

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

EXCEL REHABILITATION AND HEALTH CENTER, LLC,
d/b/a EXCEL REHABILITATION AND NURSING CENTER;
HGOP, LLC, d/b/a CAMBRIDGE QUALITY CARE;
and HORIZON STAFFING, LLC

and

Case 12-CA-25117

SERVICE EMPLOYEES INTERNATIONAL UNION,
FLORIDA HEALTHCARE UNION

TAMPA SNF, LLC, d/b/a
EXCEL REHABILITATION AND NURSING CENTER

and

Case 12-CA-25596

SERVICE EMPLOYEES INTERNATIONAL UNION,
FLORIDA HEALTHCARE UNION

*Rachel Harvey, Esq., for the General Counsel.
Clifford H. Nelson, Jr., Esq., and Robert C. Lemert, Jr., Esq.
and Leigh E. Tyson, Esq., for the Respondent.*

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Tampa, Florida, on April 9, 10 and 11, 2008. Service Employees International Union, Florida Healthcare Union (“the Union”) filed the charge in Case No. 12-CA-25117 on August 29, 2006, and amended it three times, on October 30, 2006, December 6, 2006 and May 31, 2007. The Union filed the charge in Case No. 12-CA-25596 on October 17, 2007. Based upon these charges, the General Counsel issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on February 15, 2008 alleging that Respondents Excel Rehabilitation and Health Center, LLC, d/b/a Excel Rehabilitation and Nursing Center (“Excel”), HGOP, LLC d/b/a Cambridge Quality Care (“HGOP”), Horizon Staffing, LLC (“Horizon”) and Tampa SNF, LLC, d/b/a Excel Rehabilitation and Nursing Center (“SNF”) violated Section 8(a)(1) and (5) of the Act.

Specifically, the complaint alleges that, on June 14 and 15, 2006¹, Respondents Excel, HGOP and Horizon, as joint employers, through their alleged supervisors and agent,

¹ All dates are in 2006, unless otherwise noted.

interrogated employees about other employees' union sympathies; solicited employees to circulate and sign a decertification petition; made statements to employees misrepresenting the status of negotiations with the Union; and impliedly promised employees benefits to induce them to abandon their support for the Union, all in violation of Section 8(a)(1) of the Act, and that, on June 16, 2006, these Respondents withdrew recognition from the Union in the absence of evidence that the Union had lost support of the majority of employees in the unit. The complaint alleges alternatively that, even if the Union had lost majority support, the loss was caused by the Respondents' unfair labor practices. The complaint further alleges that the Respondent Joint Employer has, since June 16, 2006, failed and refused to recognize and bargain with the Union and that it made unilateral changes in the employees' wages following the withdrawal of recognition. Finally the complaint alleges that Respondent SNF, as a *Golden State*² successor, is responsible for remedying the unfair labor practices of its predecessors and, as a *Burns*³ successor, has continued the unfair labor practices of its predecessor by failing and refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of Unit employees since taking over operation of the facility on September 1, 2007.

On February 29, 2008, the Respondents jointly filed an answer to the consolidated complaint, admitting most of the allegations regarding their joint employer and successor status but denying the unfair labor practice allegations.⁴ Although the Respondents admitted withdrawing recognition from the Union on June 16 and making the subsequent unilateral changes to employees' terms and conditions of employment, they asserted that this conduct was lawful because the Union had lost the support of a majority of employees in the Unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

Findings of Fact

I. Jurisdiction

Respondent Excel, a Florida limited liability company, operated a nursing home at 2811 Campus Hill Drive in Tampa, Florida, from about March 1, 2005 to about August 31, 2007. Respondent SNF, a Florida limited liability company with its principal office and place of business in North Miami Beach, Florida, has operated a nursing home at the same Tampa facility since about September 1, 2007. Respondents Excel and SNF each, annually, derived gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the State of Florida and from other enterprises inside the State of Florida, each of which had received goods directly from points outside the State of Florida. Respondent HGOP, a New York limited liability company with its principal office and place of business in Brooklyn, New York, has been engaged in the business of providing employee staffing services to operators of nursing homes and other health care facilities,

² *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

³ *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

⁴ Respondents denied the joint employer allegation as to Horizon on the basis that Horizon did not employ any unit employees. It also qualified its admission as to joint employer and successor status as being for the purposes of this litigation only. At the hearing, the parties stipulated that Respondent SNF is a *Golden State* successor to Respondent's Excel, HGOP and Horizon.

including Respondents Excel and SNF during the periods when each operated the Tampa facility. During the relevant period, Respondent HGOP derived gross revenues in excess of \$500,000 and performed services valued in excess of \$50,000 in states other than the State of New York. Respondent Horizon, a Florida limited liability company, with an office and place of business located in Miami Beach, Florida, has been engaged in the business of providing professional employer organization services to operators of nursing homes and other health care facilities, including Respondents Excel and SNF during the periods each operated the Tampa facility. During the relevant period, Respondent Horizon derived gross revenues in excess of \$500,000 and performed services valued in excess of \$50,000 in states other than the State of Florida. The Respondents admit and I find that each individually is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

On December 5, 2000, the Union filed a petition seeking to represent a unit of employees at the Tampa facility. At the time of the representation proceedings, the employees were employed by an entity called AOTOP, LLC d/b/a Excel Rehabilitation and Nursing Center. On December 14, 2000, the Union and then-Employer stipulated that the following employees constituted a unit appropriate under the Act for purposes of collective bargaining:

All full-time and regular part-time service and maintenance employees, including certified nursing assistants, dietary aides, cooks, dietary production supervisor, housekeeping aides, laundry aides, maintenance aides, floor technicians, medical records employees, central supply clerks, rehabilitation tech/aides, restorative aides, physical therapy assistants, activities aides, receptionists and staffing coordinators employed by the Employer at the Tampa facility, excluding all other employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

A majority of the employees in this unit voted in favor of union representation at the election conducted by the Board on January 31, 2001. AOTOP filed objections to the election, which were overruled by the Board on April 18, 2001 in a Decision and Certification of Representative that adopted the findings of the Board's Regional Director. After AOTOP refused to bargain with the Union to test the Board's certification, the Board issued an order on September 28, 2001 requiring AOTOP to bargain with the Union. *Excel Rehabilitation and Health Center*, 336 NLRB No. 10 (2001). AOTOP appealed the Board's Order to the court of appeals, which enforced the Board's Order on June 10, 2003. *AOTOP, LLC v. NLRB*, 331 F.2d 100 (D.C. Cir. 2003).

Finally, on February 6, 2004, more than 3 years after the election, the Union and AOTOP sat down to bargain for an initial collective bargaining agreement. No agreement had been reached by the time Respondents Excel, HGOP and Horizon took over operation of the facility on or about March 1, 2005 and became the unit employees' employer.⁵ Respondents

⁵ Respondents admitted in the answer that Respondents Excel and HGOP were the joint employers of the employees on Respondent HGOP's payroll. Although Respondents denied that Respondent Horizon was a joint employer with Respondent Excel of employees on its payroll, asserting that Respondent Horizon employed no unit employees at the facility, the

Continued

Excel, HGOP and Horizon continued to recognize and bargain with the Union until the events at issue in this proceeding that led to the Respondent's withdrawal of recognition on June 16.

B. Bargaining Between Respondents and the Union

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There is very little evidence in the record regarding what transpired during negotiations between Respondents Excel, HGOP and Horizon and the Union prior to February 2006. Neither party offered evidence regarding the number of sessions, if any, that were held during the first year after these Respondents took over operation of the facility. The Respondents did put in evidence notes and summaries of 5 bargaining sessions that were held between February 22 and June 13, 2006, along with some proposals that were exchanged. These 5 sessions occurred about a month apart. No evidence or explanation was offered regarding why the parties did not meet more frequently during this period.

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The evidence that does exist in the record shows that the Respondents were represented at these meeting by Attorney Nelson, who prepared the summaries that were used at each session to show where the parties were at on the issues. Also on the Respondent's negotiating committee was the facility's Administrator, Stephanie Rosenberg, and Michael Bokor, a management consultant who was employed by a company called Health Systems, LLC, which is not named as a Respondent in this proceeding.⁶ The Union was represented in negotiations by International Representative Nick Abate and a committee of 2 or 3 employees. The summaries prepared by Nelson, which Abate conceded were accurate, show that the parties had resolved most language issues by the time of their last meeting and that economic issues were the predominant focus of negotiations during the period from February to June. At the February 22 meeting, the Respondents made economic proposals regarding the 401(k) plan, health insurance, and leaves of absence, including for bereavement. On April 25, the Respondents made their first proposal on wages, which became the subject of negotiation over the next two sessions until the last meeting on June 13.

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The Respondents' wage proposal, as of June 13, provided for a "market adjustment" for full-time CNAs that would be based on the individual employee's level of experience, with all CNAs subject to a wage cap. CNAs who were making more than the rate for their experience level would not receive an increase but could retain their current rate of pay, which would be "red-circled". The hourly wage rates proposed for each level were as follows:

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<u>Experience Level</u>	<u>Up to 1 yr.</u>	<u>1 & 2 yrs</u>	<u>3 & 4 yrs.</u>	<u>5 & 6 yrs.</u>	<u>7,8, & 9 yrs.</u>	<u>10+ yrs.</u>
Full-Time Rates	\$8.75	\$9.00	\$9.25	\$9.50	\$9.75	\$10.00

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evidence of record establishes that most of the non-nursing employees at the facility were on the Horizon payroll. The employment relationship of the Horizon employees with Excel was identical to that of the employees on the HGOP payroll, i.e. that of a joint employment. I thus find that Respondent Excel and Respondent Horizon were the joint employer of Horizon's employees.

