

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,

and

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

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

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I. **INTRODUCTION** (Preliminary Statement of the Case)¹

This case is about an employer's refusal to abide by its employees' decision to organize and its subsequent quest to eliminate its employees' union through a battery of unfair labor practices. HTH Corporation ("HTH"), Pacific Beach Corporation ("PBC"), and Koa Management, LLC ("Koa") (collectively, "Respondents"), d/b/a Pacific Beach Hotel ("Hotel"), have attempted to rid themselves of the International Longshore and Warehouse Union, Local 142, AFL-CIO ("Union") since it first started organizing the Hotel's employees in 2002. This extended story of unlawfulness began when the Union filed its petition for a representation election on April 26, 2002 (GC 3, p.4). The election was conducted on July 31, 2002, pursuant to the Decision and Direction of Election issued on July 2, 2002. HTH Corp. d/b/a Pacific Beach Hotel, 342 NLRB 372 (2004). Having determined that Respondents engaged in objectionable conduct which interfered with this first election, the Board ordered a second election. Id. at 374-375.

After the second election on August 24, 2004, the Board determined once again that Respondents had engaged in objectionable conduct which interfered with the second election. Pacific Beach Corp., 344 NLRB 1160 (2005). In that same decision, the Board directed that several challenged ballots be counted and a revised tally of ballots be issued. Id. at 1163. The Board ordered yet a third election if the revised tally of ballots revealed that the Union did not receive a majority of votes cast. Id. After the challenged ballots were counted, the revised tally

¹ The Administrative Law Judge is referred to herein as "ALJ." References to the ALJ's decision are noted as "ALJD" followed by the page and line number(s). References to the transcript are noted as "Tr." followed by the volume and page numbers(s). References to Counsel for the General Counsel's exhibits are noted as "GC" followed by the exhibit number. References to Respondents' exhibits are noted as "R" followed by the exhibit number. References to all joint exhibits are noted as "Jt" followed by the exhibit number. Respondents' Brief in Support of Exceptions to the ALJD is referred to herein as "RBS" followed by the page number(s).

of ballots indicated that the Union had won the second election by one vote. After three years of protracted struggle and two elections marred by Respondents' objectionable conduct, the Union was finally certified as the collective-bargaining representative of Pacific Beach Hotel's employees on August 15, 2005.² (GC 3, p.4).

² The description of the certified bargaining unit in the ALJD contains some inadvertent errors. The correct unit description is:

All full-time, regular part-time and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(GC 3, pp.4-5). Counsel for the General Counsel has taken a limited cross-exception to this error. See Counsel for the General Counsel's Cross-Exception No. 7.

True to the recidivist tendencies first exhibited in their back-to-back objectionable conduct during the representation elections, Respondents committed a long string of imaginative unfair labor practices after the Union was certified in continuance of their war against unionization. As the ALJ correctly concluded, Respondents sought to evade their responsibilities under the Act and “wash” themselves of the Union. (ALJD 39:7-10).³ After the certification issued, Respondents began bargaining in bad faith from the first day they presented the Union with proposals for an initial collective-bargaining agreement (“CBA”). (ALJD 43:26-27). After robbing the Union of its certification year, Respondents attempted to eliminate the Union by inserting PBH Management, LLC (“PBHM”)⁴ as a middleman to bargain the Union to death on behalf of Respondents, all the while maintaining their control over the Hotel and its employees. (ALJD 43:34-38). To hide this scheme, Respondents repeatedly rebuffed the Union’s requests for relevant information the Union needed to discern which entity held actual authority over collective bargaining and the employees’ terms and conditions of employment. (ALJD 40:14-45). Respondents also thwarted PBHM’s request for permission to produce the relevant information to the Union. (ALJD 16:25-39; ALJD 17:1-18:6; GC 42, 44, & 45). When it became apparent to Respondents that PBHM would enter into a CBA with the Union,

³ On September 30, 2009, the Office of the Executive Secretary served all parties to this proceeding with a copy of the ALJD. Subsequently, the ALJD was also posted on the National Labor Relations Board’s (“NLRB” or “Board”) official website in both a PDF and HTML version. Although all ALJD versions are substantively identical, the page and line numbers do not correspond because of spacing and formatting differences. On October 20, 2009, the ALJ issued errata to his decision, in which he apparently referenced pages and lines from the PDF version of the ALJD posted online. In its Answering Brief, Counsel for the General Counsel has chosen to follow the ALJ’s decision to cite the ALJD version posted on the NLRB’s official website in PDF format. In their Exceptions and Supporting Brief, Respondents apparently cite to pages and lines from the version of the ALJD served on the parties by the Office of the Executive Secretary.

⁴ The ALJ inadvertently referred to this entity “Pacific Beach Hotel Management” in the ALJD. (ALJD 3:6-7).

Respondents abruptly terminated the Management Agreement (“Management Agreement” or “Agreement”) with PBHM and announced they would resume control of the Hotel. (ALJD 38:45-50; ALJD 39:1-10; GC 45 & 46). The ALJ correctly found Respondents to be the true, and therefore continuous, employer of the employees in spite of their charade. Respondents nevertheless compelled their employees to reapply for their jobs, using it as a ruse to unilaterally redo existing terms and conditions of employment. (ALJD 16:19-20; ALJD 44:9-13).

Respondents then used the contrived reapplication process to effectively discharge seven Union bargaining committee members. (ALJD 44:31-34). Further, when PBHM finally departed, Respondents pointedly refused to recognize the Union. (ALJD 22:47-23:10; ALJD 44:42-44).

Respondents’ stunt for getting rid of the Union failed to dazzle the ALJ. Rather, the ALJ saw right through Respondents’ febrile scheming, issued a decisive ALJD, and ordered appropriate special remedies to address Respondents’ outrageous behavior. (ALJD 41:31-42:46). In response to the ALJ’s reasoned conclusions, Respondents filed 17 very broad exceptions.⁵

II. THE ALJ’S CREDIBILITY FINDINGS

Respondents do not specifically except to any credibility findings the ALJ may have made. However, Respondents advance arguments in their Supporting Brief which cite evidence not credited by the ALJ.⁶ “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 us that they are incorrect.” D & F Industries, Inc., 339 NLRB 618, 618 fn.1 (2003)

⁵ Respondents’ exceptions are extremely broad and fail to comply with the requirements of NLRB Rules and Regulations § 102.46(b)(1). Accordingly, Respondents’ exceptions should be stricken.

⁶ See, for example, Respondents’ arguments in support of Exceptions F, G, and L. (RBS 19-28, 32-38).

(citing Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)).

Nevertheless, Respondents base several exceptions on testimony not credited by the ALJ.⁷

Exceptions that are supported by testimony which the ALJ did not credit should be dismissed.

III. THE ALJ CORRECTLY FOUND RESPONDENTS TO BE THE TRUE EMPLOYER OF THE HOTEL'S EMPLOYEES EVEN WHILE PBHM BARGAINED WITH THE UNION (Respondents' Exception H)

A. Respondents' Argument That All Unfair Labor Practice Charges Should Be Dismissed is Meritless

Respondents' Exception H attacks the ALJ's determination that the Respondents had an obligation to bargain with the Union while PBHM operated the Hotel. (ALJD 43:29-32). As an initial matter, Respondents argue in their Supporting Brief that all allegations should be dismissed because the ALJ failed to make a finding that Respondents had a joint-employer or agency relationship with PBHM in 2007. (RBS 14-16). They also argue that the ALJ did not find Respondents to be a successor to PBHM and therefore Respondents cannot be responsible for any unfair labor practices. (RBS 14-16). Respondents' arguments are meritless and should be rejected.

The Board's Rules and Regulations clearly require Respondents to "set forth specifically the questions of procedure, fact, law, or policy to which exception is taken." NLRB Rules and Regulations § 102.46(b)(1)(i). Respondents have not specifically excepted to the lack of an ALJ finding on a joint-employer or agency relationship. Respondents' Supporting Brief sets forth argument without an exception to support. Respondents' argument should therefore be

⁷ The ALJ did not credit, *inter alia*, the explanations proffered by Respondents' witness Minicola for terminating the Management Agreement with PBHM. (ALJD 37:37-39:7). In fact, the ALJ described one of Minicola's explanations as "lame." (ALJD 38:1-7). The ALJ also did not credit the reasons submitted by Respondents' witnesses Linda Morgan ("Morgan"), Christine Ko ("Ko"), John Lopianetzky ("Lopianetzky"), and Minicola for discharging seven bargaining committee members on December 1, 2007. (ALJD 29:33-30:6; 30:21-31:1; 31:23-43; 32:12-32; 33:1-34; 34:9-37; 35:34-36:4). Indeed, the ALJ went so far as to describe parts of Lopianetzky's testimony as "an afterthought," "not credible," and "unreliable." (ALJD 29:48-49; 30:40; 31:1).

disregarded because a “brief in support of exceptions shall contain no matter not included within the scope of the exceptions[.]” NLRB Rules and Regulations § 102.46(c).

Respondents’ contention should also nevertheless be rejected on the merits. The Consolidated Complaint and Amended Consolidated Complaint (“Complaint”) alleged certain unfair labor practices predicated on Respondents’ continuing obligation to bargain with the Union throughout 2007. The ALJ properly concluded that Respondents were the true, and therefore continuous, employer of the Hotel’s employees, entailing Respondents’ concomitant obligation to recognize and bargain with the Union. Accordingly, Respondents violated the Act by failing to abide by this obligation throughout 2007. In the alternative, Counsel for the General Counsel alleged that Respondents’ had an obligation to recognize and bargain with the Union as of December 1, 2007, because they were a successor to PBHM. But the ALJ had no need to reach this issue because he correctly found that Respondents remained the true employer with a continuous obligation to bargain. (ALJD 16:13-23; ALJD 43:29-32).

Instead of attacking the unfair labor practice violations predicated on the continued existence of Respondents’ obligation to recognize and bargain with the Union while PBHM supposedly operated the Hotel from January 1 to November 30, 2007, Respondents sweepingly declare they can not be found to have engaged in any unfair labor practices. This obscures the fact that Respondents engaged in certain unfair labor practices which are not legally predicated on a finding that Respondents had a continuous obligation to recognize and bargain with the Union when PBHM ostensibly operated the Hotel. Examples of these include Respondents’ surface bargaining throughout 2006 and the maintenance of overbroad rules from December 2007. The ALJ therefore properly concluded that Respondents engaged in these unfair labor practices because Respondents’ liability was not legally predicated on finding that Respondents

had a continuous obligation to recognize and bargain with the Union while they held out PBHM as the purported operator.

As for those unfair labor practices which clearly require the existence of a continuous obligation to recognize and bargain with the Union, the ALJ properly concluded that Respondents were the true employers of the Hotel's employees. The ALJ found it unnecessary to predicate the continuous obligation on the joint-employer or agency issues.⁸ (ALJD 4:41-44). This conclusion also foreclosed the possibility that Respondents could be successor employers to themselves. Accordingly, Respondents assertion that they are absolved of their unfair labor practices due to the lack of findings on these matters should be rejected.

B. Findings to Which Respondents Have Not Excepted

Among the findings which are not legally predicated on a finding of a continuous obligation to recognize and bargain with the Union, Respondents have failed to specifically except to the following:

- (1) Respondents independently violated Section 8(a)(1) by promulgating and maintaining overbroad rules⁹ (ALJD 23:12-39; 24:1-25:14; 25:41-51; 43:46-44:2);

⁸ The ALJ correctly found and concluded that Respondents were a continuous employer and that, although Respondents delegated PBHM to run the Hotel and bargain collectively with the Union on Respondents' behalf, at no time were Respondents relieved of the obligation to bargain in good faith with the Union. Therefore, Respondents must immediately recognize the Union and resume bargaining with the Union in good faith, including honoring all of the tentative agreements entered into by the Union and PBHM, and Respondents and the Union. Although, clearly, based on the ALJ's findings and conclusions, Respondents are responsible for the actions of PBHM, Counsel for the General Counsel has urged the Board to expressly find that PBHM was an agent of Respondents and that Respondents are bound by the commitments made in bargaining by PBHM. See Counsel for the General Counsel's Cross-Exception No. 6.

⁹ The following rules were found by the ALJ to be overbroad and independent violations of Section 8(a)(1):

-
- (1) Discouraging Potential or Actual Customers
Any advice by any Pacific Beach Corporation employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of Pacific Beach Corporation to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination.

(ALJD 23:21-31; GC 52).

- (2) Any information acquired by myself during the performance of my duties pursuant to my employment at, or in association with, or outside the scope of my employment, at the Pacific Beach Corporation, shall be regarded as confidential and solely for the benefit of Pacific Beach Corporation.

(ALJD 23:33-39; ALJD 24:1-4; GC 52).

- (3) 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.

(ALJD 24:8; ALJD 24:19-23; Jt 1(B), p.39).

- (4) 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 your 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.

(ALJD 24:8-10; ALJD 24:24-34; Jt 1(B), p.44)).

(5) **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.

(ALJD 24:10-11; ALJD 24:35-40; Jt 1(B), p.51).

- (6) Respondents’ rule prohibiting “[l]eaving the hotel or work areas during your working hours without the knowledge and prior consent of your supervisor.” (ALJD 24:10-11; ALJD 24:35-40; Jt 1(B), p.48).

- (7) Respondents’ rule prohibiting “[t]he making of derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation.” (ALJD 24:11; ALJD 24:41-51; Jt 1(B), p.49).

(8) **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.

(ALJD 24:11-13; ALJD 25:1; ALJD 25:41-51; Jt 1(B), p.51).

(9) **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

- (2) Respondents violated Section 8(a)(1) when Respondents' Regional Vice President, Robert M. "Mick" Minicola ("Minicola"), threatened an employee with unspecified consequences for being assertive during the collective bargaining process (ALJD 30:8-11; 44:40-41); and
- (3) Respondents HTH Corporation ("HTH"), Pacific Beach Corporation ("PBC"), and Koa Management, LLC ("Koa") constitute a single employer and are jointly and severally liable for any unfair labor practices. (ALJD 4:39-42; 43:3-10).

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

(ALJD 24:11-13; ALJD 25:1; ALJD 25:41-51, Jt 1(B), p.51).

- (10) Respondents' rule prohibiting "[a]rriving 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." (ALJD 24:11-13; ALJD 25:1; ALJD 25:41-51; Jt 1(B), p.48).

- (11) Respondents' rule which lists the following as unacceptable conduct:

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).

(ALJD 24:11-13; ALJD 25:1; ALJD 25:41-51; Jt 1(B), p.48).

- (12) Respondents' rule prohibiting "[l]oitering or straying into areas not designated as work areas, or where your duties do not take you." (ALJD 25:1-4; ALJD 25:41-51; Jt 1(B), p.48).

- (13) Respondents' rule prohibiting "[d]iscussing business, personal, or unauthorized matters in public areas where guests may be able to overhear the conversation." (ALJD 25:4-14; Jt 1(B), p.49).

Accordingly, any exceptions to the foregoing findings and conclusions are deemed waived. See NLRB Rules and Regulations § 102.46(b)(2). In addition, Respondents' Supporting Brief may not contain any matter not included within the scope of the exceptions. Id. § 102.46(c). To the extent these findings are challenged in Respondents' Supporting Brief or a potential Reply Brief, they are improper and should not be entertained by the Board.

C. The Evidence Supports the ALJ's Finding That Respondents Were the True, and Therefore, Continuous Employers of the Hotel's Employees With a Continuing Obligation to Recognize and Bargain With the Union

Respondents' except to the ALJ's determination that the Respondents had an obligation to bargain with the Union while PBHM operated the Hotel. (ALJD 43:29-32). This exception clearly lacks merit. There is ample evidence supporting the ALJ's determination that Respondents were the true, and therefore continuous, employer of the Hotel's employees. (ALJD 16:19-20).

1. Respondents dictated the initial terms and conditions of PBHM's employment of the bargaining unit and ordered a seamless transition

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 Management Agreement between Respondents and PBHM states:

Owner and Operator further agree as follows:

- (i) 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;
- (ii) 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 38, pp.9-10).

By requiring PBHM to hire all of the Hotel's bargaining unit employees 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.

2. Respondents retained control over the continuing terms and conditions of employment for all bargaining unit employees, because the Management Agreement gave them ultimate authority to approve or reject any proposed CBA

Paragraph 3.2 of the Management Agreement spelled out some of the limitations on PBHM's authority to operate the Hotel. Included in this paragraph is subparagraph 3.2.c, which states:

Operator shall obtain Owner's approval of any agreement affecting the Hotel (i) the term of which is more than one (1) year in length and that cannot be terminated upon (30) days' notice by Operator, or (ii) if the cost to the Hotel under that agreement exceeds Three Hundred Fifty Thousand Dollars (\$350,000.00), or (iii) that extends beyond the Initial Term and cannot be terminated upon thirty (30) days' notice by Operator.

(GC 38, p.8) The clear language of paragraph 3.2.c of the Agreement reserves for the Respondents final approval any agreement, of which a CBA would be one, between PBHM and the Union. Since a CBA would detail the terms and conditions of employment for all bargaining unit members, the veto power possessed by Respondents allowed them ultimate control over bargaining unit members' terms and conditions of employment.

a. Respondents' attempt to claim that approval of a CBA was not encompassed within this provision is disingenuous, and they

never communicated to PBHM their alleged interpretation of Section 3.2.c. of the Agreement

Respondents' Regional Vice President Minicola attempted to characterize the issue of whether paragraph 3.2.c of the Agreement required any CBA between PHBM and the Union to be approved by Respondents as an item of "dispute" between Respondents and PBHM.

Q Yes. And you will agree that this document does require or did require PBHM to seek owner's approval for - - let me get that specific language - - "Obtain owner's approval for any agreement affecting the hotel, the term of which is more than one year in length, and that cannot be terminated upon 30 days notice by operator, or if the cost to the hotel under that agreement exceeds \$350,000."

A Those are the terms of the bank loan.

Q "Or extends beyond the initial term, and cannot be terminated upon 30 days notice by an operator." Is that correct?

A It doesn't say "Collective Bargaining Agreement" though, Dale. It says "contracts" right?

Q That's correct. So, if a Collective Bargaining Agreement was in excess of one year in length, under this provision, would it not have to seek owner's approval?

A Well, there was a disagreement between Outrigger and us on what the language meant or did not mean, because Collective Bargaining Agreement, if you bring that document forward, you'll see that it's not included or excluded in that document.

(Tr. 1:100-01). This is a preposterous statement and the ALJ properly discredited Minicola's claim and concluded that Respondents knew this provision would require them to approve any CBA reached by PBHM and the Union. (ALJD 11:4-7).

In a letter dated July 30, 2007 to Respondents' attorney Ronald Leong ("Leong"), PBHM's attorney Richard Rand ("Rand") requested permission to propose a two-year contract to the Union containing terms PBHM was reasonably certain the Union would accept. (GC 44). He also requested permission to release more portions of the Agreement that had previously been

requested by the Union, including paragraph 3.2.c, because PBHM believed it constituted a limitation on PBHM's authority to enter into an agreement with the Union and must be disclosed to the Union prior to reaching an agreement in order to fulfill PBHM's good-faith bargaining obligations. (GC 44).

The issue of whether Respondents' consent of the CBA was required under the Agreement was also addressed in this letter. Rand wrote:

Operator recognizes its obligation to negotiate with the Union in good faith and believes that a contract that is two years in length reflects the best interests of all parties. In your e-mail of July 29, you say that "PBHM Management, LLC, is in control as it must and has been in order to be operating the Hotel." Either Operator has the right, under Section 3.3(e) of the Management Agreement to enter into the 2-year CBA without Owner's consent, or Operator must, under relevant provisions of the Management Agreement, get Owner's consent before entering into the CBA. Owner has taken the position in the meeting among our clients and you and I, that Owner's consent is required under Section 3.2(c) ("Operator shall obtain Owner's approval of any agreement affecting the Hotel (i) the term of which is more than one (1) year in length and that cannot be terminated upon thirty (30) days' notice by Operator"). If Owner and you are now implying, for whatever reason, in your July 29 e-mail that Owner's consent is not required for the 2-year contract and the other terms set out in the Union's proposal, we would appreciate your written confirmation of that position and we will proceed with and conclude the Union negotiations without the Owner's consent.

(Emphasis added) (GC 44, pp.1-2). Because PBHM received no response to Rand's letter, PBHM Vice President Mel Wilinsky ("Wilinsky") sent another letter dated August 2, 2007, this time addressed to Respondents' Corporate Head and Hotel owner, Corine Watanabe *nee* Hayashi ("Watanabe"). (GC 45). Attached to Wilinsky's letter was a copy of Rand's July 30, 2007 letter to Leong, with copies of all of the attachments. Wilinsky never received a response to his letter. (Tr. 13:2312).

Minicola stated that he believed Leong responded to Rand's letter, but produced no evidence of the existence of such a response. (Tr. 13:2314-16). In addition, Counsel for the

General Counsel subpoenaed "All documents including correspondence, e-mails and memos between PBH Management, LLC and [HTH, Koa and PBC] during the period August 1, 2005, to present which refer to the Union." (GC 54, 55, 56, para.22). Respondents produced nothing to indicate a response was made to Rand's letter of July 30, 2007.

When asked specifically whether it was his opinion that approval of the CBA was not required under paragraph 3.2.c of the Management Agreement, Minicola refused to answer the question directly and responded with evasive and contradictory statements.

