ever presented in evidence. (Id.) Neither he nor Lopianetzky could recall any specific numbers to be applied to any particular department, whether a reduction or increase. (Decision, 28:44-46).

Likewise, Morgan could not remember any number, which applied to any other department except housekeeping. (Decision, 28:46-47). There she knew that six employees needed to be denied employment. (Id.) Even so, there is no explanation concerning why it was six, rather than any other number. (Decision,28:47; 29:1-2). Yet she and Lopianetzky both agreed that Minicola told them how many employees needed to be subtracted by department. (Decision, 29:2-3). Curiously, at one point, Minicola testified that he never told anyone how

many positions were to be eliminated. (Id) Instead he waited for all the applications that come in and then made his determinations. (Decision, 29:3-6). Once he had a stack of applications for a particular department he (Minicola) says he told Morgan and Lopianetzky what he wanted from that stack. (Id.) He claimed he didn't really tell them what he was thinking. (Decision, 29:5-7).

The judge then summarized his findings:

The upshot of all this is that there is no credible record explanation for the process that was used, aside from what ever was in Minicola's, Lopianetzky's or Ko's mind. It became a subjective process, somewhat tempered by the six factors mentioned above. (Decision, 29:9-12)(emphasis added.)

4. The Judge Correctly Concluded That The Seven Union Activists Discharge Violated Section 8(a)(3) Of The Act.

Under Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the General Counsel must show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. The General Counsel meets this initial burden by demonstrating that the employee engaged in protected activity, the employer knew of that activity, and the employer harbored animus against the protected activity. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action in the absence of the protected activity. See United Rentals, 350 NLRB No. 76 (2007) (citing Donaldson Bros., Ready Mix, Inc., 341 NLRB 958, 961 (2004)). The employer's burden on rebuttal is not met by a showing merely that it had a legitimate reason for his action. Rather, the employer "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." Roure Bertrand Dupont, Inc., 271 NLRB 443(1984). In Goodyear Tire & Rubber Co., 312 NLRB 674 (1993), the Board elaborated on the Wright Line test and identified five factors for a prima facie case of unlawful motivation for a Section 8(a)(3) and (1) violations:

The first is that the employees alleged to have been unlawfully discharged must have been engaged in union or protected activities or that the employer believed them to have been so engaged. The second is that the employer knew about those union or protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of these activities. Fourth, the employer must do something to either sever or weaken the employment relationship. Finally, the act of employment severance must usually be connected to the union activity in terms of timing.

The Goodyear Tire & Rubber Co., 312 NLRB 674, 691 (1993).

See also Timekeeping Systems, Inc., 323 NLRB 244, 249 (1997) (applying elements); See also NLRB v. Interstate Builders, Inc., 351 F.3d 1020, (10th Cir. 2003) (reciting first three elements).

5. The Record Evidence Of Protected Conduct.

First, Respondents' exceptions do not contest the fact that at the time of the November 30, 2007 discharge all seven (7) individuals: 1) Darryl Miyashiro, 2) Keith Kapena Kanaiaupuni, 3) Todd Hatanaka, 4) Ruben Bumanglag, 5) Virbina Revamonte, 6) Virginia Recaido and 7) Rhandy Villanueva were members of the union negotiating committee and had actively participated in protected union activities (i.e. union sponsored rallies, boycott and union information booth). (Tr. 596-597 (Darryl); 650, 666, 691-93 (Keith); 908,926-27 (Todd); 819, 906,908, 822-24 (Ruben); 819-21,860,863 (Virbina); 737-38,740,751-52 (Virginia); 776-78 (Rhandy)).

6. The Record Evidence Of Respondents' Knowledge Of Protected Conduct.

Second, Respondents' exceptions do not contest the fact that the executive officers, managers and supervisors of the Respondent (i.e. Corine Hayashi, Robert Minicola, Linda Morgan, John L. and Christine Ko) knew about these seven (7) committee members' participation in these protected union activities. (Tr. 613, 618-21, 656-58, 662-64, 686-688, 926-27, 929-30, 821-22, 860, 731-34, 777-78).

7. **The Record Evidence Of Respondents' Animus Toward Union Activists.**

Third, the record evidence establishes that Respondent's managers harbored animus against the union committee members. For example, Respondents did not contest the fact that Robert Minicola informed PBHM executives that Corine Hayashi was "angry" at the Hotel employees (including the seven committee members) and believed that they were "disloyal to her family" by joining up with the union." (Tr. 1050 (GC Exh. 77). Minicola said Corine Hayashi was taking the boycott personally, because it was affecting the Hotel financially. (Id.). Further, Minicola also mentioned that Corine Hayashi was upset and offended because of the union activities and rallies and didn't care if all of the employees were rehired or not when the Respondent took over management in December 2007. (Tr. 921).

Further, Respondents do not contest the fact that Virginia Recaido recalled that Minicola, expressed his opinion about the union negotiating committee members by saying most of them would not be working, if not for the goodness of Corine Hayashi. (Tr. 733-34). The only conclusion to draw from the message is that a Hotel employee will be discharged for joining the Union and being a member of the Union's negotiating committee. See, e.g., NLRB v. MDI Commercial Services, 175 F.3d 621, 626 (8th Cir. 1999) (quoting NLRB v. Hale Mfg. Co., 570 F.2d 705, 708 (8th Cir. 1978)) (To prove an element of wrongful discharge, the General Counsel must show that "the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated."); see also Fixtures Mfg. Corp., 332 NLRB 565 (2000); Boydston Electric, 331 NLRB 1450 (2000) (The Board still holds employers liable for all threats that could reasonably tend to be coercive, even if the statement is oblique or ambiguous.).

Also, Minicola admitted that the termination of the seven unit committee members was "personal," part of it was for business reasons and part of it was personal. (Tr. 674,

921). See NLRB v. Tom Wood Pontiac, Inc., 447 F.2d 383 (7th Cir. 1971) (It is well-established that, even if a partial reason for alleged discrimination is one proscribed by the Act, a violation must be found.); Dilene Answering Service, Inc., 222 NLRB 462 (1976) (Same); see also Florida Medical Center, Inc. dba Lauderdale Lakes General Hospital, 227 NLRB 1412(1976); NLRB v. Dant et al., 207 F.2d 165, 167(9th Cir. 1953) (discrimination is unlawful even if it is only partially motivated by discriminatory animus.)

8. The Record Evidence Of Discharge Of Known Union Activists/Refusal To Recognize Union.

Fourth, Respondents did not contest that on November 30, 2007, Respondents discharged the seven (7) union committee members. The next day (December 1, 2007) Respondent refused to hire them back as employees at the Pacific Beach Hotel. (See, Respondent Exh. 11). On December 3, 2007, Minicola informed ILWU President Fred Galdones that Respondents was not recognizing the Union and there would be no bargaining. (Tr. 576-77, 580-81; GC Exh. 47).

9. The Record Evidence Of The Timing Of Discharge Action To The Failure To Recognize The Union.

Finally, the record evidence establishes that Respondent's actions of the November 30, 2007 discharge and the December 1, 2007 refusal to hire were timed to coincide with Respondents notice, on December 3, 2007 that they were not recognizing the Union and that there would be no bargaining. Id.

In addition, the judge conducted a detailed evidentiary analysis into the “circumstances of each of the committee members [who] were not retained.”(Decision, 29:12-13), prior to reaching his conclusion that under Wright Line, supra, the General Counsel had made a prima facie showing that Respondents harbored union animus and was motivated by the

seven (7) union committee members union activities in reaching the decision to discharge these known Union activists on December 1, 2007. (Decision, 44:31-34)

F. THE RECORD EVIDENCE ESTABLISHES THAT SEVEN UNION ACTIVISTS WERE DISCHARGED IN VIOLATION OF § 8(a)(3)

1. Respondents' Exception To The Judge's Ruling That Darryl Miyashiro's Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Miyashiro's Protected Conduct.

Darryl Miyashiro (hereinafter "Miyashiro"), a 15-year employee was initially hired as a banquet waiter and worked continuously through November 30, 2007. (Tr. 584-85). As a banquet waiter, he was the "most senior" (i.e., top seniority) in the Banquet's department. (Tr. 629). Miyashiro has extensive training and experience as a banquet waiter and also received an employee of the year award in 2004 (GC Exh. 61) (Tr. 606-07). In August 2007, Miyashiro went through the application process and signed the new policy form "on the spot," but was not rehired. (Tr. 590).

Beginning in 2005, Miyashiro was chosen by his coworkers to be on the union negotiating committee and participated in the entire contract negotiations through his last day of employment on November 30, 2007. (Tr. 596-97). Miyashiro took his role seriously and personally negotiated a work distribution issue "across the table" with General Manager Robert Minicola involving the Banquet department and the Shogun restaurant. (Tr. 613,630). During these negotiations, Minicola became upset with Miyashiro's position stated at the table, pointed a finger at him, raised his voice, and lashed out at Miyashiro. (Tr. 613-15) Minicola said that he had already "dealt with Darryl before" (prior to 2005) when Darryl had started a petition on the

percentage of gratuities for the fellow employees.¹⁷ Darryl's role was as the spokesperson for everyone in the banquet department. (Tr. 618-21).

b. Record Evidence Of Discriminatory/Adverse Action.

John Lopianetzky, one of Respondent's three managers involved in the rehiring process (Tr. 1120-25), confirmed that "no offer" of employment was sent to Miyashiro. (Tr. 1163). (Respondents Exh. 18). Miyashiro was never interviewed and knows that "offer letters" were sent out to other employees with more discipline than him, but still were rehired. (Tr. 590). In the Decision, the judge's findings refer to John Lopianetzky's testimony that Miyashiro was not re-hired for two reasons: (1) starting the fire in the trash can, and (2) an unrecorded complaint from a co-worker of being upset with Miyashiro, which had never been discussed with him. (Tr. 1131). (Decision, 29:33-34).