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⁶ Rosenberg served as the Administrator from September 2003 until August 2006. At the time of the hearing she was employed by another facility that appears to be unrelated to the Respondents. Bokor, who was no longer employed by Health Systems at the time of the hearing, is the CEO of SNF Management, Inc., the management company of the facility involved in this proceeding.

5 These rates would become the starting rates for new hires.⁷ The cap or wage ceiling proposed by the Respondents was \$12/hour. The Respondents proposed phasing out part-time CNA positions. The current hourly rates for part-time CNAs would be reduced to the level of a full-time CNA with the same experience. The Respondents also proposed that CNAs working under the Baylor plan would be subject to the same \$12/hour cap, but the Respondent retained the right to discontinue the Baylor program.⁸ All CNAs, except those on the Baylor plan, who were at or above the proposed rates and wage ceiling would be red-circled. The Respondents proposed a rate of \$11/hour for PRN, or per diem, CNAs even though it took the position that these employees were not part of the Unit.⁹

10 At the June 13 bargaining session, the Respondents also made the first wage proposal for non-CNA unit employees. As with the CNA proposal, the Respondents proposed a one-time wage adjustment based on years of experience. For example, dietary aides, housekeeping aides and laundry aides with 2 or more years of experience would be paid at the hourly rate of \$8.00 and cooks and floor techs with 2 or more years experience would receive \$10/hour. The proposal also provided for starting rates for a number of non-CNA classifications. Similar to the CNA proposal, all employees were subject to a wage ceiling, i.e. \$8.23 for dietary, housekeeping and laundry aides, \$11.00 for cooks and floor techs, and \$12.50 for the lead cook. There is no mention in this proposal of “red-circling” employees if they were at or above either the proposed rate or wage ceiling for their classification. The Respondents wage proposal for non-CNAs omitted any reference to several classifications of unit employees, i.e. physical therapy assistants, rehabilitation aides, medical records employees, central supply clerks, receptionists and staffing coordinators.

25 The Respondents also proposed that all employees, CNAs and non-CNAs, would be eligible for an annual merit increase of 1% to 4% based on management’s assessment of their performance, provided that the employee was not at or above the proposed wage ceiling. This proposal represented an improvement over the Respondents current practice of 0% to 3% annual merit increases. Under the Respondents’ proposal, however, employees could not file a grievance over management’s assessment of their performance unless it was based on alleged discrimination or protected conduct under state and federal law.

35 The Respondents’ proposals as of June 13 also included the same proposals it had made on February 22 regarding the 401(k) plan, health insurance and PTO (paid time off), which essentially was to maintain the existing level of benefits while retaining the discretion to change benefits for unit employees if the Respondents changed them for non-unit employees.

40 As of June 13, the Union had rejected these economic proposals and countered with a proposal for a 2% across the board increase upon ratification with an additional 2% every 6 months thereafter. While willing to accept the Respondents proposed wage ceilings, the Union proposed that employees receive annual bonuses on their anniversary after reaching the ceiling. Attorney Nelson’s notes of this last meeting between the parties show that Abate pointed out that many unit employees would be “topped out” under the Respondents proposal and get nothing.

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⁷ The rates proposed on June 13 were \$.10 more than Respondents’ initial April 25 proposal.

50 ⁸ The Baylor plan, which applied to weekend only CNAs provided for 40 hours pay for two 12 or 16 hour shifts. It is unclear from the record the exact length of the Respondents Baylor shifts.

⁹ As of June 13, the Union’s position was that these employees were part of the Unit.

C. Respondents Communicate with Unit Employees

5 On June 14 and 15, after the last bargaining session between the parties, the Respondents held a series of 12 meetings with small groups of employees in a conference room at the facility. Respondent HGOP's Director of Human Resources, Susan Weiss, conducted these meetings.¹⁰ Also present at most, if not all of the meetings, were management consultant Bokor, the facility's Administrator Stephanie Rosenberg, and Sandra Gant, the facility's Business Office Coordinator, who served primarily as the recording secretary at the meetings. At each meeting, a handout was given to the employees and Weiss read from a prepared script.¹¹ Gant or one of the other management representatives recorded the date and time of each meeting and the names of all those in attendance, including the management representatives.

15 Rosenberg testified that the purpose of the meetings was to update the employees on the status of negotiations. According to Rosenberg, the meetings were held in response to employees asking her questions about the progress of negotiations. The Union's chief negotiator, Abate, did concede under questioning from the Respondent's counsel that the Union had not regularly communicated with unit employees regarding the negotiations. Abate recalled having had only one meeting with the employees, in 2005, on this subject. Abate also acknowledged that the Union did not provide any written materials to the unit employees to explain what was happening in the negotiations or to describe the proposals being exchanged. According to Abate, he relied primarily on the employee members of the negotiating committee to keep the unit members informed about bargaining by word-of-mouth.

25 The scripts in evidence show that the first meeting was held at 11:07 A.M. on June 14. Nine more meetings were held before 5:00 P.M. that day. The eleventh meeting started at 11:25 P.M. to cover employees on the 11:00 P.M. to 7:00 A.M. shift. The last meeting was held at 10:38 A.M. on June 15. All but two of the meetings were attended exclusively by either CNAs or non-CNA unit employees. The remaining two meetings had a mixed group. In all, the Respondents' representatives met with more than half of the unit employees. In addition to these meetings, the four management representatives met separately with Rushelle Perry and Kenyetta Crowder, employee-members of the Union's negotiating committee, at about 1:45 P.M. on June 14. Perry and Crowder were given copies of the handouts distributed to other employees but the prepared script was not read to them. The Respondents had already held five meetings with employees before meeting with Perry and Crowder.

40 As noted, the employees who attended these meetings were given one of two handouts, depending on whether they were a CNA or a non-CNA. Both versions of the handout were headlined "**Current Status of Union Negotiations...**" and were divided into two sections, the first stating "What the Union has rejected" and the second "What the Union has agreed to." The only difference between the two versions was in the first section, which purported to describe

45 ¹⁰ Weiss, who was known at the time of these meetings by her previous married name Weiss-Foxbruner, worked out of HGOP's Brooklyn, New York office. She was not a frequent visitor to the facility. Although she conceded she did not know many of the employees, she was familiar with them by name due to her familiarity with their personnel and payroll records.

50 ¹¹ All of the scripts were identical in their typed version. Handwritten notes on some of the scripts, made by Gant or another management representative, reflected deviations from the script. These were primarily to reflect the difference in the wage proposal for CNAs and non-CNAs.

the Respondents' wage proposals made at the June 13 meeting. The CNA handout stated:

What the Union has rejected:

- An average **9.6% increase** in salary.
- An average \$ value of about **\$1700** a year to you.
- **Your rate** is a part of this calculation. Come see us for the exact change in your hourly wage!

(emphasis in original)

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10 The handout given to non-CNA employees stated, regarding wages:

What the Union has rejected:

- Pay increases based on years of experience
- Come see us for the exact change in your hourly wage!

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As will be discussed later in this decision, the General Counsel contends that this section of the handouts misrepresented the Respondents' wage proposal by overestimating the amount of increase employees could expect if the Union agreed to this proposal and by conveying the impression that all employees would receive an increase.

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The next section of the handouts, identical for CNAs and non-CNAs, purported to list "What the Union has agreed to." The handout indicates that the Union had agreed to no changes in the employees' health insurance, PTO (paid time off), 401K, and other benefits, including bereavement pay. As the General Counsel points out, this was not accurate. The Union had not in fact agreed to no change in the bereavement policy. On the contrary, the evidence shows that this was still an open issue on June 13, with the Union seeking to broaden the definition of family members for whom such leave could be taken and to allow more employees to take such leave.

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30 After this depiction of what the Union had rejected and agreed to, the handout stated:

When there is a contract, what the Union will cost you:

The Union charges its members 2% of base salary in union dues.
(emphasis in original)

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Both versions of the handouts end with the following paragraph:

Come talk to us:

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Excel will continue to negotiate in good faith with the Union with the hopes of reaching an agreement. If you want to figure out what your pay increase will be under Excel's most recent offer, come ask us. We have done the calculations of the dollar amounts based on your salary.
(emphasis in original)

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After giving employees the handout, Weiss read to the employees from the script. After a brief introduction, she suggested that some employees might be wondering "how all this started." She then proceeded to give them a somewhat inaccurate and incomplete "history", as follows:

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Well, back in 2001 there was an election here at Excel in which a majority of employees voted to have the Service Employees represent them. **This all**

5 **happened right after our Company took over management of the facility.** At that time, employees felt concerned about conditions over which **WE** had no real control. Unfortunately, by the time we were able to come in and get things straightened out, it was too late. At that point the election had already been held and the results had already come in. (emphasis in original)

10 As noted at the beginning of this decision, Respondents Excel, HGOP and Horizon did not take over operation of the facility until March 1, 2005, more than four years after the election. Weiss, reading from the script, then told the employees that “legal issues [had] to be dealt with by the Labor Board and the Courts, and that took a couple of years to get resolved.” She failed to mention that these “legal issues” were the result of objections and appeals filed by the entity operating the facility at the time of the election.