Q. Under this -- under the terms that are stated in the management agreement, isn't the Collective Bargaining Agreement -- wouldn't a Collective Bargaining Agreement fall?

A. It's not in there. The Collective Bargaining Agreement, it says that the --

Q. -- So, are you saying, then, that any Collective Bargaining Agreement would not have had to be submitted to the owner's group?

A. I'm not saying that. I'm saying that it's not detailed to the bank. I'm saying that if you talk about Collective Bargaining Agreement, it's in the rights of PBH Management LLC, if you read the management agreement. So I'm saying that I don't agree with your --

Q. -- And it's within rights of PBH Management LLC -- the negotiations aspect of it?

A. They're responsible for the negotiations.

Q. That's correct?

A. That's correct.

Q. And you're saying they could enter into a Collective Bargaining Agreement without seeking approval of their own?

A. They could enter into an agreement, subject to the approval from the bank -- the process like we did every other contract. Because if there was a default with UBS or Wachovia, we would have been the company that would default.

So what happens is, actually, you have a bank loan. PB Corporation was removed, which the bank had to approve and replace it with PBH Management LLC as the manager of the property, and employer.

I actually - - Judge, for simplicity purposes, and I think - - I had made a chart that - - am I able to produce the chart?

(Emphasis added) (Tr. 1:101-02). After Minicola started to digress and attempt to dodge the direct question, the ALJ properly requested clarification.

THE EXAMINER: But I do think I'm going to have to look at that.

But let me see if I understand Mr. Minicola's testimony. He's saying that Collective Bargaining Agreement would be subject to all the same sorts of approval processes that any other contract would be subject to, In terms of being submitted to the bank?

THE WITNESS: We had contact, Wachovia, which was our servicer of the loan.

THE EXAMINER: Well, can you just answer my question? Was it yes or no?

THE WITNESS: They told us to send them - -

THE EXAMINER: All contracts?

THE WITNESS: All contracts

(Tr. 1:103-04). However, after saying that, Minicola later contradicted himself again.

THE WITNESS: Sir, I understand what you're saying. I want to go back to the language of our bank loan, which we have produced. And it identifies "major contracts" and that is the description of what they consider "major contract."

It does not say "collective bargaining" or not. And I agree with you, it's questionable whether or not we have to send it to them.

THE EXAMINER: Okay.

THE WITNESS: And Outrigger and I - - our company had disagreements over that.

THE EXAMINER: And your company's position was what?

THE WITNESS: Our company's position was, you folks have the right to manage and make decisions on the CBA. However, the only disagreement that we had was that the ILWU did not remove HTH Corporation from the Agreement.

And if you look at that, the management agreement, they did not have the right to sign an agreement with HTH Corporation's name on it, because they could not negotiate for us.

THE EXAMINER: So, from your point of view, it wasn't a question of whether the bank had to be approved, it was a question of who the contracting parties were?

THE WITNESS: Exactly.

(Tr. 1:105-06). Finally, when asked whether Minicola communicated the fact that PBHM did have the authority to enter into a CBA without Respondents' approval, he once again evaded the question.

Q. Is it your position that the Collective Bargaining Agreement did not have to be forwarded to UBS? Is that what you're saying today?

A. I'm saying that in the agreement, they had the right to make those decisions.

Q. Who had the right?

A. PBH Management LLC, as long as they did not have us on the contract.

Q. Okay. So, again, I'm asking the question. Under the management agreement, are you saying that any Collective Bargaining Agreement entered into by PBH Management did not have to be approved by the owners?

A. Unless they had an owner's name on it. That's what I'm saying. That's the only reason that we would be in contest of it.

Q. And did you communicate this interpretation?

A. Because we had no idea what it's about. They had not updated us on any of the negotiations. We had no part of it.

Q. Did you ever tell anybody in PBH Management that that is the -- the interpretation that the management agreement -- that the Collective Bargaining Agreement did not have to be approved by the owners?

A. We said that it was not included or excluded based upon the agreement.

We had attorneys, we had discussions that were privileged at the time. And there were many disagreements about what that meant or didn't mean.

PHB Management LLC also has other contracts that they enter in on behalf of the hotel that needs to follow this, which are revenue-related contracts, that this would be the provision, yes.

So, what I'm saying is that, based upon all contracts, CBA seems to be a little different.

Q. But that was never communicated, specifically?

A. Well, there were different reasons of what would happen. However, the fact of the matter was, if they did something that the bank felt was not right, we would be in default, not PBH Management LLC. Those were the concerns on both sides.

(Tr. 1:109-10).

What was clear through this exchange was that Minicola was intentionally attempting to conceal the truth that paragraph 3.2.c placed ultimate veto power of any CBA in Respondents' hands. The ALJ, appropriately, did not credit this testimony. (ALJD 11:4-7). Logically, if Respondents believed that the CBA should not have been included among the contracts that required Respondents' consent under the Agreement, it would have been simple enough to clarify it for PBHM. According to Outrigger Hotels Hawaii ("Outrigger") Vice President Barry Wallace ("Wallace") and Wilinsky, Respondents never told them that their consent was not necessary for PBHM to enter into a CBA with the Union. (Tr. 3:410; 4:504).

The evidence supports the ALJ's conclusion that Respondents knew that paragraph 3.2.c would apply to any CBA PBHM might negotiate with the Union. It was precisely because

Respondents never intended to allow a CBA with the Union to be achieved that they attempted to obscure this fact.

Finally, PBHM's CBA proposal that it presented to Respondents' for authorization to offer the Union included the requirement that PBHM would be the sole party to the contract. (GC 44). Therefore, if Minicola testified truthfully, the proposal did address Respondents' only concern (i.e., not to be named in the CBA between PBHM and the Union), and Respondents should not have had any remaining concerns over the proposal. Respondents instead chose to cancel the Agreement with PBHM.

b. The UBS Loan document language clearly included a CBA as a contract requiring bank approval

Minicola stated that paragraph 3.2.c was included in the Agreement because it was required under the bank loan from UBS, which was serviced by Wachovia. (Tr. 1:99-100, 12:1948). According to Section 4.4.12 of the Loan Agreement between Koa and UBS dated August 9, 2004, Koa was required to obtain UBS's written approval of all "major contracts" affecting the "Property". (R 14, p.41) The Loan Agreement defined "Major Contracts" as,

(i) any management, brokerage or leasing agreement, or (ii) any cleaning, maintenance, service or other contract or agreement of any kind (other than Leases) of a material nature (materiality for these purposes to include contracts in excess of \$350,000 or which extend beyond one year (unless cancelable on thirty (30) days or less notice)), in either case relating to the ownership, leasing, management, use, operation, maintenance, repair or restoration of the Property, whether written or oral.

(Emphasis added) (R 14, p.9). By Minicola's own testimony, the terms of the Loan Agreement determined the requirement in Respondents' Agreement with PBHM. Respondents were obligated under the Loan Agreement to make sure that PBHM complied with the lender's approval requirement. The plain language of the Loan Agreement as well as the Management Agreement clearly includes a CBA. Finally, it is impossible to believe that Minicola did not

comprehend that a CBA is a contract and, as such, is encompassed in the scope of paragraph 3.2.c of the Agreement.

c. Respondents controlled what was sent to the bank for approval

During Minicola's testimony, he tried to minimize Respondents' role in reviewing contracts under paragraph 3.2.c of the Agreement it had with PBHM and instead attempted to characterize Respondents' role as a pass-through entity. (Tr. 1:101). When providing his affidavit to the Board Agent, however, he stated that "KM was a gate-keeper to UBS or Wachovia under this provision."¹⁰ KM would not forward a contract to UBS and Wachovia under the loan, if it had not agreed to the terms of the proposed contract." (Tr. 1:108-09). This description is a more realistic representation of Respondents' role in relation to the bank. In light of the strong feelings that Respondents had toward the Union, and Minicola's dogged refusal to believe that the Union enjoyed the majority of the bargaining unit members' support, it strains the imagination that Respondents would forward a CBA to UBS for review if it objected to its contents.

d. Respondents intentionally withheld information from the Union regarding the Management Agreement and thwarted PBHM's attempt to provide the same information to the Union, thereby continuing to control the negotiating relationship between PBHM and the Union

The Union made information requests of both PBHM and Respondents asking for clarification as to which entities controlled the terms and conditions of employment of the bargaining unit employees. (GC 28 & 29). Shortly after the Respondents received the Union's April 17, 2007, request, Minicola contacted the Union's Oahu Division Director and chief negotiator, Dave Mori ("Mori"), and informed him that he (Minicola) had been advised by his

¹⁰ The term "this provision" referred to Section 3.2.c of the Management Agreement.

attorney that Respondents had no obligation to respond because they were not involved in negotiations with the Union. (Tr. 2:260).

The Management Agreement between Respondents and PBHM contained a confidentiality clause, which required both parties' consent before any information regarding the contents of the Management Agreement could be divulged. (GC 38, p.36, para.25.17). PBHM attempted several times to secure Respondents' consent to release the contents of paragraph 3.2.c, because it believed that that paragraph constituted a limit on PBHM's authority, and that the principles of good-faith bargaining required PBHM to disclose such limitation. (GC 42 & 44). Respondents would not consent to the requested disclosure, and instead cancelled the Management Agreement it had entered into with PBHM. By controlling the information PBHM could disclose to the Union, Respondents effectively controlled the outcome of negotiations between PBHM and the Union. This is further support for the ALJ's finding that Respondents, rather than PBHM, were the true employer of the Hotel's employees as they ultimately controlled their employees' terms and conditions of employment.

3. Because the Management Agreement required Respondents to reimburse PBHM for all employee wages and benefits, Respondents exercised control over the cost of employment of all employees

Under the terms of the Management Agreement, Respondents were responsible for reimbursing PBHM for all costs of employment, including:

3.3.a.

- (i) 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;
- (ii) the employer's portion of social security taxes, employer unemployment insurance contributions and assessments;

- (iii) workers' compensation insurance;
 - (iv) temporary disability insurance (TDI);
 - (v) prepaid healthcare; vacation and sick leave pay; and
 - (vi) employee benefit plan contributions earned by the Hotel Employees for service during the term.
- b. 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 38, pp.8-9).

Under Article X, Respondents exercised control over the total cost of operating the Hotel through its review of the annual operating budget, which, under the Agreement, must be approved by Respondents. (GC 38, p.15, para.10.1). In addition, PBHM could not exceed the approved annual budget by more than 5% or a line item by more than 10% without Respondents' approval. (GC 38, p.15, para.10.2). Since employee expenses are included in an annual budget, Respondents had ultimate control over the level of pay and benefits PBHM could offer to the employees.

4. Respondents obligated PBHM to honor all tentative agreements reached by Respondents and the Union

The ALJ found that PBHM was obligated by Respondents to bargain from where Respondents left off. (ALJD 12:37-39). The evidence supports this finding. Dave Mori testified uncontrovertibly that during a meeting he and Union President Fred Galdones ("Galdones") had with Minicola at which Minicola informed them of the Management Agreement Respondents had reached with PBHM, Minicola told them that PBHM would be honoring all tentative agreements reached by Respondents and the Union, and that PBHM would resume bargaining

with the Union where Respondents left off. (Tr. 2:237-38). Wilinsky confirmed Mori's testimony and stated that PBHM agreed to begin where prior negotiations had left off because it was a condition of their agreement with Respondents. (Tr. 4:493). This represented still another way that Respondents maintained some control over the CBA terms negotiated between PBHM and the Union.

5. Respondents required PBHM to retain John Lopianetzky as an employee or Food and Beverage "consultant" who reported directly to Respondents

As part of the Management Agreement, Respondents required PBHM to offer a position to Respondents' Food and Beverage Director John Lopianetzky ("Lopianetzky"). Paragraph 3.3.d. of the Agreement states:

Operator shall offer employment to the person holding (immediately prior to the Effective Date) the position of Director of Food and Beverage of the Hotel, upon terms and conditions determined by Operator in its sole discretion, and if such person does not accept Operator's offer, Operator shall, at Owner's Expense, consult with such person for a period of eighteen (18) months after the Commencement Date to ensure a cooperative transition in the management of the food and beverage areas of the Hotel; provided, however, that if and for so long as Operator uses such person to oversee the day-to-day food and beverage operations (including during any period in which Operator is recruiting for the position of Director of Food and Beverage, should the person currently holding the position decline Operator's offer), Operator shall pay for such person's wages and benefits as a Hotel Expense.

(GC 38, p. 9).

Wallace, a veteran and experienced hotelier who had reviewed 40 to 50 management agreements on behalf of Outrigger, stated that he had never seen a provision such as 3.3.d. in any other agreement. (Tr. 3:417). Wallace stated that PBHM liked Lopianetzky's work and therefore decided to continue to utilize him in the Director of Food and Beverage position until PBHM could identify another individual to take his place. (Tr. 3:416). Wallace stated that "at

all times [Lopianetzky] was an employee of the owner, not of PBH [sic]" and that "[h]e reported to Mr. Minicola." (Tr. 3:416).

Lopianetzky, a particularly uncooperative witness, testified that he reported to PBHM's Hotel General Manager Bill Comstock ("Comstock") and attempted to paint his role as simply advisory in nature, giving virtually no specific examples of the work that he performed. (Tr. 7:1103-06).

The ALJ, however, correctly noted that Lopianetzky "advised and assisted" Comstock by interviewing job applicants and recommending various applicants be hired for specific jobs. (ALJD 11:50-52). The evidence certainly supports this finding. (Tr. 7:1200-02; GC 73). Additionally, while he worked as a consultant, Lopianetzky reviewed and initialed personnel documents when it pertained to Food and Beverage Department personnel. (GC 72). Finally, by his own admission, Lopianetzky performed essentially the same functions as a consultant as he did as Director of Food and Beverage prior to January 1, 2007, and occupied the same office.¹¹ (Tr. 7:1179-92).

Bargaining committee member Todd Hatanaka ("Hatanaka") testified that in 2007, his restaurant manager, Dio Raquel ("Raquel") told Hatanaka that Lopianetzky was upset that he (Hatanaka) had clocked out early one day, and that Raquel would have to discipline Hatanaka if Lopianetzky told Raquel to do so. (Tr. 6:929). Hatanaka said that he was also told that any time he left the bar area where he worked as a bartender, he had to inform the manager on duty that he

¹¹ He testified, *inter alia*, that he had the same access to the various food and beverage areas, he would make sure there was proper staffing by reviewing schedules, he attended Food and Beverage Department meetings and he continued to receive the same reports from his managers that he had prior to January 1, 2007. From Lopianetzky's description, the only difference between what he did prior to January 1, 2007 and while working as a consultant was that he was sometimes accompanied by General Manager Comstock and that he believed he did not have the final say on anything.

was doing so. (Tr. 6:928). Hatanaka said that Raquel told him that order also came from Lopianetzky. (Tr. 6:929). Conveniently, Lopianetzky could not recall asking Hatanaka to report to him every time Hatanaka left the bar area. (Tr. 8:1317).

Respondents clearly viewed Lopianetzky as their manager when they included him as one of three decision makers during the fabricated hiring process that began in September 2007. (Tr. 7:1196). Lopianetzky also testified that when he attended monthly financial review meetings, where Minicola, Comstock, Respondents' controller Sheryl Naito, Chuck Shishido¹² and Avery from Outrigger were usually present. (Tr. 7:1213). Lopianetzky testified that he attended those financial review meetings as a representative of Respondents. (Tr. 7:1214). He clearly enjoyed a special status to have been included in meetings where the Hotel's general manager and Respondents' and Outrigger's corporate officials discussed the Hotel's financial performance.

Obviously, there was a relationship that Respondents had with Lopianetzky that motivated them to carve out a position for him even after PBHM assumed the management of the Hotel. Because of this special relationship, Lopianetzky trusted Respondents enough to accept changes to his position, from Director of Food and Beverage, to consultant, and finally to General Manager, without discussion of compensation or knowing who could ultimately fire him. (Tr. 7:1106; 7:1198-99). It is apparent that Lopianetzky saw himself as Respondents agent at the Hotel, and saw his role as providing his food and beverage expertise at the Hotel during PBHM's brief presence all the while reporting directly to Minicola.

Respondents' imposition of Lopianetzky on PBHM and the authority they conferred upon him as their agent support the ALJ's ultimate conclusion that Respondents, rather than PBHM, remained the true employer of the Hotel's employees.

¹² Chuck Shishido is a Vice President of Operations for Outrigger's Ohana branded hotels. (Tr. 3:370). He was assigned to oversee the Pacific Beach Hotel. (Tr. 3:371).

6. Respondents required PBHM to secure Respondents' approval of any hiring or change of general manager

The Management Agreement between Respondents and PBHM required PBHM to obtain Respondents' approval of its selection of a hotel general manager. (GC 38, p.9). Paragraph 3.3.c. of the Agreement 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 Outrigger has never given up its right to ultimately decide who will be the general manager of a property managed by Outrigger, and found this provision to be unique. (Tr. 3:417) In addition, Outrigger informed Minicola through a copy of an electronic message addressed to Comstock of the hiring of Director of Housekeeping Christine Ko ("Ko") and Human Resource Manager Clarisse Eguchi ("Eguchi"). (Tr. 8:1352-53; GC 67).

If PBHM were truly and solely responsible for the day to day operation of the Hotel, it would have been PBHM's prerogative to determine who would run the Hotel and who to hire as department managers. The ALJ properly noted this in his findings of fact (ALJD 12:4-8), and it is yet another example of Respondents' refusal to relinquish control of the operation of the Hotel to PBHM.

7. Respondents reserved for themselves the unrestricted right to cancel the Agreement for the first 18 months of the term of the Agreement

Respondents reserved the right to cancel the Agreement with PBHM for any reason 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. . . .

(Underline emphasis in original) (GC 38, p.26). In contrast, the Agreement allowed PBHM to terminate the Agreement only under specific, narrow circumstances, such as a breach of the

Agreement by Respondents, and only after Respondents would be afforded an opportunity to cure such default. (GC 38, pp.26-27, para.19.1.a.-e). Respondents ultimately invoked paragraph 18.3 of the Agreement when they terminated the Agreement by letter dated August 3, 2007.

There can be no question that Respondents' unfettered right to terminate the Agreement with PBHM would enhance Respondents' ability to tightly control PBHM's management of the Hotel during the life of paragraph 18.3. If PBHM wanted to continue managing the Hotel, it would have had to be mindful of Respondents preferences. This provision, along with the many other restrictive provisions of the Management Agreement previously mentioned demonstrate the direct control Respondents maintained over the operations of the Hotel.

8. Respondents' conduct demonstrated they were still involved in the operation of the hotel

Although Respondents tried to demonstrate that PBHM had total control over the operations of the Hotel, and Respondents abstained from interfering with PBHM's management, in reality, Respondents continued to see themselves as the owner and co-operator of the Hotel.

a. Respondents changed carpets in the Hotel without notifying or consulting PBHM

The ALJ properly found that Respondents maintained control over the Hotel by replacing carpeting without consulting PBHM. (ALJD 16:42-44). Wallace testified that there was some carpet replacement and perhaps some renovations to one of the restaurants that occurred during PBHM's management of the Hotel, which were not ordered done by PBHM (Tr. 3:417-18). Wilinsky confirmed Wallace's testimony.

Q Do you know whether or not there were any renovations done to the Pacific Beach Hotel while PBH Management LLC managed the property?

A As far as I know, they replaced the carpeting unbeknownst to us. Certainly without counseling our operations folks. It just happened.

Q Do you know who “they” is?

A Must be Mr. Minicola, since he was responsible for capital spending.

Q Where was this carpet replacement done?

A Corridors.

Q This is room corridors?

A Yeah.

Q. Room corridors?

A And I believe also in some of the public areas as well.

(Tr. 4:507-08). This fact was never disputed by Respondents and is further evidence that they never truly gave control to PBHM.

b. Minicola initiated and directed his own investigation of employees

The ALJ correctly observed that Respondents’ “easy bypass” of PBHM as the employer during investigations of employees supported a conclusion that Respondents were the true employers of the Hotel’s employees. (ALJD 16:13-25). Dave Mori testified that he believed Respondents continued to be involved in the operation of the Hotel while PBHM managed it, partly due to PBHM’s refusal to allow Respondents to be included in any CBA and to PBHM’s responses to some requests from the Union. (Tr. 2:263-68). Fueling Mori’s suspicion about Respondents’ role in the operation of the Hotel was an incident involving an anonymous letter addressed to Watanabe.

Mori stated that a letter had been delivered to the Bell Department. The letter was addressed to the Hotel's owner and Respondents' corporate head, Corine Watanabe, and it was dated May 8, 2007. (Tr. 2:269). The standard procedure under those circumstances is a bellman would deliver the letter to the addressee, in this case, Watanabe. (Tr. 2:269). The letter was delivered to Watanabe, and it turned out to be an open letter asking for her assistance in getting a collective bargaining agreement. (GC 34).