The judge examined the "first reason" for Lopianetzky not rehiring Miyashiro that occurred in 2006 during a negotiation sessions. Minicola had brought up a trash fire incident that eventually led to Miyashiro receiving a one-day suspension. (Tr. 594-95). Miyashiro had placed a sterno container (which he believed to be out) in a rubbish can that later caused a fire. (Id.). Minicola had initially threatened to suspend him for two weeks but eventually reconsidered and said that since he was a good worker, Miyashiro would be "suspended only for one day." (Tr. 597-600). Miyashiro agreed to the one-day suspension, which would not be placed in his employee record. (Tr. 601). A few days later, he was approached by John Lopianetzky with an incorrectly worded disciplinary action form that did not follow the earlier agreement. (Tr. 602-03). Eventually, his Union business agent worked out the correction with Lopianetzky as to what

¹⁷ (See, (Decision,30:8-11)- In addition, Minicola's remark that he had "dealt" with Miyashiro in the past for his protected conduct is a threat of unspecified consequences should Miyashiro assert himself in the same fashion again, it violates § 8(a)(1) (Decision, 44:40-41).

was earlier agreed to, “a 1-day suspension without any precedence.” (Tr. 605).

In the Decision, the judge correctly discounted Lopianetzky’s testimony that this “sterno incident” played any role in the decision not to retain Miyashiro. (Decision, 29:41-44). In finding that Lopianetzky “apparently disagreed (with one-day suspension) believing that the incident was too dangerous to be treated lightly”; the judge found that Lopianetzky had “signed off on the one-day suspension including a negotiated modification stating ‘This disciplinary action will not be precedence (sic) setting’.”(Decision, 29:42-44).

The judge also reviewed the “second reason” given by Lopianetzky regarding the “complaint by a coworker” and determined it to be “an undescribed incident involving a fellow employee” which “seems to have no support.” (Decision, 29:45-46). At the hearing, when confronted (by General Counsel) with his affidavit, Lopianetzky agreed there was no reference in his affidavit to the coworker’s complaint and no reference to the 1-day suspension for the sterno can fire incident. (Tr. 1133-35).

c. Judge’s Findings Upon Review Of The Record Evidence

The judge correctly incorporated the above facts in his findings as follows:

The second reason given by Lopianetzky, an undescribed incident involving a fellow employee seems to have no support. He gave testimony to that effect, but his prehearing affidavit given to the Board investigator did not mention the incident whatsoever. More likely, his testimony is an afterthought. I find, whatever may have occurred involving the coworker did not actually play a role in the decision not to retain Miyashiro. Accordingly, I give the second reason no weight whatsoever. (Decision, 29: 46-50).(Emphasis added.)

In addition, the judge found that “. . .the decision not to retain Miyashiro had nothing to do the reasons given by the Lopianetzky.” (Decision, 30: 1-2).

Second, the judge found that “Miyashiro's outspoken and assertive union activity, made him a target in the course of Respondents’ effort to shed itself of the Union in December

2007. (Decision: 30:3-4).

Third, the judge further found that “since Respondents had no intention of recognizing the union and when it resumed operations on December 1, 2007, it certainly have no desire to continue to employ a strong union activist such as Miyashiro. (Decision, 30:5-8).

Taking these three facts, either alone or together, the record evidence clearly established that Respondents discharged Miyashiro because he was a union activists and his discharge violated §8 (a)(3) and (1) of the Act. (Decision, 30:6-8). Respondents’ exception to the judge's findings and conclusions regarding the discharge of Miyashiro is unsupported by the facts and should be rejected in its entirety.

2. Respondents’ Exception To The Judge’s Ruling That Keith Kapena Kanaiaupuni’s Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Kanaiaupuni’s Protected Conduct.

Keith Kapena Kanaiaupuni (hereinafter “Kanaiaupuni”), a 25-year employee at the Pacific Beach Hotel with an excellent work history first started as a doorman and then a bellman in the Bell Department. (Tr. 643-644, 649). On November 30, 2007, his rate of pay was \$7.25 an hour (40-hours a week) plus “portorage” for the “delivery of luggage, at \$3.00 in and \$3.00 out.” (Tr. 646). This portorage monies is a big issue for all bellman since it is shared (i.e. “put into a pot”) and based on the number of hours that they work. (Id.).

At the start of 2005 contract negotiations, Kanaiaupuni became a Union negotiating committee member and was chosen to be the “chairperson” of the Union bargaining committee.(Tr. 650). He believed it to be a great honor, with greater responsibility to able to speak at the negotiations for his coworkers who had voted for him. (Tr. 655, 684).

At the negotiation table Kanaiaupuni took the lead when discussions focused

upon a “big issue” regarding the control and distribution of portorage for his department. (Tr. 656). He explained the issues directly to Robert Minicola during negotiations about the portorage breakdown, about managers who did not handle the luggage getting a part of it, and how the bellmen wanted to have control over the distribution of portorage monies. (Tr. 686-88). With a lot of bellmen working at the Hotel for over 20 years and relying on the portorage monies to pay off their bills and mortgage, the bellmen wanted to have the portorage equally distributed for everyone involved to get their fair share. (Tr. 657-58). Also, he did not believe that it was right that managers who did not touch any luggage were able to get a bigger share of the portorage than a bellman. (Tr. 657). After three or four months of “heated” negotiations (i.e. raise voices, shouting matches with Minicola) there was a settlement agreement where the bellmen got “full control of the portorage” and in exchange, Minicola was able to get the parking lot attendants removed and to separately come under the Security Department. (Tr. 657-58).

Once they reached an agreement, Kanaiaupuni thought that everything was settled; however, Minicola later heard that the bell department changed the portorage distributions and became upset because he didn't believe that the bellmen would actually change it. (Tr. 659-60). Minicola approached Kanaiaupuni and tried to raise the distribution and control of portorage issue again several times later in negotiations.(Id.) Minicola said that if he had been given the choice, he wouldn't make the same mistake again. (Tr. 660)

Kanaiaupuni was also threatened my Minicola with termination over the mistake made by another bellman without his knowledge in the transposing of “employee numbers” on a spreadsheet resulting in portorage monies being given to the wrong bellman. (Tr. 688-89). As a result of this mistake, Kanaiaupuni's portorage share was going to another person, and he was getting the portorage for the other bellman. (Tr. 660-62, 688-90). Minicola took Kanaiaupuni

outside and threatened to terminate him for stealing. (Id.) Eventually, the mistake got corrected after Kanaiaupuni told Minicola that he did not do the payroll and did not print out the spreadsheet. (Tr. 691). He was never disciplined and restitution was paid right away. (Tr. 660-62).

Kanaiaupuni was again threatened my Minicola during contract negotiations over an issue where the Hotel wanted to combine the parking valets with the doorman, and the Hotel wanted to bring in an outside contractor to run the parking valet station. (Tr. 662). This is the information Kanaiaupuni was told in negotiations. (Tr. 662-64). Minicola called “a special meeting” after somehow getting the impression that Kanaiaupuni told the parking valets that if they did not sign the paper they could lose their jobs (i.e. get fired). (Id.) Minicola came down hard on him and was forceful in his tone of voice in speaking to Kanaiaupuni. He explained to Minicola that the workers must have gotten his words mixed up and believed that they were going to be fired. Kanaiaupuni was never disciplined. (Tr. 662-64).

b. Record Evidence Of Discriminatory/Adverse Action.

Kanaiaupuni recalls having to reapply for his bellman position in August 2007. (Tr. 647). He timely applied for his bellman position but never received an interview. He never received a “job offer” by the November 30, 2007 deadline, nor was he given a reason why he was not rehired. (Tr. 647-48). Kanaiaupuni was terminated December 1, 2007. (Tr. 644-45). He was one of the seven (7) union committee members with “no offer” of employment. (See Resp. Exh. 18). As of November 30, 2007, there were a total of twelve bellmen, and eleven of them were rehired; only Kanaiaupuni was not hired back. (Tr. 664-55). He has more seniority than at least six of the bellmen. (Tr. 666).

Lopianetzky testified that Minicola and Morgan were the ones who decided not to

rehire Keith Kanaiaupuni. (Tr. 1129). Linda Morgan recalled receiving co-workers complaints about Keith, which she shared with Lopianetzky and Minicola, but later admitted that she could not remember when she received the complaints or from which co-workers. (Tr. 1466-69). Morgan testified that she spoke with Keith's manager about the complaints, but could not recall whether there was any discipline imposed by the manager. (Tr. 1467).

At the hearing, Robert Minicola explained that there were two (2) reasons why Keith Kanaiaupuni was not rehired on December 1, 2007. (Tr. 1392). The first reason was due to his "attendance." (*Id.*). The second reason was because "Keith had grumbled with other employees." (Tr. 1392-93). After Minicola was confronted with his affidavit, General Counsel was able to enter into the record a "stipulation" that any grumbling by Kapena (Keith) was not in front of customers and he simply heard a loud discussion, contents of which he did not know. (Tr. 1392-93). Minicola also agreed that Kanaiaupuni was doing his job well and was a hard worker. (Tr. 1393). In regards to the attendance matter, Minicola was directed to the attendance record of another bellman (Mark Nishida), who had "25" incidents of excessive absence and/or tardy compared to "7" incidents for Kanaiaupuni (Keith), covering the time periods of January 1, 2000 through December 31, 2006. (Tr. 1394-97)(GC Exh. 70, Tab 10;GC Exh. 74, pps. 13A-13J). A similar comparison was made with the attendance records of bellman Michael Bradshaw who was disciplined "19" times for excessive absence and tardiness between January 1, 2000 and December 31, 2006. (Tr. 1395, 1399)(GC Exh. 70, Tab 11).

c. Judge's Findings Upon Review Of The Record Evidence.

Taking all of the facts identified above, the judge found that there was no credible evidence of Kanaiaupuni's alleged grumbling and of complaints made by co-workers against him. (Decision, 35:34-41). The judge found that Respondents presented no witnesses who

directly witnessed such complaining, and Respondents' managers did not tell a consistent story concerning who made the decision not to retain Kanaiaupuni. (*Id.*) The judge found that Morgan was quite vague about these complaints and could not describe them, neither could she say whether any of the complaints resulted in any discipline. (Decision, 35: 37-39). As for the grumbling, the judge found that Minicola admitted that he had never heard any grumbling on Kanaiaupuni's part.(Decision, 35:40-41). The judge discredited, the testimony of Minicola and Morgan and found that:

[t] he grumbling question seems to be made of whole cloth, for there is no evidence whatsoever in the record concerning any such incident, unless one looks to Kanaiaupuni's behavior during negotiations. If that is what Minicola and Morgan are referring to, it was protected conduct and may not be used to support a discharge. (Decision, 36: 1-4).