15 Weiss, according to the script, then lamented how long bargaining had gone on, once the parties “finally got down to bargaining in February of 2004.” She told the employees that despite 2½ years of bargaining, there still was no contract. Weiss then said that “the real shame about this situation is that during the entire bargaining process, we have been forced to maintain the status quo with regard to our policies regarding wages and benefits for all employees.” She advised the employees that they had “potentially been greatly affected by this delay.” She told them she had come to the facility because she believed that each of them deserved to know
20 “where we now stand in this process.”

25 According to the scripts in evidence, Weiss told the employees that the language issues had been largely agreed to by the parties, including “most standard provisions” contained in a union contract obligating union members to pay dues and have those dues automatically deducted from their paychecks. She informed the employees that the Union’s dues at that time were 2% a month but, “of course they could be increased at any time.” Weiss told employees that “what usually happens is that...a big part of everybody’s wage increase gets taken away to be paid as union dues.” The evidence regarding what actually transpired in negotiations does
30 not show that the parties had agreed to either a union security provision requiring all employees to pay dues or fees to the Union, or an automatic dues check-off procedure. On the contrary, the parties had reached tentative agreement only on a *voluntary* dues check-off provision.

35 After describing what would happen to the employees in terms of union dues, Weiss, following the script, then proceeded to tell the employees what the Respondents had offered the Union as far as wages and benefits are concerned:

40 **Our offer would result in all CNAs receiving increases of 9.6% or more immediately** upon acceptance by the Union and ratification by employees.

In addition, we proposed that all employees would continue to be eligible for merit increases – as is now the case, but we raised the cap to 4% a year.

45 We would also keep all of our great benefits the same as they are now. (emphasis in original)

50 In the meetings attended by non-CNA employees, Weiss deviated from this portion of the script, instead telling the employees that they would receive experience-based pay increases and, in at least two meetings, referred to such increases as “across the board.”

After describing the Respondents' wage proposal in such glowing terms, Weis, according to the script, told the employees that,

5 [f]or some reason, the Union has refused to accept this offer! For the life of me I can't figure out why – these are the largest increases our Company has ever offered and far bigger than what other nursing homes are providing.

10 Weiss then referred to a wage increase recently given to the LPNs, advising the employees that, since the LPNs were not represented by a union, the Respondents were not obligated to go through the process of collective bargaining but could just go ahead and give them a raise.

15 Weis concluded her remarks by describing the Union's conduct as "terrible and self-serving". Weiss drove this point home, telling the employees that the Union had yet to get them a contract despite two and a half years of bargaining and despite the Respondents having offered increases greater than most employees across the country were receiving. Specifically, she said:

20 ...the latest government reports that I have read show that employees, on average, are receiving 3.1% to 3.2% increases under collective bargaining agreements. And here we have been trying to get the Union to agree to more than 9.6%, plus merit increases of up to 4%. That means in the first year of the contract you would be getting an increase of anywhere from 9% to 13%!
(emphasis in original)

25 Aleta Ford, a current employee at the time of the hearing, testified as a witness for the General Counsel regarding the meeting she attended. One of the scripts in evidence shows that Ford attended the meeting at 11:25 pm on June 14. Only Weiss and Rosenberg were there to represent management. According to Ford, Rosenberg spoke at this meeting and told the employees that they (the Respondents) wanted to give the employees a 9.6% increase and that
30 the Union wanted them to have a 3% increase. Rosenberg told the employees that 2% of the 3% increase the Union wanted would go to the Union to pay dues. When Ford and another employee, David Gittinger, asked why the Union would turn down a 9.6% increase, Rosenberg said it was not up for discussion. Gittinger asked why no one from the Union was there to defend what Rosenberg was saying. Rosenberg did not respond but continued to read the
35 script. She told the employees that the Respondents had already given the LPNs a raise and wanted to give the CNAs a raise but couldn't because of negotiations.

40 Michelle Marshall, who circulated the petition at the heart of this case, also testified at the hearing, first as a witness subpoenaed by the General Counsel and a day later when called by the Respondents. She attended the first meeting conducted by the Respondents, at 11:07 am on June 14. Weiss, Bokor, Rosenberg and Gant represented the Respondents at this meeting, which was attended by five CNAs including Marshall. When asked by the General Counsel what was said in the meeting, Marshall responded that she could not recall. When asked specifically if contract negotiations were discussed in the meeting, Marshall replied that
45 she "[didn't] know if they were considered contract negotiations but stuff pertaining to the Union was talked about." When pressed further for specifics, again Marshall proclaimed a lack of recall. Although she recalled receiving a handout during the meeting, she claimed she did not recall "the content of the meeting, the wording or anything." Despite this poor recollection,
50 Marshall did remember that another employee at the meeting, NK Obi-Lewis, asked what the

employees could do to get rid of the Union.¹² She also recalled that Rosenberg responded that the employees had to get rid of the Union on their own, but claimed she did not remember exactly what Rosenberg said about this. Only after being shown an affidavit she gave on October 3, 2006 to one of the Respondents' attorneys, was Marshall able to recall that

5 Rosenberg told the employees that they needed a petition signed by a majority of the employees showing that they did not want to be represented by the Union.¹³

The scripts in evidence show that, at the end of each meeting, after the above "update" on negotiations was concluded, employees were invited to ask questions. As was to be

10 expected, a number of employees spoke up, complaining about not getting a raise and making negative comments about the Union. As noted above, Marshall testified that one employee in her meeting, Obi-Lewis, asked what employees could do to get rid of the Union. Bokor also testified regarding these questions and comments from the employees, recalling only the statements indicating disaffection from the Union. Bokor testified that in at least two of the

15 meetings he attended, some unidentified employees asked how they could get rid of the Union. According to Bokor, he or Rosenberg responded with "something to the effect" that, if a majority of employees wanted to get rid of the Union, the Union wouldn't be there anymore. Gant who took notes at these meetings, claimed she had no independent recollection of the statements made by employees, relying on her notes to recall what was said. Gant read several of the

20 employee comments from her notes into the record.¹⁴ Gant's notes from the meeting Marshall attended contradict Marshall's testimony regarding what employee Obi-Lewis said. According to Gant's notes, Obi-Lewis "stated don't want to be in Union. Don't want Union taking any of her \$."

Gant's notes from this meeting show that another employee, Erica Knight, "stated she loves it here. Just wants to come to work, take care of her residents – go home. Does not want to be

25 part of the union at all. Too much drama w/union – never heard anything good." Gant's notes contain no statement from any employee at this meeting asking how to get rid of the Union. In fact, such a question does not appear in Gant's notes of any of the meetings. Gant's notes also reflect that not all of the questions and comments regarding the negotiations and the Union were negative. For example, Gant's notes show that cook Benita Sistrunk said she "would like

30 to see what the Union offered." Similar comments were reported from CNAs Shelly Johnson and Suzie Pellissier.

The handouts given to the employees at the meetings invited them to come see the Respondents' management representatives after the meeting to see how much of an increase

35 each would receive under the Respondents' contract proposal, based on calculations that Weiss prepared. The employees were told to line up outside the conference room and were brought in one at a time to meet with Weiss and Rosenberg. In meeting with the employees individually, Weiss used a chart that she had prepared which listed those employees who would receive any increase under the Respondents' proposal. After each employee's name, the chart listed their

40 current rate, the percentage increase and proposed rate, on an hourly and annual basis, and the difference between their current rate and the new rate, on an annual basis. The chart also showed each employee's hire date and years of experience and how much each would get, per pay period and per year, under the Union's proposal. Absent from the chart were the names of

45 ¹² In contrast to this testimony, Marshall stated in an affidavit she gave to the General Counsel on February 1, 2007, during the Region's investigation of the case, that she did not recall which employee asked this question.

50 ¹³ As the General Counsel pointed out in her brief, Marshall did not even recall Rosenberg being present at this meeting when she gave her February 2007 affidavit, even though she had previously stated, in the October 2006 affidavit that Rosenberg was present.

¹⁴ Gant's notes are also in evidence.

those unit employees who would get no increase under the Respondents' proposal, such as those who already were paid at or above the Respondents' wage ceiling. In fact, the chart prepared by Weiss contains the names of only 48 unit employees, all CNAs.¹⁵ At the time of this meeting, as stipulated by the parties, there were at least 92 employees in the unit, 64 of whom were CNAs. With respect to those employees whose names do appear on the chart, not all would receive an increase in the 9% range touted by the Respondents' representatives at the meetings. In fact, Weiss calculated the average wage increase for these 48 employees, as shown on the chart, at 9.43%, not the 9.6% shown in the handout and script used at the meetings.

Ford testified that she was one of the employees who stayed after the meeting to find out how much of an increase she would get under the Respondents' proposal. According to Ford, when she identified herself to Weiss, Weiss could not find Ford's name on the chart. Administrator Rosenberg, who was also present, told Weiss that Ford was not listed because she was in the Baylor program. Weiss then told Ford that the employees on Baylor were going to get a special rate of pay or a special pay. Neither Weiss nor Rosenberg testified about this exchange, leaving Ford's testimony uncontradicted. Under the Respondents' proposal to the Union at the June 13 meeting, Baylor employees would receive the maximum rate of \$12/hour but no other increases. None of the Respondents' witnesses testified in detail regarding these individual meetings with employees. Weiss testified that, after an employee identified him or herself, Weiss read them the information from the chart and said nothing more. Rosenberg, in contrast, acknowledged that she also mentioned to the employees the amount of dues they would be required to pay if agreement was reached on a collective bargaining agreement.