Minicola called Mori directly and asked to meet with him regarding his concern over the open letter that found its way to Watanabe. (Tr. 2:268). Mori and Business Agent Karl Lindo met with Minicola and Hotel General Manager Bill Comstock ("Comstock") on May 3, 2007. (Tr. 2:271). During the meeting, Minicola was the spokesperson for the Hotel. He informed Mori that he was investigating the matter, that he took the letter very seriously, and was concerned about what he perceived as threats contained in the letter. (Tr. 2:271-72). Mori expressed his concerns over the fact that Minicola was investigating this incident because he was not the employer of the bellmen involved, and questioned Comstock as to why he was allowing Minicola to do the investigation. (Tr. 2:272). Comstock shrugged his shoulders and simply stated that it was because he (Minicola) was the owner. (Tr. 2:272). Although this incident resulted in no disciplinary action taken against any bellmen, the ALJ aptly noted that the foregoing evidence supported the finding that had Minicola discovered the identity of the letter's author, he would have demanded disciplinary action. (ALJD 16:20-22). In the end, Minicola did mete out some retribution when Respondents refused to rehire Corey, one of the two bellmen involved in this incident, as of December 1, 2007.¹³ (R 18).

¹³ "Corey" is the spelling of the bellman's name as reflected in the transcript. The correct name of the bellman is Kohry Mulkey.

As this incident demonstrates, Minicola had no qualms about bypassing Comstock when it came to investigating employees, even when the employees were supposedly employed by PBHM. Clearly, the evidence indicates that Minicola remained in charge of the Hotel and its employees. Accordingly, the ALJ correctly relied on this evidence to properly conclude that Respondents were the true employers of the Hotel's employees. (ALJD 16:13-25).

c. Minicola talked directly to managers

To further support his finding that Respondents were the true employer of the Hotel's employees, the ALJ also properly observed that Respondents, through Minicola, discussed matters directly with Hotel managers who supposedly worked for PBHM. (ALJD 16:42-44). This is clearly supported by Wallace's testimony.

Wallace observed that Minicola maintained a very deep level of understanding of what was going on in the operation. (Tr. 3:471). Wallace described Minicola's presence at the Hotel as follows:

Q Do you know to what extent Mr. Minicola kept a presence at the hotel?

A Well, his presence was felt there very often and very powerfully. And he and I spoke a couple times about that, and he agreed to try to keep a lower profile. And, you know, we talked about that a bit.

(Tr. 3:401). When asked for clarification, Wallace explained:

It would be reported to me from my direct reports that this employee said Mr. Minicola asked him to do that, or that employee said - - so it was clear that there was a lot of - - some amount of communication between Mr. Minicola and staff members that we normally don't like to have happen.

It's easier for us to have all owner communications go through a general manager or through a vice president, either one. That's what we talked to Mr. Minicola about.

(Tr. 3:402). This is further proof of Minicola's refusal to separate himself from the operation of the Hotel, thus supporting the ALJ's determination that Respondents were the true employer of the Hotel's employees.

d. Respondents were extensively involved in decision making

Wallace's testimony that Respondents were extensively involved in decision making also supported the ALJ's determination that Respondents were the true employer of the Hotel's employees. When asked how he reacted to the news that Respondents had terminated the Agreement with PBHM, Wallace explained that he was relieved. He stated:

A Well, by the time we got there, I was vastly relieved. It had been consuming our resources at an incredible rate and was a complete distraction to our business from top to bottom. I was delighted to walk away.

Q When you say it was a distraction, how was it a distraction for your operations?

A In a more typical management agreement relationship that we would have, our actions would typically not be questioned except at the time of year when we develop an annual budget, present that, discuss, yes, this is good. You know, have a discussion once a year, and then we go and guide ourself by that budget for the rest of the year.

In this relationship, every single decision that we wanted to make wound up becoming a source of further discussion, and it took longer to get there. And sometimes our team would schedule to do certain things, and then find out, well, we have to discuss it further with the owner.

If was such a series of starts and stops that our whole company was distracted. By the time we got to August of that year, we had invested more resource into this project than it could possibly warrant. And I was totally relieved to begin the process of extricating ourselves from it.

(Emphasis added) (Tr. 3:419-20).

In addition, Minicola was so involved with monitoring and providing input into the operation that he kept tabs on the Hotel's performance by reviewing daily revenue reports. (Tr. 12:2051; 12:2298).

The uncontroverted testimony of Outrigger executive Wallace, PBHM executive Wilinsky, and Union Division Director Mori illustrate the extent to which Respondents remained involved in decision making and manipulation of the Hotel operations. This testimony provides support for the ALJ's appropriate determination that Respondents were the true employers of the Hotel's employees.

9. PBHM continued to utilize Respondents' personnel forms, and honored vacation and perfect attendance earned prior to PBHM's management of the Hotel

The ALJ correctly noted PBHM's use of Respondents' personnel forms and procedures in support of his finding that Respondents were the true employer of the Hotel's employees. (ALJD 16:45-46).

Housekeeping Director Ko identified Absentee Report forms and a Jury Duty Authorization Form bearing the HTH logo and name as having been utilized to record absence and authorize jury duty absence during the period of time PBHM managed the Hotel. (Tr. 9:1586-88; GC 75, pp.5-8(t)). She also testified that the Absentee Report forms were prepared by her Housekeeping Manager Sandy Lam ("Lam"). (Tr. 9:1588).

Ko also verified that she and Lam would collaborate to confirm for Human Resources that a Housekeeping employee had perfect attendance during a one-year period which begins on the employee's anniversary date. (Tr. 9:1588-91; GC 76, pp.4(a)-6(b)). She also confirmed that periods of time when Respondents were managing the Hotel (prior to PBHM) were included to determine the employee's one-year of perfect attendance. (Tr. 9:1592-93; GC 76). PBHM

continued Respondents' practices and treated periods of time employees worked for Respondents as time worked for PBHM. Apparently this was consistent with PBHM's understanding of what Respondents required of them pursuant to the Management Agreement.

PBHM's continuation of Respondents' practices and use of Respondents' documents supports the ALJ's finding that Respondents remained involved in the Hotel's operations.

10. After December 1, 2007, Respondents continued to honor employees' original dates of hire and perfect attendance earned during PBHM's management of the Hotel

Minicola verified that at least two individuals received perfect attendance awards after December 1, 2007 for completing their anniversary year without absence. (Tr. 8:1351-52; GC 68). In both cases, Respondents presented the employees with perfect attendance awards taking into consideration periods of employment both had with PBHM. In this fashion, Respondents treated the period of time employees worked for PBHM as time worked for Respondents.

Based on all of the foregoing, Respondents were the true, and therefore continuous, employer of the Hotel's employees, with a continuing obligation to recognize and bargain with the Union, even while they claimed PBHM operated the Hotel. The ALJ's conclusion is therefore correct. (ALJD 16:19-20).

IV. RESPONDENTS REFUSED TO BARGAIN IN GOOD FAITH WITH THE UNION FROM AT LEAST JANUARY 2006 TO THE UNLAWFUL WITHDRAWAL OF RECOGNITION ON DECEMBER 1, 2007, WHICH CONTINUES TO THIS DAY (Respondents' Exceptions E, F, and G)

Respondents' Exceptions E, F, and G apparently attack the ALJ's determination that Respondents engaged in a general refusal to bargain in good faith. Respondents claim that the "totality of the circumstances" do not evidence bad-faith bargaining throughout 2006. (RBS at 16-19). Respondents also contend that they did not thereafter use PBHM as a "middleman" to rid themselves of the Union and then thwart PBHM's efforts to negotiate a CBA with the Union

by cancelling the Management Agreement. (RBS at 19-28). These arguments obscure the evidence which, under the “totality of the circumstances,” fully supports the ALJ’s conclusion that the Respondents engaged in bad-faith bargaining. (ALJD 43:26-40).

A. Respondents Harbored Abundant Animus for the Union and its Adherents

Respondents disregard evidence of the pervasive animus which motivated their numerous acts. In order to address the “totality of the circumstances,” it is necessary to point out what is abundantly evident from the record developed at the hearing – Respondents’ inability to accept its employees’ choice to be represented by the Union and their consequent mission to be rid of it.

1. Watanabe was angry with the Hotel employees for voting for the Union and Minicola was posturing in hopeful anticipation of a decertification petition

The ALJ observed that the search for a Hotel management company coincided with the “appearance of the Union on the scene.” (ALJD 9:28-30). It was no coincidence that Respondents began searching for a company to manage the Pacific Beach Hotel around the time of or shortly after the second election was held by order of the Board. Minicola joined Respondents on December 19, 2003 (Tr. 1:66), between the first and second representation elections, and testified that he was tasked with the responsibility of soliciting proposals for the operation of the Hotel. (Tr. 11:1884-88). Outrigger’s Vice President Mel Kaneshige testified that he was the spokesperson for Outrigger during the negotiations with Respondents over a joint venture and/or a management agreement. According to Kaneshige, a meeting occurred on May 19, 2006, at which Minicola, Kaneshige, Wallace and Wilinsky were present. (Tr. 7:1049-51). During that meeting, Kaneshige took written notes. (Tr. 7:1052-53; GC 77). According to Kaneshige’s uncontroverted testimony and notes, Minicola stated during that meeting that owner Watanabe was “pissed off” with the Hotel employees. (Tr. 7:1050; GC 77). Watanabe’s

displeasure with her employees provides the perfect explanation for the reason Respondents were suddenly searching for another entity to manage the Hotel after serving as the Hotel's owner-operators for decades.

The ALJ also properly noted that Kaneshige's notes from this same meeting revealed that Minicola told Kaneshige, Wallace, and Wilinsky that the certification year would be ending in August 2006 and that there could be a move to decertify the Union. (ALJD 11:20-30; Tr. 7:1057-58; GC 77). There is generally no reason for an employer to mention decertification, especially while still negotiating a first contract within the certification year, unless it is contemplating something untoward. Accordingly, this discussion is further evidence of Respondents' animus.

2. Minicola's continuous reference to the Union's one-vote win demonstrates his Union animus

Many witnesses testified, Minicola himself confirmed (Tr. 1:125), and the ALJ properly noted (ALJD 8:9-10; 9:9-11; 11:13-18; 11:25-26) that Minicola repeatedly pointed out that the Union had won the representation election by one vote. Dave Mori stated that at his first meeting with Minicola, he told Mori that the Union had won by only one vote. Minicola repeated this statement at every bargaining session up to April 27, 2006, when Mori presented to Minicola an employee petition that was signed by a majority of the employees in support of the Union. (Tr. 2:225-26). The bargaining committee members initiated the employee petition because they were tired of hearing Minicola remind them that the Union had won by only one vote. (Tr. 2:226-27). However, after seeing the petition, Minicola clearly disregarded it as he continued to mention the one vote margin. (Tr. 2:227).

Wallace, Kaneshige, and Lopianetzky also testified that they heard Minicola refer to the one vote margin by which the Union won the representation election. (Tr. 3:414; Tr. 7:1050-51;

GC 77). This endless carping by Minicola, to anyone and everyone who would listen, reflects his undying bitterness towards the Union and employees for inflicting a one-vote loss upon Respondents. Minicola's monomaniacal fixation, which the ALJ rightfully noted throughout his decision (ALJD 8:9-10; 9:15-20; 38:50-39:1; 39:27-28), clearly evidences Minicola's refusal to accept the Union's role. It is also definite evidence of animus.

3. Minicola refused to accept the results of the representation election

A corollary to Minicola's compulsive recap of the one-vote margin is his refusal to accept the results of the representation election. Minicola admitted that he believed the feelings of the true majority of employees were not really known because 25 percent of the employees did not vote. (Tr. 1:124). He further stated,

Well, when the union said that all of our members want this, I have to remind him that we've had a split house. And I have a hard time believing that all of the members want something, when they're telling me different.

(Emphasis added.) (Tr. 1:125).

When asked what opinion he had formed with regard to Minicola's feelings about the Union, Wallace responded,

A It was very, very clear to me that Mr. Minicola was adamantly opposed to settlement with the Union and was willing to go to great lengths to see that that did not occur.

....

Q Were you able to formulate an opinion as to how Mr. Minicola felt about achieving a collective bargaining agreement with the Union?

A It was clear to me that he did not wish to achieve that. I mean, he was clear that he did not wish to have an agreement with the Union.

Q On what do you base that opinion?

A. Just on conversations we had. And again, we didn't – my role was not to direct the Union negotiations strategy, but nonetheless, came up in conversation occasionally with Mr. Minicola. And it was quite clear that he was adamantly opposed to a settlement.

Q Do you recall things that he may have said that gave you that impression?

....

The Witness: The only specifics I recall are the emotions which he discussed, the one vote difference in the election.

(Tr. 3:414-15). When asked the same question, Wilinsky's response was consistent with the testimony of Wallace and Minicola's admission:

A [by Wilinsky] Prior to taking over negotiations, I met with Mick in his office, and he gave me his views of what had transpired to date and his views of the Union, and what had happened with respect to the elections. And it was clear to me that the Union was an unnecessary interference in the operation of the Hotel from his perspective.

Q. Do you recall what he said about the elections, the Union elections during this conversation that you just spoke of?

A. He just recounted the chronology of events between winning an election and losing an election. And, you know, his views that he didn't think the outcome was correct, that he shouldn't have had to suffer negotiation in the first place.

(Emphasis added.) (Tr. 4:507). It is uncontroverted that Minicola refused to accept the results of the election and resented being forced to deal with the Union.

Instead of simply accepting the fact that some employees did not vote in the representation election and that the majority of the ones who did voted in favor of the Union, Minicola stubbornly clung to his purported belief that he did not have to accept the Union as employees' exclusive representative because he did not know what the numerical majority of the employees truly wanted. The consistent testimony of Wallace, Wilinsky, and of Minicola himself, regarding Minicola's refusal to accept the Union as the exclusive representatives of the

Hotel's bargaining unit employees further supports the conclusion that Respondents harbored a deep animosity toward the Union and those associated with it.

4. Minicola admitted that animus motivated Respondents' refusal to hire members of the bargaining committee after the PBHM Management Agreement was terminated.

Keith "Kapena" Kanaiaupuni ("Kanaiaupuni"), Todd Hatanaka, and Rhandy Villanueva ("Villanueva") were among the seven bargaining committee members who were not rehired by Respondents to begin work on December 1, 2007. Kanaiaupuni, Hatanaka and Villanueva, testified that on January 25, 2008, they went to Respondents' new corporate offices on 12th Avenue to hold banners, distribute leaflets, and hold signs on 12th Avenue to inform the public about the employees who were not rehired and about boycotting the Hotel. (Tr. 4:666; 6:916; 5:803).

As the ALJ properly noted (ALJD 22:16-46), after Minicola arrived there was a rather lengthy exchange between Minicola and Kanaiaupuni, Hatanaka, and Union employee Eadie Omonaka ("Omonaka") that took place on the sidewalk outside of the 12 Avenue office building. Kanaiaupuni reported that Minicola told him that "you guys made this personal," referencing the fact that Hatanaka and Kanaiaupuni identified Minicola as the person that didn't hire them back during Christmas. (Tr. 4:670). Kanaiaupuni asked Minicola several times whether "not bringing us back was personal." (Tr. 4:671-72).

When describing part of the conversation that occurred on the sidewalk, Kanaiaupuni stated the following, demonstrating that Minicola was refusing to accept the results of the representation election and upset about the lawful economic actions being implemented by the Union:

A Yes. He said he was upset about the boycott and the leafleting campaigns that we had. And at that time I told him, you know, what did

you expect us to do? We needed to get a contract. And we felt that was - it was within our right to do. And at that time Eadie Omonaka asked him, don't you want to respect the workers' decision for Union. And Mr. Minicola said you guys only won by one vote.

So at that time I said we gave you a petition from the workers with about 70 to 80 percent of signatures on the petition, and I didn't get a response at that time from Mr. Minicola.

Q Did Mr. Minicola mention anything else about the amount of support for the Union?

A Yes. He said that he didn't know if it was 70/30 or 80/20. He wasn't sure. And I told him that I think we had more support than the 50 percent that they thought we did, because we went out and we got the signatures from the workers and put it on the petition.

(Tr. 4:672-73).

As the ALJ correctly observed (ALJD 22:41-46), Hatanaka recalled that Minicola mentioned Watanabe and said:

A He had mentioned that when Outrigger - - that's what I know them by - - came in to manage the hotel, that Corine had negotiated the contract with them, and one of the conditions was Outrigger needed to retain all the workers, all the employees.

But because of all our union activities and rallies during 2007 when Outrigger was managing, that she was upset and offended, and she didn't care if all the employees re-hired - - were going to be re-hired or not, when Pacific Beach Corp took over management in December 2007.

(Emphasis added) (Tr. 6:921). The ALJ properly concluded that Hatanaka's testimony regarding Watanabe's displeasure with the Union supported Kaneshige's testimony regarding her anger with the employees discussed previously in Section IV.A.1, supra, as well as Union President Galdones' testimony discussed later in Section IV.A.6, infra.

Kanaiaupuni asked Minicola one last time whether the failure to rehire the bargaining committee members was personal.

A Yeah. When I walked in, I was still upset , and I told him, you know, as a man, I need to know if firing us was personal or for business reasons. And his demeanor changed and he said I'll lay it on the table. Part of it was for business reasons, and part of it was personal.

(Emphasis added.) (Tr. 4:674). Kanaiaupuni's testimony was supported by Hatanaka as well as by Villanueva. (Tr. 6:921; 5:804).

Respondents presented no evidence to refute the testimony presented by Kanaiaupuni, Hatanaka, and Villanueva. Nor do they acknowledge this incriminating evidence in their Supporting Brief. As the ALJ found (ALJD 39:2-3), Minicola's statement obviously demonstrates his animosity towards the Union , as well as employees engaged in union activities, and is consistent with Watanabe's remarks as reported by Hatanaka, Galdones and Kaneshige.

5. Minicola was upset by the rallies and boycott supported by the Union

Hatanaka's testimony regarding Watanabe's anger over the Union's legitimate economic activities reveals Respondents' great displeasure with the Union. Minicola also consistently described Watanabe's feelings during his conversation with Union President Galdones when he told Galdones that Watanabe was taking things personally and that the Union had also initiated a boycott campaign. (Tr. 4:577). Minicola said this to Galdones in the same conversation during which Minicola said that Respondents would not recognize the Union. (Tr. 4:577). The ALJ properly noted this evidence of animus in his decision. (ALJD 22:47-23:3).

Further evidence of Respondent's displeasure with the rallies held by the Union is contained in the tone of Minicola's testimony. He stated:

Q But you don't know whether or not the union told their people not to come to their rallies do you?

A We don't know that we did or they didn't, but it seemed like they wanted to demonstrate because they were calling my name to make me watch the demonstrations. I can still remember the chants you know, no

peace - - what was it? “No Peace, No Aloha, Give us a contract, Minicola” - - was that Tracy’s?

But I mean, on a bullhorn, yelling it right outside of my office, I’m guessing you want me to pay attention. So I watched, and I saw a lot of union affiliations from other unions, but I didn’t see employees out there.

So if you’re trying to - - I don’t know, I’m taking it that you were trying to give me a message. But the message, to me, failed dramatically, that you did not demonstrate had you a majority status, and continued not to. Even though you were disruptive to my business, you didn’t prove to me that you had majority status.

(Tr. 1:134-35). In this testimony regarding rallies, Minicola demonstrated once again that he did not believe that the Union enjoyed the support of the majority of bargaining unit members.

Clearly, Minicola misconstrued the intent of the rally to fit his own outlandish beliefs about the Union’s small victory margin in the representation election. Based on Minicola’s own recollection of the messages printed on the signs carried the rally participants, it was clear that the intent of the rally was not to demonstrate the Union’s majority status but simply to achieve a contract.

6. Respondents’ withdrawal of recognition and refusal to bargain with the Union was further evidence of their Union animus

Union President Galdones’ uncontroverted testimony revealed that he had called Minicola on November 17, 2007, to ask him to meet. (Tr. 4:576). Minicola responded that he was advised by his attorney not to speak with the Union because Respondents were not the official managing company of the Hotel until December 1, 2007. (Tr. 4:576). On December 3, 2007, Galdones again called Minicola to request a meeting to negotiate a contract. (Tr. 4:577). At that time, Minicola told Galdones that Respondents were not recognizing the Union, and therefore no collective bargaining would occur. (Tr. 4:577). Minicola continued, saying that Watanabe was taking things personally because the Union activities, including boycotts, were

financially affecting the Hotel. (Tr. 4:577). Minicola's statements compel the conclusion that the Respondents were extremely upset with the Union.

Respondents demonstrated repeatedly and in a variety of ways their absolute disdain for the Union. This enmity constituted the root of, and motivation behind, the Respondents' various actions since the Union filed its RC petition in 2002 to the present. Accordingly, the evidence is entirely supportive of the ALJ's conclusion that Counsel for the General Counsel's case was "fraught with animus." (ALJD 34:42).

**B. Respondents Engaged in Bad-Faith Bargaining Throughout 2006
(Respondents' Exception E)**

Respondents' Exception E specifically attacks the ALJ's conclusion that Respondents' engaged in bad-faith bargaining throughout 2006. (ALJD 43:26-27). This exception is meritless. There is no dispute that Respondents negotiated with the Union directly from November 2005 until December 2006, and during that time Respondents maintained their position on several proposals from the first day they offered them.

As the ALJ noted, the first unchanging proposal was entitled "Union Recognition," and stated the following: "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." (GC 19, Sec.1). Respondents did not alter this proposal once. (Tr. 2:212).

Respondents' second proposal noted by the ALJ was entitled "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.

(GC 19, Sec.1.A). Respondents' position on this proposal was also immutable throughout bargaining. (Tr. 2:212-13).