If attendance was a factor in the decision not to retain Kanaiaupuni, the judge referenced the record evidence, which clearly established that "Kanaiaupuni's record is clearly superior to the attendance records of fellow bellman Mark Nishida and Michael Bradshaw." (Decision, 35: 43-45). The judge found that Nishida's record shows that he had been disciplined 25 separate times, 23 of which were for absences or tardies. Bradshaw was disciplined 21 times for absences and tardies, while Kanaiaupuni received only 7 disciplines for attendance issues during that same time frame. (Decision, 35:45-48).

Accordingly, there is no record evidence of Keith Kanaiaupuni's grumbling with coworkers or of complaints made against him by coworkers. The judge correctly discredited testimony that Kanaiaupuni's poor "attendance" record was a justified reason for not rehiring him. Taking these facts established by the record, either alone or together, the judge correctly concluded that "the General Counsel has made a prima facie case that Respondents discharged Kanaiaupuni in violation of §8 (a)(3) and (1) of the Act."(Decision, 36:6-7).

Further, the judge determined that “Respondents’ assigned reasons for selecting him for discharge do not hold water and are entirely unpersuasive. Accordingly, I find that Respondents have not rebutted the prima facie case.” (Decision, 36:7-9). Therefore, the Board should find that Respondents’ exception to the judge’s findings and conclusions regarding the discharge of Keith Kanaiaupuni is unsupported by the facts and should be rejected as lacking merit.

3. Respondents’ Exception To The Judge’s Ruling That Todd Hatanaka’s Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Hatanaka’s Protected Conduct.

Todd Hatanaka (hereinafter “Hatanaka”), a 20-year employee at Pacific Beach Hotel, has worked 12 years as a purchasing clerk and 8 years as a bartender (Tr. 900-01). Todd has also received recognition awards such as perfect attendance (twice) and some good reviews from a mystery shopper. (Tr. 903). Over the years, restaurant managers have given him good evaluations and, overall, he has been doing a good job. (Tr. 905). Prior to December 1, 2007, there were six full-time bartenders and one part-timer. In company-wide seniority, only one person had more seniority than Hatanaka. (Tr. 915) The only full-time bartender not rehired was Hatanaka. (Tr. 914). Prior to December 1, 2007, he had worked as a full-time bartender in the Oceanarium, Shogun Restaurant, and in the Neptune restaurant. (Tr. 901).

In February 2006, Todd Hatanaka was elected to hold the position of a union bargaining committee member. (Tr. 926-27). He had replaced Caesar Aldana. (Tr. 906). In contract negotiations, there were a couple of times in which Hatanaka spoke up on matters dealing with his department. (Tr. 909). In 2006 and 2007 Hatanaka participated in ten to twenty Union rallies, normally in front of the Pacific Beach Hotel. (Tr. 906, 908). Robert Minicola

witnessed these rallies; especially the Union rallies held right outside of his office window. (Tr. 929-30). He has also participated in leafleting about twenty times in 2006 and 2007 at the Pacific Beach Hotel, other areas of Waikiki and Outrigger properties, the Honolulu Marathon and in front of the Convention Center. (Tr. 908).

b. Record Evidence Of Discriminatory/Adverse Action.

Hatanaka filled out an application to be rehired during the application acceptance times of September 24 through September 28, 2007. (Tr. 900). He was not offered a position, nor was rehired, on December 1, 2007. (Id.) When he put in his application, he was the only full-time bartender not rehired. (Tr. 932-33). Todd was not interviewed, nor given any reasons why he was not rehired. (Tr. 901-902) He sent two certified letters, one to Robert Minicola and one to Linda Morgan, asking for the reasons why he was not offered a job; however, he did not receive a response. (Id.).

At the hearing, John Lopianetzky testified that he did not recommend Hatanaka to be re-hired due to the impact on bartender positions as a result of the Shogun restaurant closing and complaints from managers that Todd did not do his work. (Tr. 1139-40). Lopianetzky asserted that he did not rehire Hatanaka, cause he “would not close checks in a timely manner” and some of his managers had made such complaints. (Id.) Lopianetzky was unable to locate any discipline in Hatanaka's personnel file through January 2007 regarding these alleged complaints from managers. (Tr. 1143-45). Lopianetzky never personally spoke to Hatanaka and relied only upon the manager's statements regarding problems with cashiering and being un-personable. (Tr. 1145-46).

Lopianetzky also confirmed that bartender Edwin Nagasako was given a five day suspension (on 8/14/07) for serving a minor alcoholic beverages, was rehired in the bartender

position on December 1, 2007. (Tr. 1122)(GC Exh. 74, p.14 (a) 14(b)). Although having no discipline imposed against him in 2006 and 2007, Lopianetzky did not recommend that Hatanaka be rehired. (Tr. 1148). Further, two (2) “on-call” bartenders were rehired on December 1, 2007. (Tr. 1224-25). (GC Exh. 71).

c. Judges Findings Upon Review Of The Record Evidence.

The judge correctly found that Respondents failed to present credible evidence of any legitimate business related reason for discharging Todd Hatanaka. (Decision, 31: 1-7). The judge found “Lopianetzky's testimony to be unreliable.” (Decision, 31:1). Lopianetzky could not produce any record whatsoever pertaining to Hatanaka's deficiency (Decision, 30:33-39). Had Hatanaka had problems with customers, or even with coworkers, some sort of record would have been made. None was. (Decision, 30:37-38). Lopianetzky was not even certain whether any manager had ever taken steps or been directed to take steps rectify whatever issues Lopianetzky claims to have been seen.(Decision, 30:38-40).

Respondents have asserted that the main reason for not keeping Hatanaka was because “the Shogun restaurant closed and bartending shifts have been lost.”(Decision, 30:42-43). However, Respondents have ignored the fact that “one of the individuals kept Edwin Nagasako, a bartender, who in 2007 had jeopardized Respondents’ liquor license by serving liquor to a minor, receiving a liquor commission citation for doing so.” (Decision, 30:44-46). The judge correctly found that “compared to the trifling shortcomings exhibited by Hatanaka, choosing Nagasako over Hatanaka makes no business sense whatsoever, even assuming that the restaurant closing necessitated the loss of a bartender shift.”(Decision, 30:46-49).

In the absence of any credible evidence, the judge concluded that “since the reasons advanced to justify Hatanaka's discharge is neither supported nor plausible, the

remaining evidence leads to the conclusion that Respondents discharged Hatanaka because of his union activities, specifically his support of the union during the time frame in which Respondents were trying to evade their responsibilities under the Act.” (Decision, 31: 1-5). “There has been no rebuttal to the prima facie case,” therefore the judge correctly concluded “Respondents discharged Hatanaka in violation of §8 (a)(3) and (1) of the Act.”(Decision, 31:5-6). Considering all of the above, Respondents’ exception to the judge’s findings and conclusions regarding the discharge of Todd Hatanaka is unsupported by the facts and should be rejected as lacking merit.

4. Respondents’ Exception To The Judge’s Ruling That Rhandy Villanueva’s Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Villanueva’s Protected Conduct.

Rhandy Villanueva (hereinafter “Villanueva”), a 14-year Houseman at Pacific Beach Hotel was not rehired on December 1, 2007. (Tr. 761). He recalls receiving some discipline during his 14 years for absenteeism because of having asthma-like respiratory problems. (Tr. 763, 792). He described having allergy problems and is prescribed medication. (Tr. 765-66). Regarding his absentee problem he always provided a doctor’s note and submitting it to the housekeeping executive. Also, he would call in as soon as he knew he would be absent. (Tr. 801-02). There was another discipline about forgetting to lock the door of the guest room some time back in 2000. (Tr. 764). He has received commendations from the hotel for five-year service and ten-year service awards. He has also received favorable recognition and was asked by the executive housekeeping manager in 2006 if he was interested in being a quality control supervisor. (Tr. 766-67). During the when PBHM manage the hotel, Villanueva did not receive any discipline. (i.e. from January to November 2007. (Tr. 790-91).

In 2005, Villanueva was elected to be a member of the negotiating committee for the housemen, which was part of the housekeeping department. (Tr. 762). He was involved in the first negotiations in November 2005 and was present during all contract negotiations. (*Id.*). He recalls that he only missed two bargaining sessions. (Tr. 776) At the negotiations sessions Villanueva spoke up on housekeeping matters such as the problems with machines used by the housemen and their rate of pay. (Tr. 776-77). He recalls Minicola sitting across the table. (Tr. 787). Villanueva has also taken part in the union information booth, and remembers an incident when someone was taking pictures of them at the backside of the Hotel. Villenueva also recalls Minicola standing by the entrance of the annex building just looking at him when he attended union rallies held in front of Pacific Beach Hotel. (Tr. 777, 788).

b. Record Evidence Of Discriminatory/Adverse Action.

Villanueva recalls being approached by the Housekeeping manager, Christine Ko, in late November 2007 about discipline for a co-worker. He was surprised about the comments made by the manager. (Tr. 778-79). Also in this discussion, Manager Ko asked him if he had received a job offer. He said, “No” and she was kind of “surprised” that he did not receive one. (Tr. 783). Villenueva asked her for a letter of recommendation and she said that he was doing good, had no problems but did point out the absenteeism. She began thinking and said that she didn’t have any authority about rehiring. (Tr. 784-85).

In November 2007 he was not given an offer letter, in spite of putting in an application as required by Respondents. (Respondent Exh. 11). Villenueva was not called in for any interviews. He never received any response to his job application and was not hired by Respondents. (Tr. 762-63). Villanueva believed that he should have been rehired because he applied for the same position he had worked in for the past 14 years and because he was the only

houseman who was not rehired. (Tr. 786-87).

