UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

NOVA SOUTHEASTERN UNIVERSITY

and

LOCAL 11, SERVICE EMPLOYEES
INTERNATIONAL UNION

_____/

CASES: 12-CA-25114
12-CA-25290
12-CA-25298

RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

Respondent, Nova Southeastern University ("Nova"), by and through undersigned counsel, pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations and Statements of Procedure ("Rules and Regulations"), files the following Exceptions to the Decision and Order ("Decision") issued by Administrative Law Judge ("ALJ") John H. West on March 16, 2009.

EXCEPTIONS

Nova directs these exceptions both generally to the entire report of the ALJ and specifically to the ALJ's findings, conclusions, and recommendations, set forth below. Upon the grounds, testimony, and evidence, and for the reasons set forth in Nova's brief in support hereof, and for additional grounds as set forth below, Nova's exceptions are as follows:

1. Nova excepts to the ALJ's decision because it contains numerous errors that substantially prejudiced Nova's defense in the hearing. In particular, the ALJ misconceives the applicable legal standards, and misapplied the law to the evidence presented at the hearing. Also, the ALJ committed reversible error with respect to the admission or exclusion of evidence, and also unduly restricted Nova's direct and cross examination of certain witnesses.

2. Nova excepts to the ALJ's findings of fact in general, set forth on pages 2 through 18, in that the sixteen pages of recitation gives the appearance of identifying all pertinent facts, but instead selectively omits important facts established at the hearing, including, but not limited to: the fact that McGonigle began passing out fliers before exiting the building and soliciting in the parking lot; McGonigle was permitted to solicit for the SEIU on Nova's campus following the August 2006 incident without incident; and Santulli's testimony that he would have granted McGonigle permission to solicit had he made the request.

3. Nova excepts to the ALJ's finding of fact, set forth on page 8, lines 14-15, of the decision, that McGonigle testified that he handed out fliers in the parking lot to co-workers as they came into work.

4. Nova excepts to the ALJ's Analysis, set forth on page 18, lines 40-44, of the decision, that John George testified that he did not have personal knowledge of the incidents involved in the proceeding.

5. Nova excepts to the ALJ's Analysis, set forth on page 19, lines 4-7, of the decision, that Nova's rule is overbroad as written and enforced, and that Nova has not proved any special circumstances requiring its rule.

6. Nova excepts to the ALJ's Analysis, set forth on page 19, lines 20-25, of the decision, that Santulli did not testify that the solicitation rule is not generally applied to management of Nova employees.

7. Nova excepts to the ALJ's Analysis, set forth on page 19, lines 25-26, of the decision, that the threat to Nova's campus is not unique.

8. Nova excepts to the ALJ's Analysis, set forth on page 19, lines 35-36, of the decision, that Nova's rule is overbroad and invalid, and that there are not special circumstances permitting its solicitation rule.

9. Nova excepts to the ALJ's Analysis, set forth on page 19, lines 36-39, of the decision, that there was no evidence of record that the rule was communicated to employees in a way as to convey an intent to permit solicitation in nonworking areas when employees were not actively at work.

10. Nova excepts to the ALJ's Analysis, set forth on page 19, lines 39-40, of the decision, that the rule is overly broad and discriminatory on its face.

11. Nova excepts to the ALJ's Analysis, set forth on page 20, lines 24-26, of the decision, that the rule is unlawful on its face, that Nova did not communicate the rule effectively, and that Nova violated the NLRA as alleged in Paragraph 6 of the Complaint.

12. Nova excepts to the ALJ's Analysis, set forth on page 22, lines 1-4, of the decision, that Nova violated the NLRA as alleged in Paragraph 7 of the Complaint.

13. Nova excepts to the ALJ's Analysis, set forth on page 22, lines 14-16, of the decision, that Nova prohibited McGonigle from giving flyers to his UNICCO co-workers in a non-working area while he and they had not yet clocked in.

14. Nova excepts to the ALJ's Analysis, set forth on page 23, lines 45, of the decision, that McGonigle was not soliciting Nova's employees and that UNICCO employees were not outsiders.