The ALJ also noted Respondents' proposal entitled "Complaint Procedure":

24.a [Omitted]

24.b [Omitted]

24.c The steps in the complaint procedure shall be as follows:

1st Step – The employee or Union shall first present the complaint in writing to the Department Manager or his designee.

2nd Step – If the Department Manager or his designee does not adjust the complaint to the complainant's satisfaction within ten (10) calendar days from the time the complaint is presented, the complainant may present the complaint to the Director of Human Resources, or his designee. Presentation to the Director of Human Resources or his designee must be made in writing within the next eight (8) calendar days.

3rd Step – If the Director of Human Resources or his designee does not adjust the complaint to the complainant's satisfaction within ten (10)

calendar days from the time the complaint is presented, the complainant may present the grievance to the General Manager or his designee. Presentation to the General Manager or his designee must be made in writing within the next eight (8) calendar days. The decision rendered of the General Manager or his designee shall be in writing and must be rendered within fourteen (14) calendar days from the date the complaint is presented to the General Manager or his designee. All decisions of the General Manager under this section shall be final and binding upon the parties.

24.d If management representatives fail to answer within the time frame specified in any step, the complaint shall be deemed unadjusted and the complainant may take the next step to secure a determination of its merits.

24.e [Omitted]

24.f If any adjustment of a complaint is decided in any of the steps, no retroactive adjustment shall exceed thirty (30) calendar days from the date of the submission of the complaint at Step 1.

(GC 19, Sec.24). As noted by the ALJ, Respondents subsequently altered this proposal by adding the following fourth step: "If the General Manager does not adjust the complaint to the complainant's satisfaction within ten (10) days from the time the complaint is presented, then the alleged complaint will be considered quashed or the employee may submit the complaint to the Department of Labor." (GC 24, Sec.27.5).

The Respondents also sanctimoniously insisted on the following "Open Shop" proposal:

Each employee covered by this Agreement may chose whether or not to become a member of the Union. Employees may become union members at any time after the execution of this Agreement or for new employees, at any time on or after the thirty-first (31st) day following the date of hire.

(GC 19, Sec.19). Similarly, Respondents were wedded to the following proposal entitled "Union Dues":

3.a The Hotel acknowledges that only employees who elect to become a Union member have an obligation to pay Union dues in accordance with the Union's Constitution and Bylaws.

3.b The Union acknowledges that it is in the best interest to and will work directly with its members to collect Union dues and to develop a personal relationship with each member.

(GC 19, Sec. 3).

The ALJ properly noted that Respondents' "Union Recognition," "Management Rights," and "Complaint Procedure" proposals clearly demonstrated an intention to evade its duty to bargain in good faith because Respondents stubbornly insisted on refusing to cede the Union any authority whatsoever over employees' terms and conditions of employment. (ALJD 7:41-8:5). Respondents contend that the ALJ's reliance on their "Management Rights" and "Complaint Procedure" proposals is insufficient to evidence bad-faith bargaining. (RBS at 18-19). But the ALJ did not rely on these two proposals in isolation. In fact, the ALJ did not rely on anything in isolation.

1. Respondents ignore the totality of the circumstances

For all the reasons set forth previously in Section IV.A, supra, the totality of the circumstances shows an abundance of animus towards the Union, which would necessarily support a finding of bad-faith bargaining. There are also additional reasons which illustrate Respondents' bad faith.

a. Minicola's uncontrollable repetition of the Union's one-vote margin of victory indicates bad faith

Minicola's red-hot infatuation with the Union's one-vote margin of victory is important because his never-ending references to this indicate bad faith. See Hydrotherm, 302 NLRB 990, 995 (1991); Prentice-Hall, Inc., 290 NLRB 646, 646 (1988).

b. Respondents' proposals are a total rejection of the Union and collective bargaining

There is also convincing evidence that Respondents sought to obliterate the Union's representational capacity through its "Union Recognition" proposal. Respondents conveniently fail to mention their mulish adherence to the "Union Recognition" proposal in their Supporting Brief. Indeed, they cannot explain this proposal because, as the ALJ accurately concluded, this proposal was designed to negate the presence of the Union. It was therefore, from the outset, a rejection of collective bargaining. (ALJD 5:25-31; 6:1-13).

Alongside this, Respondents made a brazen demand for total control over all terms and conditions of employment with their "Management Rights" proposal. Then, through their "Complaint Procedure" proposal, Respondents shamelessly demanded that their control be absolute and unquestionable. In addition, as the ALJ properly noted, Respondents' modification of their "Complaint Procedure" proposal to incorporate an appeal from the General Manager's final decision to an ambiguous "Department of Labor" also indicates the frivolity of Respondents' approach to bargaining. (ALJD 12:23-28). Not only would such a department have no authority to interpret a CBA, Respondents did not even care enough to specify whether they were referring to the local or federal department of labor. Respondents' insistence on terms which render meaningless the Union's exclusive representational role and create circumstances under which the bargaining unit employees may be better off without a collective bargaining agreement demonstrate the Respondents' contempt for the Union and its intention not to reach an agreement. See, e.g. Summa Health System, 330 NLRB 1379 (2000).

c. Respondents' inflexible insistence on their "Open Shop" and "Union Dues" proposals is supporting evidence of bad faith

The ALJ also noted that Respondents insisted on their "Open Shop" and "Union Dues" proposals. (ALJD 12:10-21). First, Respondents argue that they had good reasons for these proposals, and therefore the Union was bargaining in bad faith by rejecting them. (RBS at 17).

Whatever Respondents' reasons were, the Union was the party which actually negotiated on these matters by modifying its proposals to try and reach agreement with Respondents. (GC 21 & 23). Respondents were clearly unwilling to reach out in similar fashion. (GC 22).

Respondents then argue that insistence on these proposals cannot indicate bad-faith bargaining. (RBS at 18). Again, Respondents neglect the totality of the circumstances. While not evidence of bad-faith bargaining per se, an immutable opposition under any circumstances to a union-shop or any modified version thereof, along with a fundamental opposition to a dues-checkoff proposal, may be indicative of bad faith if there is other evidence. See CJC Holdings, Inc., 320 NLRB 1041, 1046-47 (1996), *affd. mem.* 110 F.3d 794 (5th Cir. 1997); Preterm, Inc., 240 NLRB 654, 654, 673 (1979). And, clearly, there is other evidence in this case.

In addition, the ALJ conscientiously found that Respondents' open-shop proposal prohibited new employees from voluntarily joining the Union for 31 days after being hired. (ALJD 12:16-17). Thus, Respondents' were insisting that the Union agree to an open-shop proposal which would actually deprive new employees for 31 days of their Section 7 right to voluntarily join the Union. Nothing but spite could motivate such a proposal. For all Minicola's misguided allegations about the Union's union-security proposal being illegal (ALJD 9:9-13), it appears that it was Respondents' open-shop proposal that was unlawful. Of course, Respondents never mention this point in their Supporting Brief.

d. Respondents delayed bargaining in 2005

Respondents also delayed bargaining in 2005. Minicola's calculated insistence on wasting valuable negotiation time by having Mori read every proposal aloud even though the proposals had been sent to Minicola ahead of time is one such example. Minicola's refusal to authorize time for his own committee members to attend negotiations is another example.

Respondents fail to mention these “isolated” affairs, but the ALJ properly considered them and clearly did not fail to note them as part of the “totality of the circumstances.” (ALJD 8:34-38).

e. Respondents clearly targeted the bargaining unit for retaliation in response to their choice to organize

After bargaining finally began over an initial contract, Minicola immediately made it clear that he would target the bargaining unit during the 2005 holiday season. Minicola refused to give the bargaining-unit employees their Christmas bonus, while also snidely pointing out he would be giving the bonus to non-bargaining unit employees. Respondents ignore this point in their Supporting Brief, but the ALJ properly cited it for what it was – a “simple reprisal” against employees at the very beginning of first-contract negotiations because they voted in favor of the Union. (ALJD 8:38-44; 9:1-7). The point was made even more acridly sharp by ensuring that it would hit employees in their pocketbooks during the gifting season.

Moreover, Minicola obstructed the Union’s attempts to ensure that employees would be able to receive the Christmas bonus. At the first bargaining session on November 29, 2005, Minicola presented the Union with a list of ground rules and said that the Respondents and the Union first had to agree to ground rules before he would be willing to begin negotiations. (Tr. 2:202). The ground rules included the agreement that the parties would discuss non-economic issues before moving on to economic issues. (Tr. 2:202-03). To get bargaining started, the Union agreed to the ground rules as presented by Minicola. (Tr. 2:202). Before the end of the negotiations that day, Minicola announced that Respondents would be giving the non-bargaining unit workers a bonus, but would not be giving the bargaining unit employees a bonus because it was illegal, and he had to first bargain over the bonus with the Union. (Tr. 204-05). Mori explained that the Union had no objection to the Respondents giving bonuses to bargaining unit employees. (Tr. 2:205). Minicola cynically told him that the ground rules dictate that the parties

address non-cost issues first, and then cost issues, so Mori needed to wait until they were discussing cost issues to talk about bonuses. (Tr. 2:206). By that time, the holidays would undoubtedly be over.¹⁴

f. The totality of the circumstances demonstrate Respondents engaged in an overall pattern of obstructing the Union

Additional supporting evidence of Respondents' ill-will under the "totality of the circumstances" include recidivist objectionable conduct throughout the Union's organizing campaign leading up to the negotiations. See HTH Corp. d/b/a Pacific Beach Hotel, 342 NLRB 372 (2004); Pacific Beach Corp., 344 NLRB 1160 (2005). As noted by the ALJ and discussed in Section IV.C, infra, Respondents' interference with, and willful thwarting of, PBHM's efforts to reach a CBA with the Union in 2007 by cancelling the Management Agreement also demonstrates the Respondents' intractable opposition to any final agreement with the Union. Finally, after years of taking the maddeningly slow route, Respondents' festering animosity drove them to abruptly, and unlawfully, withdraw recognition from the Union without a shred of evidence to prove the Union's actual loss of majority support, as discussed more fully in Section VIII, infra.

g. This case involves first-contract negotiations following a contentious election campaign

The Board is especially sensitive to claims that bargaining for a first contract has not been in good faith, particularly after a contentious election campaign. APT Medical Transportation, Inc., 333 NLRB 760, 760 fn.4 (2001). This is such a case, and the evidence clearly demonstrates that Respondents have been deliberately attempting to shatter this new

¹⁴ When the Union did raise the bonus again during cost-item negotiations in 2006, Minicola contradicted his earlier reliance on the ground rules and flatly refused to bargain. (Tr. 2:206-07).

bargaining relationship and, ultimately, the employees' initial choice to organize. Respondents' should not be permitted to do so.

h. Respondents' reliance on the number of bargaining sessions and amount of tentative agreements reached is misplaced

Finally, Respondents point to 37 bargaining sessions and roughly 170 tentative agreements as evidence that they bargained in good faith. (RBS at 19). The ALJ correctly observed that Respondents went through the motions of bargaining and reached agreement on a number of unspectacular individual items and then afforded this evidence the weight it deserved. See Calex Corp., 322 NLRB 977, 977-978 (1997) (finding that employer engaged in bad-faith bargaining by engaging in pattern of delay even though parties met on 20 occasions over a 15-month period and reached agreement on 75% of a contract), *enfd.* 144 F.3d 904 (6th Cir. 1998). As discussed in Section IV.A.1, supra, there was clear evidence that Minicola planned on dragging negotiations beyond the end of the certification year so that a decertification petition could potentially be filed. (Tr. 7:1050; 7:1058; GC 77). As he made the "decertification" comment, Minicola also noted that his boss, Watanabe, was "pissed off" at her employees. (GC 77).

The animus cascading from the summit of Respondents' hierarchical mount obviously fed a need to eradicate the object animating that animus. Severing the Union from the Hotel would be made more difficult if Respondents ever agreed to a contract, which is precisely why all the evidence powerfully demonstrates that Respondents would never have agreed to a contract with the Union. Accordingly, the ALJ was correct in his finding that Respondents engaged in bad-faith bargaining throughout 2006. Respondents' Exception E is therefore without merit.

C. Respondents Used PBHM as a “Middleman” to Deprive Employees of Union Representation and Cancelled the Management Agreement to Thwart PBHM’s Efforts to Conclude Negotiations and Enter into a CBA with the Union

1. The evidence supports the ALJ’s conclusion that Respondents terminated the Management Agreement to avoid a CBA with the Union

Outrigger executives Wallace and Wilinsky credibly testified that based on their separate observations of conversations with Minicola, they did not expect that he would allow PBHM to enter into a CBA with the Union. As the ALJ ultimately found, it turned out that they were correct. (ALJD 43:29-38). The evidence supports the ALJ’s finding in this regard.

PBHM had been communicating to Respondents as early as June 27, 2007 that it was contemplating entering into a CBA with the Union. (GC 39). In a letter dated June 29, 2007 from PBHM counsel Rand to Respondents’ counsel Leong, Rand wrote that during the meeting on June 27, 2007, Wilinsky updated Minicola on the status of negotiations with the Union and informed him that PBHM was working towards reaching an agreement with the Union in the near future. (GC 39). Also contained in Rand’s letter to Leong was the following statement:

I was told Mick was very unhappy with the concept of PBH signing an agreement with the union. If the Owner is adamant that PBH not sign an agreement with Local 142, we need more direction as to the course we should be pursuing. There are only a few issues outstanding, and although they are major issues, we believe that we can find common ground to secure an agreement.

(GC 39). Leong responded to Rand by letter dated July 3, 2007, denying the characterization of Minicola’s discussions with Wilinsky and Wallace. (GC 40). Instead, Leong pointed to Minicola’s displeasure that PBHM had not been successful in “amending the ‘NLRB Certification’ to reflect ‘PBH Management LLC’ instead of HTH Corporation.” (GC 40). It is unclear as to why Minicola believed that an amendment to the certification was necessary or even achievable by PBHM. Although Leong tried to distance Minicola from any implication

that he (Minicola) was promoting a decertification, discussion of this topic by Minicola had already been noted by Kaneshige in his initial discussions with Minicola in 2005, which substantiates the reference to a decertification discussion contained in Rand's letter.

On Thursday, July 26, 2007, Rand sent to Leong via e-mail the Union's latest proposal, and requests by the Union for information regarding the Management Agreement and for a letter signed by Outrigger CEO David Carey and Watanabe affirming that Respondents had no control over the terms and conditions of employment of the Hotel employees. (GC 42). Leong responded via e-message on July 29, stating:

I have informed Mick of the Union's request for a signed letter from Ms. Hayashi and Mr. Carey. Our response would undoubtedly be the same as Mr. Carey's HTH's position has not changed; PBH Management, LLC is in control as it must and has been in order to be operating the Hotel. Accordingly, we are not interested in seeing the Union's proposals as we expect PBH would continue to handle any response needed, as it has to date. As to the Union's continuing request for more information contained in the Management Agreement, our position has not changed. Such requests are merely an attempt to secure irrelevant information and are being made with the knowledge that they will not be provided. This likewise appears to be designed to allow it to keep 8(a)(1) and 8(a)(5) actions on the books. They are obviously afraid of a "boogie man, er, person".

(GC 43).

On July 30, 2007, Rand responded to Leong's e-message with a letter and attachments that he sent via e-mail. (GC 44). The attachments contained PBHM's proposed package agreement to the Union, and proposed disclosure of portions of the Agreement. Rand's letter stated very directly that if Respondents believed that PBHM had sole control over any contract with the Union and Respondents' approval of such a contract was unnecessary, Respondents should give a written confirmation of that belief to PBHM, and that PBHM would then conclude its negotiations with the Union. (GC 44, p.2). Rand's letter explained all of the reasons that PBHM believed that settling the contract with the Union at this time was beneficial to the Hotel

and everyone involved, and also explained PBHM's belief that if they conclude negotiations with the Union without informing the Union of the restrictions on PBHM's authority contained in paragraph 3.2.c in the Agreement, PBHM would be committing an unfair labor practice. (GC 44, pp.2-3). Rand's letter requested a response by noon on August 1, 2007, and stated in conclusion:

Should Owner continue to refuse to the above two requests for consent, Operator believes Owner will be in breach of the covenant to reasonably consent to the requests and will cause Operator to no longer be able to bargain in good faith. Operator does not want to bargain with the Union if its ability to reach a settlement which it believes is in the best interests of the hotel is impaired by Owner's refusal to consent to an agreement that extends beyond one year, or any agreement that contains agency shop. To do so would in our judgment constitute bargaining in bad faith; Operator agreed to assume Owner's obligation to bargain with the Union on the assumption that Operator could do so in good faith. Operator accordingly would have no choice but to conclude that Owner is in breach of the Management Agreement and to ask Owner to assume the obligation to negotiate with the Union and to complete negotiations with the Union.

(Emphasis added) (GC 44, p.4).

Having received no response from Respondents, Wilinsky sent a letter via facsimile dated August 2, 2007 to Watanabe requesting permission to propose specific contract terms to the Union and to release to the Union portions of the Management Agreement. (GC 45). He attached to his letter a copy of Rand's letter of July 30, 2007 with all its attachments. Wilinsky also requested a response as soon as possible because PBHM could not continue to bargain in good faith without the Respondents' consent to its two requests. (GC 45). The only response received by PBHM to that letter was a letter from Minicola terminating the Management Agreement for no specified reason, a day after Wilinsky sent his letter.

Wallace had heard from Wilinsky that the Respondents' desires and PBHM's desires with regard to the Union were diverging and that PBHM was now looking to settle a contract

with the Union. (Tr. 3:408). At just about that same time, Respondents terminated the Agreement. (Tr. 3:407-08).

As discussed previously, Respondents created the fiction that they were not sure whether paragraph 3.2.c in the Agreement, requiring Respondents' approval of all contract and agreements applied to a CBA to obfuscate their intent to avoid a CBA with the Union.

Respondents also attempted to suggest that since PBHM had not reached an agreement with the Union at the time PBHM requested authorization to make what they believed would be a proposal that the Union would find acceptable, Respondents were not obligated to provide review and authorization. (Tr. 4:572-73). Wilinsky made it clear in his responses, however, that PBHM believed they were at the point with the Union that an agreement was likely based on its proposals that it presented to Respondents on June 30, 2007. (Tr. 4:569). Of course if PBHM believed the Union would agree with the proposed terms, it would have been foolish for PBHM to make the proposal to the Union, and only after the Union accepted it submit it to the Respondents for approval. Once the Union accepted any proposal for an agreement with PBHM, any refusal to execute the agreed upon CBA would have been an unfair labor practice, which PBHM understandably did not want to risk.

As discussed in more detail below, Respondents maintain they were contemplating walking away from the Management Agreement they had with PBHM because of, *inter alia*, the discussions that occurred over the 2.5% commission on Japanese business. However, Minicola is a decisive, "hands on" manager (Tr. 1:121-22), and he would more likely have terminated the Management Agreement immediately upon receiving Wallace's letter of July 16, 2007, if he believed that it contained PBHM's final word on the matter. Instead, Minicola waited 18 days to issue a termination letter, and only after Respondents received two letters from PBHM forcing

Respondents to take a stand as to the release of information PBHM deemed necessary to provide to the Union, and, more importantly, to entering into a contract with the Union. The timing of Respondents' termination of the Management Agreement, a mere day after receipt of PBHM's second demand letter, reveals that it was done to avoid entering into a CBA with the Union, something that Minicola and Watanabe were adamantly against.

2. All the reasons proffered by Respondents for terminating the Management Agreement were properly discredited by the ALJ

Minicola suggested that there were several disputes that Respondents were having with PBHM, which caused Respondents to cancel the Management Agreement and that Respondents' motive was not to avoid the PBHM-proposed CBA. He suggested that it was the combination of problems with the installation and the limitations of the Stellex system,¹⁵ PBHM's failure to perform up to par with their projected occupancy rate, the fact that many fish in the Hotel's salt water aquarium died while PBHM managed the property, PBHM's changes to their projected performance figures 5 months into the Management Agreement, the Respondents' disagreement with PBHM over the 1.5% chain services fee PBHM proposed to charge Respondents, and PBHM's dispute over the 2.5% commission on all Japanese sales that Respondents wanted to charge PBHM that led the Respondents to terminate the Agreement. All of these reasons were extensively litigated on the record and briefed for the ALJ. In the end, the ALJ correctly discredited all these professed reasons when he determined that "all [Respondents'] explanations for canceling the management agreement with PBHM are basically false." (ALJD 37:37-38:50). Now, Respondents regurgitate the same arguments in support of their Exceptions. (RBS at 21-28). The evidence, moreover, clearly supports the ALJ's determination.

a. The Stellex system was not a justification for Minicola's termination of the Management Agreement

¹⁵ Stellex is the Outrigger's reservation system. (ALJD 38:30-33).

The ALJ correctly concluded that the Stellex system was installed later than either Respondents or Outrigger had wanted but, even if installed in a timely manner, the impact of the new system would not be evident for almost a year. (ALJD 38:25-43). The ALJD also noted that once in place, Respondents did not allow it sufficient time to succeed. (ALJD 38:35-43). Accordingly, the ALJ discredited the installation of the Stellex system as a basis for Respondents' cancellation of the Management Agreement. The evidence supports this conclusion.