As in Virginia Recaido's situation, Linda Morgan relied upon Christine Ko's recommendation that Rhandy Villanueva should not be rehired. (Tr. 1456). Ko told Morgan that Villanueva was absent a lot from work, and was not able to do his job completely. (Tr. 1456-57, 1653-55). When further questioned, Ko testified that Villanueva was not hired because he failed to complete work assignments, had attendance problems, and had committed safety violations. (Tr. 1653, 1657-58). She cited to an incident of delivering a roll away bed to a guest room, where he failed to knock on the room door even though the guest had placed a "do not disturb" sign on the door. (Tr. 1654-55).

In this instance, Ko testified that Villanueva should have called the Housekeeping supervisor to call the room. (Tr. 1655). Ko described another incident, where Villanueva left a rollaway bed in a hallway after a checkout room instead of returning it to Housekeeping. (Tr. 1656). Ko also cited to two (2) safety violations: when Villanueva over stacked rubbish bags in a bin and on another occasion when he tried to push two trash bins at the same time, using one to push the other. (Tr. 1657-58). When questioned whether any of these alleged safety violations resulted in discipline, Ko admitted that there were "none" in Villanueva's personnel file. (Tr. 1660-61).

Ko admitted that to the extent that Villanueva had absentee problems, she was unaware that Villanueva suffered asthma-like symptoms. (Tr. 1661-62). She also admitted that there were no written disciplinary records for Rhandy Villanueva when she made her recommendations on October 15, 2007. (Tr. 1777-78). At the hearing, Ko was questioned on the documented disciplinary actions that she had issued to other housekeepers and houseman. For example, there were five (5) discipline actions she imposed upon Frederico Galam between

March 1 and September 30, 2007. These disciplines included (1) a written warning for excessive absences on March 20, 2007 for excessive absences (GC Exh. 74, p.12(c));(2) a verbal warning on June 5, 2007 for entering a room without authorization (GC Exh 74,p.12 (b)-(c));(3) a written warning on September 3, 2007 for blocking the elevators doors with trash bags (GC Exh. 74, p.12 (e));(4) on September 18, 2007 a written warning for utilizing a guest elevator to transport a rollaway (GC Exh. 74, p.12 (f)-(h)); and (5)on September 24, 2007, a three-day suspension for changing his assignment without supervisor or manager's permission (GC Exh. 74, p.12(i)-(n). Although not been able to recall each discipline, Ko admitted that she signed all five documented disciplinary actions with the last three of occurring in September 2007. (Id.)

c. Judge's Findings Upon Review Of The Record Evidence.

In its exceptions, Respondents contend that Villanueva was a “sub-par employee,” was prone to taking “shortcuts at work” and at the same time “committing safety violations in the process.” (BSE at 35). Respondents also contend that Villanueva had “perhaps one of the worst attendance records in the entire housekeeping department.” Therefore, Ms. Ko felt that he was “not qualified, reliable or dependable.”(BSE at 35-36).

Contrary to Respondents' argument, the judge carefully considered and squarely rejected Ms. Ko's belief that Villanueva was not qualified, reliable or dependable. Instead, the judge found that to the extent that Villanueva had any absentee problems, “they were attributable to an asthma like condition.” Each of these absences were “explained by a doctor's note and he never failed to give notice of the situation.” While there “may have been no call of no-show absences, his work was generally very good.” (Decision, 34: 19-22).

Further, the record evidence supports the judge's finding that the Villanova was “the only houseman not retained” and as with “other housekeeping employees, Ko did not

consult any personnel jacket entries for her decision and recommendation.”(Decision, 34:24-26). Also, the record evidence relied upon by the judge confirmed that “[W] hile it was not entirely clear who made the decision not to retain Villanueva, Ko, made some kind of recommendation, and Morgan reviewed it. (Decision 34:26-28). Further relying on the record evidence, the judge found that “whoever made the recommendation, made an odd choice, given the records of those houseman who are retained.”(Decision, 34:29-31).

Contrary to Respondent's argument that Villanueva had one of the worse attendance records in the housekeeping department (BSE at 35-36), the judge found that “Housekeeper II Frederico Galam clearly had an inferior record given the fact that he had been disciplined five different times between March 1 and September 30, 2007.”(Decision, 34:31-37).

The judge then correctly concluded that when comparing Galam’s inferior record to union activist Villanueva’s, “the only conclusion that can be reasonably be drawn is that Respondents chose not to recall a Villanueva, because of his union activism, including his long participation as a member of the Union’s negotiating committee.” (Decision, 34:40-42). Therefore, the overwhelming record evidence, clearly supported the judge's conclusion that the “General Counsel’s prima facie case, fraught with animus, has not been rebutted” and “Villanueva was discharged in violation of §8(a)(3) and (1).”(Decision, 34: 42-43).

Therefore, Respondents’ exception that the judge erred in ruling that Respondents discharged Rhandy Villenueva in violation of §8(a)(3) is clearly unsupported by the facts; and the Board should reject this exception as lacking merit.

5. Respondents' Exception To The Judge's Ruling That Virginia Recaido's Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Recaido's Protected Conduct.

Virginia Recaido (hereinafter "Recaido") a 15-year employee, working as a housekeeper at Pacific Beach Hotel was not rehired on December 1, 2007. (Tr. 728). In 2005, Virginia was elected by housekeeping workers and became a member of the union negotiating committee. Being a large department, Housekeeping has three (3) committee members, Rhandy Villanueva was elected for the general cleaners and housemen and Virginia represented the housekeepers together with Guillerma Ulep. (Tr. 737-38). She took part in the first contract negotiations and as a union committee member; Recaido takes her position seriously because she believes in the Union. (Tr. 737-38). She was very vocal at the negotiations sessions when she spoke out for the housekeeping people and their problems. (Id.). In negotiations Recaido had brought up the working conditions in housekeeping such as the number of rooms they needed to clean. (Tr. 734). She spoke out, especially when the housekeeping job problems came up, such as not having time to eat when there are too many rooms to clean. At that time, there were 16 rooms given to the housekeepers by the Hotel. Recaido would be looking at Minicola when she spoke up about the problems. (Tr. 739). She recalls Minicola expressing his opinion about the union negotiating committee members by saying most of them will not be here (i.e. would not be continuing working) if not for the goodness of Corinne Hayashi. (Tr. 733-34). Minicola was looking at each of the committee members at the negotiating table when he made this statement. (Tr. 733, 755).

Recaido also took part in union rallies such as those held in the front of the Hotel. They would go past Minicola's office during these union rallies. (Tr. 740). She also did leafleting and also was interviewed by the news media about the Union. She sent an August 19, 2007

“letter to the editor”¹⁸, which she brought up her concerns about on-going negotiations with the Hotel. (Tr. 751-52). She has also been “quoted” in the newspaper and spoke in union sponsored commercials on TV, at least three or four times. (Id.). The Housekeeping manager, Christine Ko, mentioned that she had seen Virginia in the union commercials on TV. (Tr. 734-35).

b. Record Evidence Of Discriminatory/Adverse Action.

Christine Ko was executive housekeeper, during the time that PBHM was managing the Hotel., During this time(January 1, 2007 through November 30, 2007), Recaido did not have any disciplinary write-ups. (Tr. 742-43). Recaido believed that she should have been rehired since she has a good employee record, and has been a good worker for the 15 years working at the Pacific Beach Hotel. (Tr. 739). She also believed it to be unfair, because lower seniority people were retained instead of her in the housekeeping department. (Tr. 739-40). In the hearing, Christine Ko admitted that since December 1, 2007, eight (8) individuals have been hired in the Housekeeper I position for the Housekeeping department and that Virginia Recaido was never considered. (Tr. 1774-76)(GC Exh. 62).

Linda Morgan testified that the reason for not rehiring Virginia Recaido was based upon discussions with Christine Ko, the PBHM executive housekeeper, who Morgan worked with in order to decide which housekeepers would be hired. (TR. 1417-18). On October 15, 2007, Christine Ko provided Linda Morgan with six (6) names included Virginia Recaido. (Tr. 1714-16). In completing her assignment, Ko felt rushed and did not speak to Virginia or to Rhandy Villanueva. (Tr. 1767). Ko admitted that her “rush assignment” was difficult and she did

¹⁸ Alaska Pulp Corp., 296 NLRB 1260 (1989)(employee who wrote letter to newspaper criticizing employer engaged in protected concerted activity because letter was intended to elicit community support for strike).

not have enough time to rate each person within the different classifications, and therefore just used her “memory.” (Tr. 1740-43).

Morgan recalled Ko, stating that Recaido did not meet the job performance requirements, and also attendance was not satisfactory. (Tr. 1424). Ko also believed that Virginia was not a “team player.” (Tr. 1609). Ko described an incident that the housekeeper had supposedly failed to check a bed that become soaked with blood. (Tr. 1605-07). In alleging that Recaido's behavior is not professional, Ko claimed that she counseled her about this incident, however, no disciplinary action was found in PBHM’s file. (Tr. 1607-08). Another incident referred to by Ko involved Recaido allegedly not having a good attitude and being subordinate when she questioned the large number of work assignments for each housekeeper. Ko could not recall any disciplinary action imposed against Recaido for this incident. (Tr. 1608).

At the hearing, both Linda Morgan and Christine Ko were extensively questioned (with over one hundred and thirty (130) disciplinary records and attendance reports) of no less than twenty-five (25) other housekeeping employees whose records were much worse than Virginia Recaido and Rhandy Villanueva. (Tr. 1426-44, 1615-19, 1636-51, 1662-75) See GC Exh. 70; GC Exh. 74; and GC EXH 75). At the time (October 2007) when decisions were being made to rehire housekeeping employees, Ko admitted that she never discussed any of the disciplinary actions given to housekeeping employees with Morgan or Lopianetzky. (Tr. 1651-52)

For example, housekeeper Imelda Garibaldi was given a one-day suspension for being insubordinate to a supervisor and not wanting to do her work assignments of wiping the baseboards fronting an elevator. (GC Exh. 74, p.11 (a)-(b)). Another room attendant, Rosita Callo-Fieldad was given a written warning when guest complained of bloody sheets on their bed.

