

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**NEWARK EXTENDED CARE,**

**Employer,**

**- and -**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NEW JERSEY REGION,**

**Petitioner,**

**- and -**

**Case No. 22-RC-13203**

**LOCAL 707, H.E.A.R.T.,**

**Intervenor.**

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**1199 SEIU'S OPPOSITION TO LOCAL 707'S  
EXCEPTIONS TO THE ALJ'S DECISION**

Petitioner, 1199 SEIU United Healthcare Workers East, New Jersey Region ("Petitioner" or "1199 SEIU"), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this answering brief in opposition to the Exceptions filed by Intervenor Local 707, H.E.A.R.T. ("Intervenor" or "Local 707") and in support of Administrative Law Judge Steven Davis' recommended decision that all of Intervenor's Objections to the election be overruled.

1199 SEIU won the April 14, 2011 election by the wide margin of 130 to 78 (Local 707), with one ballot cast against both unions and with three non-determinative challenged ballots. On May 19, 2011, the Regional Director directed that a hearing be held on Intervenor's Objections 1-3 and 5-7 to the April 14, 2011 representation election, and granted Intervenor's request to withdraw Objection 4. Administrative Law Judge Steven Davis ("ALJ") conducted a hearing on July 5, 6, and 7, 2011. On August 2, 2011, the ALJ issued his

Recommended Decision on Objections (“ALJD”). On August 12, 2011, Intervenor filed Exceptions to the ALJD.

At the hearing, much of the evidence presented by Local 707 related to the conduct of employees or other third parties. In order to prevail on Objections based on third party conduct, the conduct “must be so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible.” *Cal-West Periodicals, Inc.*, 300 NLRB 599 (2000). *See also Accubuilt, Inc.*, 340 NLRB No. 161 (2003).

With regard to party conduct, the Board applies an objective standard for evaluating a party’s conduct during the critical pre-election period. In order to prevail, the objecting party must establish that the conduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991), citing *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986). In deciding whether interference affecting the results of an election has occurred under this standard, the Board considers the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they are likely to cause fear among bargaining unit employees; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the eligible employees; (6) the extent of dissemination of the misconduct among eligible employees; (7) the closeness of the final vote; and (8) the size of the voting unit. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004).

1199 SEIU won the election by a large margin, 130-78 (with only three non-determinative challenged ballots). In order to prevail on its Objections, Intervenor carried the burden of establishing that objectionable conduct was disseminated among a sufficient number of employees as to affect the outcome of the election. *Cornell Forge Co.*, 339 NLRB 733 (2003).

Here, even if the alleged conduct had been proven—which it was not—any alleged conduct was de minimus at best, affecting very few employees, and was not sufficiently disseminated.

Finally, Intervenor’s Exceptions are frivolous and either unsupported by any record evidence or law or flatly contradicted by the record. The Board should reject Intervenor’s Exceptions and fully adopt the recommended decision of the ALJ for the reasons discussed below.

### **Exception 1**

Exception 1 deals with the sixth allegation/paragraph of Intervenor’s Objection 7. This Objection alleged, in relevant part, that 1199 distributed a campaign leaflet that misrepresented a U.S. Department of Labor audit report citing bookkeeping violations committed by Local 707. ALJD 17; Int. Ex. 18.<sup>1</sup> Local 707 asserts that the ALJ misapplied Board law in evaluating the leaflet at issue. This Exception is wholly without merit, as the ALJ correctly noted that under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board does not probe into the truth or falsity of campaign statements and will not set aside an election on the basis of misleading or false campaign statements, except in cases of forgery that preclude employees from recognizing campaign propaganda for what it is. *Id.* at 131-33. Here, there is no allegation, evidence, or likelihood that unit employees viewed or would have viewed the relevant leaflet as anything but a piece of 1199 campaign propaganda. The ALJ therefore properly found the leaflet to be unobjectionable.

Even assuming *arguendo* that the leaflet were somehow found to be objectionable, Local 707 presented no evidence that it was drafted, issued, or distributed by

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<sup>1</sup> Numbers preceded by “Bd. Ex.,” “Int. Ex.” and “Pet. Ex.” refer to the exhibits of the Board, Local 707, and 1199 SEIU, respectively. Page references preceded by “Tr.” are to the official transcript of the hearing held on July 5, 6 and 7, 2011.

agents of Petitioner. Moreover, the record is unclear as to how many unit employees viewed or heard about the leaflet. For all of the foregoing reasons, Exception 1 should be rejected.