Minicola stated that part of the Respondents' dissatisfaction with PBHM was the length of time it took for them to install the Stellex system. He claimed that the delay was due solely to Outrigger's commitment to install Stellex at the Ala Moana Hotel, which it agreed to manage at the same time it entered into the instant Agreement with Respondents. Therefore, Respondents took a back seat while Outrigger's installation efforts at the Ala Moana Hotel were being completed and while Outrigger worked through the programming and budgetary requirements for the installation of Stellex at the Hotel. (Tr. 3:427-28; 12:2027-29). This conflicted with explanations provided by his own mole within PBHM's organization.

Lopianetzky stated that he had heard it was the conversion from the LMS system used at the Ala Moana Hotel to Stellex that was causing difficulty. (Tr. 8:1299). The LMS system used by the Ala Moana Hotel was the same LMS system that was being used at the Pacific Beach Hotel. Lopianetzky explained that because of the conversion difficulties experienced at the Ala Moana Hotel, PBHM delayed their installation of Stellex at the Pacific Beach Hotel until they were able to "get the kinks out of the system." (Tr. 8:1299).

Wallace also testified that PBHM would have liked the Stellex system to have been in place by the time PBHM took over management of the Hotel on January 1, 2007, but that did not

happen. (Tr. 3:381). Stellex was up and running in May 2007. (Tr. 3:380). There were a couple of reasons for the delay in the installation of Stellex. First, Wallace explained that there were some hardware, software and training cost issues that had to be worked out. (Tr. 3:381). Second, the replacement of a central hotel system is a “very significant commitment”, and requires many people many hours to do the conversion. (Tr. 3:381). Minicola raised concerns about what would happen if PBHM discontinued managing the Hotel, since the change in the central hotel system would require a significant commitment. (Tr. 3:382). As if warning PBHM of an inexorable conclusion, Minicola raised that concern many times and Wallace assured him many times that Outrigger would allow Respondents to lease the technology from them until Respondents were able to install their own replacement system. (Tr. 3:382-83).

Lopianetzky’s and Wallace’s explanations of the reasons for the delay are more credible than Minicola’s. Lopianetzky had no reason to misrepresent what he had heard during discussions at meetings he attended. Minicola, on the other hand, was motivated to paint PBHM and Outrigger as the incompetent Agreement violators who forced him to cancel the Management Agreement. The fact that Minicola admitted he knew the Stellex system by virtue of his 15 years of work with Outrigger (Tr. 13:2244; 13:2310) supports a conclusion that he should have anticipated some level of difficulty with the transition from the Hotel’s LMS system to Stellex, especially since Lopianetzky heard of the difficulties encountered at the Ala Moana Hotel.

Nevertheless, regardless of whether Respondents or Outrigger were to blame for the delay in installation, Minicola’s remaining reasons for being unhappy with the Stellex system are still incredible. Part of Minicola’s dissatisfaction with Stellex was the fact that Stellex could not generate the same market segment breakdown that the Respondents’ LMS system could. (Tr.

12:2006-11; R 15, pp. 5/142-43, 5/174). Again, based on Minicola's knowledge of the Stellex system, he should have been able to anticipate differences in reports that could be generated by Stellex. In addition, the Stellex system was up and running in May or June, 2007. Whether the Stellex system could have eventually generated market segment reports in the manner Minicola wanted is unclear in the record.

Finally, as the ALJ cogently explained, the full benefits of the Stellex system would not be reaped by the Hotel until it had a chance to work properly for almost a year. Moreover, the testimony of Wallace on this point was clear. (Tr. 3:474). Minicola, with his tremendous experience as a longtime employee of the Outrigger and thorough familiarity with the Stellex system (Tr. 13:2244; 13:2310), most certainly knew this as well. For these reasons, Respondents' attempt to blame PBHM for failing to bring enough guests to the Hotel (RBS at 23-24) is absurd, particularly since Respondents never allowed PBHM to use Stellex long enough to market the Hotel properly. Accordingly, Minicola's reliance on this explanation for cancelling the Management Agreement can only call his credibility into question.

b. Respondents' insistence that PBHM rely on projected figures, refrain from charging Respondents a 1.5% Chain Service fee, and continue payment to Respondents of a 2.5% commission on all Japanese business is inconceivable

i. Respondents' reliance on projected figures was prohibited by their Agreement with PBHM

Minicola repeatedly harped on the fact that PBHM did not hit their projected occupancy and revenue figures, but admitted the average room rate was higher. (Tr. 21:2003-04). Starting from February 2007, Minicola started to point out that to PBHM that the Financial Statements showed that PBHM's actual performance was lagging behind the projected occupancy figures by 10.6 points. (Tr. 12:2017-18). The ALJ properly dismissed these excuses. (ALJD 38:12-23).

By Minicola's own admission, it was understood that the preliminary budget would be replaced by a formal budget that PBHM was to create within 90 days of the start of their management of the Hotel pursuant to the Agreement. (Tr. 13:2282-83; GC 38, p.15, para.10.1). The purpose of providing PBHM a 90 day period by which to prepare a formal budget is to allow them time to become familiar with the actual expenses associated with the operation of the Hotel. (Tr. 13:2282).

The Agreement itself contains a prohibition on the reliance on projections, which Respondents obviously should have read before signing. Paragraph 10.3 of the Agreement states:

No Reliance on Projections. Owner hereby represents that, in entering into this Agreement, *Owner has not relied, and agrees that in the future it will not rely, on any budgets, projection of earnings, statements as to the possibility of future success or other similar matter, including the Annual Budgets (“Projections”), which may have been or may be prepared hereafter by Operator*. Owner hereby acknowledges and agrees that the Projections are good faith estimates only, that unforeseen circumstances may make adherence to the Projections impracticable and that any use of the Projections by Owner shall be subject to this understanding; provided, however, notwithstanding this paragraph or any other term of this Agreement to the contrary, Operator shall have the obligation to pay the monthly Guaranteed Owner Payment as set forth in Article VI, but subject to Section 25.4 (Force Majeure).

(Italics emphasis added; underscore and bold emphasis in the original.) (GC 38, p.16).

Even more puzzling than Minicola's stubborn reliance on projections was the fact that he admitted that the decline in occupancy was not solely Outrigger's fault because the tourism economy was beginning to decline. (Tr. 13:2274). In addition, Minicola himself admitted that he had projected occupancy rates of 68% into 2008, which he failed to achieve, even with his years of experience at that Hotel.¹⁶ (Tr. 13:2160). He admitted that no one had a “crystal ball”,

¹⁶ Minicola stated that they were still “finalizing” their achieved occupancy rate, but estimated it to be about 65% or 66%. (Tr. 13:2160).

and that the 68% occupancy projection that Respondents prepared in 2007 for the 2008 year seemed reasonable and achievable. (Tr. 13:2161). Thus, Minicola was being duplicitous when he expected Outrigger to have a crystal ball and held their projections against them.

Finally, as discussed above, the full benefits of Stellex would not have been experienced for about a year, and that it was never given an opportunity to demonstrate its potential. (Tr. 3:474). In the face of this evidence, and particularly Minicola's obdurate refusal to concede what the clear language of the Agreement reflects, Respondents cannot seriously fault the ALJ for crediting the obvious and discrediting the ridiculous.

ii. Minicola was unreasonably outraged over the 1.5% fees that Outrigger permissibly planned to charge Respondents in accordance with Article IV (Chain Services) of the Management Agreement

The ALJ thoroughly discredited the reasons proffered by Respondents to justify their termination of the Agreement. (ALJD 37:37-39). Among those reasons, Respondents claim that the Outrigger was attempting to charge an additional fee for the domestic wholesale market. (RBS at 24). The evidence lays bare the unbelievable basis of Respondents' contention.

Minicola alleged that he was told by Outrigger Vice President of Sales and Marketing Rob Solomon ("Solomon") that Respondents would have to pay more money if they wanted to see a difference in occupancy from the domestic market. (Tr. 12:2020-23). Minicola refused, saying that Respondents were already paying Outrigger what had been agreed to in the Management Agreement. (Tr. 12:2023). Solomon responded that Outrigger believed they could charge Respondents an additional fee for domestic wholesale marketing, and that was what they were going to charge Respondents. (Tr. 12:2023). Minicola alleged that this conversation with Solomon occurred in March, and that was the first time he had heard of being charged for domestic sales. (Tr. 12:2024).

Wallace explained that it was not uncommon for there to be sometimes heated discussions over fees that management companies charge owners. (Tr. 3:383). He stated that the fees are usually built into the annual budgets, and during annual budget approval time, it was not uncommon to get into more detailed discussions over the fees that the management company will assess. (Tr. 3:383). Wallace believed that PBHM had sufficiently explained to Minicola how the fees were constructed, and assured him that both Respondents and PBHM were getting a fair deal under the fee terms in the annual budget. (Tr. 3:383-84).

In any event, a simple review of the Chain Services section of the Agreement reveals Minicola should have known that such a fee was allowed. Paragraph 4.1 of the Agreement states:

Chain Services Generally. The Management Fee covers Operator's basic operation and management of the Hotel. Operator agrees to make available to Owner specialized services provided by Operator and/or its Affiliates, for *marketing*, reservations, information technology, accounting, risk management (including placement of insurance coverage and loss prevention services) and purchasing, and for human resources (including training, payroll processing and benefit administration) (the "**Chain Services**"), the costs for which shall be competitive with the prices, terms and quality of goods, supplies and/or services otherwise available from unrelated third party providers as provided for in Section 3.1.d hereof. *The cost for the Chain Services, including general excise taxes imposed thereon, shall be paid for by Owner in accordance with the Annual Operating Budget.*

(Italics emphasis added; underscore and bold emphasis in the original.) (GC 38, p. 10). Quite simply, this is akin to Minicola's relentless attempt to deny the plain language of Section 10.3 of the Agreement proscribing reliance on projections. Likewise, Minicola's intractable insistence on disregarding the obvious language on chain service fees precludes any credible finding that the chain service fee factored into Respondents' decision to terminate the Management Agreement.

iii. Although the 2.5% commission on all Japanese business was a sticking point for both Respondents and PBHM, Minicola's insistence that it was a deal breaker is incredible

Respondents spent a great deal of time propounding their concern PBHM would cancel the 2.5% commission on all Japanese business. The testimonies of Wallace, Wilinsky, and Minicola amply reflect the fact that there was disagreement between PBHM and Respondents on this issue. Nevertheless, after extensive discussion of this matter on the record and in the briefs to the ALJ, the ALJ discredited all of Respondents' explanations for cancelling the Agreement. The evidence clearly indicates that Minicola's concerns were exaggerated and, accordingly, Respondents can not credibly contend that discussions over the 2.5% commission motivated their decision to cancel the Agreement.

Wallace credibly testified that he was not aware that PBHM was paying a 2.5% commission on all Japanese business that came to the Hotel to John Hayashi's ("Hayashi") operations in Japan. (Tr. 3:384). Hayashi is Respondents' Corporate Vice-President. (Tr. 1:81). When he became aware of the payments, he began asking Minicola for documentation of the agreement between the "Japan office" and Respondents so as to be able to evaluate the services for which the Japan office was being paid. (Tr. 3:384). The requirement that PBHM pay 2.5% commission on all Japanese sales to the Japan office, even by Minicola's admission, was not contained anywhere in the Agreement. (Tr. 3:384; 13:2294). Minicola simply told Wallace that payment was "customary" and that it had been a "long-standing relationship" that Hayashi's office and the Respondents enjoyed. (Tr. 3:385). He also claimed that although not specifically mentioned in the Agreement, the requirement to pay the 2.5% commission on all Japanese sales was encompassed under all other contracts and agreements to which PBHM was required to

adhere, but did not point out the specific section of the Agreement that required this. (Tr. 13:2306-07).

Minicola stated that on or about April 23, 2007, he told Wallace that he was unhappy with PBHM's performance and with the fact that Wallace was saying that PBHM wanted to stop paying the 2.5% commission on all Japanese business. (Tr. 12:2055). He admitted that there was no written agreement regarding the relationship between the Hotel and the Japan office. (Tr. 12:2057). Minicola explained that there was no written agreement because "we were owner and operator, and we already operated all of these entities, including the Japan operation." (Tr. 12:2057). Minicola denied being asked by Wallace to provide the terms of Respondents' agreement with the Japan office.¹⁷ (Tr. 12:2057).

Minicola claimed that when Wallace heard how upset he was, Wallace asked for a meeting with Minicola. (Tr. 12:2065-66). The meeting occurred in the latter part of June, and was attended by Minicola, Lopianetzky, Respondents' controller, and Senior Director of Sales, and by Wilinsky and Wallace for PBHM. (Tr. 12:2066-67). At that meeting, Minicola claimed that they discussed the 1.5% domestic marketing fee, and the possible closing of a restaurant, in addition to the 2.5% commission on Japanese business. (Tr. 12:2067-69). With regard to the 2.5% commission, Minicola claimed that Wallace and Wilinsky informed him that PBHM would stop paying it. (Tr. 12:2069). Minicola told them that it would be a deal-breaker and that if they stopped paying it, Respondents would take legal action against PBHM. (Tr. 12:2070-71). Minicola asked Wallace to put the contents of the meeting in writing so that he could present it to his owner. (Tr. 12:2071-72).

¹⁷ This is contradicted by the letter dated July 16, 2007 sent to Minicola by Wallace. (GC 41).

After the meeting, Minicola claimed there was a meeting amongst him, Wilinsky, PBHM counsel Rand and Respondents' counsel Leong. (Tr. 12:2073-74). Minicola stated that at the meeting Wilinsky told him that Wallace would soften his position with regard to paying the 2.5% commission. (Tr. 12:2074). Wilinsky recalled telling Minicola at some point that the 2.5% commission issue was inconsequential and that it would be worked out. (Tr. 4:498). However, when Minicola received the letter from Wallace memorializing the contents of their June meeting, included in that letter was Wallace's statement that PBHM was planning to stop paying the 2.5% commission right away. (Tr. 12:2074).

Minicola claimed he went to Japan at the beginning of July to discuss the situation with Respondents' Japan office and it was after he returned that he received Wallace's letter memorializing their June meeting. (Tr. 12:2082). Minicola claimed he called Wallace after receiving the letter and told Wallace that if PBHM was serious about stopping the 2.5% commission payment, then he would terminate the Agreement. (Tr. 12:2086). Wallace said he would get back to Minicola, but Minicola claims that he did not. (Tr. 12:2086). Minicola alleges this is what triggered the termination of the Agreement on August 3, 2007. (Tr. 12:2082-83).

Wallace and Wilinsky testified, and Minicola confirmed, that PBHM never stopped paying the 2.5% commission. (Tr. 13:2316). Wilinsky and Wallace confirmed that the 2.5% commission was inconsequential, and that they would not let a financial arrangement interfere with their Agreement with Respondents. (Tr. 3:389; 4:498).

After Respondents invested over \$140,000 on the installation of Stellex, and suffering the huge disruption to their operation caused by the installation of Stellex, it was surprising that the Respondents would cancel the contract over the threat of something that never happened. Since

Minicola received assurances from Wilinsky that the 2.5% commission would not stand in the way of their Agreement, it is curious as to why Minicola did not try to contact Wilinsky instead to determine what Wallace was thinking at the time.

Even more problematic for Respondents was Minicola's unembarrassed insistence that Respondents were entitled to the 2.5% commission even though he could not point to anything in the Management Agreement to support his claim. However, this is curiously consistent with the illogic of Minicola's general testimony. Minicola reflexively insisted that the parties rely on projections in the face of clear terms in the Agreement stating that the parties would not rely on them. Minicola then argued that PBHM could not assess a 1.5% fee on Respondents despite clear terms in the Agreement authorizing as much. Then, Minicola was suddenly adamant in insisting that Respondents were entitled to a 2.5% commission from PBHM, even though it was apparently so important to Respondents, they completely failed to mention it in the Agreement. Frankly, Minicola used so many pages of transcript in arguing the nonexistence of the obvious and the existence of the obviously nonexistent that these self-serving justifications for cancelling the Management Agreement can be considered little else but fantastic. With reasoning as senseless as this to justify cancelling the Agreement, it is little wonder the ALJ found Respondents' reasons to be false.

c. PBHM's changes to the base line data reflected in its financial summary for the month of May was simply a required reflection of their newly created formal budget figures

Minicola's histrionics over the changes to the financial summary from April to May 2007 suggest that either he did not understand that the change was required under accounting principles or that he intended to mislead the fact finder. Minicola described the differences between the April and May financial summaries, and stated:

A. According to Mr. Comstock and Mr. Shishido, that they were told from corporate Outrigger that these are the new budget numbers, so we're starting from scratch. So in other words, the revised budget is now into play, forget about the first four months of business.

Q. And what was your response to that comment by them?

A. I told them, you folks aren't serious about managing this property. You can't be.

Q. And what was the basis for your comment?

A. There was no way that I could explain this to my owner, than now, all of a sudden, we're starting on a clean slate.

Q. In other words, the Outrigger had wiped out what had been in excess of a \$700,000 deficit in April, to now, it was 261,000?

A. Which should have been an add-on, which means it should have been over a million dollars, which is the number that should be in here now, its 261,000.

And to not drag this out, from May till the end of the year - - well, till the end of November when we parted ways with Outrigger, they never changed these numbers, and continued to take their - - as they felt, incentive dollars based upon the revised numbers that they put into place.

(Tr. 12:2079-80).

Minicola himself stated on several occasions during his testimony that he began to see a change in the Japanese business the last quarter of 2006, and that downward trend continued into 2007. (Tr. 13:2247-50). He admitted that it was after PBHM and Respondents entered into their Agreement that the downturn in Japanese business began. (Tr. 13:2252). It is therefore curious that he would have been so upset with the formal budget adjustments that were prepared in April and May. (Tr. 12:2030-31).

In addition, under the Agreement, PBHM's fees were tied to their actual performance, and not projections. (GC 38, pp.10-11, para.5.1). Therefore, it is even more perplexing why

Minicola was disturbed by the fact that PBHM continued to earn incentive fees for their actual performance.

Clearly, Minicola did not understand the Financial Statements and the reasons for the changes. His explanation that PBHM wanted to enhance their performance by using “new” projections five months into the Agreement made little sense upon closer examination of the May Financial Summary. When Counsel for the General Counsel pointed out to Minicola that PBHM reduced their performance on the Gross Operating Profit (“GOP”) line from almost \$300,000 ahead of projection in April to \$16,718 behind projection in May, and that contradicted his suggestion that PBHM was simply changing numbers to enhance their performance, Minicola said nothing.¹⁸ (Tr. 13:2289-90). It is illogical that PBHM would intend to negatively affect its performance on the GOP line since its incentive fees come from improvement on that line. (GC 38, p.11, para.5.1.a.(ii)).

As discussed previously, PBHM was required to develop a formal annual operating budget 90 days after the commencement of the Agreement. It is logical that once the budget is prepared and implemented, the targeted occupancy and revenue figures should be those contained in the budget, and not the previous projections. The change in figures in the Financial Summaries applying the new budget figures should have come as no surprise to Minicola. Once again, Minicola’s defective reasoning shines through his testimony, illuminating its implausibility.

- d. PBHM generated more profit for Respondents than they had done for themselves during the comparable period in the previous two years**

¹⁸ Minicola’s silence should be construed as an admission that he did not know what he was talking about with regard to his representations about the May Financial Statement.

Outrigger CFO Wilinsky, who has over 30 years of financial experience within the hospitality industry, testified that that the profits PBHM earned Respondents were substantially ahead of the same period in the prior year. He explained:

A. Profits were substantially ahead of budget and substantially ahead of last year. In fact, at the line that we're responsible for, which is gross operating profit, our profits were about \$1.3 million better than last year and the prior year, so that would have been 2005 - - 2006, rather, sorry.

Q. It was upon \$1.3 million better for what period?

A. For 11 month that we operated the hotel.

Q. And that - - and you're comparing it to the 11-month period in the year before?

A. Correct.

(Tr. 4:496-97). Minicola admitted that he could not refute Wilinsky's testimony with regard to the gross operating profit. (Tr. 13:2309). Thus, the "bottom line" could not be a credible excuse.

e. Respondents were guaranteed payments by PBHM, which were based on the very early projections of revenue which were attached to the Management Agreement

The unreasonableness of Minicola's strong reaction to the formal budget figures prepared by Outrigger was accentuated by the fact that Respondents continued to receive their guaranteed payments which were based on inflated figures under the Agreement. Paragraph 6.1 of the Agreement required the following:

Guaranteed Payment to Owner.

- a. During the Initial Term (which commences as of the Commencement Date), Operator shall pay to Owner a "**Guaranteed Owner Payment**" equal to fifty percent (50%) of the annual pro forma operating cash flow that is shown on the pro forma operating budget attached hereto as **Exhibit D** and made a part hereof; provided, however, that if the first Fiscal Year is a partial Fiscal Year, the Guaranteed Owner Payment for that partial Fiscal Year shall be prorated based on (1) the number of months in that partial Fiscal Year and (2) the Guaranteed Owner Payment for the first full Fiscal Year, and such prorated

amount shall be added to the Guaranteed Owner Payment for the first full Fiscal year in calculating the first “Guaranteed Owner payment” covering the partial Fiscal Year and the first full Fiscal year.

(Bold and underscore emphasis in original) (GC 38, p.12). Under the terms of the Agreement, Respondents were guaranteed payments based on the unrealistically inflated figures contained in the pro forma attached to the Agreement, which were prepared well in advance of September 2006 execution of the Agreement, when the visitor market was still strong. (Tr. 13:2251). This most certainly is not a credible justification for cancelling the Agreement.