15. Nova excepts to the ALJ's Analysis, set forth on page 24, lines 1-3, of the decision, that UNICCO employees replace or do the work which could be done by employees of Nova.

16. Nova excepts to the ALJ's Analysis, set forth on page 24, lines 3-5, of the decision, that one of the considerations of Nova using contractors is that it does not have the expense of full benefits for those employees.

17. Nova excepts to the ALJ's Analysis, set forth on page 24, lines 5-7, of the decision, that it appeared that UNICCO janitors did not have health insurance.

18. Nova excepts to the ALJ's Analysis, set forth on page 26, lines 20-22, of the decision, that the facts of *New York New York Hotel and Casino*, 313 F.3d 585 (D.C. Cir. 2002) are significantly different from the instant case.

19. Nova excepts to the ALJ's Analysis, set forth on page 26, lines 23-25, of the decision, that UNICCO employees worked out of a building like Nova employees would if it used its own employees.

20. Nova excepts to the ALJ's Analysis, set forth on page 26, lines 26-30, of the decision, that Nova supplied UNICCO with everything it needed to work or that the work performed by UNICCO was not complementary to the function of Nova.

21. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 1-2, of the decision, that the work performed by UNICCO employees on Nova's property was work that normally would be performed by the employees of the property owner.

22. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 3-4, of the decision, that UNICCO provided for the continuous smooth operation of the function of the property owner, Nova.

23. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 5-6, of the decision, that Nova's no-solicitation policy has been found to be unlawful.

24. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 10-15, of the decision, that McGonigle did not handbill anyone other than his UNICCO co-workers while they were off-duty coming into work, and he did not try to involve non UNICCO employees on Nova's campus in the attempt to convince Nova's President that the janitors should have a living wage and health care.

25. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 22-25, of the decision, that no one mentioned anything to McGonigle about trespassing.

26. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 29-30, of the decision, that Nova did not treat McGonigle as a trespasser, and that Nova treated McGonigle as it would one of its own employees.

27. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 32-35, of the decision, that Nova did not take advantage of any theoretical change to McGonigle's status.

28. Nova excepts to the ALJ's Analysis, set forth on page 27, line 36, of the decision, that Nova waived its theoretical opportunity to treat McGonigle as a trespasser.

29. Nova excepts to the ALJ's Analysis, set forth on page 27, line 37, of the decision, that Nova never intended to treat McGonigle as a trespasser.

30. Nova excepts to the ALJ's Analysis, set forth on page 27, lines 38-39, of the decision, that McGonigle was not an outsider seeking access to Nova's property and that McGonigle was not an invitee on Nova's property.

31. Nova excepts to the ALJ's Analysis, set forth on page 27, line 40, of the decision, that McGonigle was treated as an employee of Nova with respect to access.

32. Nova excepts to the ALJ's Analysis, set forth on page 28, lines 12-16, of the decision, that exonerating Nova because McGonigle was not its employee would subvert the

clear policy and intent of the Act, and that Nova placed itself within the orbit of the Board's corrective jurisdiction by knowingly participating in the effectuation of an unfair labor practice.

33. Nova excepts to the ALJ's Analysis, set forth on page 29, lines 25-27, of the decision, that the situation in *NLRB v. Pneu-Electric* was unlike Nova in that the contractor services were not something one would expect your average worker in a plastic plant would be able to do, and was more akin to the repairman in *Southern*.

34. Nova excepts to the ALJ's Analysis, set forth on page 29, lines 33-34, of the decision, that Nova's contract with UNICCO could be described as long term.

35. Nova excepts to the ALJ's Analysis, set forth on page 29, lines 34-35, of the decision, that Nova's contract with UNICCO ended because of performance issues which were never specifically described.

36. Nova excepts to the ALJ's Analysis, set forth on page 29, lines 39-42, of the decision, that Nova asked McGonigle not to hand out fliers to his co-workers while they were in the parking lot and off the clock.