D. Preparation and Circulation of the Decertification Petition

Marshall testified that, after the meeting she attended on June 14, she approached Administrator Rosenberg and asked her how to get rid of the Union.¹⁶ Both Marshall and Rosenberg testified that, in response, Rosenberg gave Marshall a one page document with the heading:

Excel – Response to Employee Questions on Continued Union Representation

Rosenberg testified that this document was prepared by the Respondents' attorneys. It appears to have been prepared prior to the June 14 meetings since Rosenberg already had it when Marshall approached her after the very first meeting. Although Rosenberg claimed that Marshall and other employees had approached her before June 14 with questions regarding the Union's continued representation, she was not specific as to when and where such conversations occurred and identified no employee other than Marshall as expressing such a concern. Marshall herself did not testify to any occasions before June 14 when she spoke to Rosenberg

¹⁵ General Counsel, on brief, also points out that some of the employees named in the chart were no longer employed at that time, as shown by the Respondents' payroll records in evidence.

¹⁶ Marshall's testimony in this regard, elicited on direct examination by the Respondents' counsel, is inconsistent with her testimony in response to questions from the General Counsel on the first day of trial. At that time, Marshall claimed that she went home after the meeting, on her lunch break, and drafted the petition on her own with no mention of a conversation with Rosenberg or the document she was given by Rosenberg. Similarly, Marshall had denied in her prior affidavits that she spoke to Rosenberg or any other supervisor about the petition before she created it.

about this subject.

5 The document that Rosenberg gave Marshall on June 14 explains in detail how to go about decertifying the Union, from the precise language to use in the petition, the manner in which to collect the signatures, when such activity could be conducted and the exact number of signatures (50) that would be needed. The document then advises the employee to take the petition to the NLRB's regional office, provides the address, and what to say when the employee gets there. The document also suggests that the employee keep a copy of the petition and concludes by stating: "If you wish to give me a copy as well, you are free to do so."

10 As previously noted, Marshall claimed that she created the petition at home during her lunch break on June 14. The language on the petition, i.e. "We undersigned employees no longer wish to be represented by SEIU Florida Healthcare Union", is identical to the language suggested in the document Marshall obtained from Rosenberg. Marshall testified that she returned to the facility after lunch with two copies of this petition and began collecting signatures. According to Marshall she obtained the first signatures on the first page immediately upon returning to the facility when she went to the smoking area where several housekeeping employees were on break. She claimed to have done all of this on her 30 minute lunch break. However, in her pre-trial affidavits, she stated that she obtained the signatures from the housekeeping employees later that afternoon when she took a smoke break. Her testimony is also inconsistent with her prior statements in that she previously stated that she lived 15 minutes from the facility so it would have taken her entire lunch break just to drive home and back. Nevertheless, Marshall insisted she obtained all 51 signatures on the petition during breaks and before and after work.

25 Marshall testified further that, after returning to work following lunch and the visit to the smoking area, she kept the petition in her possession at all times and that she was the only one to solicit the signatures that appear on the petition. Her testimony, however, was devoid of any specifics as to where and when she collected each signature and what was said by her and the employee being solicited during these encounters. Moreover, she did not authenticate any of the signatures on the petition.¹⁷ Marshall was not much more forthcoming in her prior affidavits. For example, she previously stated that she could not recall whether she had collected any signatures, other than those of the housekeeping employees in the smoking area, during the remainder of her shift that first day. She also stated previously, much closer in time to the events, that she could not recall whether she collected any signatures at any location other than the Respondents' facility, whether she had collected any signatures after her shift ended on June 14, or whether she had returned to the facility during the 11:00 PM to 7:00 AM shift that night. With respect to the third page of the petition, which she admitted creating after June 14, Marshall testified that she obtained the two signatures on that page before she turned the petition in to Rosenberg, even though David Gittinger's signature on that page is preceded by the date "6-19-06".¹⁸ The Respondents' letter to the Union, withdrawing recognition based on Marshall's petition, is dated June 16, three days earlier. Nevertheless, Marshall insisted, despite her generally poor recollection of events, that both signatures on the last page were obtained before she handed in the petition. Marshall testified further that the second signature on that page was obtained before submitting the petition when she met the employee, whose

50 ¹⁷ In obvious recognition of the unreliability of Ms. Marshall's testimony at the hearing, the Respondents' counsel chooses in his brief to rely on the statements contained in the October 2006 affidavit she gave to counsel as evidence regarding the solicitation of signatures.

¹⁸ Gittinger's signature also appears on the first page of the petition.

identity she did not remember, at the employee's other job.¹⁹ Again, Marshall provided few details of the circumstances or how she obtained this last signature.

5 Aleta Ford, the employee witness called by the General Counsel, signed the petition and described, in much greater detail, how this occurred. As noted above, Ford attended the meeting conducted by Weiss and Rosenberg on the night of June 14, just before midnight. After the meeting, she lined up outside the conference room with other employees, waiting to find out how much of an increase each would receive under the Respondents' proposal. Marshall, who did not work on that shift, approached the waiting employees with the petition. According to 10 Ford, Marshall told the employees who were there that, if the company was going to fire them, it would fire them anyway. Marshall asked the employees what would the Union do to prevent them from losing their jobs. She then told the employees that, if they signed the petition, that would guarantee that they were going to get the 9.6% increase. Marshall said further that she would rather receive the 9.6% that the Respondents were offering than the 3% pay raise with 15 2% taken out for dues that the Union wanted. Ford testified that she and the two employees in line with her, David Gittinger and Areesah Jordan, then signed the petition. Their signatures appear one after the other in the second column on the first page of the petition. Marshall did not testify regarding the solicitation of Ford's signature, leaving Ford's testimony uncontradicted.

20 E. The Incident at the Nurses' Station

Ford testified that, on the night of June 14-15, after the meeting in the conference room and after signing the petition in the hallway while waiting to find out she would not be getting the 9.6% raise touted in the meeting, Ford returned to the floor and was at the nurses' station when 25 Weiss and Rosenberg approached. According to Ford, they asked if everyone had attended the meeting. The employees who were there responded that they had.²⁰ Weiss and Rosenberg then asked if everybody had signed the paper. At that point, Marshall came around the nurses' station and said, "yes, I got the paper right here." She put the paper down on top of the nurses' station and Ford recognized it as the petition she had signed a short time earlier. Weiss and 30 Rosenberg then said goodnight and left.

Marshall, Rosenberg and Weiss all denied that this incident occurred. Although Marshall at first denied being present at the facility on the night of June 14-15, she testified when 35 questioned by the Respondents' counsel that she had solicited signatures at the facility that night. She even conceded that she may have approached one or more of the nurses' stations while there. Despite her generally poor recall of events, Marshall denied, in response to counsel's questions, that she spoke to Rosenberg while at the facility that night, or that she encountered Weiss. She also denied giving either of them any documents or papers, such as the petition, while at the facility. Rosenberg testified that she could not recall stopping at the 40 nurses' station that night, after the meeting, but conceded that, if she did, it was just to say good night. Rosenberg also denied seeing Marshall at the facility, or speaking to her, during the night shift. Weiss admitted visiting the nurses' station after the meeting to greet the employees. She recalled that she spent about 20 minutes walking around the facility, talking to the employees. She listened to Gittinger, who worked with Ford, who voiced some complaints and seemed very 45 angry. Weiss testified that when she stopped at the nurses' station, she said no more than that it was nice to meet the employees and bid them goodbye. Weiss and Rosenberg specifically

¹⁹ The Respondents' claim that this signature belongs to Sherane Sealey.

²⁰ Ford identified herself, Jordan and a nurse referred to in the record phonetically as "El Senior" as being in the nurses' station. CNA Claris Lloyd was down the hall and Gittinger was in the TV room.

denied asking anyone if they had signed a paper. They also denied seeing the petition at the nurses' station. Although their testimony appears to be consistent, Weiss and Rosenberg did contradict one another on one point. Rosenberg testified that she left the facility with Weiss that night. Weiss, on the other hand, recalled that she left alone.

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F. The Respondents Withdraw Recognition

Marshall testified that, after she collected the signatures on the three-page petition, she gave it to Rosenberg. She testified that this occurred on a Friday, in the late afternoon, and that Ms. Rosenberg was standing in the doorway of her office when she gave her the petition. Rosenberg testified that she was handed the petition by an employee whom she could not recall while she was sitting at her desk. She also testified that this occurred on June 16, a Friday.

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Rosenberg testified that, upon receiving the petition, she gave it to Gant and asked her to verify the signatures on the petition, i.e. whose signatures were on it and whether they were in the unit. Gant also testified that Rosenberg made such a request and that she complied, verifying the signatures by checking the employees' personnel files. Rosenberg testified that she also faxed a copy of the petition to the Respondents' counsel. It is not clear whether she did this before or after Gant had verified the signatures. In any event, almost immediately upon receipt of the petition, Attorney Nelson sent a letter, via fax, e-mail and certified mail, to Abate to inform the Union that the Respondents were withdrawing recognition based on this petition.

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The petition that Marshall gave to Rosenberg on Friday, June 16, a copy of which is in evidence,²¹ contains 51 signatures. As noted previously, the signature of CNA Gittinger appears twice, leaving 50 signatures to consider. At the beginning of the hearing, the parties stipulated to the identity of 92 employees who it was agreed were employed in the bargaining unit on that date. Forty-five of the employees whose names appear on the petition were undisputedly in the unit. Four of the remaining five employees were among 19 whom the parties disagreed as to their unit placement because they were identified as part-time, or PRN employees. The last disputed signature belonged to Joseph Soto, Sr., employed full-time as a certified occupational therapy assistant (COTA). While the General Counsel would exclude the COTA, the Respondents claim that he should be included because he shares a community of interest with the unit employees. In addition to disputing who is in or out of the unit among these five employees, the General Counsel contends that several of the signatures on Marshall's petition have not been properly authenticated.