**f. The traumatic dead-fish affair was an unbelievable
afterthought**

The ALJ thoroughly discredited Minicola’s testimony concerning the infamous dead-fish affair. (ALJD 37:45-38:7). The ALJ’s prescient conclusion that the dead-fish affair was not a reason for which Respondents cancelled the Management Agreement is amply supported by the evidence.

Minicola stated at the hearing that during the month of April 2007, he was at a convention in Las Vegas when he received a telephone call from General Manager Comstock informing him that 80 to 100 fish died or were dying in the Oceanarium tank.¹⁹ (Tr. 12:2040-41). Minicola further suggested at trial, and Respondents reiterate in their Supporting Brief, that the loss of fish may have been due to an unreasonable reduction in maintenance expenditures by PBHM. (Tr. 12:2064-65; RBS at 23). However, there is no evidence tying any cost-cutting measures to Minicola’s suspicions.

Minicola described during the hearing how Watanabe was in tears over the loss of her fish and the importance of the fish not only to the Hayashi family but to the Hotel. (Tr. 12:2042). He also described what he assumed was a traumatic experience for the restaurant

¹⁹ The Oceanarium tank is a 280,000 gallon salt water aquarium that is approximately 30 feet high and is located in the middle of the Hotel.

diners and the Hotel employees caused by the sight of dead fish. (Tr. 12:2065). Despite all the alleged trauma associated with this unforgettable event – including the tears shed by Watanabe for fish while her employees’ struggled to obtain a contract – Minicola completely failed to mention it in his affidavit when he explained the reasons Respondents terminated the Agreement with PBHM. (Tr. 13:2276). The ALJ appropriately noted that if the incident had played such a major role in the decision to cancel the Agreement, Minicola would not have failed to mention it in his affidavit. (ALJD 38:1-6).

For the foregoing reasons, the rationalizations set forth by Respondents to justify their termination of the Management Agreement were properly found by the ALJ to be “basically false.” (ALJD 37:37-39). Accordingly, the evidence wholly supports the ALJ’s determination that Respondents’ cancelled the Management Agreement to thwart PBHM and the Union from entering into a first contract. (ALJD 39:5-10).

D. The Evidence Supports the ALJ’s Conclusion that Respondents Engaged in a General Refusal to Bargain in Good Faith

Based on the foregoing, it is unmistakably clear that Respondents could never accept the Union, and therefore could never agree to a CBA which would considerably complicate their efforts to get rid of the Union. Consequently, Respondents engaged in surface bargaining throughout 2006, attempted to rid itself of the Union by using PBHM to tie the Union up in bargaining, and then discarded PBHM to terminate negotiations which would lead to a CBA with the Union. Respondents deliberately wasted the Union’s time and energy in bargaining from at least January 2006 through the end of November 2007. Respondents then iced their own cake by refusing to recognize the Union after December 1, 2007. As the ALJ concluded, this is nothing less than a general refusal to bargain in good faith. (ALJD 43:40-41). These antics also lead to the inescapable conclusion that Respondents used their relationship with PBHM to try and wash

itself of the Union, as discussed further in Section XI.A, *infra*. Therefore, Exceptions F, G, and H are meritless.

V. RESPONDENTS FAILED TO PROVIDE INFORMATION TO THE UNION IN 2007 (Respondents' Exception J)

Respondents' Exception J challenges the ALJ's proper finding that Respondents unlawfully failed to provide information requested by the Union. Respondents' primary argument is that because they were not the employer of the employees and were not involved in negotiations, they cannot have any obligation to provide information to the Union. (RBS at 30-31).

For the reasons discussed in Section III.C, *supra*, the ALJ properly determined that Respondents were the true employer of employees while PBHM managed the Hotel. (ALJD 16:19-20). Consequently, Respondents had an obligation to recognize and bargain with the Union (See ALJD 43:15-24), which necessarily included an obligation to provide information. Accordingly, Respondents' argument is without merit.

Moreover, the ALJ cogently articulated the reasons why the Union's requests for information were relevant, and the circumstances under which they were made. (ALJD 13:16-14:46; 15:1-29; 16:1-29; 19:22-46; 39:47-40:45). The ALJ also aptly observed how Respondents foiled PBHM's efforts to provide additional information to the Union. (ALJD 16:31-39; 17:1-50; 18:1-8). Thus, the ALJ's determination that Respondents violated Section 8(a)(5) by failing to provide relevant information to the Union should not be disturbed. Consequently, Exception J is meritless.

To the extent Respondents challenge the relevance of the requested information, they assert that the Union's requests are now moot. (RBS at 30-31). Nevertheless, for the reasons set forth by the ALJ, the information was undeniably relevant at the time the Union made its

requests. See Daimler Chrysler Corp., 344 NLRB 772, 780 (2005); Wayne Memorial Hospital Assoc., 322 NLRB 100, 110 (1996). In addition, even if the Board finds the requested information to be moot, Respondents' refusal to provide the information while it was still relevant remains a violation of Section 8(a)(5). Accordingly, a cease and desist order is still entirely appropriate. See Wayne Memorial Hospital Assoc., 322 NLRB at 110.

VI. RESPONDENTS CHANGED ASSORTED TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT BARGAINING WITH THE UNION (Respondents' Exception K)

In Exception K, Respondents except to the ALJ's conclusion that Respondents engaged in assorted unilateral changes. Respondents argue that the ALJ left the issue unresolved because he failed to find Respondents to be either a joint-employer with PBHM or a successor to PBHM. (RBS at 31-32).

First, it must be observed that Respondents' exception is over broad because it does not specifically identify each alleged unilateral change to which exception is taken. Second, Respondents did not present evidence to dispute that the unilateral changes found by the ALJ involved mandatory subjects of bargaining. (See ALJD 41:7-27; 43:46-44:21). Third and most importantly, the exception itself is meritless in light of the ALJ's finding that Respondents were the true employers of the Hotel's employees. (ALJD 16:19-20). For reasons discussed in Section III.C, supra, the ALJ's determination was entirely appropriate and fully supported by the evidence. Consequently, Respondents had a corresponding obligation to recognize and bargain with the Union prior to implementing any changes to employees' terms and conditions of employment (See ALJD 43:15-24), regardless of whether the ALJ found Respondents to be a joint employer with PBHM or a successor to PBHM. Accordingly, the ALJ's conclusion that

Respondents unilaterally changed terms and conditions of employees' employment in violation of Section 8(a)(5) is correct and Exception K is meritless.

VII. RESPONDENTS UNLAWFULLY DISCHARGED SEVEN HIGH-PROFILE BARGAINING COMMITTEE MEMBERS (Respondents' Exception L)

Respondents' Exception L challenges the ALJ's conclusion that Respondents discharged seven members of the Union's bargaining committee for their Union support. Respondents advance several arguments in support of their position, including: (1) economics rather than union activities motivated their decision not to hire the seven bargaining committee members (RBS at 32-34); (2) Respondents properly applied six criteria to evaluate employees in the rehiring process (RBS at 33-34); (3) the majority of the Union's bargaining committee were rehired (RBS at 35); and (4) the seven bargaining committee members were not qualified for their jobs. (RBS at 35-38). These arguments are entirely meritless.

A. Respondents Utilize the Wrong Standard

As an initial matter, Respondents cite Jerry Ryce Builders, Inc., 352 NLRB No. 143 (2008), as setting forth the proper standard to evaluate whether the seven bargaining committee members were not hired for union activities. (RBS at 34). The ALJ clearly found that the Respondents were the true employers of the Hotel's employees, based on proper evidence in the record as discussed in Section III.C, supra. (ALJD 16:19-20). Also, the ALJ concluded that Respondents "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[.]" (ALJD 44:10-12).

Based on these conclusions, the proper standard to apply is not that which is set forth in Jerry Ryce. That test applies to cases where a new employer is accused of failing to hire employees because of their union activities. Based on the ALJ's conclusions, Respondents were

not a new employer discriminating against applicants, but were in fact the true and continuous employer utilizing an application and rehiring process as a ruse to target employees for discharge effective December 1, 2007. Under such a scheme, the employees are properly treated as discharged workers pursuant to a Wright Line analysis. Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Under Wright Line, Counsel for the General Counsel must show that protected conduct was a substantial or motivating factor in the adverse employment decision. The elements for such a showing are union or other protected activity by the employee, employer knowledge of the activity, and union animus on the part of the employer. Internet Stevensville, 350 NLRB 1270, 1274 (2007). If Counsel for the General Counsel makes this prima facie showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's union activity. Manno Electric, 321 NLRB 278, 280 fn.12 (1996). The evidence clearly supports the ALJ's conclusion that there was a prima facie showing made by Counsel for the General Counsel. The credited evidence also unquestionably supports the ALJ's conclusion that Respondents failed to rebut that showing.

B. Animus, Not Economics, Motivated Respondents Discharge of the Seven Bargaining Committee Members

As discussed in Section IV.A.4, supra, Minicola told several of the discharged employees on January 25, 2008, that the reason for not rehiring the bargaining committee was partly for personal reasons. (Tr. 4:674; 5:804-05; 6:921). This undoubtedly indicates that Respondents singled out Union adherents for discrimination to send a message to remaining employees. Only Union-related activities could possibly account for the "personal" reasons cited by Minicola for not rehiring the seven bargaining committee members. It was clear by January 2008 that

Respondents took the Union's activities personally and as a sign of disloyalty, particularly the Union's rallies and what Respondent believed was a Union-sponsored boycott. (Tr. 4:577; 6:921; GC 77) This powerful admission of animus is clear and uncontroverted. It is also buttressed by copious amounts of evidence indicative of Respondents' overall animus towards the Union and the employees who favored it, as discussed in Section IV.A, supra.

There is no dispute that the discriminatees participated in various Union-related activities and served on the bargaining committee.²⁰ Respondents also knew of these activities and the discriminatees' union sympathies because Regional Vice President Minicola, Corporate Human Resources Director Morgan, and Food and Beverage Director turned "Consultant" Lopianetzky all participated in negotiations and sat across the table from them for over a year of negotiations. (Tr. 7:1117-18; 9:1472, 1476; GC 3, p.2). These three also formed the surly troika which decided the fates of employees in the artificial reapplication process. Housekeeping Director Ko, who was also allegedly consulted by the troika in its Housekeeping Department "hiring" decisions, also acknowledged that she was well aware of housekeeping employees Virginia Recaido's ("Recaido") and Rhandy Villanueva's ("Villanueva") membership on the Union's bargaining committee. (Tr. 10:1756). Based on this unmistakable evidence, the ALJ properly concluded that Counsel for the General Counsel clearly met its burden of showing that Respondents discharged these seven bargaining committee members for their union activities.

C. Respondents are Unable to Rebut the Prima Facie Showing Because the Professed "Rehiring" Process was Incredible

²⁰ Keith Kapena Kanaiaupuni (Tr. 4:650-55); Darryl Miyashiro (Tr. 4:609-11); Todd Hatanaka (Tr. 6:906-09); Ruben Bumanglag (Tr. 5:819-22); Virbina Revamonte (Tr. 5:853-54; 5:860; 5:863); Virginia Recaido (Tr. 5:731; 5:734-36); and Rhandy Villanueva (Tr. 5:777; 5:786).

Respondents' real dilemma is their inability to rebut the prima facie showing.

Respondents first argue that the economic climate required them to cut staffing among employees. (RBS at 33). Respondents then contend that based on these staffing determinations, they formulated a six-factor test to determine which employees should be rehired. (RBS at 33). As the ALJ correctly concluded, these explanations are not credible.

The ALJ first found that no detailed analysis of Minicola's thinking was ever presented into evidence. (ALJD 28:44-46). The evidence supports the ALJ's finding. Minicola provided some general explanations for the need to reduce departmental positions (Tr. 13:2160-62) but, despite repeated examination, Minicola conveniently never provided the specific position counts that he allegedly formulated for each department nor did he ever explain how he arrived at the position counts for each department. Instead, Minicola provided vague and ambiguous explanations for the need to cut positions without providing any detailed analysis. (Tr. 13:2138-45; 13:2148-52; 13:2162; 13:2169). Minicola could never provide or explain the number of positions Respondents determined needed to be cut in either his affidavit or at the hearing. (Tr. 8:1359-60; 13:2191). Likewise, Lopianetzky could not recall any specific numbers of positions to be cut from the departments but could only recall that Minicola shared the numbers with him. Lopianetzky also added that the position counts shifted during the process. (Tr. 7:1126; 7:1165). Similarly, Morgan could not recall the number of positions cut in various other departments but at the hearing she could miraculously remember that six needed to be cut from the Housekeeping Department. She, too, testified that Minicola provided her and Lopianetzky with specific target numbers. (Tr. 9:1451; 9:1521-23).

Whether Minicola actually shared the numbers to be cut is questionable since his testimony was vague and even contradictory. Initially, Minicola testified that he never told

anyone of the numbers of positions he was going to eliminate. (Tr. 8:1357-62). But towards the end of the hearing, Minicola attempted to reverse course, with little explanation of what numbers if any he shared with Morgan and Lopianetzky:

A. [by Minicola] Applications came in first.

Q. We stacked them all, to make sure I had numbers from each one.

From there, if we didn't have people apply, that would be less people. So, I would know only the amount of stacks of the application, what the variances would be, based upon what the needs were.

Q. And did you share the numbers, with respect to what you had in mind, as far as the staffing requirements, with John and Linda?

A. John and Linda, I would just tell them how many in that stack that I needed to be reduced.

Q. And you had numbers already in your head, and kind of adjusted it, depending on how many had applied?

A. Well, I was following it, but I wanted to keep control of it, and not let anybody know what I was thinking, because of the fact of the confidential nature of it.

(Tr. 13:2190-91).

Despite lengthy examination, none of Respondents' highest officials could explain the specific staffing determinations. The complete failure to explain with specificity how many positions were to be cut in each department and, more importantly, the analysis leading to the final determination, implies that positions were reduced for more than just business reasons. In light of the abundant animus directed towards employees, the Union, and their supporters, the reductions in positions were not the driving force in the decision not to rehire certain employees. Accordingly, the ALJ afforded Minicola's vague and contradictory explanations the proper weight they deserved.

Although it is unclear whether Minicola communicated any exact numbers to Morgan or Lopianetzky, Minicola, Morgan, and Lopianetzky met nonetheless and claimed to have applied six criteria to individuals in order to determine which should be rehired or not. (Tr. 7:1123; 9:1423). The criteria were attitude, performance, flexibility, attendance, customer service, and team work. (Tr. 7:1123; 9:1423). However, this troika never set any quantifiable standards to assess employees by the criteria nor were employee applicants scored. (Tr. 7:1123; 8:1372). Minicola testified that he expected that he, Lopianetzky, and Morgan had a consistent understanding of the six criteria (Tr. 8:1372-73) but offered no basis for that expectation. Minicola also added that sometimes the three of them would use other criteria to determine whether to rehire an applicant. (Tr. 8:1371-72).

It is clear that while Minicola (Tr. 8:1370-71), Lopianetzky, Morgan, and even Ko (Tr. 9:1580) could mechanically recount the six easily-memorized criteria during the hearing, there really was never a uniform understanding of how the criteria were to be applied to employees. The absolute lack of any quantifiable standards to evaluate employees under each criterion, and the lack of any common understanding of how to apply the criteria, gives rise to a strong inference that the criteria were a post hoc afterthought created to provide cover for Respondents as they picked whichever employees met with their approval. Minicola himself admitted that other factors were sometimes considered (Tr. 1371-72), confirming that the criteria were not strictly applied to employee applicants. It is clear that the criteria allegedly used were properly discredited by the ALJ as a reliable method upon which Respondents could rely to defend its hiring determinations.

Minicola, Lopianetzky, and Morgan also testified that they did not review any of the employees' personnel files while reviewing their applications. (Tr. 7:1125; 9:1421; 13:2143-44).

Instead, this makeshift triumvirate relied entirely on their personal knowledge of each applicant based on their recollections. (Tr. 7:1124-25; 9:1421). Lopianetzky had knowledge of the Food and Beverage Department and Morgan knew many of the employees from her past history with the Hotel. (Tr. 13:2178). Minicola asserted he knew the employee applicants, their departments, and the operations of the Hotel intimately because he is a very involved, hands-on manager. (Tr. 1:121-22). He directed that personnel files were not to be consulted because, in essence, he did not want the employees' actual records to play a role in determining who would be rehired. (Tr. 13:2143-44). This assured that the process would be entirely subjective, based only upon the accurate or inaccurate personal recollections, opinions, prejudices, and biases of Minicola, Lopianetzky, Morgan, and, with respect to the Housekeeping Department, Ko. This is substantiated by the subsequent rehiring of employees with personnel records far more suspect than employees who were not rehired, including several of the discriminatees. (GC 70). It also provides a convenient excuse for Respondents to feign ignorance of actual employee conduct and performance while making their selections. This short subjective process in which no employee applicants were interviewed provided an all too convenient cover for Respondents as they weeded out certain employees using selectively-applied, non-quantifiable criteria, in a process propelled by union animus. In operation, this unarresting troika, plus one valuable Executive Housekeeper, functioned with the inscrutability of a Star Chamber, and with comparable lethal efficiency.

As if all this subterfuge were not enough, Minicola, Morgan, Lopianetzky, and Ko all seemed to assert that it was one of the others or a combination thereof who made the recommendations not to rehire employee applicants. Minicola attempted to obscure the role he played in evaluating employee applicants. To this end, he testified that he would offer feedback

to Lopianetzky and Morgan on certain employee applicants, such as Ruben Bumanglag (“Bumanglag”) and Keith Kapena Kanaiaupuni (“Kanaiaupuni”), but that he would still allow Lopianetzky and Morgan to make the decision as to their rehire. (Tr. 13:2183-88). Minicola further claimed that a lot of the discussion over Bumanglag came from Morgan and Lopianetzky. (Tr. 9:1388). But Morgan claims that Minicola and Lopianetzky decided not to rehire Bumanglag. (Tr. 9:1464-65). Lopianetzky first claimed that he had “some input” into the decision not to rehire Bumanglag (Tr. 7:1127) but then, after a short afternoon break in the hearing (Tr. 7:1148), explained that he recommended Bumanglag not be rehired. (Tr. 7:1149).

With respect to Kanaiaupuni, Minicola’s representation that he provided feedback but allowed Morgan and Lopianetzky to make the decision contradicts his own testimony that he decided not to rehire Kanaiaupuni based in part on Kanaiaupuni’s attendance record. (Tr. 8:1392). Lopianetzky testified that he just deferred to Minicola and Morgan with respect to Kanaiaupuni’s application. (Tr. 7:1129-30). Consequently, the decisions made in this rehiring process are confused by the role of the various decision makers, thereby allowing each to point at the other and obscure how the actual decisions were made.

Finally, to further discredit this rehiring scheme, there is the sham rehiring process administered by Morgan and Ko for the Housekeeping Department’s applicants, discussed in further detail in Section VII.E.4.a, infra.

In sum, the rehiring process offered by Respondents as a plausible explanation for how they determined which employees to rehire was so clearly flawed that it could not be credited by the ALJ. In light of all this, and Respondents’ abundant union animus, the ALJ correctly discredited this unimpressive process as Respondents’ justification for their decision to effectively discharge seven of the bargaining committee members. Thus, the ALJ was correct in

concluding that Respondents failed to rebut Counsel for the General Counsel's prima facie case on this basis.

D. Contrary to Respondents' Assertions, Respondents Discharged the Majority of the Union's Bargaining Committee

Respondents attempt to rebut Counsel for the General Counsel's prima facie case by contending that Respondents actually rehired a majority of the Union's bargaining committee. (RBS at 35). Respondents pad the number of actual bargaining committee members to reach this conclusion.

Chief Union negotiator Dave Mori's testimony clearly establishes that the Union's bargaining committee members at the time bargaining first began in 2005 were Cesar Aldana ("Aldana"), Ruben Bumanglag, Desiree Hee ("Hee"), Keith Kapena Kanaiaupuni, Darryl Miyashiro ("Miyashiro"), Bing Obra ("Obra"), Virginia Recaido, Virbina Revamonte ("Revamonte"), Larry Tsuchiyama ("Tsuchiyama"), Guillerma Ulep ("Ulep"), Rhandy Villanueva, and Edison Yago ("Yago"). (Tr. 2:209). Mori also testified that at various points throughout 2006, three committee members left. Specifically, Aldana left the committee early in 2006 and was replaced by Todd Hatanaka ("Hatanaka"), Obra stepped down in April 2006 and was not replaced, and Hee was replaced by Cesar Pedrina ("Pedrina") when she left for another job around May 2006. (Tr. 2:210). Mori never identified Carol Ped or Enoch Chong as employee members of the Union's bargaining committee at any time, nor do their names appear on any of the negotiation sign-in sheets. (GC 8 to 16). As the chief negotiator for the Union, Mori's identification of the employee members of his own committee should hold significant weight.

Based on Mori's clear testimony, the only employees who were still on the committee at the time of reapplication process were Bumanglag, Hatanaka, Kanaiaupuni, Miyashiro, Pedrina,

Recaido, Revamonte, Tsuchiyama, Ulep, Villanueva, and Yago. Of these, Bumanglag, Hatanaka, Kanaiaupuni, Miyashiro, Recaido, Revamonte, and Villanueva were effectively discharged on December 1, 2007. Thus, seven of the eleven committee members were eliminated by Respondents. Respondents' attempt to enlarge the bargaining committee should be rejected.

