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July 8, 2011

Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

RE: Sands Bethworks Gaming, LLC
NLRB Case No. 4-RC-21833

Dear Sir or Madam:

I have enclosed three (3) originals of the Petitioner's opposition memorandum of law in the above referenced matter.

Very truly yours,

Terrence P. Dwyer

Terrence P. Dwyer

TPD/jmc

Enc.

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ORDER SECTION

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Attorney for Petitioner
LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SANDS BETHWORKS GAMING, LLC
d/b/a SANDS CASINO RESORT BETHLEHEM,

Employer,

-- and --

LAW ENFORCEMENT EMPLOYEES
BENEVOLENT ASSOCIATION,

Petitioner.

NLRB CASE NO. 4-RC-21833

PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

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I. STATEMENT IN OPPOSITION

Petitioner opposes the Employer's Request for Review on the basis of there being no procedural error or substantial question of law or policy raised by the Employer. The record and Regional Director's decision in the present matter have not departed from officially reported Board precedent. Further, there has been no error or prejudice in the Regional Director's decision on any substantial factual issues which prejudice the Employer or any other party to the proceeding.

II. CASE BACKGROUND

Petitioner, Law Enforcement Employees Benevolent Association (hereinafter "L.E.E.B.A."), filed a representation petition with the requisite showing of interest on May 10, 2011 seeking to represent the unit consisting of all full-time and part-time security guards, excluding supervisors and all civilians, employed by the Sands Casino Resort Bethlehem. A hearing was held on May 23, 2011 during which time the parties stipulated to petitioner's status as a labor organization as defined in section 2(5) of the National Labor Relations Act, as well as to Employer's involvement in commerce for purposes of jurisdiction. At issue is the question of Petitioner's exclusive representation of security guards and the status of a Sands Casino locksmith who the Employer wants to include in the representative group and who the Petitioner wants to exclude as a non-guard. The Employer called three witnesses on its behalf, Kenneth N. Wynder, Jr., President of L.E.E.B.A.; Holly Eicher, Vice-President and General Counsel to Sands Casino Resort Bethlehem; and Fred Kraus, Vice-President and General Counsel, Venetian Casino Resort, LLC. On June 21, 2011 Regional Director Dorothy L. Moore-Duncan issued a Decision and Direction of Election and in doing so found that Petitioner was a guard union within the strictures of section 9(b)(3) and that the position of locksmith did not meet the

definition of a guard under prior Board decisional law. An election among the 93 security guards encompassing the petitioned-for unit is scheduled to take place on July 21, 2011.

III. ARGUMENT IN OPPOSITION

A. Petitioner is a labor organization comprised exclusively of security guards or public law enforcement officers that excludes non-guards from membership. The Regional Director was correct in the determination that Petitioner is solely a guard union unaffiliated with non-guard entities.

The Regional Director carefully reviewed the testimony of the witnesses and the evidence presented at the May 23 hearing to find that L.E.E.B.A. was qualified to be certified by the Board as a guard union. The Regional Director properly discounted the arguments of the Employer to suggest affiliation with non-guard unions and instead followed prior Board decisions in reaching her conclusions. The Petitioner has been certified by the Board as a guard union in two prior Region 29 decisions. (See, *Brinks U.S., 29-RC-11291* and *Sea Gate Association, 29-RD-1096*). Membership in L.E.E.B.A. is restricted to guards. L.E.E.B.A. does not admit non-guard employees to membership. In the instant case the Employer claims Petitioner is a mixed guard/non-guard labor organization by pointing to L.E.E.B.A. President Kenneth Wynder's past attempt with other individuals to organize a group of nurses at Putnam Hospital Center located in the Town of Carmel, County of Putnam, State of New York under a loosely formed group called the Putnam Nurses Association . However, as Mr. Wynder testified at the regional hearing, this was an organizing effort and was separate and apart from his duties and responsibilities with L.E.E.B.A. **(R. p. 11, l. 13-19).**[1] The Putnam Nurses Association had no members, no by-laws, was not incorporated, was not certified as a bargaining entity with the

[1] The May 23, 2011 hearing record transcript is designated as "R" followed by "p" for page number and "l" for line references within the record.