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G. Events Post-Withdrawal of Recognition

There is no dispute that, after withdrawing recognition from the Union on June 16, the Respondents implemented the ceiling on wage rates that had been included in the June 13 offer made to the Union during negotiations. It is also undisputed that, since that date, the Respondents have not granted any wage increases to unit employees that were already at the wage ceiling. The Respondents admitted in their answer to the complaint that these changes were made without notice to the Union nor any bargaining other than what had transpired before the withdrawal of recognition.²²

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More than a year after Respondents withdrew recognition from the Union, the facility

²¹ The Respondents did not proffer the original of the petition as evidence.

²² The complaint does not allege any other unilateral changes post withdrawal of recognition.

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changed hands yet again. On September 1, 2007, while the Union's charges against the previous joint employer were still pending, Respondent SNF replaced Respondent Excel as operator of the nursing home. Respondents HGOP and Horizon have remained at the facility in the same capacity as before and have continued to be joint employers, now with Respondent SNF, of the unit employees.²³ The Respondents collectively have admitted that, since September 1, 2007, Respondent SNF has operated the business of Excel in basically unchanged form, and has employed as a majority of its employees in the unit involved in this proceeding, individuals who were employees of Respondent Excel in the same job classifications as existed on August 31. It is also admitted that Respondent SNF took over operation of the facility with knowledge of the pending unfair labor practice proceeding and the potential liability to remedy the alleged unfair labor practices. The Respondents, collectively, have also admitted, for purposes of this proceeding, that the Respondent SNF is a successor within the meaning of the Supreme Court's decision in *Golden State Bottling Co. v. NLRB*, supra, responsible for remedying any unfair labor practices found here.

There is no dispute that Respondent SNF, as a joint employer with HGOP and Horizon, has continued to refuse to recognize and bargain with the Union as the representative of the unit employees and has maintained in effect the wage ceiling that was implemented on June 16. If it is found here that the joint Respondent Excel unlawfully withdrew recognition from the Union, then the same undisputed facts that establish that Respondent SNF is a *Golden State* successor would establish that it is also a successor with an obligation to recognize and bargain with the Union, under the Supreme Court's decision in *NLRB v. Burns International Security Services*.

H. Analysis and Conclusions

1. Section 8(a)(1) Allegations

The complaint alleges that the Respondents Excel, HGOP and Horizon violated Section 8(a)(1) of the Act at the meetings conducted on June 14 and 15 by : (1) misrepresenting the wage proposals and other proposals made by the parties during negotiations; (2) placing the onus on the Union for failure to reach agreement on an initial collective bargaining agreement to induce them to abandon support for the Union; (3) placing the onus on the Union for delays in granting of wage increases in order to induce them to abandon support for the Union; and (4) making implied promises of benefits in order to induce employees to abandon support for the Union. The Respondents deny that they violated the Act as alleged, arguing that the handout provided to the employees and the statements made by their representatives, as reflected in the scripts from the meetings, were protected communication with employees regarding the status of negotiations.

There is essentially no dispute about what the Respondents' supervisors and agents communicated to the employees. The two handouts speak for themselves and, regardless of whether the scripts were read verbatim, they accurately reflect what was communicated to the employees as recalled by the witnesses who were at the meetings. There is thus no need to make any credibility resolutions to determine this aspect of the case. Based on the handouts and the scripts, I find that the Respondents Excel, HGOP and Horizon clearly misrepresented the proposals made by the parties during negotiations.

²³ See footnote 5 above in which I rejected the Respondents denial that Respondent Horizon was a joint employer with Respondent Excel. The same finding applies here.

The handout provided to the CNAs stated that they would receive “an average 9.6% increase in salary” and “an average \$ value of about \$1700 a year to you.” In reality, Weiss’ own calculations, as shown on the chart she used during the one-on-one meetings with employees after each group meeting, showed an average increase of 9.46%. While this difference is small, it is material because it reflects the Respondents’ strategy of inflating the value of its proposal to the employees. Moreover, as shown by General Counsel, Weiss’ calculations were flawed because she included employees who no longer worked for the Respondents, as shown by its payroll records,²⁴ and omitted any employee who would not be getting a wage increase under the Respondents’ proposal,²⁵ a significant portion of the Unit that was already at the Respondents’ wage ceiling.²⁶ In fact, only 29 of the 40 CNAs on Weiss’ chart would receive an increase of 9.6% or more. There is no dispute that there were at least 64 CNAs in the unit at that time. As calculated by counsel for the General Counsel, the average wage increase under the Respondents’ proposal for employees who were in the unit was only 5.95% and the average dollar amount of the increase was \$1084.86. Even more misleading than the handout is what Weiss told the CNAs during the meeting, as reflected in the script. She claimed that “[o]ur offer would result in all CNAs receiving increases of 9.6% or more immediately upon acceptance by the Union and ratification by employees” (emphasis in original text of script). This is patently false.

The evidence regarding what the non-CNA employees were told is spotty. The handout merely stated that the Respondents had proposed “pay increases based on years of experience” and invited the employees to see the Respondents’ representatives after the meeting to find out how much they would receive under that proposal. The Respondents did not put in evidence any chart or other document that may have been used by Weiss to tell these employees how much their raise would be, Weiss did not testify as to what she told any employees who came to see her, and there is no other evidence regarding what any individual employee might have been told. However, the scripts from the non-CNA meetings reveal that Weiss, or whoever was speaking, told the employees during at least two of these meetings that they would receive “across the board increases based on experience” under the Respondents’ offer on the table. As Counsel for the General Counsel demonstrated in her brief, many of the non-CNA unit employees would receive no increase under the Respondents proposal because they were at the wage ceiling included in that offer.²⁷ In addition, the Respondents’ wage proposal for the non-CNA employees omitted a number of job classifications in the unit, including the staffing coordinator, the position held by Marshal at the time, indicating these employees would get no increase other than the annual merit increase that the Respondent had always given.

The evidence shows that the Respondents Excel, HGOP and Horizon also misrepresented the Union’s proposal that was on the table. According to the handouts provided

²⁴ The following names appear on Weiss’ chart but are not among the CNAs whom the parties stipulated were in the unit at the time: Patricia Fields, Shaun Fourman, Jacqueline Johnson, Nancy Marke, Lisette Moreno, Mary Nyarko and Mildred Webb. These seven individuals are not even included in the list of part-time/PRN employees whose unit placement is in dispute.

²⁵ There are 23 names of CNAs that appear on the list of employees stipulated to be in the unit who do not appear on Weiss’ chart.

²⁶ Interestingly, none of the Respondents agents who spoke at these meetings mentioned the wage ceiling as part of their “accurate” reporting of the parties’ proposals.

²⁷ Again, there was no mention of this cap on wages by the Respondents’ representatives in the handouts or meetings with these employees.

to all employees and the scripts of the meetings, the employees were told that the Union was seeking a 3% wage increase, which was correct, but that 2% of that increase would go back to the Union because the employees would have to pay dues if the Union's proposal was accepted. This claim is false. As of June 14, the Union was not seeking any union security provision that would have required **all** employees in the unit to pay dues or agency fees. The only thing on the table was a **voluntary** dues check-off provision which would only apply to those employees who chose to pay dues and wished to have such dues withheld from their paycheck.

It is clear from the above that the General Counsel has met the burden of proof that Respondents Excel, HGOP and Horizon indeed misrepresented the wage proposals and other proposals made by the parties during negotiations.²⁸ The Board has held that such misrepresentations are unlawful when made in a manner that would tend to undermine employee support for the Union. *RTP Co.*, 334 NLRB 466, 467 (2001), *enfd.* 315 F.3d 951 (8th Cir. 2003), *cert. denied* 540 U.S. 811 (2003). I find that such is the case here. In fact, as will be discussed *infra*, the evidence shows that these statements had the anticipated effect, precipitating the circulation of the decertification petition that led to the Respondents' withdrawal of recognition. The cases relied upon by the Respondents are distinguishable because in those cases, the employers reported the status of negotiations and described the proposals on the table accurately, without any threat or promise of benefit. See *Terminix-International Co., Ltd. Partnership*, 315 NLRB 1283 (1995); *United Technologies Corporation*, 274 NLRB 609 (1985), *enfd. sub nom. NLRB v. Pratt & Whitney Aircraft Div.*, 789 F.2d 121 (2nd Cir. 1986). Accordingly, I find that Respondents Excel, HGOP and Horizon violated Section 8(a)(1) in this respect.

The scripts utilized by Weiss or Rosenberg at the meetings on June 14 and 15 also show, as alleged in the complaint, that the Respondents Excel, HGOP and Horizon placed the onus on the Union for the parties' failure to reach agreement on a contract and for the delay in employees receiving any wage increase. Employees were told that it took over three years to even begin bargaining because of "legal issues" surrounding the election that had to be resolved and that, even after bargaining commenced, two and a half years had passed without agreement being reached. Although, according to the text, there is no explicit blame placed on the Union for this delay, the implication is clear when these statements are considered in the context of the entire speech. Employees were told, for example, that they had potentially been greatly affected by this delay and that, "the real shame about this situation is that during the entire bargaining process, we have been forced to maintain the status quo" regarding wages and benefits. Reading further into the script, it is clear that the Respondents' representatives sought to convey the impression that the Union was standing in the way of agreement. Thus, according to the script, after inaccurately describing the Respondents' wage proposal, as shown above, Weiss or whoever read the script said:

For some reason, the Union has refused to accept this offer! For the life of me I can't figure out why – these are the largest increases our company has ever offered and far bigger than what other nursing homes are providing.