37. Nova excepts to the ALJ's Analysis, set forth on page 31, lines 19-20, of the decision, that this case involves on-site employees of the landowner.

38. Nova excepts to the ALJ's Analysis, set forth on page 31, lines 34-35, of the decision, that this case involves McGonigle soliciting only his co-workers during non-work time in a non-work area and not the employees of Nova.

39. Nova excepts to the ALJ's Analysis, set forth on page 31, lines 36-38, of the decision, that this case involves McGonigle performing work on a long term basis pursuant to a contractual relationship for work that could be done by a Nova employee.

40. Nova excepts to the ALJ's Analysis, set forth on page 31, lines 49-50, of the decision, that this case should be decided under *Fabric Services*, and that Nova violated the Act as alleged in paragraph 7 of the complaint.

41. Nova excepts to the ALJ's Analysis, set forth on page 32, lines 3-5, of the decision, that Nova presents even more compelling reasons than in *Southern* that it violated the Act in denying McGonigle his Section 7 right to handbill his co-workers.

42. Nova excepts to the ALJ's Analysis, set forth on page 32, lines 7-8, of the decision, that Nova's solicitation policy is unlawful.

43. Nova excepts to the ALJ's Analysis, set forth on page 32, lines 15-16, of the decision, that Nova's campus is not secured or controlled.

44. Nova excepts to the ALJ's Analysis, set forth on page 35, lines 20-22, of the decision, that McGonigle was rightfully on Nova's property reporting to work.

45. Nova excepts to the ALJ's Analysis, set forth on page 35, line 23, of the decision, that since Nova did not use a trespass approach, it did not convert McGonigle's status.

46. Nova excepts to the ALJ's Analysis, set forth on page 35, lines 30-35, of the decision, that Nova waived its theoretical right to trespass McGonigle and that Nova did not attempt to show that its management interests would be prejudiced.

47. Nova excepts to the ALJ's Analysis, set forth on page 35, lines 37-40, of the decision, that Nova's campus is open to the public and it did not show that McGonigle's conduct infringed on Nova's property rights.

48. Nova excepts to the ALJ's Analysis, set forth on page 36, lines 4-7, of the decision, that the Section 7 right has been denied for years, and would have continued to be

denied if Nova had its way, to individuals who substitute for Nova's employees, who do the work that Nova's employees could be doing.

49. Nova excepts to the ALJ's Analysis, set forth on page 36, line 8, of the decision, that Nova's no-solicitation rule is unlawful.

50. Nova excepts to the ALJ's Analysis, set forth on page 36, lines 9-10, of the decision, that Nova takes the approach it does to avoid having to pay certain benefits such as health care and living wages.

51. Nova excepts to the ALJ's Analysis, set forth on page 36, lines 12-16, of the decision, that Nova is unlawfully reaping the benefit of denying employees like McGonigle the Section 7 right to handbill only their contractor co-workers.

52. Nova excepts to the ALJ's Analysis, set forth on page 36, lines 18-20, of the decision, that even if the *Fabric Services* approach is not taken, it has been demonstrated that Nova violated the Act as alleged in paragraph 7 of the complaint.

53. Nova excepts to the ALJ's Analysis, set forth on page 37, line 3, of the decision that McGonigle was a credible witness.

54. Nova excepts to the ALJ's Analysis, set forth on page 37, lines 5-8, of the decision, that Nova violated the act as alleged in paragraph 8 by allowing its supervisors to prohibit McGonigle from leafleting.

55. Nova excepts to the ALJ's Analysis, set forth on page 37, line 8-10, of the decision, that McGonigle had the Section 7 right to handbill his co-workers on Nova's campus and that Nova, through Neely, violated the Act when it precluded this.

56. Nova excepts to the ALJ's Analysis, set forth on page 37, lines 11-12, of the decision, that Nova's supervisors also violated the Act when they affirmed Nova's position to McGonigle with respect to what he did.

57. Nova excepts to the ALJ's Analysis, set forth on page 38, lines 20-25, of the decision, that Nova's argument that it was unaware of the verbal warnings prior to the hearing was a red herring.