Board or any state agency, and did not negotiate or enter into any contracts with any employers **(R. p. 25, l. 8-19)**. Though Mr. Wynder was one of several individuals involved in the tentative organizing efforts of the Putnam Nurses Association he did not create nor have any involvement with the Putnam Nurses Association website or any of its postings other than supplying to the website manager his biography **(R. p. 25, l. 20-p. 26, l. 11)**. The Employer's incredible stretch of logic would have the Board believe that writing up a short biography for inclusion on a website somehow equates to Mr. Wynder publishing and running the website. Mr. Wynder's testimony indicated he did not have control over the website and that the material on the website was never removed by the webmaster **(R. p. 25, l. 20-p. 26, l. 8)**. This is but one of several imaginary leap-froggings of fact to arrive at the Employer's desired conclusion. However, no amount of sophistry can replace the record that was before the Regional Director or the testimony that was heard by the hearing officer, Ms. Joanne Sachetti. One of the most significant facts the Employer overlooks is that the Putnam Nurses Association never had any members; it never existed as a labor organization or as any other form of legally cognizable association and to this day it has no members. It is, in fact, a defunct organizing effort by Mr. Wynder and some other involved individuals in which he has no further involvement **(R. p. 11, l. 10-16)**. There is no direct or indirect affiliation by L.E.E.B.A. with non-guards through the Putnam Nurses Association because there are no members of the Association and the Association was never formally established beyond a loosely based organizing effort.

Despite these facts the Employer still bases its groundless assertions on non-relevant trivia such as the number of visitors to the Putnam Nurses Association former web-page with its implied corollary argument that this somehow represents an indication of membership. There is no proof in the record that the 2,500 plus visits the Employer alleges to the web-site even

represents the actual number of visits by "web surfers" since such web-site counters can be set to begin at a pre-arranged number. The Employer retains the burden of proving its position by substantial evidence. Probative and persuasive evidence involves facts supported by testimony or real evidence not conjecture, surmise, innuendo or fanciful flights of tortured logic. The Putnam Nurses Association is not a labor organization as defined in section 2(5) of the Act, it does not meet any of the statutory criteria chief among them being that it is an "existing" entity. The Board has required "clear and definitive evidence" to establish a union's disqualification based on an affiliation with non-guard unions. *Wackenhut v. NLRB, 178 F.3d 543 (DC Cir., 1999); Lee Adjustment Center, 325 NLRB 375, 376 (1998).* The Employer has not met this burden.

Similar attempts were made by the Employer to link L.E.E.B.A. with the United Steelworkers Union based on a meeting held at the United Steelworkers hall in Bethlehem. This "fronting" claim is another attempt by the Employer at a desperate alteration of the facts adduced at the hearing. First, it bears noting that the testimony of Mr. Wynder indicated the use of the United Steelworkers Hall was arranged by interested security guard employees of the Sands Casino who wanted to meet with members of L.E.E.B.A. **(R. p. 26 l. 18-p. 27, l. 4).** As Mr. Wynder testified, his organization was approached by individual security guards from the Sands Casino who arranged for the meeting location **(R. p. 20, l. 21-p. 21, l. 18)**. There was no involvement or affiliation between the United Steelworkers and L.E.E.B.A. nor any connection other than the use of their hall which was arranged by the individual employees of Sands Casino seeking to become members of L.E.E.B.A. **(R. p. 20, l. 13-20, p. 26, l.12-p. 27, l. 4)**. Once again the Employer has taken the evidence out of context and asked the Board to assume facts not in evidence. The Employer's assertion that the United Steel Workers obtained employee signature

cards on behalf of L.E.E.B.A. is a falsehood unsupported by any testimony or other evidence obtained at the May 23 hearing. The rent free use of the union hall, unsolicited by L.E.E.B.A. and arranged by a Sands Casino guard, does not in itself constitute affiliation. *International Harvester Company, 81 N.L.R.B. 374 (1949).* There is nothing in the hearing record to suggest that L.E.E.B.A. relies on any other entity, or allows any other entity to participate in its affairs. L.E.E.B.A. is an independent entity with its own by-laws and the ability to formulate its own policy.