The employees were then told that the Union's conduct in negotiations was "terrible and self-

²⁸ Counsel for the General Counsel also argues that the Respondents Excel, HGOP and Horizon misrepresented the status of negotiations over bereavement leave. I find it unnecessary to reach this issue as it would merely be cumulative and was clearly not as significant as the misrepresentations regarding the wage proposals.

serving.” To emphasize the impact on the employees, the script mentions the recent wage increase that the unrepresented LPNs had received and states that the Respondents were able to “just go ahead and give them a raise” because it did not have to go through the collective bargaining process.

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The Board has historically found a violation when an employer makes statements to employees that reasonably tend to convey the impression that employees are being denied benefits or otherwise adversely affected because of the Union’s actions. See *Kentucky Fried Chicken Caribbean Holdings*, 341 NLRB 69, 69-70 (2004); *RTP Co.*, supra; *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001). The cases relied upon by the Respondents again are distinguishable because the statements at issue were accurate and devoid of any implication that the union was an obstacle to improved wages and benefits. See *Garden Ridge Management, Inc.*, 347 NLRB 131 (2006); *Lepel Corp.*, 323 NLRB 841 (1997). Based on the above, I find, as alleged in the complaint, that the Respondents Excel, HGOP and Horizon in fact placed the onus on the Union for the delay in bargaining and the delay in granting wage increases and that such statements violated Section 8(a)(1) of the Act.

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The complaint further alleges that the statements referenced above, i.e. those inaccurately portraying the Respondents’ wage proposal and blaming the Union for employees not getting the hefty increases described, amounted to an implied promise that, if the employees abandoned their support for the Union, the Respondent would implement the wage increases. Having considered the matter, including the totality of the speech as reflected by the script, and the manner in which the Respondent communicated this information to the employees, I find that the Respondents Excel, HGOP and Horizon in fact violated the Act as alleged. As the Board has said, promises of benefit to induce employees to abandon protected activity need not be explicit but may be implied. *E.L.C. Electric*, 344 NLRB 188, 189-190 (2005), citing *County Window Cleaning Co.*, 328 NLRB 190, 196 (1999). The statements of the Respondents’ representatives, at the meetings on June 14 and 15, when viewed objectively in the context of the surrounding circumstances, would reasonably tend to convey the impression that any increase in wages was predicated on their abandonment of the Union. Such an interpretation is demonstrated by the fact that Marshall, in soliciting Ford and the other employees in line to sign the decertification petition, told them that they would be guaranteed the 9.6% increase touted in the meeting if they signed the petition.²⁹ Accordingly, I find that Respondents Excel, HGOP and Horizon violated the Act as alleged in the complaint.

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The complaint alleges that Respondent Excel, HGOP and Horizon violated Section 8(a)(1) of the Act during the incident at the nurses’ station when Weiss and Rosenberg asked the employees if they had all attended the meeting and signed the paper. The reference to the petition was made clear when Marshall came on the scene and responded affirmatively and placed the decertification petition on top of the nurses station for all to see. The General Counsel relies on the testimony of Aleta Ford as proof of this violation. I credit Ford’s testimony regarding this incident over the denials of Marshall, Weiss and Rosenberg. I have previously noted the unreliability of Marshall’s testimony because of her selective memory. I have also noted the conflict in the testimony of Weiss and Rosenberg regarding whether they left alone or together. I found Ford, on the other hand, to be a generally credible witness. Having signed the petition herself, and not being a union officer or otherwise aligned with the Union, she would have no reason to fabricate this story. I thus find the incident occurred as claimed by Ford.

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²⁹ Although Marshall is not alleged to be an agent of the Respondents, and her statement is not attributable to the Respondents, it does illustrate of how an employee would have interpreted what they had just read in the handout and heard at the meeting.

Weiss' and Rosenberg's question, whether all the employees had signed the petition being circulated by Marshall, constitutes unlawful interrogation under the totality of circumstances test utilized by the Board to evaluate such allegations. *Gardner Engineering*, 313 NLRB 755 (1994), *enfd. in rel. part 115 F.3d 636 (9th Cir. 1997)*. Applying that test here, the question was coercive. I note that the questioners were the corporate Human Resources Director and the highest ranking supervisor in the facility. The questioning occurred immediately after a meeting at which these individuals had made statements which have been found unlawful because of their tendency to undermine support for the Union. The information being sought, i.e. whether the employees had signed a paper seeking to remove the Union as their bargaining representative, relates to the employees' exercise of their Section 7 rights. Accordingly, I find that Respondents' Excel, HGOP and Horizon unlawfully interrogated employees at the nurses' station on the night of June 14-15 in violation of Section 8(a)(1) of the Act, as alleged in the complaint. The complaint also alleges that Weiss and Rosenberg unlawfully solicited employees to circulate and sign a decertification petition during this incident. I do not interpret their brief comments at the nurses' station that night as solicitation and will recommend dismissal of this allegation.

2. *The Union's Majority Status and the Withdrawal of Recognition*

The Respondents collectively admit that Respondents Excel, HGOP and Horizon withdrew recognition on June 16, 2006 and that, since that date, they have refused to recognize and bargain with the Union. The parties agree that the applicable legal standard for determining whether the withdrawal of recognition violated the Act is set forth in the Board's *Levitz* decision. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).³⁰ Under this standard, the Employer has the burden of proving, by a preponderance of the evidence, that the Union had, in fact, lost majority support among employees in the unit at the time the Employer withdrew recognition. The Board has said that an employer that withdraws recognition from an incumbent union does so "at its peril." *Id.* at 725. The Board has held that an antiunion petition, signed by a majority of the employees in the unit, which is not tainted by prior unremedied unfair labor practices, is adequate objective evidence of actual loss of majority status. *Id.* Accord: *KFMB Stations*, 349 NLRB 373, 377 (2007), *Lexus of Concord, Inc.*, 343 NLRB 851, 851-852 (2004). The Respondents in the instant case rely on the petition that was circulated by Marshall on June 14-16 and on statements made by two employees who did not sign the petition during the meetings held by Weiss, et al. on June 14 and 15 as proof that the Union had lost the support of an actual majority of unit employees. The General Counsel contends that the Respondents have not met their *Levitz* burden because they failed to authenticate all of the signatures on the decertification petition submitted by Marshall; because the evidence regarding verbal communications from employees who did not sign the petition was insufficient to establish that the employees in question no longer desired union representation; and because the total number of employees who signed the petition, even if all the signatures were authentic, was less than half the unit as defined by the General Counsel.

As with any petition relied upon to prove that a union either does or does not have the support of a majority of the employees in an appropriate bargaining unit, it is necessary to do

³⁰ The Respondents' counsel argued at the hearing and in its brief for a return to the pre-*Levitz* standard, i.e. whether the employer had a good faith, reasonable, belief based on objective evidence that a union no longer enjoys the support of a majority of unit employees. I decline to address this issue, leaving it to the Board's wisdom whether to change the legal standard for such cases.

two things. First, the signatures on the petition, or in the case of a demand for recognition, on union authorization cards, must be authenticated, i.e. it must be established that they are indeed the signatures of the individuals named in the petition or on the card. *Flying Foods*, 345 NLRB 101, 103 (2005); *Parts Depot, Inc.*, 332 NLRB 670 (2000). Second, the unit must be determined in order to know at what point majority status either has or has not been achieved. In the present case, the parties stipulated at the outset of the hearing to the identity of 92 employees who were in the unit. In addition, the parties identified 20 employees whose unit placement was at issue. Nineteen individuals were identified as either part-time or PRN employees and the question is whether they fall under the classification of “regular part-time employees” included in the stipulated bargaining unit. The last individual is classified as a certified occupational therapy assistant (COTA), a category not mentioned as included or excluded in the stipulated unit. In their briefs, the parties arrived at the number of employees each believed comprised the unit. Counsel for the General Counsel would include all but two of the part-time or PRN employees while excluding the COTA, arguing that there were a total of 109 employees in the unit. The Respondents argued that only four of the part-time or PRN employees satisfied its definition of a regular part-time employee and should be included in the unit along with the COTA, making a total of 97 employees in the unit. If the Respondents’ position is adopted, it would have to prove that at least 49 of the unit employees had either signed the petition or otherwise expressed to Respondent their lack of support for continued representation by the union.

(a) Authentication

Initially, the wording on the petition must be evaluated to determine whether it in fact clearly expresses the intent of the signatories not to be represented by the Union, rather than a desire for a decertification election, or a desire not to become a member of the Union or to pay union dues. *Wurland Nursing & Rehabilitation Center*, 351 NLRB 817 (2007). Cf. *Highlands Regional Medical Center*, 347 NLRB 1404, 1406 (2006), *enfd.* 508 F.3d 28 (D.C. Cir. 2007). The language here, which was admittedly supplied by the Respondents’ Administrator Rosenberg, clearly states that the employees who sign “no longer wish to be represented by SEIU Florida Healthcare Union.” A more clear expression of a desire to remove the Union could hardly be imagined.