## **Exception 2**

In Exception 2, Local 707 complains about the ALJ's treatment of David Serrano. This Exception relates to Intervenor's first Objection, which arguably alleges, in part, that agents of Newark Extended Care ("NEC" or "Employer") (campaigns for Petitioner. First, the record evidence fully supports the ALJ's finding that Serrano was not an Employer agent, but rather merely worked in the Employer's gift shop and performed handyman tasks, messenger work, and other errands. Tr. 54-55, 289, 297; ALJD 18. Since Intervenor failed to meet its burden of establishing Serrano's status as a supervisor or agent of NEC, his remark at issue is irrelevant and does not support Local 707's theory that NEC acted unlawfully to assist Petitioner.

Even assuming *arguendo* that Serrano was an Employer agent, Serrano's remark was non-coercive and unobjectionable.<sup>2</sup> In this regard, the ALJ correctly noted that an employer may lawfully prefer one union over another as long it does not engage in coercive conduct in doing so. ALJD 7 (citing *Flamingo Hilton-Laughlin*, 324 NLRB 72 fn. 1 (1997), *enf'd.* as modified 148 F.3d 1166 (D.C. Cir. 1998)); *Regency Grande Nursing and Rehab. Ctr.*, 355 NLRB No. 109 (2010), incorporating by reference *Regency Grande Nursing and Rehab. Ctr.*, 354 NLRB No. 75 fn. 7 (2009) (citing *Virginia Elec. Power Co.*, 260 NLRB 408, 414 (1982) (distinguishing employer's non-coercive preference for one union over another from antiunion animus)). For all of the foregoing reasons, Exception 2 should be rejected.

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<sup>2</sup> Serrano stated, "[s]ome reason why some of the staff was not voting for 707 is because they like 1199, they, they want they [sic] 1199 pension, because 1199 staff told them they were going to lose it if they don't vote for 1199. Because she [sic] say he receiving his and a couple of housekeeping guys receiving theirs and they might lose it." Tr. 54-55.

### **Exception 3**

In Exception 3, Local 707 asserts that the ALJ improperly ignored “the totality of the violations” committed by the Employer or, in other words, the cumulative impact of various instances of overt Employer support for 1199. This Exception is wholly without merit, as the ALJ properly found that Local 707 failed to prove any individual “violation(s)” or instance(s) of the Employer providing objectionable support (or even any support) to Petitioner. In this Exception, Local 707 first asserts (in part (a) of this Exception), without any explanation or elaboration, that Petitioner’s agents made reference to the Employer’s purported desire to avoid further withdrawal liability to the SEIU Pension Fund. As the ALJ correctly noted, this was one of the subjects of Local 707’s original Objection 4, which it withdrew prior to the hearing. ALJD 18. Further, as the ALJ also noted, 1199 SEIU representative Rickey Elliott denied saying anything about the Employer’s withdrawal liability. *Id.* Moreover, even had the ALJ made a determination to discredit Elliott’s testimony, which he did not, any campaigning by Petitioner about the Employer’s alleged desire to avoid withdrawal liability does not prove or even tend to establish that the Employer provided objectionable support to Petitioner.

Local 707 next asserts (in part (b) of this Exception) that the ALJ ignored evidence that the Employer delayed scheduling grievances with Local 707 in order to support 1199 SEIU. The ALJ, however, properly found that Local 707 failed to offer into evidence its grievance procedure (or testimony describing it), making it impossible to determine whether the procedure had been delayed. ALJD 6. As discussed in detail below (in Petitioner’s response to Exception 4), the record also fully supports the ALJ’s finding that the Employer’s alleged dilatory tactics took place prior to the critical pre-election period (and even prior to 1199’s arrival on the scene) and thus cannot, as a matter of law, serve as the basis for objectionable conduct. *See Ideal Elec. Mfg. Co.*, 134 NLRB 1275 (1961); *Novotel New York*, 321 NLRB 624,

639, fn. 68 (1996); *Accubuilt, Inc.*, 340 NLRB No. 161 (2003); *Gibraltar Steel Corp.*, 323 NLRB No. 100 (1997) (it is the objecting party's burden to establish that objectionable conduct occurred during the critical period); *Int'l Ship Repair & Marine Servs.*, 329 NLRB No. 27 (1999). Moreover, as the ALJ found, the record evidence shows that once 1199 SEIU's petition was filed, the Employer ceased engaging in delay tactics. The evidence thus completely undermines Intervenor's contention that NEC acted to further the interests of Petitioner in the election. ALJD at 6-7.

Local 707 additionally asserts (in the final part (c) of this Exception) that the ALJ ignored evidence of the conduct of Employer agents (namely the security guard, "gift shop manager," and "supervisors") on election day. First, for the reasons set forth in detail below in relation to Exception 6, the ALJ correctly concluded that security guard Victoria Oyerinde did not engage in objectionable conduct. Similarly, as set forth above regarding Exception 2, the ALJ properly concluded that the comment made by David Serrano did not constitute objectionable conduct. Finally, in its Exceptions and brief supporting its Exceptions, Intervenor does not cite or specify any other election day supervisor conduct and, regardless, the record is devoid of any other election day Employer conduct that is even arguably objectionable. For all of the foregoing reasons, Exception 3 should be rejected.