Even the potential or "theoretical chance" for a non-guard to join or affiliate with a guard union is not enough to deny certification of a union that represents only guards. *Elite Protective and Security Services, Inc., 300 NLRB 832 (1990); see also, NLRB v. J.W. Mays, Inc., 675 F.2d 442, 444 (2d Cir., 1982), enfg 253 NLRB 717 (1980).* The Employer has not shown that L.E.E.B.A. admits non-guard members or is intimately affiliated with another group that admits non-guard members.

The Employer has also raised an issue regarding Mr. Wynder's part-time employment as a security supervisor with the New York Mets at Citi Field in Queens, New York. Mr. Wynder's testimony indicated he was not a union member at his part-time job but that he did supervise unionized members of Local 277 who were employed as security guards at Citi Field. The status of a union's officers or employees as non-guards does not prohibit a union under Section 9(b)(3) from representing guards. *Sentry Investigation Corp., 194 NLRB 1074 (1972).* In *NLRB v. J.W. Mays, Inc. 675 F.2d 422 (2d Cir., 1982)* one of the officers of a guard union was employed part-time in a non-guard capacity and this was found by the Board to be of no consequence to the union's certification as a guard union. The purpose of Section 9(b)(3) with respect to barring non-guard employees from a guard union is to prevent the guard union from bargaining on

behalf of the non-guard employees and to deny certification of any organization that would be attempting to do so. *Sentry Investigation Corp. 194 NLRB at 1075.* Mr. Wynder's employment as a non-union security supervisor for the New York Mets is of no consequence to the certification of L.E.E.B.A. to represent guards at the Sands Casino.

The non-certifiability of a guard union must be shown by "definitive evidence". *Burns Security Services, 278 NLRB 565 (1986).* The evidentiary burden for the Employer is one of "substantial evidence" under 29 U.S.C. §160(e) and it has not sustained its burden of proof. The Employer has simply failed to prove the Petitioner is anything other than a labor organization representing only guards or that the L.E.E.B.A. is otherwise precluded because of Mr. Wynder's employment as a security supervisor at Citi Field.

Lastly, though this matter is outside the scope of a legal argument, the issue needs to be addressed since it has been referenced in each of the Employer's memorandums to the Regional Director and to the Board. Specifically, with reference to the Employer's denigration of L.E.E.B.A. as a marginally successful union raiding other groups, the Petitioner feels compelled to respond. L.E.E.B.A. has been in existence since 2002 and during its existence was able to secure separate representation for the New York City Department of Environmental Police. Despite being told by various labor experts, attorneys and union leaders they would be never be able to remove themselves from Local 300, S.E.I.U. a group of DEP officers approached L.E.E.B.A. to represent them. After two years of litigation before the New York City Office of Collective Bargaining L.E.E.B.A. obtained the right to have the officers vote on whether they wanted to retain Local 300 as their collective bargaining representative or join another bargaining group (*See, Law Enforcement Employees Benevolent Association, NYC OCB Decision No.3-2005).* By a unanimous vote the membership elected L.E.E.B.A. as their

collective bargaining representative (*See, Law Enforcement Employees Benevolent Association, 760 CB 5, NYC OCB Decision No. 5-2005*). L.E.E.B.A. subsequently went on to obtain representation for the armored guards at the Brooklyn and New Jersey plants of Brinks, Inc. For two years L.E.E.B.A. represented these members in unfair labor practice complaints, grievances and contract negotiations but unfortunately due to perceived employer intimidation the rank and file members were not unified and L.E.E.B.A., in keeping with its pre-election promise to the guards that they could leave the union if they so desired anytime they wanted, allowed the guards to vote on whether to retain L.E.E.B.A. as its designated collective bargaining representative. The Brinks guards opted to de-unionize and parted from L.E.E.B.A. Subsequent to that event L.E.E.B.A. was approached by members of Sea Gate Police Department, a private security force in Brooklyn, New York, who wanted to break from their present union the Supervisory and Security Officers Benevolent Association, due to the fact that members did not believe they were adequately represented. L.E.E.B.A. obtained the necessary showing of interest and was subsequently elected unanimously to represent the Sea Gate officers. A subsequent contract negotiation with Sea Gate enabled L.E.E.B.A. to improve on the contract award and secure increased starting pay for Sea Gate officers and an overall wage and benefit increase. In its short duration L.E.E.B.A. has represented all of its members in grievances, disciplinary cases, arbitrations and most tellingly has just completed the first ever interest arbitration with the City of New York for DEP officers in their nearly one-hundred year labor history. That L.E.E.B.A has over the years suffered some setback on certain cases handled by varying counsel it has employed does not reflect on its otherwise successful history. To draw a simple analogy, it would be unfair to state that an attorney who handles a case or two and has an adverse decision rendered is a "marginally successful" attorney. Yet the Employer would engage in a type of