In order to authenticate the 50 signatures on the three-page petition, the Respondents submitted into evidence handwriting exemplars taken from its employee personnel files and relied upon me, as a layman, to compare the signatures on the petition to these exemplars to determine whether they were authentic. The Respondents could have chosen other ways to authenticate these signatures. It could have asked Marshall, the only employee to solicit all the signatures on the petition, to authenticate them. Although Marshall did testify as a witness for the Respondents, she was not asked to authenticate any signatures, not even her own. The Respondents could also have asked Aleta Ford, who testified for the General Counsel, to authenticate her signature and that of the others who were in line with her and signed at the same time. Counsel for the Respondents chose not to do so. The Respondents could also have called as a witness any employee whose signature was not clearly a match with the exemplar and had the employee authenticate his or her signature. Again, this was not done. Finally, the Respondents could have called a handwriting expert to compare the signatures on the petition and the exemplars and provide an opinion whether they were authentic. Again, not done.

Having reviewed the signatures on the petition³¹ against the exemplars relied upon by

³¹ The Respondents only proffered a copy of the petition and did not offer the original into evidence.

the Respondents, I am satisfied that all but five are authentic. However, without the benefit of training in handwriting analysis, I can not say with confidence that the signatures of five individuals on the petition were placed there by the same individual who signed the exemplar. Although the signatures of Deborah Browne on the petition and the exemplar are close, the middle “b” and final “h” in her first name are significantly different. I also note the flourish on the capital “B” of her last name contrasts with the simple printed one on the petition. The two signatures of Jean Pierre are almost illegible and also vastly different on their face. It is hard for me to say they were done by the same individual. Similarly, the somewhat printed signature of Ngozi Nwagbuo on the petition is markedly different from the more free form handwritten signature on the exemplar provided by the Respondents. Even more glaringly different are the printed signature of Sarita Chauhan on the petition and the abbreviated scribbling that passes for a signature on the form she signed for the Respondents’ records. Finally, I note the very different “p” at the beginning of Pamela Williams signature on the petition compared to the way it is written on the employment form. The last names are also not identical in the way in which they are written.

If the five signatures of Browne, Pierre, Nwagbuo, Chauhan and P. Williams are not counted, that leaves 45 authentic signatures on the decertification petition circulated by Marshall. The parties stipulated that all but Nwagbuo were in the unit. As to Nwagbuo, both parties argue in their briefs that she worked with sufficient regularity to satisfy either parties’ definition of a regular part-time employee included in the unit. Assuming that the Respondents are correct that there were 97 employees in the unit, including these five employees, the 45 authenticated signatures would not be sufficient to show an actual loss of majority. Even if I count the comments made by two unit employees who did not sign Marshall’s petition, NK Obi-Lewis and Erica Knight, at one of the meetings on June 14, which comments are relied upon by the Respondents to show a loss of support, the Respondents still fall short of the numerical threshold to show an actual loss of majority support by the Union.

Accordingly, were I to rely on my layman’s skills at handwriting analysis, I would have to conclude that the Respondents have not met the burden of proving that an actual majority of employees in the unit no longer supported the Union as their representative. Under these circumstances, the withdrawal of recognition would be unlawful. If I am wrong on this count, and all of the signatures on the petition are authentic, then it becomes necessary to determine whether all who signed were in fact bargaining unit employees and whether the comments made by Obi-Lewis and Knight in fact show a loss of support.

(b) Unit Issues and Majority Status

Assuming all 50 signatures on the decertification petition are indeed authentic, it becomes necessary to determine the unit placement of the part-time/PRN employees and the COTA because only forty-five (45) of the signatures belonged to employees whom the parties have stipulated were in the unit. Four of the signatures belong to employees identified as “part-time” or PRN. One signature belongs to the COTA.

The General Counsel would include 17 of the 19 part-time/PRN employees by applying the Board’s *Davison-Paxon* formula for determining whether an on-call employee has sufficient regularity of employment to be included in a unit of full-time and regular part-time employees.³² Under that formula, an employee meets the definition of regularity, absent special circumstances, if the employee averages four (4) or more hours a week in the last quarter

³² *Davison-Paxon Co.*, 185 NLRB 121 (1970).

before the eligibility date.³³ The Board has applied this formula in the health care industry. See *SS. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994); *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1980). The Respondents, on the other hand, while acknowledging the existence of the *Davison-Paxon* formula, argue for a more restrictive definition of regular part-time employee based on a tentative agreement reached between the Respondents and the Union during contract negotiations. Although the parties did not agree to any changes in the unit description contained in the stipulation and incorporated that into the proposed recognition clause of the collective bargaining agreement, they did reach tentative agreement on a separate article defining “full-time”, part-time”, and “casual” employees (Article 5. Categories of Employees):

.....

Section 2. A part-time employee is one who is regularly scheduled to work and actually does work less than thirty (30) hours per week, but a minimum of sixteen (16) hours per week for four (4) consecutive pay periods.

Section 3. A casual employee is one who has no regular schedule of hours of work, but works intermittently as required. A casual employee who averages sixteen (16) hours a week or more for four (4) consecutive pay periods shall be reclassified as a full-time or part-time employee, whichever is applicable....

Applying their respective formulas, the parties agree that at least four of the disputed part-time/PRN employees should be included in the unit: Joan Chirwa, Ngozi Nwagbuo, Gloria Tyler and Marquita Walker. I find that the payroll records in evidence do show that these four employees worked consistently, on a regular basis, a sufficient number of hours to satisfy either the *Davison-Paxon* formula, or the definition of “part-time employee” contained in the parties tentative agreement. Accordingly, I shall include them in the unit for purposes of determining whether the Union had lost majority support as of June 16. Their inclusion brings the total number of employees in the unit to 96, meaning that the Respondents would have to prove at least 48 employees had either signed the petition or otherwise demonstrated their loss of support for the Union. Of these four, only Nwagbuo and Walker signed Marshall’s petition.³⁴ When their signatures are added to the 45 signatures belonging to employees undisputedly in the unit, the Respondents are left with 47 out of 96, not sufficient to show a numerical loss of majority support. Even if the signature of Joseph Soto, Sr., the COTA, and his job classification are included, the Respondents are still left with only 48 out of 97 unit employees having signed the petition.

Having essentially conceded that two of the signatures on Marshall’s petition should not be counted because, under the Respondents’ definition, they were not regular part-time employees,³⁵ the Respondents, in order to reach the numerical threshold, are forced to rely on the statements of the two unit employees who spoke up at one of the June 14 meetings but who did not sign the petition, NK Obi-Lewis and Erica Knight. The only evidence regarding what they said at the meeting are the notes taken by Gant, who acknowledged she had no clear recollection what was said beyond what’s contained in her notes.

³³ While this test is normally applied in representation cases, the Board has used the formula in other cases where unit placement is at issue. *Gourmet Foods*, 270 NLRB 578 (1984).

³⁴ I have noted above my concerns as to the authenticity of Nwagbuo’s signature on the petition.

³⁵ The two signatures belong to Rita Gipson and Hattie Murphy.

According to Gant's notes, Obi-Lewis said that she did not want to be in the Union and did not want the Union taking any of her money. I find this statement insufficient to establish that Obi-Lewis no longer wanted the Union to be her collective bargaining representative. At best, it indicates a desire not to join the Union or pay dues, sentiments that the Board has historically found insufficient to show loss of majority support. See *R.J.B. Knits*, 309 NLRB 201, 206 (1992) and cases cited therein. Moreover, the Respondents can not rely on this statement, even if it evidences a loss of support for the Union, because the statement was made in response to Respondents Excel, HGOP and Horizon's unlawful statements misrepresenting the parties' proposals and the status of negotiations. This is clear from the fact that the Union wasn't even seeking to take Ms. Obi-Lewis' money through a contractual union security provision. The only reason Ms. Obi-Lewis believed this is because Weiss or Rosenberg told her and the other employees at the meeting that the Union was proposing only a 3% raise, of which 2% would have to be paid to the Union as dues.

Marshall also testified that Obi-Lewis was the employee who asked during the meeting she attended how the employees could get rid of the Union. I do not credit this testimony. As noted above, Marshall's testimony in this regard was inconsistent with affidavits she gave much closer in time to the events, in which she claimed she did not remember who asked this question. Moreover, Gant's notes do not corroborate Marshall's testimony. Although Gant did not claim to have written down all the comments that were made by employees, it is highly unlikely that she would have missed a comment like the one Marshall attributes to Obi-Lewis. Finally, I have previously noted Marshall's general lack of credibility and find nothing in the record to convince me that her testimony as to this statement should be believed.

Gant's notes indicate that Erica Knight said, at the same meeting, that she did not want to be "part of the Union at all." She said there was "too much drama with the Union" and that "she never heard anything good." I find that these statements also do not establish that Ms. Knight did not wish to be represented by the Union. The statements indicate a desire not to be a member of the Union. Moreover, as with the comments by Obi-Lewis, Ms. Knight's statements also followed the unlawful presentation to the employees by Weiss and Rosenberg, which accounts for her reference to "union drama". Of course she hadn't heard anything good about the Union since all she had heard about the Union and negotiations was the misrepresentations advanced by the Respondents' representatives. Under these circumstances, Respondents Excel, HGOP and Horizon can not rely on Ms. Knight's statements to withdraw recognition. *Smoke House Restaurant*, 347 NLRB 192, 193 (2006).