E. Respondents Failed to Present Credible Reasons for Discharging the Seven Committee Members

In their Supporting Brief, Respondents set forth various justifications for discharging the seven bargaining committee members effective December 1, 2007. Several observations are required before addressing Respondents' points. First, the portion of Respondents' Supporting Brief dealing with the seven discriminatees does not contain any supporting citations to the record. (RBS at 35-38). Second, Respondents do not dispute that Hatanaka and Kanaiaupuni were qualified for their jobs at the time they were discharged on December 1, 2007. Accordingly, Respondents do not rebut the prima facie showing that animus motivated Respondents' decision to discharge Hatanaka and Kanaiaupuni as of December 1, 2007. Respondents' argument that Hatanaka and Kanaiaupuni were not victims of discrimination at the time of their discharge because they were rehired several months later is a trifling excuse post hoc. (RBS at 35). Third, Respondents rehash the same tired reasons in their attempt to rebut the prima facie case as to the remaining five discriminatees. (RBS at 35-38). As set forth below, these arguments were properly discredited by the ALJ. (ALJD 29:15-36:9).

1. Darryl Miyashiro was discharged for his union activities

Respondents rely on Lopianetzky's testimony to assert that Miyashiro was properly discharged. (RBS at 36-37). The ALJ discredited Lopianetzky's testimony on this matter and articulated proper reasons for doing so. (ALJD 29:33-30:11). Respondents do not present a

compelling reason to revisit that determination. Accordingly, Respondents are unable to rebut the prima facie showing that Miyashiro was discharged for his union activities.

2. Ruben Bumanglag was discharged for his union activities

Respondents first contend that Bumanglag, a Maintenance I employee, was less qualified and less flexible in his scheduling than two other Maintenance I employees who were rehired. (RBS at 37). Respondents argument that Bumanglag was less qualified is unbelievable because he had skills in air conditioning and refrigeration repair (Tr. 5:809), much like the other Maintenance I employee cited by Respondents. Respondents' concerns about scheduling are also exaggerated. If Respondents were truly concerned about scheduling, they would not have been offering work to employees who could not work and logically could not be scheduled to work, like Vickie Sabado. (ALJD 32:28-31). It is simply an excuse for Respondents to justify not offering Bumanglag anything at all.

Respondents also cite Lopianetzky's convenient concern with Bumanglag's supposed incompetence, which they claim resulted in the electrocution of another employee. (RBS at 37). The ALJ discredited this invented justification for reasons so clear they speak for themselves. (ALJD 31:17-48).

Throughout it all, Respondents noticeably overlook Bumanglag's extensive activities on behalf of the Union, including his conspicuous appearance in a television commercial related to the ongoing labor dispute. (ALJD 31:8-15). As the ALJ correctly concluded, this made Bumanglag a tempting target for Respondents to hit. (ALJD 31:42-43). In light of all this, the ALJ properly concluded that none of Respondents' rationalizations contained any merit. Therefore, Respondents are unable to rebut the prima facie showing that Bumanglag was discharged for his union activities.

3. Virbina Revamonte was discharged for her union activities

Respondents contend that Revamonte was not hired because she was unable to work and therefore not listed on the work schedule. (RBS at 38). However, as the ALJ fittingly observed, Revamonte maintained that she was available for work and that the incredible Lopianetzky could easily have spoken to her. (ALJD 32:24-26).

The ALJ also observed that Respondents treated Revamonte differently from others who were similarly situated. Specifically, the ALJ noted that Vickie Sabado and Joel Pancipanci were offered employment by Respondents even though they were both not on the active payroll at the time. (ALJD 32:29-32). Respondents attack the ALJ's finding in their Supporting Brief by claiming it was Ko who made those determinations and that Lopianetzky made the determination as to Revamonte. (RBS at 38). Moreover, Respondents claim Ko was never instructed not to hire employees who were on leave. (RBS at 38). Respondents fail to cite any transcript or records from the hearing to support this assertion. Moreover, this purported reason, if indeed true, just further discredits the entire reapplication process by demonstrating that unidentified criteria were applied unevenly.

In light of Respondents' astonishing animus towards the Union, the ALJ properly concluded that Respondents' reasons did not rebut the prima facie showing that Revamonte was discharged for her union activities.

4. Virginia Recaido and Rhandy Villanueva were discharged for their union activities

Respondents contend that Recaido was not rehired because she was insubordinate and, consequently, not a team player. (RBS at 36). However, the ALJ assiduously rebutted these contentions in his decision. (ALJD 33:1-34). Interestingly, Respondents argue that Recaido was

insubordinate because she spoke up against supervisors and showed no respect for authority. Respondents fail to note that they rehired an employee who snapped back at a supervisor and proceeded to argue with Ko about it in public. (GC 74, p.11(b)). In stark contrast to Respondents' pregnant silence, however, is the ALJ's thoughtful consideration of this evidence, among others, to appropriately label Respondents' excuses as "untenable." (ALJD 33:22-25). Accordingly, the ALJ properly concluded that Respondents' failed to rebut the prima facie showing that Recaido was discharged for her union activities.

Respondents also claim that Villanueva was not rehired for sundry reasons. Among these are Respondents' claims that Villanueva took shortcuts at work, committed safety violations, and did not follow proper protocol. (RBS at 35). In discrediting these excuses, the ALJ, however, cited Ko's failure to discipline Villanueva for any supposed safety violations she recalled on the stand. (ALJD 34:17-18). The ALJ also concluded that Respondents' performance-based justifications were undermined by their rehiring of an employee whose abysmal work record was clearly known to those involved. (ALJD 34:27-37). Respondents argue next that Villanueva was not rehired because of his poor attendance record. (RBS at 35). Yet again, the ALJ noted that these absences were instigated by a medical condition, each absence was accompanied by a doctor's note, and Villanueva gave proper notice of his situation. (ALJD 34:20-23). In short, it was not a credible justification put forward by Respondents to rebut the prima facie showing that Villanueva was discharged for his union activities.

a. The rehiring process for the Housekeeping Department was a sham

What further undermines Respondents' arguments concerning the discharges of Recaido and Villanueva is the absolute incoherence of the Housekeeping Department's reapplication process. Minicola did not participate in deciding which employees of the Housekeeping

Department would be offered positions and which ones would not because he was away from the State from October 6 to October 19, 2007. (Tr. 8:1364; 13:2254). Accordingly, Morgan consulted with then-PBHM Executive Housekeeper Ko to determine which Housekeeping Department employees should not be rehired. (Tr. 9:1421-25, 1450-51). Lopianetzky testified that he reviewed and approved the recommendations of Morgan and Ko as to which employees in the housekeeping department should not be rehired because he was not as familiar with the Housekeeping employees as he was some of the others. (Tr. 7:1128-29).

Morgan and Lopianetzky could not recall whether they met together with Ko to discuss the housekeepers' applications. (Tr. 9:1450; 8:1303-05). Morgan testified that she, Lopianetzky and Ko met before meeting to decide which of the housekeeping staff would be retained to inform Ko of the six hiring criteria. (Tr. 9:1531-35). At that meeting, Morgan stated that she and Lopianetzky told Ko that she needed to reduce her department by six positions. (Tr. 9:1535-36).

Morgan specifically remembered meeting with Ko to discuss which of the Housekeeping Department employees should be offered positions and which should not. (Tr. 9:1450-51). Morgan testified that Minicola gave her the number six as the number of positions that needed to be eliminated in the Housekeeping department overall.²¹ (Tr. 9:1451-52). Morgan stated that she relied solely on Ko's recommendations as to who should not be hired and did not do an independent assessment of the applicants. (Tr. 9:1459; 9:1568). In fact, Morgan could not recollect with any specificity what Ko had said in her assessments of Recaido and Villanueva. (Tr. 9:1423-25; 9:1455-56).

²¹ Morgan testified that she could not remember the numbers by which each department needed to be reduced that Minicola gave them, nor could she remember whether she was given those numbers verbally or in writing. (Tr. 9:1521-22). She could, however, miraculously remember that housekeeping staff needed to be reduced by six, and then proceeded to robotically repeat that number at the hearing like an indisputable, but unexplainable, truth.

The testimonies of Minicola, Lopianetzky, Morgan and Ko were filled with perplexing contradictions and inconsistencies leading to the conclusion that the process was fabricated. Minicola testified that based on a number of factors, he determined the staffing requirements of the Hotel come December 1, 2007 and that he never told anyone of the numbers of positions he was going to eliminate because it was confidential. (Tr. 8:1357-62). Under these circumstances it is impossible to know who testified truthfully, since Lopianetzky and Morgan said that Minicola gave them the number of positions which were going to be eliminated from each department as of December 1, 2007. If Morgan and Lopianetzky were never told the numbers by which each department had to be reduced, it is a mystery how Ko knew that she had to reduce housekeeping staff by six people. Better still, the ALJ noted that there was no explanation why the positions were set at six. (ALJD 29:1-2).

Ko was then told of the six criteria to use in determining which employees should be rehired and which should not, but was never instructed on how to apply the alleged criteria developed by Minicola, Lopianetzky and Morgan. She was left to figure it out on her own.

With regard to how the applications were handled, Morgan stated at first that all of the applications were separated by departments and sent to each department for review. (Tr. 9:1512-13). She later backtracked and stated that she did not know whether Lopianetzky gave the applications to the various departments, but she stated that she did give the applications for the Housekeeping Department to Ko for her review and suggestions. (Tr. 9:1538; 9:1515-16).

In direct contradiction with Morgan's testimony, Ko testified that she was never given employee applications to review. (Tr. 9:1585; 10:1762). Ko stated that she was received a call from Morgan at about 9:00 or 9:30 a.m. on October 15. (Tr. 9:1577-78; 9:1584-86). Morgan told Ko that she needed to identify six individuals from the Housekeeping Department who

should not be rehired. (Tr. 9:1578). Morgan told Ko about the six criteria they had developed and left it was up to Ko to interpret and apply the criteria to each of the Housekeeping Department employees. (Tr. 9:1534; 9:1537; 9:1586). Ko's statement directly contradicted Morgan's testimony that she and Lopianetzky met with Ko and reviewed the six hiring criteria.

Ko explained that because she was not given a list of applicants or their applications and did not know who had applied, she used the employee names on the Housekeeping Department schedules to review each employee and determine, solely from what she could remember of her experience with each of the employees, which six employees she would recommend not be rehired. (Tr. 9:1579-80). Ko stated that she was given only a few hours to make her recommendation, and did so at approximately 1:30 or 2:00 p.m. on the same day. (Tr. 9:1584). Morgan did not provide any input based on her own knowledge of the Housekeeping employees and Morgan and Ko never discussed any of the other employees who were recommended to be rehired. (Tr. 9:1637-38, 1597). Ko also did not consult any of her managers or assistants when making her decision and she did not refer to any personnel files. (Tr. 10:1725-26; 9:1583).

Ko stated that she identified six employees who should not be rehired, and that list included Recaido and Villanueva. (Tr. 9:1597-98). Ko met Morgan in the afternoon on October 15 at the Pagoda Hotel. (Tr. 10:1714). She stated that Lopianetzky was in the area, but was not in the room where she and Morgan met. (Tr. 10:1718). Ko claims she was there with Morgan for about 30 minutes and gave her the names of six individuals. (Tr. 10:1759). She testified that it was her understanding that the letters offering employment to Housekeeping employees would be sent after her meeting with Morgan. (Tr. 10:1760).

GC Exhibits 63 and 79 show that letters offering employment to Housekeeping Department employees were dated October 12, 2007. According to the signature dates on the

three documents contained in GC Exhibit 79, one housekeeping employee signed his offer letter on October 13, 2007, and two other housekeeping employees signed their offer letters on October 16, 2007. The dates on the offer letters and the dates of the signatures on these documents are significant because they prove that that entire process as to the method the Housekeepers were selected for rehire as described by Morgan, Ko and Lopianetzky was a sham.

Ko testified that she was on vacation from the ending of September and returned to work on October 14, 2007. (Tr. 9:1617-18; 10:1722-23). During that testimony, she was referring to copies of the Housekeeping Department employees' schedule, on which she was able to verify her vacation dates. If her testimony that she was contacted by Morgan on October 15 is the truth, then the decision as to which Housekeeping employees would not be retained had to have been made prior to October 15 so that the offer letters could be prepared and sent out by October 12, 2007. This in turn discredits Morgan's testimony that she relied on Ko's recommendations in determining which employees to keep from Housekeeping Department. (Tr. 9:1459; 9:1568).

It is also illogical that there was no discussion of the individual applicants and no input provided by Morgan regarding her knowledge of the employees. Morgan had worked for the Hotel continuously since 1995, and should have had valuable knowledge of each employee based on her position and information that she would have received over the years regarding employees' disciplinary actions and attendance by virtue of her position. This lends further credence to the conclusion that it was predetermined that Villanueva and Recaido would not be rehired.

It is apparent that the ALJ could not, and did not, credit the overall rehiring process for reasons discussed in Section VII.C, supra. (ALJD 29:9-13). The Housekeeping Department's rehiring process is an equally flawed sub-part of the incredible scheme designed by Respondents

to eliminate visible union activists, like Recaido and Villanueva. The ALJ obviously could not credit this inept procedural sub-part (ALJD 29:9-13; 34:27-30). Accordingly, the evidence supports a determination that the Housekeeping Department's rehiring process was entirely worthy of disbelief and, therefore, unreliable evidence with which to rebut the prima facie showing.

In the end, all that is left is Respondents' animus and brutal resolve to defeat the Union at all costs. To dissipate the one-vote majority Minicola obsessed over constantly, Respondents purged these seven visible union activists using every pretext in the book to smear them in a manufactured rehiring scheme. The ALJ concluded as much (ALJD 32:19-21; 39:25-31), and the evidence undoubtedly supports that conclusion. Accordingly, Exception L is without merit.

VIII. RESPONDENTS REFUSED TO RECOGNIZE AND BARGAIN WITH THE UNION AS OF DECEMBER 1, 2007 (Respondents' Exceptions A, B, C, D, and I)

Respondents' Exceptions A, B, C, D, and I all pertain in some way to Respondents' refusal to recognize and bargain with the Union as of December 1, 2007, and thereafter. The number of exceptions on this issue is revealing of how adamantly Respondents oppose the notion of being compelled to deal with the Union once again. Despite their numerosity, Respondents' exceptions are patently meritless.

Respondents first appear to argue that their bargaining obligations are contingent only on their status as successor employers. (RBS at 29). The ALJ correctly concluded that Respondents were the true employers of the employees, and therefore a continuous employer. (ALJD 16:19-20). Although Respondents delegated PBHM to run the Hotel and bargain collectively with the Union on Respondents' behalf, at no time were Respondents relieved of the obligation to bargain in good faith with the Union. Therefore, Respondents must immediately recognize the Union and resume bargaining with the Union in good faith, including honoring all

of the tentative agreements entered into by the Union, Respondents, and PBHM. Thus, Respondents argument is unavailing. Respondents' other arguments are even less availing than this one.

A. Respondents Had No Actual Proof That the Union Had Lost Majority Support at the Time They Withdrew Recognition on December 1, 2007, Therefore the ALJ Correctly Excluded Respondents' Pre-Withdrawal "Evidence"

Respondents admit they withdrew recognition from the Union on December 1, 2007, but claim they were justified because the Union no longer had the majority support of employees. (RBS at 29). However, Respondents were prepared to offer only anecdotal and hearsay evidence to support Minicola's "good-faith doubt" (Tr. 1:124) that a majority of employees no longer supported the Union when they withdrew recognition. (RBS at 29). Respondents' purported "evidence" flies in the face of law. The ALJ took great pains to explain, both at trial and in his decision that an employer, absent **actual proof** that the union has lost its majority status, may not withdraw or refuse to recognize an incumbent union. Levitz Furniture Co. of the Pacific, Inc., 333 NLRB 717, 717 (2001). When Respondents withdrew recognition from the Union on December 1, 2007, they had nothing whatsoever resembling actual proof.

Despite the lack of relevant evidence to meet the stringent Levitz standard, Respondents complain that the ALJ improperly excluded their anecdotal and hearsay evidence which would indicate that certain anonymous employees had heard from their coworkers in 2007 that they did not support the Union, and then reported it to Minicola. As discussed above, this falls far short of actual proof required by Levitz. Moreover, Levitz dictates that Respondents had to prove that the Union had, in fact, actually lost majority support at the time Respondents withdrew recognition, which admittedly was on December 1, 2007. Levitz, 333 NLRB at 725. Respondents' anecdotal and hearsay evidence could not meet this stringent legal requirement so

it was irrelevant. Accordingly, the ALJ properly excluded this evidence. Port Printing Ad & Specialties, 344 NLRB 354, 357-358 (2005), enfd. per curiam 192 Fed.Appx. 290 (5th Cir. 2006).

Respondents vainly claim that hearsay and anecdotal evidence is admissible to prove a union's loss of majority status. (RBS at 8-9). Respondents cite Levitz for the proposition that such hearsay is admissible in RM proceedings and therefore they are likewise admissible to justify withdrawals of recognition. (RBS at 8-9). This argument is intellectually bankrupt. Levitz clearly sets forth two completely distinct standards: one standard applies to the filing of an RM petition, and the other standard applies to an employer's withdrawal of recognition. In making the distinction, the Board decided that it would permit employers to file RM petitions based on a good-faith reasonable uncertainty standard. Id. at 727-728. Correspondingly, the Board tightened its requirements for an employer to lawfully rebut a union's presumption of majority status and withdraw recognition. In doing so, it required proof of a union's actual loss of majority support. Id. at 725. Given the striking clarity of Levitz and its underlying reasoning, Respondents inappropriately combine the two standards in order to fit their unenviable legal predicament.

Respondents next grasp at GC Memorandum 02-01 for a similar proposition. (RBS at 9). Apart from being a GC Memorandum which is not binding authority on the Board, the Memorandum clearly distinguishes the two standards for an employer's withdrawal of recognition and an employer's filing of an RM petition pursuant to Levitz. Respondents accurately cite the Memorandum's discussion of evidence which would satisfy the good-faith reasonable uncertainty standard for filing RM petitions. Respondents then shockingly turn around and inaccurately maintain that such anecdotal evidence is actual proof of a union's loss of

majority support. (RBS at 9). Even a cursory reading of Levitz or GC Memorandum 02-01 will reveal that it clearly is not.

Moreover, Respondents' claim that they actually possessed anecdotal and hearsay evidence at the time they withdrew recognition is itself unconvincing. The undisputed testimony of Galdones reveals that Minicola never mentioned any evidence of the Union's loss of majority support at the time he was informed by Respondents that they were withdrawing recognition from the Union. See Section IV.A.6, supra. In actuality, as the ALJ noted, everything was personal. (ALJD 39:2-3).

B. The ALJ Properly Excluded Respondents' Purported Post-Withdrawal "Evidence" of Disaffection as a Basis to Prove the Union Lacked Majority Support

After withdrawing recognition, Respondents continued to claim that they could prove the Union lacked majority support. Consequently, Respondents excepted to the ALJ's rejection of evidence which they claim would prove the actual loss of the Union's majority support after Respondents already withdrew recognition. (RBS at 9-13). Unfortunately, this excluded evidence was obtained many months after they actually withdrew recognition from the Union. (Resp. Rejected Exs. 12 & 12a). Thus, it is irrelevant to demonstrate that Respondents lawfully withdrew recognition on December 1, 2007. Levitz, 333 NLRB at 725.

Even if such post-withdrawal evidence were relevant, Lee Lumber & Building Material Corp., 322 NLRB 175 (1996) *affd.* in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997), establishes an almost irrebuttable presumption that all post-withdrawal evidence of disaffection is tainted by the unlawful withdrawal of recognition. Lee Lumber, 322 NLRB at 177. The Board allowed hapless employers only two options to rebut that presumption of taint. The first option is for the employer to show that employee disaffection arose after the employer resumed

its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Id. It is undisputed that Respondents have refused to deal with the Union to this day.

The only other option would be for the wayward employer to show “unusual circumstances” which would rebut the presumption of taint. Id. Respondents unimpressively seize upon this more limited exception to the presumption of taint. (RBS at 9-11). At the hearing, Respondents attempted to introduce post-withdrawal “evidence” of employee disaffection they received in July 2008, which was allegedly gathered beginning in April or May 2008. (Resp. Rejected Exs. 12 & 12a). Anticipating that such evidence would come with an insurmountable presumption of taint, Respondents claim they should have been permitted to rebut the presumption of taint. Respondents claim that their rebuttal “evidence” would have shown some employee disaffection caused by the Union’s lawful economic response to Respondents’ unfair labor practices.²²

Respondents quote the following passage from Lee Lumber in their Supporting Brief and arrestingly italicize the phrase they seize upon to support this claim:

In the absence of unusual circumstances, we find that this presumption of unlawful taint can be rebutted only by an employer’s showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

²² In response to a question concerning what actions the Union took after December 1, 2007 (i.e., the date of the unlawful withdrawal of recognition), Dave Mori testified that the Union was part of a community organization called “Justice at the Beach” which called for a boycott of the Hotel to protest Respondents’ unfair labor practices. (Tr. 2:291-92).

(RBS at 10) (Italics in the original). Respondents then maintain that employees' response to the boycott was an "unusual circumstance" which could have rebutted the presumption of taint that saturates their post-withdrawal "evidence." (RBS at 9-13). This is an unbelievable contention.