character assassination aimed at L.E.E.B.A. rather than focus on the facts of the case at hand. The success of L.E.E.B.A. and its reputation for fair dealing and standing up for its members is evident in the number of approaches it has entertained from unhappy employees in the security and law enforcement field seeking to either unionize or abandon their present unions.

The Employer cannot craft out of thin air what does not exist especially when the time and place for making its case was at the hearing where concrete evidence and factual proof could have been presented. The problem with the Employer's case was that there was no "smoking gun", the facts uncovered were not what they hoped them to be – instead, the facts indicated that L.E.E.B.A. did not have any non-guard members, the Putnam Nurses Association no longer existed and when it did exist it was an organizing effort not a "labor organization", and that the United Steel Workers and L.E.E.B.A. had no coordinating efforts to organize the unit of security guards at the Sands Casino. The Employer is now attempting to stretch the fabric of its lies and insinuations to create an issue where none exists and waste the same valuable Board resources it accuses the Petitioner of wasting in the past. The Sands Casino employees who are guards decided to unionize, they approached a guard union and exercised their First Amendment right to associate and organize, not to mention their statutory rights under the Act. These are rights which both the affected employees and L.E.E.B.A. take seriously and the vindication of which can hardly be considered a waste of the Board's time and resources.

B. The job title of locksmith at the Sands Casino Resort Bethlehem is a non-guard position and placement of the locksmith in the bargaining unit would be outside the requirements of Section 9(b)(3) that a guard union not include non-guard employees. The Regional Director's Decision was correct in the determination that the locksmith does not share a community of interest with security guards.

The Regional Director correctly found that the locksmith does not share a community of interest with guards at the Sands Casino and therefore should not be included within the group of

employees L.E.E.B.A. seeks to represent. There has been no substantial error in law or prejudice in the findings of the Regional Director sufficient to warrant review of the Regional Director's decision let alone to overturn the decision results. The irony contained in the Employer's position is that in one breath it attempts to argue Petitioner is affiliated with non-guard entities yet in another it attempts to include a non-guard member within the group Petitioner seeks to represent. Extensive testimony was provided by the Employer as to the job title of locksmith within the Sands Casino Resort Bethlehem and why the position should be included with the security guards Petitioner has petitioned to represent. The Employer's Exhibits 12 and 13 are but one example of the glaring difference between the job function of security guards at the Sands Casino and the locksmith. Employer's Exhibit 12, the Job Description Form for the Security Officer title, lists the following as the "Position Purpose": "The primary responsibility of the Security Officer is to provide for the safety and protection of guests, team members, and company property." Toward that goal the "Specific Position Requirements" provided for in the "Qualifications and Physical/Mental Requirements" section seek "[P]rior experience in civilian or military law enforcement, casino/hotel security, or industrial security preferred." Employer's witness Holly Eicher testified that by her estimation a large number of the security officers had such prior experience but she did not know whether the locksmith had comparable experience **(R. p. 63, l. 12-22)**. Under the "Position Responsibilities" section of Employer's Exhibit 12 the security officer position has the following significant security responsibilities:

- Execute emergency response and evacuation procedures as directed by the manager.
- Monitor and assist in the enforcement of casino policies and procedures, federal, state and local laws.