Having found that the Respondents can not rely on the statements made by NK Obi-Lewis and Erica Knight, the Respondents are left with at best 48 signatures on the decertification petition out of a unit which, by the Respondents own calculation, included 97 employees. Thus, the Respondents have not met their burden of proving that the Union had lost the support of an actual, numerical, majority of its unit employees. Accordingly, I find that the June 16 withdrawal of recognition by Respondents Excel, HGOP and Horizon violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint. *Levitz*, supra.³⁶

³⁶ I find it unnecessary to resolve the unit placement of the other 13 part-time/PRN employees whom the General Counsel claims should be included in the unit because resolution of this issue would not affect the result, i.e. the more employees included, the larger the unit and the more difficult it would be for the Respondents to meet their burden under *Levitz*. Although I have assumed, for purposes of determining whether the Respondents have met their *Levitz* burden, that Soto, the COTA, was included in the unit, I find it unnecessary to resolve the issue

Continued

(c) The General Counsel's Alternative Theory

5 The General Counsel alleged, in the complaint, that Respondent Excel, HGOP and Horizon violated the Act by withdrawing recognition from the Union even if it were found that the Union had lost the support of a majority of employees in the unit because the employees' disaffection from the Union was caused by the unfair labor practices committed during the meetings held on June 14 and 15. I agree with the General Counsel that the nature of the unfair labor practices found here, their timing in relation to Marshall's circulation of the petition, the natural tendency of the Respondents' conduct to cause employee disaffection and the effect it had on employee morale, organizational activities and union membership, as demonstrated by the negative comments generated at the meetings by the Respondents' presentation, establishes the requisite causal connection between the unfair labor practices and the loss of support for the Union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

15 It is clear that Marshall would not have sought information regarding getting rid of the Union had she not attended the first meeting conducted by the Respondents' representatives on June 14. In soliciting other employees to sign her petition, she made reference to the unlawful statements misrepresenting the parties' proposals that she saw and read at the meeting. Moreover, the Respondents' inaccurate claims regarding the size of the wage increase employees would get under the Respondents' proposal and what the Union's proposal would cost the employees, together with the statements suggesting that the Union was responsible for the delay in reaching agreement on a contract and giving the employees a raise, all tend to convey the impression that employees would be better off without the Union. *Kentucky Fried Chicken*, *Caribbean Holdings*, supra at 69-70; *RTP Co.*, supra at 468.

25 Based on the above, I find that Respondent Excel, HGOP and Horizon's withdrawal of recognition from the Union was unlawful even assuming a majority of employees in the unit had demonstrated their lack of support for the Union as the bargaining representative of the unit. *Williams Enterprises*, 312 NLRB 937,939-940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).

3. Post-Withdrawal Unfair Labor Practices

35 The complaint alleges that Respondents Excel, HGOP and Horizon unilaterally changed the terms and conditions of employment of unit employees on June 16 by implementing the wage ceiling that was part of its June 13 proposal to the Union. There is no dispute that this change was made and has been maintained in effect since June 16, even by Respondent SNF after it took over operation of the facility from Respondent Excel on September 1, 2007. Because the Respondents' actions were predicated on its unlawful withdrawal of recognition, I find that the unilateral change violated the Act as alleged.

45 The complaint also alleges that Respondent SNF, as a *Burns* successor, independently violated the Act by refusing to recognize and bargain with the Union after it took over operation of the facility on September 1, 2007. Because the June 16 withdrawal of recognition was unlawful and had not been remedied as of September 1, 2007, the Union was still the employees' representative entitled to recognition. Accordingly, Respondent SNF violated the Act

50 of his unit placement. Whether he is in or out of the unit, the Respondents still fall short of the number needed to withdraw recognition. It is best to leave this issue to the parties to resolve through negotiations when the Respondent complies with its obligation to recognize and bargain with the Union.

on September 1, 2007 when it refused to recognize and bargain with the Union.

Conclusions of Law

5 1. By making statements at meetings with employees on June 14 and 15, 2006 that (a) misrepresented wage and other proposals made by the parties during negotiations, (b) placed the onus on the Union for delays in reaching agreement on an initial collective bargaining agreement and for granting wage increases to employees, and (c) implied that employees would receive increased wages and benefits if they abandoned their support for the Union, the Respondents Excel, HGOP and Horizon have engaged in unfair labor practices affecting
10 commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

15 2. By interrogating employees on June 14-15, 2006 regarding whether they had signed a petition to decertify the Union as their bargaining representative, the Respondents Excel, HGOP and Horizon have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

20 3. By withdrawing recognition from the Union on June 16, 2006 at a time when the Union had not lost the support of a majority of employees in the unit, and where any loss of support was caused by the unfair labor practices described above, the Respondents Excel, HGOP and Horizon have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

25 4. By unilaterally implementing a ceiling on the wage rates of unit employees on June 16, and by continuing that ceiling in effect until August 31, 2006, the Respondents Excel, HGOP and Horizon have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

30 5. By refusing to recognize and bargain with the Union and by maintaining in effect the unilaterally implemented wage ceiling described above since September 1, 2007, the Respondents SNF, HGOP and Horizon have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

35 6. Respondents did not violate the Act by soliciting employees to circulate and sign a petition to remove the Union as their collective bargaining representative.

Remedy

40 Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because Respondent SNF assumed operation of the facility on September 1, 2007 with knowledge of the pending unfair labor practices, it is liable under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), to remedy the unfair labor practices
45 found here to have been committed by its predecessor, the Respondent Excel. I shall recommend that the Respondents be required to recognize and bargain upon request with Service Employees International Union, Florida Healthcare Union, as the exclusive collective bargaining representative of their service and maintenance employees in the unit described in the Order, *infra*. The Respondents shall also be required to rescind the unilaterally imposed
50 ceiling on wages implemented on June 16, 2006 and make employees whole for any wages and

benefits they lost as a result of the ceiling, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³⁷ The Respondents shall also be required to post and abide by the customary notice to employees.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

ORDER

10 The Respondents, Tampa SNF LLC d/b/a Excel Rehabilitation and Nursing Center, Tampa, Florida, Excel Rehabilitation and Health Center, LLC, d/b/a Excel Rehabilitation and Nursing Center, Tampa, Florida, HGOP, LLC, d/b/a Cambridge Quality Care, Brooklyn, New York, and Horizon Staffing, LLC, Miami Beach, Florida, their officers, agents, successors, and assigns, shall

15

1. Cease and desist from

20 (a) Making misrepresentations and false statements to employees concerning wage and other proposals made by the Respondents and the Service Employees International Union, Florida Healthcare Union (the Union) during contract negotiations; blaming the Union for delays in reaching agreement on a collective bargaining agreement or for delays in granting employees wage increases in order to convince them to stop supporting the Union; and making implied promises of wage increases if the employees abandon their support for the Union.

25 (b) Coercively interrogating any employee about union support or union activities.

(c) Failing or refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in the following appropriate bargaining unit:

30 All full-time and regular part-time service and maintenance employees, including certified nursing assistants, dietary aides, cooks, dietary production supervisor, housekeeping aides, laundry aides, maintenance aides, floor technicians, medical records employees, central supply clerks, rehabilitation tech/aides, restorative aides, physical therapy assistants, activities aides, receptionists and staffing coordinators
35 employed by the Employer at the Tampa facility, excluding all other employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

40 (d) Unilaterally changing the wages, hours, or other terms and conditions of employment of employees in the above unit without first notifying the Union and providing an opportunity to bargain about the changes.

45 ³⁷ In the complaint, the General Counsel sought, as part of the remedy, that interest on any back pay awarded be compounded. To date, the Board has not granted such a request from the General Counsel. See *Glen Rock Ham*, 352 NLRB 516, fn. 1 (2008); *Rogers Corporation*, 344 NLRB 504 (2005).

50 ³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

10

(b) Make whole any unit employees who lost wages or benefits as a result of the ceiling on wage rates that was unilaterally implemented on June 16, 2006, in the manner set forth in the remedy section of the Decision.

15

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20

(d) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."³⁹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 14, 2006.

25

30

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

35

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

40

Dated, Washington, D.C., May 13, 2009.

45

Michael A. Marcionese
Administrative Law Judge

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³⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT make misrepresentations or false statements to you, our employees, concerning our position or the position of Service Employees International Union, Florida Healthcare Union (the Union) in collective bargaining negotiations.

WE WILL NOT blame the Union for delays in bargaining or delays in our payment of wage increases in order to convince you to stop supporting the Union.

WE WILL NOT impliedly promise you wage increases in order to convince you to stop supporting the Union.

WE WILL NOT ask you whether you or your co-workers support the Union.

WE WILL NOT fail or refuse to recognize and bargain with the Union as the exclusive collective bargaining representative of our employees in the following appropriate bargaining unit:

All full-time and regular part-time service and maintenance employees, including certified nursing assistants, dietary aides, cooks, dietary production supervisor, housekeeping aides, laundry aides, maintenance aides, floor technicians, medical records employees, central supply clerks, rehabilitation tech/aides, restorative aides, physical therapy assistants, activities aides, receptionists and staffing coordinators employed by the Employer at the Tampa facility, excluding all other employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT change the wages, hours, or other terms and conditions of employment of our employees in the above bargaining unit without first giving the Union notice and an opportunity to bargain with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above guaranteed by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective bargaining representative of our employees in the above bargaining unit with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, WE WILL reduce it to writing and sign it.

WE WILL make whole our employees in the above bargaining unit for any wages and benefits lost because we implemented a ceiling on wage rates on or about June 16, 2006.

TAMPA SNF, LLC, d/b/a Excel Rehabilitation and
Nursing Center; EXCEL REHABILITATION AND
HEALTH CENTER, LLC, d/b/a Excel Rehabilitation
and Nursing Center; HGOP, LLC, d/b/a
CAMBRIDGE QUALITY CARE; HORIZON
STAFFING, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530

Tampa, Florida 33602-5824

Hours: 8 a.m. to 4:30 p.m.

813-228-2641.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 813-228-2662.