(GC Exh. 74, p.1 (a)-(c)). Room attendant Lydia Diego was counseled when guest complained of finding bloody bandages between the sheets and used baby bottles under the bed. (GC Exh. 74, p.4 (a)-(b)). Quality control supervisor Nida Corpuz, and Gilicera Ventura; room attendants Ramona Coloma, Angelita Nativida and Junita Lucas all received verbal warnings for failing to treat fellow employees with respect and courtesy. (GC Exh. 74, p.2, 3(c), 7(a)-(d), 9,10(c)). Room clerk Rose Mad was disciplined for unprofessional disrespectful behavior towards another employee. (GC Exh. 74,p.8 (a)-(b)).

Room attendant Junita Lucas' personnel records confirmed that she had a lot of cleaning discrepancies (GC Exh. 74, p.7(c)); a written warning for substandard cleaning (GC Exh. 70,p.8 (uu)-8(zz)); documented counseling for failing to complete her assigned rooms (GC Exh70, p.8 (hhh)-8(mmm)); a five day suspension for failing to clean two rooms as assigned (GC Exh. 70, p.8 (aaa)-8(ggg)); and a 90 day probation, which was extended for another 30 days because Lucas was consistently unable to complete her room assignments.(GC Exh. 70,p.8(vvv)-8(xxx)). While Ko could not remember each of Lucas' disciplinary problems, her signature appearing on each one of the document that disciplinary actions, refreshed her memory. (Tr. 1647). Earlier disciplines for room discrepancies imposed upon Lucas were included in her personnel records. (GC Exh. 70,8(ff)-gg),8(hh)-(ii),8(rr),8(ss)-(tt)).

c. Judge's Findings Upon Review Of The Record Evidence.

Upon review of the record file identified above, the judge's findings referred to the fact that Ko's explanation for not rehiring Recaido to be "untenable" where "Respondents retained employees whose histories of transgressions were far worse" than Recaido's. (Decision, 33:22-23). The judge's findings referred to all of the disciplinary actions identified above, especially those given to Junita Lucas. (Decision, 33:23-34). "Nevertheless, all of these

individuals were retained over Recaido whose work performance is clearly superior.”(Decision, 33; 33-34). The record evidence further supports the judge’s summarized findings:

Again, given Respondents’ hostility and antipathy, and the hollowness of the assigned reasons for not keeping her, it is clear that the General Counsel’s prima facie case has not been rebutted. Recaido was discharge in violation of §8(a)(3) and (1). (Decision, 33:36-38).

Accordingly, the Board should find that Respondents’ exception that the judge erred in ruling that Respondents discharged Virginia Recaido in violation of §8(a)(3) is clearly unsupported by the facts; and should be rejected as lacking merit.

6. Respondents’ Exceptions To The Judge’s Ruling That Ruben Bumanglag’s Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Bumanglag's Protected Conduct.

Ruben Bumanglag (hereinafter “Bumanglag”), almost 12 years working at Pacific Beach Hotel was not rehired on December 1, 2007. (Tr. 809). Bumanglag worked 40-hours a week as a Maintenance first class and recalled a disciplinary incident over 10 years ago, occurring in 1998, when a freezer went down due to a mix up in communication, and he got blamed for the problem. Other than that, there have been no other complaints or discipline. (Tr. 810, 816). He has received commendations for his work performance from the Chief Engineer and also has perfect attendance awards from 2001, 2003 and 2006. (Tr. 816-17). He was also promoted in 2001 from second-class maintenance to first class maintenance. (Tr. 817). During the PBHM time, there was no discipline imposed against him. (Tr. 843-41).

Bumanglag has been involved in union organizing from the very beginning in 2002, at the time of signing union cards, through two (2) elections and all the way through November 2007. (Tr. 817). At the first and second elections, Bumanglag was a union observer and participated in the contested hearings as a witness for the Union. (Tr. 818-19). After the

second election in August 2005, the union won by one vote. (Tr. 822-23). Minicola was present when the votes were opened and always brought up the fact that “the union only won by one vote.” (Tr. 824).

Bumanglag had remained active with the Union (1) by attending at least 10 Union rallies in 2007; (2) had done house calls and leafleting and TV commercials; and (3) was elected to serve as a union committee member sitting on the bargaining table across from management. (Tr. 819). He also operated the information booth in July and August of 2007 where Union committee members would inform employees of the progress of negotiations. (Tr. 819-21). He participated in the contract negotiations bargaining from its beginning in 2005 through November 2007. (Tr. 821-22). He was very vocal at the negotiation table when it had to do with matters dealing with his three (3) departments. When Minicola wanted to find out some information regarding these departments, in response, Bumanglag always spoke up. (Tr. 822).

b. Record Evidence Of Discriminatory/Adverse Action.

Bumanglag submitted his application in September 2007 and went through the whole process, such as getting the employee checklist, which mentioned that once they were hired they would be “at-will” employees. (Tr. 814). Bumanglag made the commercial for the Union in September 2007, which was about the same time of the application process. (Tr. 842). When he put in his application he said that he was available for the same shift that he worked before; however, he would reconsider if there was an opening in night shift. (Tr. 831). In spite of submitting his application, Bumanglag was never interviewed. (Id.).

At the time of the December 1, 2007 termination, Bumanglag had an excellent work record as a maintenance first class. He was certified under the Clean Air Act to handle refrigeration as required by the EPA. His certification is on refrigeration and air conditioning,

which he achieved at a technical institute in Honolulu. (Tr. 809). In December 1, 2007, there were approximately 800 Hotel rooms and there were “tons of refrigeration and air conditioning work” involving the hotel rooms, three restaurants and also function rooms. (Tr. 843). John Lopianetzky was incorrect regarding the other maintenance first class worker (Mr. Lee), who does only plumbing and house calls, and not air-conditioning or refrigeration work. (Id.).

As of December 1, 2007, there were 15 employees in the Maintenance department and Bumanglag was the “most senior” of three individuals in the classification of Maintenance 1st Class. Roger Galutira and Mr. Lee were rehired; however, Bumanglag was not rehired. (Tr. 810). Also, two (2) less senior employees who were union supporters and signed the petition for the union, were not rehired. (Tr. 811). Bumanglag was disappointed especially since he has a clean work record and perfect attendance. and that the other employees who were hired back, had bad records and some have lower seniority. (Tr. 825).

At the hearing, John Lopianetzky testified that he did not recommend that Ruben Bumanglag be rehired based upon (1) personal observations of Ruben doing repair work in the kitchen area and (2) with Shogun restaurant closing [he] kept another maintenance worker (Mr. Lee), who was stronger in air-conditioning and refrigeration work. (Tr. 1150). Lopianetzky also admitted that there were no disciplinary actions against Ruben for failure to properly fix any kitchen equipment. (Tr. 1151-52).

At hearing, Robert Minicola provided a different reason on why Ruben Bumanglag was not rehired. (Tr. 1137-38). Minicola believed that Ruben was not flexible in the scheduling of work, which he discussed with John Lopianetzky and Linda Morgan. (Id.). When confronted with his affidavit, Minicola confirmed that the additional reason of Ruben not

properly fixing kitchen equipment was not included in his affidavit. (Tr. 1390). Also since December 1, 2007, Respondent has hired six (6) new employees in the maintenance department for permanent and temporary maintenance trainee positions. (Tr. 1154-58)(GC Exh. 62).

d. Judge's Findings Upon Review Of The Record Evidence.

In its exceptions, Respondents' contend Bumanglag was not qualified to be rehired and the other Maintenance I workers were more flexible in their work scheduling. (BSE at 37). Respondents also contend that John Lopianetzky was frustrated that Bumanglag was unable to properly fix equipment and referred to the incident where a banquet chef was allegedly electrocuted after Bumanglag said the machinery was ready to be used. Respondents also refer to complaints made to Mr. Emerick that Bumanglag's work continued to be unsatisfactory. (Id.).

Contrary to Respondents' above-cited contentions, the judge carefully reviewed the record and squarely rejected them as not credible. The judge found that "[D]espite these incidents, if they occurred, no record was kept and no discipline was levied at the time. Indeed, the dates of these incidents are not shown in the record." (Decision, 31:31-32). Next, the judge found that Lopianetzky "admits that he did not ask Bumanglag's immediate supervisor to discipline him for failing to properly fix the ovens." (Decision, 31:33-34). Furthermore, the judge properly found that "there is no evidence that Minicola took any steps concerning the so-called electrocution incident. Since someone had gotten hurt in that event, a record should have been kept, either for OSHA reasons or for a workers compensation claim. But none was." (Decision, 31:34-37).

In his findings, the judge properly discounted proof offered by Respondents at the hearing "that Bumanglag was really no different than the other two Maintenance I employees

observing that both of them were also union supporters.” (Decision, 31:38-39). Based upon the record evidence of Bumanglag's protected conduct, the judge found that:

. . .it is clear that Bumanglag's union activities were far greater, as were his commitment to the Union by becoming heavily involved in negotiations. Appearing in the television commercial made him a far bigger concern, and therefore a bigger target. (Decision, 31:41-43).

The judge then summarized his findings and determined that “Respondents’ efforts to rebut the General Counsel’s proof fails the plausibility test. Respondents’ reasons are not only inconsistent and unsupported, they are made of whole cloth. They do not rebut the prima facie case.”(Decision, 31:44-46). Bumanglag's discharge violated § 8(a) (3) and (1) of the Act. (Decision, 31:46-47).

Consequently, the Board should affirm the judges finding’s that Respondents had no proper evidence, either through Lopianetzky or Minicola's testimony on which to base a lawful discharge of Bumanglag. On this point, the Board will affirm an evidentiary ruling of an administrative law judge, unless that ruling constitutes an abuse of discretion. PPG Industries, 339 NLRB 821, 821(2003). Based upon the record evidence as a whole, the judge was correct in finding and concluding that Bumanglag's discharge violated § 8(a) (3) and (1) of the Act. (Decision, 31:46-47). Therefore, Respondents exception that the judge erred in ruling that Respondents discharged Ruben Bumanglag in violation of §8(a)(3), should be rejected in its entirety as lacking merit.