A side-by-side comparison of Respondents' quote from Lee Lumber and the actual decision itself is illuminating. The actual decision reads as follows:

In the absence of unusual circumstances,²⁴ we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

....

²⁴ These would be comparable to the "unusual circumstances" that would permit a challenge to a newly certified union during the certification year. The Board and courts have construed those circumstances narrowly. See *Ray Brooks v. NLRB*, 348 U.S. at 98-99.

Lee Lumber, 322 NLRB at 178. As the vanished footnote visibly explains, "unusual circumstances" are defined by the Board and Supreme Court very narrowly. The Supreme Court's Ray Brooks decision, duly referenced by the Board in footnote 24, mentions only three "unusual circumstances": (1) where the certified union dissolves or becomes defunct; (2) where, as a result of a schism, substantially all the members or officers of the certified union transfer their affiliation to a new local or international; or (3) where the size of the bargaining unit fluctuates rapidly within a short time. Ray Brooks v. NLRB, 348 U.S. 96, 98-99 (1954).

Respondents' sanitized quotation notwithstanding, Respondents were unable to offer any evidence which would meet the actual definition of "unusual circumstances." (Resp. Rejected Exs. 12 & 12a). Thus, Respondents' claim that they can rebut the presumption of taint rings hollow. Consequently, the ALJ then properly excluded all Respondents' post-withdrawal

“evidence” of disaffection because it was tainted by their unlawful withdrawal of recognition. Respondents’ contentions to the contrary are not credible when footnote 24 of Lee Lumber is properly documented and considered. Relatedly, Respondents’ omission of footnote 24 from their argument is inexcusable given its seminal role in defining the very exception they anxiously exploit. Accordingly, for all the foregoing reasons, Respondents’ claims that the ALJ improperly excluded their “evidence” should be enthusiastically rejected, along with Exceptions B, C, D, and I.²³

C. The ALJ Properly Issued an Affirmative Bargaining Order to Remedy the Unlawful Withdrawal of Recognition (Respondents’ Exception A)

Respondents’ Exception A challenges the ALJ’s issuance of an affirmative bargaining order. Unfortunately for Respondents, an affirmative bargaining order is the “traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.” Caterair International, 322 NLRB 64, 68 (1996). Employees deserve nothing less after observing Respondents’ efforts to cheat them of

²³ On October 28, 2009, Respondents filed a Motion to Remand and Reopen the Record for the Taking of Additional Evidence (“Motion”). Counsel for the General Counsel filed its Opposition to Respondents’ Motion (“Opposition”) on November 2, 2009. In their Motion, Respondents duplicated their arguments that the ALJ erred by failing to permit Respondents to offer their anecdotal, hearsay, and post-withdrawal evidence of disaffection at the hearing. In its Opposition, Counsel for the General Counsel noted that Respondents’ arguments would be addressed by Counsel for the General Counsel in its Answering Brief. Accordingly, Counsel for the General Counsel respectfully submits that Respondents’ Motion should be denied based on the arguments set forth in Section VIII of this Answering Brief.

Respondents cite to Saint Gobain Abrasives, Inc., 342 NLRB 434 (2004), in their Motion but do not cite to it in their Supporting Brief. In any event, this case is unavailing because an unlawful withdrawal of recognition presumptively taints any subsequent employee disaffection so there is no need to prove a nexus between the unfair labor practice and employee disaffection. Lee Lumber, 322 NLRB at 177. As noted above, Respondents have no relevant evidence to rebut the presumption of taint, thus their post-withdrawal evidence of disaffection was properly excluded.

their initial choice to organize for almost four years.²⁴ Accordingly, Exception A is devoid of merit.

IX. RESPONDENTS UNLAWFULLY POLLED AND INTERROGATED EMPLOYEES IN APRIL 2008 (Respondents' Exception M)

The ALJ correctly concluded that Respondents unlawfully polled and interrogated employees in April 2008. (ALJD 26:1-28:14). Respondents challenge the ALJ's finding in Exception M and claim they were simply asking employees about the Union's boycott and not their sentiments about the Union. (RBS at 39). Respondents' claim is absurd.

Respondents told employees who rejected the Union's lawful response to Respondents' assorted unfair labor practices to report to the Human Resources Department and be counted. This solicitation was a proxy for polling employees' support for the Union. It is undisputed that Respondents never practiced any of the safeguards required by Struksnes Construction Co., 165 NLRB 1062 (1967). Thus, the ALJ correctly concluded that Respondents violated the Act.

Additionally, the ALJ noted that "cutting from the herd" certain employees exposed those who continued to favor the Union and its tactics. (ALJD 28:2-5). The ALJ correctly concluded that this was also unlawful. Houston Coca-Cola Bottling Co., 256 NLRB 520 (1981).

Accordingly, Respondents' Exception M is without merit.

²⁴ An affirmative bargaining order vindicates the Section 7 rights of unit employees who have essentially been denied the benefits of collective bargaining since certification in 2005 by Respondents' bad-faith bargaining antics and subsequent withdrawal of recognition. The subsequent bar to a decertification petition would allow employees ample time to fairly assess the Union's effectiveness without the nefarious interference of Respondents. An affirmative bargaining order also discourages Respondents from delaying further bargaining while ensuring that the Union will not be pressured by the withdrawal of recognition to achieve immediate results at the table during the insulated period following the Board's issuance of a cease-and-desist order. A cease-and-desist order alone would be insufficient because it would not provide enough time for the taint of Respondents' seemingly eternal unfair labor practices to dissipate before the Union's majority status could be challenged. In this case, the Union would also need ample time to reestablish its representative status since the unlawful withdrawal of recognition occurred. Consequently, the ALJ was quite correct in issuing an affirmative bargaining order to remedy Respondents' unlawful withdrawal of recognition.

X. RESPONDENTS UNLAWFULLY THREATENED EMPLOYEES WITH THE LOSS OF JOBS (Respondents' Exception N)

The ALJ properly concluded that Minicola's and Morgan's remarks at the April 2008 meetings constituted a threat of loss of jobs. (ALJD 28:12-14). In Exception N, Respondents take exception to this conclusion and argue that the Complaint did not contain any allegation that Respondents threatened employees with a loss of jobs. (RBS at 40). Respondents' accurately observe that such an allegation was not contained in the Complaint, but their argument nevertheless fails for the following reasons.

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. Pergament United Sales, Inc., 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). The factual connection between the alleged threat of job loss and alleged polling and interrogation of employees is very close. The threats were voiced by Minicola and Morgan at the very meetings alleged in the Complaint to have constituted the polling. These threats then fueled Respondents' unlawful scheme by motivating employees at these meetings to report to the Human Resources Department and be counted in opposition to the Union and its tactics.

Moreover, the meetings at issue were fully litigated. Respondents had an opportunity to cross-examine witnesses Cesar Pedrina, Guillerma Ulep, and Jacqueline Taylor-Lee. Minicola and Morgan, the actual mouthpieces at these meetings, testified at length during the hearing as well. Although the meetings were clearly alleged in the Complaint as unlawful polling schemes, Respondents' counsel did not extensively question Minicola or Morgan to dispute what they allegedly said at these meetings. Thus, the matter was, for all practical purposes, fully litigated at the hearing. Accordingly, the ALJ appropriately concluded that Respondents violated Section

8(a)(1) by threatening employees with a loss of jobs, even in the absence of such an allegation in the Complaint.

XI. THE SPECIAL REMEDIES ORDERED BY THE ALJ ARE VITAL AND NECESSARY (Respondents' Exceptions O, P, and Q)

After taking a thorough look at the atrocious situation at Pacific Beach Hotel from 2002 to the present, the ALJ ordered a multitude of special remedies. First, the ALJ ordered a full extension of the certification year. Second, the ALJ ordered Respondents to reimburse the Union for its bargaining costs and to make whole employee negotiators for earnings lost while attending bargaining sessions. Third, the ALJ ordered Respondents' agent to read the Notice to Employees aloud. Finally, the ALJ issued a broad cease-and-desist order. Respondents challenge these remedies in Exceptions O, P, and Q. Given the severity of the overall situation resulting from Respondents' course of misconduct, these exceptions are patently meritless. As the ALJ properly concluded, Respondents have gone to extraordinary lengths to evade their duties under the Act in every respect. Consequently, only extraordinary remedies will rectify such calculated flouting of the law.

A. Respondents' Long-Term Wrongdoing is Calculated and Ongoing

The totality of the evidence discussed throughout this Brief shows that Respondents have rejected the Union's role from the day it was certified in August 2005. Respondents enthusiastically warred with the Union for years prior to the Union's certification, even engaging in objectionable conduct to achieve their ends. After losing the representation election, Respondents were compelled by the Board's certification to recognize and bargain with the Union. Respondents then deliberately bargained in bad-faith over the course of the certification year, preventing any first contract in hopeful anticipation of a decertification petition.

Concurrently, Respondents schemed of a way to wash their Hotel of the Union. To that end, Respondents used an old bait-and-switch scheme. Respondents injected PBHM into the picture to deal with the Union, while still maintaining true control. Respondents then refused to provide the Union with relevant information about its clandestine relationship with PBHM. Moreover, it prevented PBHM from providing the same relevant information to the Union. Once it became obvious that PBHM was on the cusp of offering the Union proposals which it believed would result in a complete agreement, Respondents eliminated PBHM. Respondents then pretended to be an entirely new employer that would not be bound by anything they or PBHM had done previously. Thus, the Union had wasted valuable resources in bargaining first with Respondents and then with PBHM for almost two full years.

In line with their scheme to be new employers, Respondents then manufactured a reapplication scheme to weed out problematic Union supporters, thereby dissipating the one-vote majority Respondents had obsessed over for years. As the ALJ found, Respondents scheme contemplated that they could be considered successor employers, so they rid themselves of known Union supporters to eliminate the Union's purported one-vote majority. (ALJD 39:24-31). And, once PBHM departed, Respondents refused to be satisfied with what would have been their more limited obligations to the Union as a successor to PBHM.²⁵ After taking the exasperatingly long route for years, Respondents finally decided to claim the Union had lost its support. Accordingly, Respondents withdrew recognition after disposing of seven vocal Union activists to finally dispatch the one-vote majority, while sending a clear and chilling message to

²⁵ This, of course, assumes that Respondents would actually be considered "successors" after such a short hiatus as the employer of the unit. There is case law indicating that after such a short hiatus, the successor doctrine would not apply and that Respondents would just automatically assume their former role as the employer with their previous obligations to the Union. See, e.g., F & A Food Sales, 325 NLRB 513 (1998), *enfd.* 202 F.3d 1258 (10th Cir. 2000).

the remaining employees. Respondents' scheme to wash the Hotel of the Union was complete. And, not yet entirely satiated, Respondents underscored this rejection of the Union by implementing numerous unilateral changes. This course of conduct is simply outrageous.

The ALJ properly concluded that the evidence of Respondents' various acts supported a conclusion that this was a long-term scheme to wash the Hotel of the Union, even though Respondents contemplated that they might be regarded successor to PBHM. (ALJD 38:45-39:38). This scheme, as found by the ALJ, was quite simply the sum of its nefarious parts, with PBHM as the "middleman."²⁶ Thus, Respondents' antagonistic actions from 2002 to the present unquestionably validate the ALJ's conclusion that extraordinary remedies are required.

B. The ALJ's Extension of the Certification Year is Necessary in Light of Respondents' Uninterrupted Bad-Faith Bargaining From at Least January 2006 to Their Unlawful Withdrawal of Recognition in December 2007 (Respondents' Exception O)

In order to remedy Respondents' general refusal to bargain, the ALJ properly ordered a complete extension of the certification year. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Glomac Plastics, Inc., 234 NLRB 1309 (1978), enfd. in part 592 F.2d 94 (2d Cir. 1979). The entire purpose of the certification year is to provide a newly-certified 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). An employer's bad-faith bargaining after certification deprives the union of this fair chance to succeed. The evidence clearly indicates that Respondents did not bargain in good faith at any time since they first made their initial contract

²⁶ The scheme contemplated by Respondents here is akin to an employer's intentional attempts to rid themselves of their bargaining obligations through scheming, such as where an employer intentionally attempts to avoid its bargaining obligations as a successor. In such cases, a full restoration of the status quo is the typical remedy because any uncertainties must be resolved against the Respondent "since it cannot be permitted to benefit from its unlawful conduct." See, e.g., Love's Barbeque Restaurant No. 62, 245 NLRB 78, 82 (1979) (footnote omitted), enfd. in part sub nom. Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981).

proposals to the Union in January 2006. Even before then, Respondents had engaged in delaying tactics and targeted the bargaining unit for reprisals. Thereafter, Respondents continued to frustrate bargaining until they unlawfully withdrew recognition from the Union. To date, Respondents' illegal bargaining and withdrawal of recognition have combined to rob the Union of not just one year, but almost four years of an opportunity to succeed. It is entirely appropriate for the Union to finally receive an honest year free from Respondents' illegal antics to bargain properly without questions being raised as to its status. And during that time, it would also have the added benefit of allowing the effects of Respondents' longstanding unfair labor practices to dissipate before the Union would be distracted by challenges to its status. For these reasons, the ALJ's decision to extend the certification year is absolutely supported by the evidence.

C. The ALJ's Award of Special Remedies in Light of Respondents' Protracted Course of Misconduct is Entirely Appropriate (Respondents' Exception P)

In light of Respondents' deplorable course of misconduct, the ALJ properly awarded special remedies in this case. (ALJD 42:1-47). In addition to denying they did anything wrong, Respondents basically argue that traditional remedies would be appropriate. (RBS at 45-46). However, Respondents' protracted course of unlawful conduct included deliberate bargaining in bad faith from at least January 2006, terminations of high-profile Union supporters, withdrawal of recognition from the Union, and numerous unilateral changes. The ALJ properly found that these actions were part of a scheme to wash the Hotel of the Union and he therefore concluded that Respondents' overall misconduct basically amounted to a willful attempt to make a mockery of the Act. (ALJD 40:47-41:3; 42:24-30). Respondents cannot seriously contend otherwise. Accordingly, extraordinary remedies are warranted.

The ALJ properly concluded that the lengthy Notice to Employees should be read aloud so that employees are educated about, and made aware of, Respondents' unfair labor practices.

To counteract Respondents' proclivity to violate the Act, the ALJ concluded this remedy was necessary so the attentions of all employees would be brought to bear upon Respondents' comprehensive list of past unfair labor practices. As a result, these employees could vigilantly monitor Respondents' actions in the future. (ALJD 42:39-47). The ALJ's reasoning is sound and his conclusion correct.

The ALJ also ordered Respondents to reimburse the Union for costs and expenses it incurred for collective bargaining after January 5, 2006, and to also make whole the employee negotiators for any earnings lost as a result of attending bargaining sessions. (ALJD 46:33-35; ALJD Errata at 2). Respondents claim that they have not engaged in "flagrant, egregious, deliberate or pervasive bad-faith conduct aimed at frustrating the bargaining process or causing the Union to waste its resources in a futile attempt at collective bargaining." (RBS at 46). But, as the ALJ found, Respondents strung the Union along in numerous bargaining sessions and made illegal proposals which the ALJ concluded constituted bad-faith bargaining. Then, Respondents inserted PBHM as their negotiator, but any progress the Union made with PBHM was sabotaged by Respondents when they terminated PBHM on the brink of reaching a first contract. Respondents compounded this by flatly refusing to recognize the Union thereafter. Almost four years of continuous rejection of the Union and the collective-bargaining process must qualify as flagrant, egregious, deliberate and pervasive bad faith. Therefore, the ALJ properly concluded that the Union is entitled to be reimbursed for the wasted resources in this protracted scheme.

Respondents argue that the bargaining process was not without value because Counsel for the General Counsel is seeking to compel Respondents to honor all tentative agreements reached between Respondents, PBHM, and the Union throughout the process. (RBS at 47). Respondents

therefore contend that the Union is not entitled to reimbursement for bargaining if the tentative agreements which resulted from those bargaining sessions are imposed on Respondents. Respondents' argument is wholly unappealing. The award of bargaining costs is to reimburse the Union for the time and money it spent bargaining for a first contract which Respondents never intended to reach. In order to ensure that Respondents do not repeat the same process over again, Counsel for the General Counsel merely seeks to restore the bargaining positions of the Union and Respondents at the point where Respondents unlawfully ended the relationship. See Counsel for the General Counsel's Cross-Exception No.6. The only other option is to have the parties start from scratch once again. Given their history of misconduct, this would provide license for Respondents to endlessly string the Union along once again.

D. The ALJ's Issuance of a Broad Cease-And-Desist Order Deters Respondents From Disregarding the Act and Trampling on Employees' Section 7 Rights in the Future (Respondents' Exception Q)

The ALJ concluded that Respondents' extended course of conduct demonstrated that Respondents' had a proclivity for violating the Act, while stubbornly disregarding its employees' statutory rights to be represented by the Union. (ALJD 42:32-37). He therefore properly issued a broad cease-and-desist order in this case. (ALJD 42:32-37). Hickmott Foods, Inc., 242 NLRB 1357 (1979). To dispute the propriety of this order, Respondents mostly engage in wholesale denial of the ALJ's thoughtful findings on this issue. (RBS at 48). However, the overall evidence of their egregious conduct obviously supports the ALJ's conclusion.

Additionally, Respondents cite Bentonite Performance Minerals, 353 NLRB No. 75 (2008), to claim that the Board rejected a broad cease-and-desist order in a more egregious case. (RBS at 48). However, a perusal of Bentonite reveals that it involved numerous 8(a)(5) findings, but no 8(a)(3) allegations. In the present case, Respondents' course of misconduct reveals that it

was rejecting the Union, like the employer in Bentonite. But there are also key differences. Respondents' unlawful conduct here is of an inordinate duration. Furthermore, unlike Bentonite, Respondents here disposed of visible Union supporters in order to decimate the Union's supposed slim victory and to also send an unmistakable message that it would not tolerate any further Union-related nonsense. After all, things were personal for Respondents. (ALJD 39:2-3). Clearly, the facts here are more egregious than those in Bentonite. Accordingly, Respondents' contention should be rejected.

E. Respondents Disingenuously Claim to be the Saviors of Their Employees' Section 7 Rights

Respondents endlessly repeat throughout their Supporting Brief that they are the true vindicators of their employees' Section 7 rights because they know their employees do not want to be represented by the Union. (RBS at 4-13, 29-30, 41-42, 48). The Board has confronted such duplicitous claims before:

Employers' invocation of employee free choice as a rationale for withdrawing recognition has, with good reason, met with skepticism. As the Supreme Court observed in *Auciello Iron Works v. NLRB*, "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." 517 U.S. at 790.

Levitz, 333 NLRB at 724 fn. 45.

Here, Respondents were so consumed by the one-vote margin of their loss in 2005, that they have continuously rejected the Union since then. Respondents never honored their employees' choice to organize after a Board-conducted election, which had already been tainted twice by their objectionable conduct. But, after they engaged in a host of unfair labor practices, unlawfully withdrew recognition, and did everything to macerate the Union before their

employees' eyes, Respondents suddenly claimed to be the vindicators of these same employees' Section 7 rights to reject the Union. The Board should not entertain such insincerity.

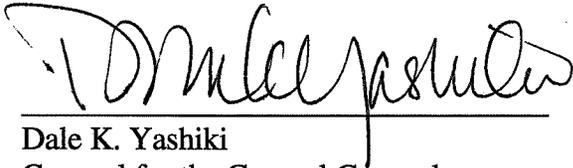
Respondents' post-withdrawal, post hoc excuses typify the absolute necessity of keeping this employer on that "short leash." Accordingly, their simulated concern should be rejected.

XII. CONCLUSION

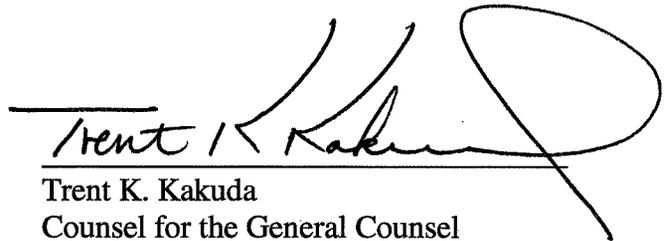
It is respectfully submitted that, exclusive of the limited Cross-Exceptions filed by Counsel for the General Counsel, the ALJ's Decision and Recommended Order was correct and, to that extent, should be adopted by the Board.

DATED AT Honolulu, Hawaii, this 9th day of December, 2009.

Respectfully submitted:



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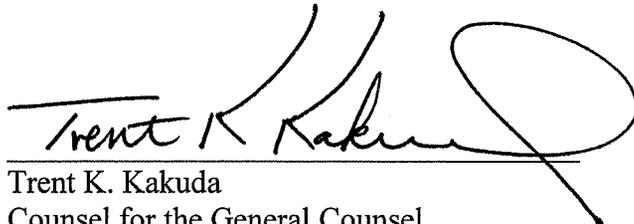
CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the General Counsel's Answering Brief has this day been electronically filed with the National Labor Relations Board's Office of the Executive Secretary in Washington, D.C., and a copy served upon the following persons by hand delivery at their last-known address:

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A handwritten signature in black ink, appearing to read "Trent K. Kakuda". The signature is written in a cursive style with a large, looping flourish at the end.

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