#### **Exception 4**

In Exception 4, Local 707 again asserts that the ALJ erred in not finding that the Employer delayed the grievance procedure in order to support 1199. As the ALJ properly found, the evidence does not support Intervenor's contention that NEC acted to further the interests of Petitioner in the election.

Local 707 replaced 1199 SEIU as the collective bargaining agent for the Employer's employees in early 2008. Tr. 139, 322. Local 707 and NEC promptly reached

agreement on their initial collective bargaining agreement. Tr. 422, 426-27; Pet. Exs. 9, 10. Labor relations between Local 707 and NEC took a turn for the worse in early 2009. Tr. 322-323, 411-12. The first contentious issue, payment of a wage increase, was resolved by an arbitrator's award on December 1, 2009. Tr. 324-25, 411-12, 458; Pet. Ex. 1.

Another contentious issue that came to the forefront in 2009 was that of unpaid health insurance bills. Tr. 412. NEC and Local 707 held a joint meeting for unit employees with the health insurance provider in late 2009 or early 2010, in an attempt to resolve employees' insurance problems. Tr. 413. While some of the insurance issues were quickly resolved, the insurance problems did not cease and instead got progressively worse beginning in the spring of 2010. Tr. 335-36, 413-14. A second joint meeting was held later in 2010 with NEC, Local 707, the insurance provider, and employees. Tr. 459-60. Upon Intervenor's request, Local 707 and the Employer held a third joint meeting with employees and the insurance provider on February 14, 2011—three weeks after 1199 SEIU filed its representation petition and two months prior to the election. Tr. 414; Pet. Ex. 2. On March 11, 2011, Local 707, following up on a February 18, 2011 discussion with NEC, submitted additional medical bills to NEC. Int. Ex. 23. On March 20, 2011, Local 707 President Odette Machado agreed to give the Employer additional time to try to resolve the health insurance problems. Tr. 415; Pet. Ex. 3. On March 29, 2011, Local 707 amended the health care grievance that it had initially filed. Tr. 415-16; Pet. Ex. 4. On April 12, 2011, prior to the election, the Employer provided Local 707 with detailed written responses (some positive and some negative) to all of the employee health insurance bill problems. Tr. 416; Pet. Ex. 5. Machado conceded that for the most part, the Employer addressed the employees' ongoing health insurance grievances in a timely fashion. Tr. 333, 346, 374; 459.

Aside from the wage increase and health insurance issues discussed above, the Employer began to drag its feet with respect to grievance handling shortly after the raise issue

surfaced in 2009. Tr. 326, 328-29. Labor relations improved in May 2010. Tr. 343-44. In September, October and November of 2010—months before the start of the critical period and months prior to 1199 SEIU’s arrival on the scene—Local 707 again had difficulties scheduling several grievance meetings with the Employer. Tr. 344, 396, 416-17, 446-47. In February 2011, the Employer stopped dragging its feet and resumed scheduling grievances. Tr. 448. On February 28, 2011, Local 707 and NEC held a Labor-Management meeting, prior to which Machado sent the Employer a proposed agenda for the meeting. Tr. 435-36; Pet. Ex. 12. The very next day, the Employer responded to Machado and resolved several of the issues proposed by Local 707. The Employer also provided Machado with a schedule to hold seven grievance hearings by the end of first week of March 2011. Tr. 435-37; Pet. Ex. 12. The Employer continued to process grievances during the months of March and April 2011. Tr. 453. On April 11, 2011, Local 707 and NEC had a Labor-Management meeting. Two days later, prior to the election, the Employer responded to grievances that had been discussed at the meeting. Tr. 435; Pet. Ex. 11.

This evidence clearly shows that during the critical period, NEC worked to resolve issues with Local 707 and in no way created an environment that was hostile to Intervenor and friendly to Petitioner. For the foregoing reasons, Exception 4 should be rejected.