7. Respondents’ Exception To The Judge’s Ruling That Virbina Revamonte Discharge Violated § 8(a)(3) Is Unsupported By The Facts.

a. Record Evidence Of Revamonte’s Protected Conduct.

Virbina Revamonte (hereinafter “Revamonte”), an 18-year employee at the Pacific Beach Hotel had a good work record including the promotion to an Assistant Pantry

Worker I in 2005. (Tr. 846-47). She has received commendations for her performance at work and also “service award certificates for five years, ten years and fifteen years.” (Tr. 851). She recalls a favorable evaluation done by her supervisor Chef in 2002 or 2003. (Tr. 852). She also had a good disciplinary record, with only one discipline in 1999 or 2000 when she called in sick. (Tr. 851). Revamonte suffered a work accident on June 11, 2006, and returned back to work September 5, 2006 in a light duty position in the Logo Store through April 25, 2007 when her doctor took her off of work. (Tr. 848-49). She was still on disability under workers’ compensation. (Tr. 869).

Virbina Revamonte became a member of the union negotiating committee in 2005 and recalled speaking up at the negotiation table on matters dealing with the employee concerns of Respondents making changes in the employee handbooks. (Tr. 860). In addition to serving on the union negotiating committee, Revamonte has participated in some union rallies, one in December 2006 and another one in 2007. These rallies were held on the sidewalk outside of the Pacific Beach Hotel. (Tr. 860). She was also the union observer in both organizing drives leading to the 2002 and 2005 elections. (Tr. 863).

b. Record Evidence Of Discriminatory/Adverse Action.

Virbina Revamonte was also required to reapply for her Pantry I position in August 2007 and filled out the application on August 27, 2007. (Tr. 850). She has never been contacted by the Respondents regarding her application or called back for any interview. (Tr. 850-51). In the application she just placed that she was available to work and she did not limit the hours because she was still out on disability. (Tr. 870). In December 2007, when Respondents rehired employees to staff the kitchens, there were at least ten pantry workers in the

Neptune Restaurant and about ten pantry workers for Oceanarium. Given her date of hire, Revamonte's seniority places her at seniority number #7. (Tr. 862-63).

At the hearing, Robert Minicola provided “the reasons” why Virbina Revamonte was not rehired on December 1, 2007. (Tr. 1391). Minicola stated that the kitchen department was going to be reduced and her application was not considered because they did not have any confirmation of [Virbina] being able to work. (Tr. 1391). The reason given by John Lopianetzky was that Revamonte “was not available to work.” (Tr. 1128). Hearing this reason, she was surprised that Respondents chose to rehire another Pantry I worker at Oceanarium, Blanche Kamau, who also injured herself at work, and missed work for about a year. Blanche Kamau is now working light duty at the Pacific Beach Hotel. (Tr. 866-67). Also, two housekeeping department employees (Joel Pancipanci and Vickie Sabado) who were not on the work schedule during the September 2007 application process, were either rehired or provided with an offer of employment. (Tr. 1686-87)(GC Exh. 63).

c. Judge’s Findings Upon Review Of The Record Evidence.

Clearly, the record evidence of Verbina Revamonte’s protected conduct as a whole, supported the judge’s findings that “Respondents chose to bypass Revamonte for discriminatory reasons.” (Decision, 32:20-21). Further, based upon the record evidence of Revamonte’s protected conduct, the judge properly found that she was a “union activists” and her “. . . availability or unavailability had no bearing on Respondents’ decision. (Decision, 32:22-23). Contrary to Respondents’ exception that its decision “for not hiring certain employees (i.e. Revamonte) was based on legitimate and nondiscriminatory reasons”(BSE at 37-38); the judge chose to accept the testimony of Verbina Revamonte as being more credible than the testimony evidence offered by John Lopianetzky. In making his credibility resolution, the judge found that

“Respondents’ explanation that it did not know whether she was available for work ‘clearly fails as a credible’ explanation” (Decision, 32: 24-25). Despite being on workers compensation leave, “she had said she was available on her application form and if Lopianetzky had any doubt, he could easily have spoken to her.” (Decision, 32: 23-28). “Either way, she was entitled to maintain at least the very status that she didn’t occupied -- workers comp leave.”(Id.).

Under Board established law, credibility resolutions by an administrative law judge are “not to be overruled,” unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Drywall Products, supra. Here, the judge correctly found that in view of his “findings elsewhere in this decision that the entire transition was part of a scheme to avoid unionization, and therefore had no real validity.”(Decision, 32: 19-21). Undeniably, the record evidence as a whole supports the judge’s findings of Respondents’ animus toward the seven (7) union activists, including Revamonte. (Id.).

Further, the judge correctly found that Respondents “chose to bypass Revamonte for discriminatory purposes”(Decision, 32:20-21), where the record evidence reveals, “Respondents did recall people who were not on the active payroll.”(Decision, 32:29).

One example is Vickie Sabado, a housekeeper on workers comp at the time of the transition. In addition, another housekeeper, Joel Pancipanci was an on-call employee. Both Sabado and Pancipanci were offered jobs. If these two were offered employment, there was no need to disconnect Revamonte from her job. The General Counsel’s prima facie case has not been rebutted. Revamonte’s discharge violated § 8(a)(3) and (1) of the Act.(Decision, 32:29-33).

Accordingly, under these circumstances, the Board should find no reason to disturb the judge's credibility determinations and agree with the judge that the Respondents failed to show that it would have discharged Virbina Revamonte in the absence of her union activities. The reason that John Lopianetzky gave for discharging and not rehiring Revamonte

were not in fact relied on, but were pretexts for taking actions against a leading union adherent. “There is clearly no obligation on the Board to accept at face value the reason advanced by the employer.” NLRB v. Buitoni Foods Corp., 298 F.2d169,174 (3rd Cir.1962). As such, Respondents exception that the judge erred in ruling that Respondents discharged Virbina Revamonte in violation of §8(a)(3), should be rejected as lacking merit.

Therefore, contrary to Respondents’ contention, Exception L should be rejected in its entirety. The credibility resolutions by the judge should not be disturbed under the Board’s policy established in Standard Drywall Products, *supra*. Based upon the record evidence as a whole, the Board should find that the judge was correct in his findings of Union animus and conclusions of discriminatory discharge of Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte, on December 1, 2007, because they were Union activists and thereby violated §8(a)(3) and (1) of the Act. (Decision, 44: 31-34).

G. RESPONDENTS UNLAWFUL POLLING/INTERROGATION OF BARGAINING UNIT EMPLOYEES ON APRIL 23 & 25, 2008 EVIDENCES A VIOLATION OF § 8(a)(1) OF THE ACT.

Exception M: Respondents take exception to the judge’s findings and conclusions that on April 23, 2008 and again on April 25, 2008 Respondents polled/interrogated its employees concerning their union activities, sympathies or desires in violation of § 8 (a) (1) of the Act. (See, BSE at 38-39). In Struksnes Construction Co., 165 NLRB 1062, 1063 (1967) the Board announced the standards applicable in determining the legality of “polls:”

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a) (1) of the Act, unless the following safeguards are observed (1) the purpose of the poll is to determine the truth of a union’s claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are

given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. 165 NLRB at 1063.

Contrary to Respondents' argument, the judge carefully considered and squarely rejected on credibility grounds the proffered lawful reasons, repeated in this exception before the Board, that that "Respondents were simply asking employees about the boycott, because the boycott was hurting business at the Hotel." (BSE at 39). The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Drywall Products, supra. As argued below, the judge's credibility resolutions are supported by over abundance of relevant evidence; therefore, Respondents' exception should be rejected as having no merit.

First, the record evidence established through Jacqueline Taylor-Lee's testimony established that Robert Minicola started off the April 25, 2008 meeting by saying that the boycott was going on outside and further asked not if we agreed with what's going on outside. (Tr. 967-68). Minicola also stated, however, if you don't, we want to hear from you, those who don't agree with the Union come to HR (Human Resources Department), we want to hear from you. (Tr. 968). Other managers (Watanuki and Morgan) also spoke to the employees asking to hear from them. (Id.). Minicola continued by saying that his hands were tied, but he still needed to hear from the employees to get their feedback. (Tr. 970).

Also, the record evidence establishes the fact that Cesar Pedrina, a senior purchasing clerk and about 40 employees were present at one of the meetings called by hotel executives during the last week in April 2008. (Tr. 881-82). Other Hotel managers included Linda Morgan, Robert Minicola, John L, Monica Draper and Kazu Watanuki. (Tr. 883-84). Minicola asked whether anyone, understood or knew what a boycott was? (Tr. 884). Watanuki

said that the boycott was there to hurt the hotel and that he did not agree. He then suggested that the employees who were present should go up to Monica Draper's office or Linda Morgan's, HR office and speak with those managers. (Tr. 885) Linda Morgan also spoke up at this meeting and said, "Take a look at what happened to Aloha Airlines, all of the employees are out of a job, the airlines went out of business." (Id.).

Guillerma Ulep, Room Attendant-Housekeeper was present at the same meeting, attended to by Cesar Pedrina. (Tr. 955-56). Her testimony corroborated Pedrina's statements as to what each manager said at the meeting. (Id.). Ulep provided detailed testimony of how the employees were directed to the Human Resources Office to give their sentiments concerning the Union; especially the union rallies and boycott occurring in April 2008. (Tr. 957-58). Although Ulep did not go to human resource office, she was able to identify several other housekeeping department employees who attended that meeting. (Tr. 961-962). The judge's findings refer to all of the above facts as being fully litigated in the hearing. (Decision, 26: 7-39)

Second, Respondent' exception raises "credibility" challenges as being contrary to the record evidence where the judge chose to accept the testimony of Jacqueline Taylor-Lee (Decision, 26:7-40) Cesar Pedrina (Decision 26: 41-48; 27: 1-3), and Guillerma Ulep (Decision 27:4-14) as being more credible than the testimony evidence offered by Minicola. Upon closer review, Respondents have implicitly excepted to each and every one of the judge's credibility findings (BSE at 38-39); and under the Board's established policy, the Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. See, Standard Drywall Products, supra.

