UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:
CHICAGO HOTEL MASTER LESSEE, LLC,
AND SAGE HOSPITALITY RESOURCES, LLC,
D/B/A THE BLACKSTONE, A RENAISSANCE
HOTEL, A SINGLE INTEGRATED ENTERPRISE
AND SINGLE EMPLOYER,

Respondent

and	Consolidated Cases	13-CA-45089
		13-CA-45159
UNITE HERE, LOCAL 1,		13-CA-45313
		13-CA-45361
		13-CA-45401

Charging Party

and

ERIN KOLODZIEJ,

Party-in-Interest

RESPONDENT'S MOTION TO SUPPLEMENT EXCEPTIONS AND BRIEF

Chicago Hotel Master Lessee, LLC, and Sage Hospitality resources, LLC, d/b/a The Blackstone Hotel ("the Hotel" or "Respondent"), through its undersigned labor counsel, pursuant to Rule 102.47 of the Board's Rules and Regulations, hereby files this Motion to Supplement Exceptions and Brief, and in support thereof states:

One authority cited by the Respondent in its Exceptions and Brief in support of its closure of Room Service Department as an independent operation[1] was the Administrative Law

[1] The facts have been fully briefed in the Hotel's Exceptions (R. Exceptions., at 14-15), and Respondent's Revised Brief in Support of its Exceptions (R. Rev. Br., at 33-46); Room Service was a source of significant financial loss for the Hotel, and management shuttered that department for business reasons,

Judge (ALJ)'s decision in *Embarq Corp.*, 2009 NLRB LEXIS 40 (2009), a decision which at that time had not yet been reviewed by the Board. Subsequently, the Board issued an opinion in the case, 356 NLRB No. 125 (March 31, 2011), which clarified and modified the ALJ's rulings. The Board upheld the ALJ's finding that the "[u]nion could not have offered labor-cost concessions sufficient to alter the Respondent's decision," *id.*, slip op. at 2, the very argument Respondent made to the ALJ in these proceedings. *See* JD, at 62 (ALJ acknowledged that Respondent introduced evidence "regarding whether [the Union] could offer labor cost concessions," but refused to give *any weight* or even consideration to such evidence); R. Exceptions, at 14-15 (excepting to ALJ's failure to apply *Dubuque Packing* and analyze whether labor cost concessions were feasible); *see also* R. Rev. Br., at 43-46. The Board's holding in *Embarq Corp.* should require the same outcome in the present case.

General Counsel has alleged, *inter alia*, that Respondent made the unilateral decision to close its Room Service department and transfer that work to the bargaining unit employees in the Hotel's restaurant, Mercat a la Planxa ("Mercat") for unlawful reasons. Respondent urged the ALJ to follow the holdings of the Board and U.S. Supreme Court in *Dubuque Packing*, 303 NLRB 386 (1991), *enf'd in part* 1 F.3d 24 (D.C. Cir. 1993), *cert. denied* (1994), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), under which the Hotel was privileged to close the Room Service department and shift that department's work to other employees in the bargaining unit. The ALJ below found—in error, we submit, as explained more fully in the Respondent's Exceptions and Brief—that the Respondent's implementation of its decision without bargaining with the Union over that decision violated Section 8(a)(5) and (1)

---

which bona fide, non-discriminatory reasons the ALJ credited citations for both amount of loss and ALJ's ruling. The Hotel's position is that the closure of the Room Service Department was a business decision privileged by Board and U.S. Supreme Court precedent, including *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) and *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enfd. in part* 1 F.3d 24 (D.C. Cir. 1993), *cert. denied* (1994).

of the National Labor Relations Act, as amended ("the Act"). *See* JD at 63. In doing so, the ALJ erroneously refused to apply the relevant principles of *Dubuque Packing* and *First National Maintenance*, and declined to even address the reasoning of the judge in *Embarq Corp.*, *supra*, since "an administrative law judge's decision pending before the Board is not binding authority." JD at 63. That case, however, is now binding precedent.

In *Embarq Corp.*, the ALJ found, *inter alia*, that the employer had successfully shown that the closure of a call center in Nevada and the shifting of that work to a call center in Florida involved a "change in the scope and direction of the enterprise," rebutting the General Counsel's *prima facie* showing[2] under *Dubuque Packing*. 356 NLRB No. 125, slip op. at 8 (ALJ's opinion). In the alternative, the ALJ found that the employer had also successfully proved that

> "labor costs" were not a factor in the decision to close, and that even if a minor factor, the Union could not have offered cost concessions significant enough to have altered the Respondent's decision.

Id. at 9. The Board affirmed the ALJ's finding of no violation on the basis "that the Respondent proved that the Union could not have offered labor-cost concessions sufficient to alter the Respondent's decision to relocate." *Id.* at 2. Since the Board affirmed the ALJ "for the reasons stated in his opinion"—without further clarification or modification—as stated in the

[2] Under *Dubuque Packing*, the following test is used to analyze whether a decision to relocate work is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Respondent's Brief attached to its Exceptions, the reasoning in the ALJ's decision in *Embarq Corp.*, *see* R. Rev. Br. at 43-46, should have been considered here.

Respondent respectfully requests that the Board apply the relevant portions of its holding in *Embarq Corp.* here. We think the Board should conclude that the ALJ committed prejudicial error by refusing to address whether the Union could have offered labor-cost concessions sufficient to alter the Respondent's decision to close Room Service as a standalone department and transfer that work to Mercat. As explained more fully in the Respondent's Brief, the record is unrebutted on this point: even if the Union had agreed that Room Service employees could be paid minimum wage, without any benefits, an unrealistic solution, even those extreme labor cost concessions would not have stemmed the losses incurred by the operation of a standalone department, and The Blackstone would have continued to hemorrhage monies to keep this losing operation in place. *See* R. Rev. Br. at 33-38.

Respectfully submitted,

_____/s/_____
Norman R. Buchsbaum

_____/s/_____
Louis J. Cannon, Jr.

_____/s/_____
Wendell S. Phillips III

Law Offices of Norman R. Buchsbaum
Inner Harbor Center, Suite 600
400 East Pratt Street
Baltimore, Maryland 21202-3126
Tel: (410) 332-1343
Fax: (410) 625-1073
e-mail: NBuchs6124@aol.com

louis@buchsbaumlaw.com
wendell@buchsbaumlaw.com
Attorneys for Respondent

Dated this 8th day of June, 2011,
at Baltimore, Maryland

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Motion to Supplement Exceptions and Brief was served on the following, by electronic mail, on this 8th day of June, 2011:

N. Elizabeth Reynolds, Esquire
Allison, Slutsky & Kennedy
230 West Monroe Street, Suite 2600
Chicago, Illinois 60606
reynolds@ask-attorneys.com

Kevin McCormick, Esquire
Edward Castillo, Esquire
National Labor Relations Board
Region 13
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604
kevin.mccormick@nlrb.gov
edward.castillo@nlrb.gov

/s/
Louis J. Cannon, Jr.