58. Nova excepts to the ALJ's Analysis, set forth on page 38, lines 43-44, of the decision, that Nova had sufficient information about the disciplinary warnings to McGonigle.

59. Nova excepts to the ALJ's Analysis, set forth on page 39, line 7, of the decision, that Todaro lied under oath.

60. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 8-9, of the decision, that a reasonable person would not forget having disciplined an employee after 27 months.

61. Nova excepts to the ALJ's Analysis, set forth on page 39, line 10, of the decision, that UNICCO's Vice President of Labor Relations told Todaro and Vladiou the discipline was unlawful as far as UNICCO was concerned.

62. Nova excepts to the ALJ's Analysis, set forth on page 39, line 11, of the decision, that Todaro was doing the bidding of Nova with respect to his discipline.

63. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 13-14, of the decision, that Todaro falsely claims he does not remember the conversation he had with McGonigle about the discipline.

64. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 22-24, of the decision, that someone decided the better approach was for Todaro to plead ignorance, and the

fact that Vladoiu and Sado were not called means it was a tactical approach not orchestrated by Todaro alone.

65. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 25-27, of the decision, that the false claim advanced by Nova that it did not know about the role of Sado and Vladoiu in the discipline is a smoke screen.

66. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 33-38, of the decision, that exonerating Nova because McGonigle was not its employee would subvert the clear policy and intent of the Act, and that Nova placed itself within the orbit of the Board's corrective jurisdiction by knowingly participating in the effectuation of an unfair labor practice.

67. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 40-43, of the decision, that Nova's supervisor violated the Act by telling McGonigle he could not handbill his co-workers while they were not working and in a non-work area.

68. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 43, of the decision, that Nova's instructions to McGonigle regarding solicitation was a violation of the Act.

69. Nova excepts to the ALJ's Analysis, set forth on page 39, lines 49-52, of the decision, that Todaro gave McGonigle the discipline, and that he had Sado and Vladoiu sign the discipline and sit in on the meeting.

70. Nova excepts to the ALJ's Analysis, set forth on page 40, lines 4-5, of the decision, that the discipline given to McGonigle only speaks to Nova's solicitation rule.

71. Nova excepts to the ALJ's Analysis, set forth on page 40, lines 8-9, of the decision, that the citing of UNICCO's rule in the discipline was false and misleading, and misdirection.

72. Nova excepts to the ALJ's Analysis, set forth on page 40, lines 10-11, of the decision, that UNICCO did not want it to be obvious that McGonigle was being disciplined just for violating Nova's unlawful no solicitation rule.

73. Nova excepts to the ALJ's Analysis, set forth on page 40, lines 14-15, of the decision, that Nova went beyond the terms of the contract in that McGonigle was disciplined after Nova notified Todaro and Sado of its unlawful solicitation rule and of McGonigle's conduct.

74. Nova excepts to the ALJ's Analysis, set forth on page 40, lines 32-33, of the decision, that Nova violated the Act as alleged in paragraphs 9 and 10.

75. Nova excepts to the ALJ's Analysis, set forth on page 41, lines 33-34, of the decision, that Sanchez unequivocally testified that Todaro worked for Nova when the conversation occurred.

76. Nova excepts to the ALJ's Analysis, set forth on page 42, line 6, of the decision, that Respondent is disingenuous.

77. Nova excepts to the ALJ's Analysis, set forth on page 42, line 8, of the decision, that Todaro is not a credible witness.

78. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 19-20, of the decision, that Todaro sarcastically asked Sanchez why he did not go on the line with McGonigle and get paid.

79. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 24-25, of the decision, that Todaro told Sanchez not to deal with Massey and that he would see what was going on.

80. Nova excepts to the ALJ's Analysis, set forth on page 42, line 27-28, of the decision, that Todaro is not a credible witness and that Todaro was not sincere in speaking with Sanchez.

81. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 29-30, of the decision, that Todaro linked Sanchez being hired to work on Nova's campus with his involvement in union activity.

82. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 31-33, of the decision, that Todaro's questioning was coercive, speculating that Todaro was saying you made your bed, now go lay in it.

83. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 35-36, of the decision, that Todaro was telling Sanchez he would not be hired at Nova because of his union activities.

84. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 36-37, of the decision, that Todaro made an implicit threat that employees would not be hired because of their union activities.

85. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 37-39, of the decision, that Todaro's questions in that context were inherently coercive and interfered with Section 7 rights.

86. Nova excepts to the ALJ's Analysis, set forth on page 42, lines 39-40, of the decision, that Nova violated the Act as alleged in paragraph 11 of the complaint.

87. Nova excepts to the ALJ's Analysis, set forth on page 43, lines 39-46, of the decision, that Nguyen's testimony is contradictory in that the conversation occurred after he was

hired, and that he would recommend his guys get hired to Green Source, and that Fabre and Bazile were already working for Green Source.

88. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 2-3, of the decision, that Bazile's testimony is more credible.

89. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 28-30, of the decision, that Nova engaged in unfair labor practices by maintaining and enforcing its solicitation rule.

90. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 32-33, of the decision, that Nova engaged in unfair labor practices by interfering with the distribution of union literature by a UNICCO employee to his co-workers during non-working time and in a non-working area.

91. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 35-36, of the decision, that Nova engaged in unfair labor practices by telling an employee of UNICCO that he could not engage in solicitation at any campus or facility of Nova without its permission.

92. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 39-41, of the decision, that Nova engaged in unfair labor practices by having Todaro tell an employee of UNICCO that he could not engage in solicitation on campus without permission.

93. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 43-44, of the decision, that Nova engaged in unfair labor practices by having Todaro issue a disciplinary warning to McGonigle for violating Nova's unlawful solicitation policy.

94. Nova excepts to the ALJ's Analysis, set forth on page 44, lines 46-48, of the decision, that Nova engaged in unfair labor practices by having Todaro interrogate a former

UNICCO employee concerning his union activity and implicitly threatening him that employees would not be hired because of their union activity.

95. Nova excepts to the ALJ's Analysis, set forth on page 45, lines 1-3, of the decision, that Nova be ordered to cease and desist, and to take affirmative action designed to effectuate the policies of the Act.

96. Nova excepts to the ALJ's Order, set forth on page 45 and 46, requiring Nova to cease and desist and take other affirmative action.

97. Nova excepts to the ALJ's failure to recommend that the Complaint against it be dismissed in its entirety.

98. Nova excepts to the ALJ's recommendations in their entirety.

99. Nova excepts to the ALJ's Supplemental Decision and Order in its entirety.

CONCLUSION

Nova respectfully requests that the Board refuse to adopt the ALJ's recommended findings of fact and conclusions of law as excepted to above, and that the Board set aside the ALJ's Decision and Order. Nova further respectfully requests that the above-referenced matter be dismissed in its entirety.

A brief in support of the above Exceptions has been submitted simultaneously herewith.

Date: April 30, 2009

Respectfully submitted,

By: _____

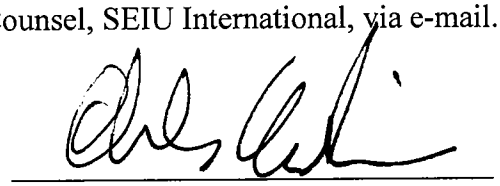
Charles S. Caulkins, Esquire
(Fla. Bar No. 0461946)
David M. Gobeo, Esquire
(Fla. Bar No. 0016565)

Attorneys For Nova Southeastern University

FISHER & PHILLIPS LLP
450 East Las Olas Boulevard
Suite 800
Fort Lauderdale, Florida 33301
Telephone: (954) 525-4800
Facsimile: (954) 525-8739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER has been filed electronically with the Board and copies served on **Susy Kucera, Esquire**, National Labor Relations Board, and **Katchen Locke, Esquire**, Associate General Counsel, SEIU International, via e-mail.



Charles S. Caulkins

Date: April 30, 2009