Third, following the board's pronouncements that a polled employee be provided safeguards concerning the information sought under Struksnes Construction Co., 165 NLRB 1062 (1967), the judge determined that "Respondents' poll/interrogations were unlawful on several front as not complying with the safeguards required by Strukness (Decision, 27:37-48) The judge correctly found that the "HR department interrogated 63 employees concerning their Union sympathies and desires, all after providing them with the Company's point of view and implied threat of job loss."(Decision, 27:37-39)) (See, GC Exh. 53, cover letter together with handwritten notes taken by HR Manager Draper that detail the employees' disagreement with the Union and their disagreement with the boycott.)(Decision, 27:14-23).

Further, the judge correctly found that GC Exh. 53 was a poll of employees, and clearly the product of the post-meeting interviews, which Minicola had solicited without following the safeguards under Strukness. (Decision, 27:14-23). Thereafter, the judge determined that "Respondents did not make any effort whatsoever to protect the employees from coercion, it is self-evident that this polling procedure was unlawful under section §8(a)(1). Furthermore, Respondents failed to get the Union advanced notice that the poll was to be taken." Texas Petrochemicals Corp., 296 NLRB 1057 (1989), enfd. as mod. 923 F.2d 398 (5th Cir. 1991).(Decision 27:38-48; 28:1-14).In addition, the judge determined that GC Exh. 53:

"qualifies as straightforward coercive interrogation concerning the employees' union sympathies, activities and desires. Finally, by cutting from the herd the employees who had been persuaded to reject the Union's tactics, it exposed those employees who continue to favor the Union and its tactics. That, too, was coercive and violates section §8(a)(1). See Houston Coca-Cola Bottling Co., 256 NLRB 520 (1981). (Decision, 28:1-5).

In addition, the April 23 and 25, 2008 meetings, which led to the improper polling of employees, were a pretext for the improper "interrogation" of hotel employees as to their

union sympathy and affiliation in violation of §8(a) (1) “because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer had obtained.” NLRB v. West Coast Casket Co., 205 F.2d 902, 904(9th Cir. 1953). See also, Obie Pac., 196 NLRB 458(1972) (employer violated §8(a) (1) & §8(a) (5) by soliciting employees sentiment for use against union during negotiations); NLRB v. Wonder State Mfg. Co., 342 NLRB 406 (2004) (Evidence abounded by which the Board could reasonably conclude that the company’s initial threats to shut the plant down... and its firm pronouncement that the employees would get nothing more than what they were presently getting, aptly demonstrated ‘a completely closed mind and (a lack of) spirit of cooperation and good faith.)

As such, Respondents’ Exception M to the judge’s, findings and conclusions that on April 23, 2008 and again on April 25, 2008 Respondents polled/interrogated its employees concerning their union activities, sympathies or desires in violation of § 8 (a) (1) of the Act should be rejected as being without merit. (Decision, 44:36-38) The Board should follow its established policy and not overrule the judge’s credibility resolutions since there exists an over abundance of relevant evidence under Standard Drywall Products, supra Respondents have woefully failed to convince the Board by a clear preponderance of evidence that the judge’s credibility determinations are incorrect.

H. THE CHARGE OF UNLAWFUL THREATS IS CLOSELY CONNECTED TO UNLAWFUL POLLING/INTERROGATION CHARGE AND HAS BEEN FULLY LITIGATED AT THE HEARING.

Exception N: Respondents take exceptions to the judge’s findings and conclusions of § 8 (a) (1) violation that employees were threatened with losing their jobs if the Hotel had to close because of the boycotts.(Decision 44:42-44) Respondents argue that the Complaint does not contain any allegations that Respondents threaten employees with job loss.(See, BSE at 40).

By adopting the judge's conclusion that the Respondents violated § 8 (a) (1) when it unlawfully polled/ interrogated its employees concerning their sympathies towards the Union boycott challenged in Exception N; the Board should find that the judge did not err in his finding and conclusions of § 8(a)(1) violations for unlawful threats of loss of jobs because of the boycotts. Exception N should also be rejected as lacking merit for three reasons.

First, in spite of the Amended Consolidated Complaint (hereinafter “complaint”) not alleging a charge of unlawful threats of loss of jobs; the unlawful threat charge was fully litigated and is closely connected to the unlawful polling/interrogation of bargaining unit employees by the Respondents. “It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” Pergarment United Sales, 296 NLRB 333, 334(1989), *enfd.* 920 F.2d 130 (2nd Cir. 1990); See also, Cardinal Home Products, Inc., 33 NLRB No. 154 (2003)(judge properly found § 8 (a)(1) violation that was not alleged in the complaint where § 8(a)(3) violation alleged and § 8(a)(1) violation on both plainly focused on the same set of facts, the ultimate issue of respondents motivation was the same in both instances, and respondent acknowledged that this issue was fully litigated at the hearing).

In the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice. and when the conduct indicated in the alleged violation has been fully and fairly litigated. See, NLRB v. Coca-Cola Bottling Co., 811 F.2d 82,87 (2nd Cir. 1987); NLRB v. Chelesa Laboratories, Inc., 825 F.2d 680, 682 (2nd Cir. 1987), *cert. denied*, 484 U. S. 1026 (1988). See also, NLRB v. Scenic Sportswear, 475 F.2d 1226, 1227 (6th Cir. 1973) (complaint alleging company violated §8 (a)(1) by surveilling union activities apprised company of allegedly unlawful conduct and did not

violate due process even though trial examiner found the behavior might not be accurately characterized as “surveillance”).

Second, Respondents do not deny that the issue of unlawful polling/interrogation was litigated fully at the hearing. (BSE at 38-39) Moreover, there is no dispute that the § 8(a) (1) violation found by the judge that employees were threatened with losing their jobs because of the boycotts and the § 8 (a) (1) violation of unlawful polling/interrogation plainly focus upon the same set of facts: the mandatory meetings of all employees in April 2008 where hotel managers polled/interrogated employees concerning their union sympathies towards the union boycott.

Third, the ultimate issue is the same in both instances: whether Respondents’ actions directed against hotel employees because of the union boycott “tends to chill employees’ section 7 activity” in violation of Section 8 (a) (1) of the Act. See, George A. Hormel and Co. v. NLRB, 926 F.2d 1061, 1064 (D.C. Cir. 1992) (supporting a boycott is a protected §7 activity if it (1) is related to an ongoing labor dispute and (2) does not disparage the employer's product).

When providing testimony on the charge of improper “polling /interrogation,” Jacqueline Taylor-Lee testified that after the April 25, 2008 meeting Minicola spoke to the group of employees by saying that the effect of losing this type of business (meaning the Japanese tourists) would result in all of us (hotel workers) probably being out of a job. (Tr. 971). He also said that we (meaning the managers) could probably get other jobs but what about you? Can you get another job?” (Tr. 971). Linda Morgan then mentioned medical benefits and asked everybody, where could they find a job in which the Company would pay for their medical benefits, about \$600 for you and your family. (Tr. 971). Morgan followed the statements by stating, where else can you people get another job like this? (Tr. 972). Cesar Pedrina recalls

Linda Morgan saying, “Take a look at what happened to Aloha Airlines, all of the employees are out of a job, the airlines went out of business.” (Tr. 885).

Accordingly, the record evidence supports a finding that the § 8(a)(1) issue of the “chilling section 7 activity” occurring at the mandatory meetings in April 2008 was fully litigated at the hearing, and Respondents do not argue to the contrary. The record establishes that at the same meeting where Respondents’ managers unlawfully polled/interrogated hotel employees; these same managers, unlawfully threatened hotel employees of loss of jobs because of the boycotts. (Tr. 885, 971-972) The judge's findings refer to these same meeting which occurred in late April 2008.(Decision, 26: 1-4). The judge then found that Respondents’ threat of loss of jobs and the threat to close the hotel to be to be unlawful:

Certainly Minicola’s remarks and Morgan’s rhetorical question concerning ‘where else could they get a job if they lost this one?’ is a threat to close the business which violates §8(a)(1) since it is not supported by any objective criteria.(Decision 28:1-14).

Therefore, Respondents Exception N taking exceptions to the judge’s findings and conclusions of § 8 (a) (1) violation (Decision, 44:42-44) that employees were threatened with losing their jobs if the Hotel had to close because of the boycotts, lacks merit. The Board should conclude that the judge’s § 8(a)(1) finding of “unlawful threat” is closely connected to the § 8(a)(1) allegation of “unlawful polling/interrogation” alleged in the complaint; and the Respondents’ exception that the unfair labor practice finding should be reversed on procedural grounds, must fail.

I. RESPONDENTS’ EGREGIOUS CONDUCT DURING NEGOTIATION FOR A FIRST CONTRACT ESTABLISHED BY THE RECORD EVIDENCE SUPPORTS THE REMEDIES ORDERED BY THE JUDGE.

Exceptions O through P: These three exceptions relate to the remedies ordered by the judge. Respondents argue that the judge erred by extending the certification period for one

full year in Exception O (BSE at 42-45); that the judge erred in issuing extraordinary remedies in this case in Exception P (BSE at 45-47); and that the judge erred in issuing a broad cease and desist order in Exception P (BSE at 47-49). Because the three arguments are related, they are responded to together.