- Patrols and/or periodically inspects assigned areas constantly on the lookout for undesirable persons whose presence on the property is not considered to be in the best interest of the hotel/casino management or its guests.
- Investigates all incidents, accidents, and/or events to include: taking initial report and conducting interviews with appropriate follow-up.
- Maintains a visible and accessible profile among casino guests and team members to create a sense of security, to deter potential problems, and to answer questions.
- Monitors suspicious persons in the hotel/casino, particularly those attempting to enter an unauthorized area. At the discretion of the shift manager, trespass undesirables and troublemakers.

None of the above listed position responsibilities are on Employer's Exhibit 13 the Job Description Form for Locksmith. In fact the "Position Responsibilities" listed on Employer's Exhibit 13 for the position of locksmith relate to the technical function of maintaining, repairing, and installing lock systems and mechanisms all in keeping with the "Position Purpose" to "provide lock services to ensure the safety and protection of guests." Again, Employer witness Holly Eicher testified that from the job description the locksmith's function in providing safety and protection was limited to providing these lock services **(R. p. 51, l. 25-p. 52, l. 12)**. This is not a job title that by its description is even closely related to the position of security officer.

Security officers at the Sands Casino are called upon at times to deal with and eject unruly customers from the casino **(R. p. 47, l. 25-p. 48, l. 20)**. Even though Employer's witness Ms. Eicher testified that the locksmith received the same CPR training as the security officers she was unable to testify as to whether the locksmith also received the use of force training the security officers receive under the Sands Casino training guidelines **(R. p. 48, l. 21-p. 49, l. 12)**.

Similarly, Ms. Eicher was unable to state the starting salary of shift supervisors for comparison with that of the locksmith and yet had the temerity to state there was a slight difference in the starting salaries of a locksmith and a security officer **(R. p. 42, l. 18-p.43, l. 4; p. 38, l. 17-21)**. The "slight difference" she acknowledged on cross-examination amounted to nearly $12,000.00 a year more in starting salary for the locksmith **(R. p. 43, l. 15-p. 44, l. 7)**. The testimony cited above was disingenuous given the witness' position as Vice President and General Counsel at Sands Casino Resort Bethlehem, her responsibility for risk management and liability concerns and her daily contact with members of the security department **(R. p. 31, l. 8-21)**. If there was any witness testimony that tested the bounds of credibility it was that of Employer's witness Ms. Eicher who either tailored her testimony to fit her purpose ("slight difference" in guard and locksmith salaries) or conveniently forgot or did not know key aspects of each positions job duties (unaware if locksmith received use of force training). Again, these are not difficult or obscure questions relating to the role of the locksmith, especially when put to the individual the Employer has put forth as one of their main witnesses on the issue of the locksmith being a guard. It would stand to reason that the Vice-President and General Counsel of the Sands Bethlehem Casino and the person who handles liability and risk assessment and management issues would have an answer to these questions. What is more likely is that the answer did not fit into the Employer's overall theory of its position. The differences between the two job descriptions and functions is glaring, there is no approximation to any of the other's job duties or qualifications. The pay scale alone is determinative of the issue since the Employer has set the locksmith into a completely different pay scale which is significantly higher than that of the guards L.E.E.B.A. seeks to represent. *See eg., Westinghouse Electric Corporation, 96 NLRB 1250 (1951).*[2]

[2] The Board in *Westinghouse* used rate of pay and benefits, among other criteria, for determining a policeman-

Additional distinctions between security officers and the locksmith are in the reports submitted by each position, the hours worked – Monday through Friday 7:00 a.m. – 3:00 p.m. for the locksmith and around the clock shifts for security officers – and in the fact security officers wear badges and a distinct uniform while the locksmith does not **(R. p. 36, l. 20-23, p. 37, l. 19-21; p. 44, l. 16-p. 45, l. 7; p. 45, l. 15-18; p. 62, l. 3-p. 63, l. 11)**. That an employee does not wear a badge or a typical guard uniform has been taken into consideration by the Board in determining that the employee is not a guard. *See eg., Union News Co., 112 NLRB 584 (1955); Fisher-New Center Co., 170 NLRB 909 (1968).* Since the casino's opening in 2009 the locksmith has not been called upon to work a post which is a daily function of a security officer **(R. p. 63, l. 6-8)**. Instead he has a "locksmith shop where his tools and equipment are located" **(R. p. 60, l. 14-15)**.