1. Respondents' Bad Faith Bargaining Conduct Established By The Record Evidence Warrants A Mar-Jac Extension Order.

First, in opposing the judge's order to extend the certification year for one year from the date of the Board's bargaining order herein (Decision, 42:1-6); Respondents "repeat" their contentions that the judge erred in finding that they were not presented with an uncoerced disaffiliation petition as evidence of the Union's loss of majority support, leading to the judge's order to recognize and bargain with the Union (See, Exceptions A-D and Exception I). Contrary to the Respondents' contentions that "boycotts" instigated by the Union qualified as "unusual circumstances" (allowing it to rebut the presumption of "taint" regarding an uncoerced disaffiliation petition); Respondents misconstrued Board law regarding "unusual circumstances" by its failure to recognize that in Lee Lumber, 332 NLRB at 178, fn. 24; the Board and Courts have construed "unusual circumstances" that would permit a challenge to a newly certified union during the certification year "narrowly," only to three circumstances, none of which included boycotts by unions. See, Ray Brooks v. NLRB, 384 U.S. 96, 98-99(1954). The judge's decision was (and is) clearly and fully supported by the record and cited case law. Accordingly, the judge was correct in his findings and conclusions that Respondents unlawfully withdrew recognition on December 1, 2007 and engaged in bad faith, in violation of §8(5) and (1) of the Act.(See Section A and arguments contained in Sections A.1 – A.6 of this Brief.) Where substantial evidence exists to support the judge's findings and conclusions of the unlawful withdrawal of recognition

on December 1, 2007; the Board should affirm the remedy ordered by the judge to recognize and bargain with the union and to the extend of the certification period for one full year. See generally, Mar-Jac Poultry Co., 136 NLRB 785 (1962) and Glomac Plastics, Inc., 234 NLRB 1309 (1978), enfd. in part, Glomac Plastics, Inc. v. NLRB, 592 F.2d 94 (1979).

Further, an extension order of less than one year as requested by the Respondents (BSE at 42-44) will, in effect, reward the Respondents for its bad faith in bargaining and “will not have the salutary effect necessary to deter Respondents from [continued] behavior in the future.” (Decision, 42:39-40). Glomac Plastics, Inc., supra. See, e.g., Teamsters Local 122, 334 NLRB 1190, 1195 (2001). Accordingly, in view of the Respondents’ bad faith bargaining disrupting the first year of negotiations and preventing PBHM from reaching an agreement with the Union in the 2007 negotiations, by suddenly terminating the Management Agreement; the parties require a reasonable period of time to resume their bargaining relationship. Bryant & Stratton Business Institute, 312 NLRB 1007, fn. 5 1045-46(1996), enfd. 140 F.3d 169 (2nd Cir.1998). The extension of certification year will provide the Union with a reasonable period of time in which it can be given a fair chance to succeed. Centr-O-Cast & Engineering Co., 100 NLRB 1507, 1508 (1952). Further, given the numerous unfair labor practices, as described in the judge’s decision; an extension of the certification period for one full year, is an appropriate remedy designed so far as possible, to dissipate the effects of Respondents’ failure to bargain in good faith and help to restore employees’ confidence in the collective bargaining process. Mar-Jac Poultry Co., supra.

2. Respondents' Egregious Conduct To Wash The Unions' Certification And To Evade Its Obligations Under The Act Warrants An Order For Extraordinary Remedies

Second, in respect to the extraordinary remedies, Respondents repeat their contentions that they 1) did not commit the alleged unfair practices; 2) did not bargain in bad faith and 3) did not bargain with the intention not to reach an agreement. (BSE at 45-46). Respondents also contend that the judge erred in ordering Respondents to pay the costs and expenses incurred by the Union in the preparation and conduct of collective bargaining sessions since they “did not engage in flagrant, egregious, deliberate or pervasive bad faith conduct aimed at frustrating the bargaining process.” (BSE at 46).

However, contrary to Respondents' contentions, Respondents' egregious course of conduct goes beyond the bargaining process and involves the deliberate evading of its obligation as the continuous “true employer,” together with the unlawful discharge of 7 union activists and numerous unfair labor practices. (See, Section C through Section H, and arguments contained in each Section of this Brief.). Even under the slightest possibility that Respondents are deemed to be a successor-employer; courts have held in successorship avoidance cases that the remedy is predicated upon the basic uncertainty that is properly resolved against the wrongdoer. See NLRB v. Staten Island Hotel, 101 F.3d 858, 862 (2nd Cir. 1996); US Marine Corp. v. NLRB, 944 F.2d 1305, 1321 (7th Cir. 19910, cert denied 503 U.S. 936 (1992); Bigelow v. RKO Radio Pictures, 327 U.S. 251,264(1946) (The “most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty, which his own wrong has created.”).

Next, consistent with NLRB precedent, the judge ordered Respondents to pay to the Union the costs and expenses incurred in preparation and conduct of bargaining negotiations

subsequent to January 5, 2006; by finding that Respondents' egregious conduct:

. . . can fairly be said to "have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies" in cases of unusually aggravated conduct, then extraordinary remedies are appropriate." Frontier Hotel & Casino, 318 NLRB 857, 859 (1995) enforced in pertinent part sub nom. Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C.Cir.1997) (Decision, 42:12-17).

In ordering the extraordinary remedies, the judge specifically found:

. . .that Respondents conduct easily fits the test. There is no debate that Respondents engaged in bad faith bargaining from the outset, then entered into a scheme whereby it could 'wash 'the Union's certification from itself and behave as if the employees never had selected the Union as their bargaining representative. In the process it discharged seven of the union's principle adherents- both as a retaliation and as a means of reducing what it perceived as the Union's thin majority. Accordingly, the General Counsel's requested extraordinary remedies will be granted.

(Decision, 42:24-31) (Emphasis added.)

Further, the judge correctly noted: as General Counsel argued (extraordinary remedies) are appropriate where there is a "direct causal relationship between the employer's action in bargaining and the charging party's losses." Teamsters Local 122 (August A. Busch & Co.), 334 NLRB 1190 at 1195 (2001), enfd. 2003 WL 880990 (D.C. 2003) (consent judgment). See also NLRB v. Gissel Packing Co., 395 US 575, 614 (1969), citing NLRB v. Logan Packing Co., 386 F.2d 562, 570(4th Cir.1967).(Decision, 42;18-23).

3. A Broad Cease And Desist Order Is Warranted Given Respondents' Unyielding And Egregious Conduct Strategically Designed To Evade Unionization.

Contrary to Respondents' contention, the record clearly and unequivocally established that the judge correctly issued a broad cease-and-desist order, because Respondents "have a proclivity for violating the Act" based upon "the serious nature of the violations and because of Respondent's unyielding and egregious misconduct, demonstrating a general disregard for the employees' fundamental rights."(Decision, 42:33-35). (See, Section D through Section H and arguments contained in each Section of this Brief.). Although arguing that a broad cease-and-

desist order is not warranted, Respondents exceptions do not contest the fact that initial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation of the parties' future labor- management relationship. When employees are bargaining for the first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative. Arlook v. Lichtenberg & Co., 952 F.2d 367,373(11th Cir. 1992). Accord: Ahearn v. Jackson Hospital Corp., 351 F.3d 226,239(6th Cir.2003). Because the parties have been embroiled in negotiations for a first contract since January 2006, the judge's broad cease-and-desist order was designed to prevent Respondents "from infringing in any other manner on rights guaranteed employees by Section 7 of the Act." Hickmott Foods, 242 NLRB 1357 (1979).(Decision, 42:36-38).

In this exception, Respondents cite to Bentonite Performance Material, LLC, 353 NLRB No.75 (2008) as being a recent case "with more egregious facts than our own," to support its contention that a broad cease-and-desist order is not warranted.(BSE at 48-49). In Bentonite, supra the Board adopted the ALJ's findings that the respondent violated § 8(a)(5) and (1) for withdrawing recognition from the union, failing to furnish the union with information, unilaterally changing wages and other terms and conditions of employment, interrogating employees, and promising wage increases if employees repudiated the union. Although, there existed numerous § 8(a)(5) violations, the Board modified the ALJ's broad cease-and-desist order, and instead substituted a narrow order requiring the respondent to cease and desist from violating the Act "in any like or related manner." Id. The Respondents' reliance on Bentonite is misplaced, as the current case is not a case "solely" of numerous §8(a)(5) violations.

In addition to Respondents' numerous §8(a)(5) violation in the current case, the judge found that Respondents' hostility and antipathy to unionization culminated in strategically

designed §8 (a) (3) violations of seven (7) union negotiation committee members (i.e., union activists) to avoid their collective bargaining obligation through an elaborate “scheme” to “wash the Union from the hotel” (Decision, 39:9-10), “with one purpose in mind: evasion of the Act (Decision, 40:47-48). The judge's finding of the elaborate “scheme” and serious §8(a)(3) violations of discriminatory discharges of the nature found in the current case distinguishes the type of remedial order as imposed by the Board in Bentonite, supra. Consequently, reliance upon Bentonite, supra, as a safe haven for Respondents to avoid a broad cease-and-desist order is not applicable in the current situation.

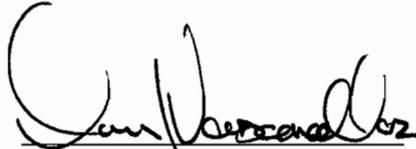
Further, the judge correctly determined that “given the nature of these unfair labor practices as I have described, I find that merely posting the notice will not have the salutary effect necessary to deter Respondents from this behavior in the future.”(Decision, 42: 39-41). Following the remedial order established in Excel Case Ready, 334 NLRB 4, 5 (2001), the judge “recommend[ed] that one of Respondents’ responsible corporate executives in the presence of a Board agent read the attached notice (Appendix) to the employees during shift meanings called for that purpose. The Board agent may also answer employee questions at that meeting.(Decision, 42:43-47). See, e.g., Audubon Regional Medical Center, 331 NLRB 374, 379 (2000)(broad remedial order warranted in addition to special remedies.)

Therefore, upon review of the record as a whole, Respondents’ Exceptions O through P taking exceptions to the judge’s Mar-Jac extension order; order for extraordinary remedies and broad cease and desist order lacks merit and should be rejected in its entirety.

V.
CONCLUSION

In summation, the judge's Decision is clearly and fully supported by the record and the cited case law. Respondents raised no exception or argument that warrants the Board, overturning the judge's well-reasoned Decision. Accordingly, the Union respectfully requests that the Board issue a decision affirming the portions of Administrative Law Judge James Kennedy's September 30, 2009 Decision to which Respondents have taken exceptions.

DATED: Honolulu, Hawaii, December 9, 2009.



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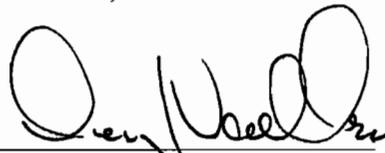
CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the following person by electronic filing and by depositing in the U.S. Mail, postage pre-paid on December 9, 2009:

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