Employer's third witness, Fred Kraus from the Venetian Resorts, LLC in Las Vegas, testified at length as to the regulatory controls placed on the casino by the Pennsylvania Gaming and Control Board. The bulk of his testimony went merely to the different aspects of Employer's Exhibits 17 and 18 wherein there was mention of a locking mechanism or control over some function of a gaming device or internal control measure. Other than the general organizational requirements for a casino found in Exhibit 17 which included a security department, the Employer's Exhibits 17 and 18 contained mainly information relating to casino accounting integrated control systems **(R. p. 115, l. 20-p. 118, l. 1)**. Nothing in Mr. Kraus' testimony indicated a similarity in the "Specific Position Requirements" for a security officer found in Employer's Exhibit 12 and the position of locksmith. In fact, on cross-examination Mr. Kraus indicated differences in the responsibilities of the two positions in an area such as

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receptionist was a guard and to be included in the representative unit of guards.

guarding the fill slip, a responsibility of security officers but not the locksmith **(R. p. 105, l. 9-18)** and in maintaining locks that are part of the casino accounting security system, responsibility of the locksmith but not a security officer **(R. p. 111, l. 1-4)**. Mr. Kraus' testimony was of a technical nature dealing more so with the internal control mechanisms the casino must have in place for accountability and auditing functions as required by the Pennsylvania Gaming Commission.

The fact that the locksmith comes under the security department in the Employer's organizational structure and that the Employer likens the position to that of a security officer does not make the employee a guard requiring inclusion in the group Petitioner seeks to represent. A secretary in a security department can come under the department's organizational structure but his/her clerical duties within the security department do not make them a guard. *See eg., Wolverine Dispatch Inc., 321 NLRB 796 (1996).* Section 9(b)(3) of the Act defines a guard as "any individual employed...to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer's premises." Employees who perform some guard-like duties that are "incidental" to their other duties are not guards under Section 9(b)(3). *Wolverine Dispatch Inc.; 55 Liberty Owners Corp., 318 NLRB 308 (1995).* There is nothing that was presented in Employer's case to indicate the locksmith performs any of the functions of a security guard as outlined in Employer's Exhibit 12 "Job Description Form." Even assuming there is some cross-over function it is incidental to the locksmith's main craft skill of repairing, constructing and maintaining locks and lock systems. As such the locksmith is not a guard and should not be included in the unit of guards Petitioner seeks to represent based on these incidental duties and the positions otherwise indirect duties toward protection of the Employer's property or that of the Employer's customers. *Courier*

Dispatch Group, 311 NLRB 728, 733 (1993); Purolator Courier Corp., 300 NLRB 812, 814 (1990).

IV. CONCLUSION

The Board should sustain the findings of the Regional Director, that L.E.E.B.A. is a guard unit free from non-guard affiliations and that the locksmith does not share a community of interest with the Sands Casino guards and is not a guard. As a result the Board should dismiss the Employer's request for review. The results of the upcoming July 21 representation election should be certified by the Board.

DATED: July 8, 2011

The Law Office of Terrence P. Dwyer

By: Terrence P. Dwyer
Terrence P. Dwyer
Attorney for Petitioner
Law Enforcement Employees
Benevolent Association

AFFIRMATION OF SERVICE

TERRENCE P. DWYER, an attorney duly admitted to practice before the Courts of the State of New York and the Federal Courts, affirms, pursuant to Rule 2106 of the Civil Practice Law and Rules, and under penalty of perjury, and in compliance with Federal Rules of Civil Procedure Rule 5(b)(2), that on July 8, 2011, I served the annexed PETITIONER STATEMENT IN OPPOSITION on:

Matthew T. Wakefield, Esq.
Ballard, Rosenberg, Golper and Savitt, LLP
1200 New Hampshire Avenue NW
Third Floor
Washington, D.C. 20036

Said address being designated by the party for service, by depositing a copy of the same, enclosed in a post paid wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service within the State of New York. Service was also made to Matthew T. Wakefield, Esq., counsel for Employer via e-mail at mwakefield@brgslaw.com.

DATED: Poughkeepsie, New York
July 8, 2011

Terrence P. Dwyer

Terrence P. Dwyer

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