**Exception 5**

In this Exception, Local 707 argues that the ALJ erred in finding the conduct of Marie St. Louis unobjectionable. The ALJ correctly noted that while Local 707 presented testimony suggesting that St. Louis played favorites when handing out assignments, the evidence showed that her practice of doing so well pre-dated the critical period and had nothing to do with Petitioner or its campaign. ALJD 10; Tr. 91, 139-40, 163. For example, Carol Sheffield experienced scheduling difficulties with St. Louis as far back as 2008. Tr. 164. Similarly,

documentary evidence relied upon by Local 707 pre-dated the filing of the petition. Tr. 301-04. Int. Ex. 15. Carol Sheffield also testified that 1199 SEIU supporter D. Hood received favorable treatment from St. Louis, but later recanted her testimony, stating, "I'm not saying that she received favorable treatments [sic] from St. Louis." Tr. 145, 167. Regardless and as the ALJ noted, the evidence does not establish that St. Louis had any knowledge of employee Hood's alleged support for 1199 SEIU. ALJD 10; Tr. 167. Moreover, Besse Thompson testified that St. Louis gave favorable assignments to her friends and other people that she likes, including Haitians, Hispanics, and Americans. ALJD 10; Tr. 265-66, 298-99.

Similarly, as the ALJ noted, while there is evidence indicating that St. Louis may not have done a great job of communicating with all employees on the evening shift and/or with Local 707's leadership, it is a stretch to suggest that she abused her position as Local 707 delegate and sabotaged the grievance process. Local 707 presented evidence that a couple of employees on the evening shift had health insurance problems which St. Louis failed to report to the delegate body. Even if true, St. Louis was not the only Local 707 delegate on the evening shift. Further, several of the day shift delegates worked schedules that overlapped with the 3-11 shift and/or worked overtime on the 3-11 shift. As such, the Local 707 day shift delegates and the other evening shift delegate, like St. Louis, had the opportunity to communicate with evening shift employees and bring their issues to Local 707's leadership and/or the Employer.

Moreover, as the ALJ noted, on several occasions during the critical period, several Local 707 delegates from the day shift and its president stayed into the evening to talk with and campaign amongst the evening shift employees. On these occasions, these Local 707 agents learned that a couple of evening shift employees had health insurance problems and referred them to the appropriate avenue to address these issues. Finally, as set forth above in response to Exception 4, Local 707 and the Employer held another joint meeting at NEC to

resolve billing problems with employees (including evening shift employees) and the health insurance provider on February 14, 2011. Tr. 414; Pet. Ex. 2. St. Louis' conduct in failing to report a couple of health insurance issues thus hardly sabotaged the grievance process.<sup>3</sup> For all of the reasons cited above, Exception 5 should be rejected.<sup>4</sup>

### **Exception 6**

In Exception 6, Intervenor states that the ALJ erred in treating the Employer's security guard, Victoria Oyerinde, as a third party. Intervenor offers no record evidence, authority or supporting statements for Exception 6. Similarly, at the hearing, Intervenor presented no probative evidence that Oyerinde was an agent of the Employer. Rather, the record shows that Oyerinde was employed by Esteem Patrol, Inc., an outside contractor. Tr. 466. As the ALJ noted, even Local 707 President Odette Machado testified that Oyerinde was not carrying out the Employer's position on the day of the election and that there is no evidence that Oyerinde was acting on the Employer's instructions on election day. ALJD 13; Tr. 440, 455. As it was Intervenor's burden to prove agency status and given the lack of any evidence suggesting Oyerinde was an Employer agent, the ALJ did not err by treating Oyerinde as a third party.

Even if Oyerinde was an agent of the Employer (which was not proven), as the ALJ correctly stated, an employer may permissibly express, in a noncoercive manner, a

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<sup>3</sup> In its brief supporting its Exceptions, Intervenor alleges that "St. Louis spearheaded a campaign improperly based on ethnicity and nationality, securing the Haitian vote for Local 1199." The brief also alleges that St. Louis and others stated, "if you are Haitian, you must vote for Local 1199." The record evidence, none of which is specifically cited by Intervenor, does not at all support these two allegations.

<sup>4</sup> The ALJ improperly considered St. Louis an agent of the Employer and/or 1199 SEIU when, in fact, she was an active Local 707 delegate and agent at all relevant times. This error did not impact the outcome of this case, as it was beneficial to Intervenor. However, this finding should not be affirmed, as it is devoid of any factual or legal basis. It is well-established that the Board will not entertain objections to an election based on the objector's own wrongdoing. *Camp Milling Co.*, 109 NLRB 471 (1954); *General Dynamics Corp.*, 181 NLRB 874, 875 (1970).

preference for one union over another. ALJD 13 (citing *Flamingo Hilton-Laughlin*, 324 NLRB 75 fn. 1 (1997)). Finally, the ALJ correctly found that Intervenor failed to prove dissemination of the alleged statement amongst enough unit members to have impacted the outcome of the election. For the foregoing reasons, Exception 6 should be rejected.

### **Exception 7**

In Exception 7, Intervenor states that the ALJ erred in attributing inconsistent testimony to Odette Machado regarding receipt of a restroom key. No such error exists.

Machado testified on direct examination that she obtained the restroom key from the security guard but later, on rebuttal, stated to the contrary that she had received the key from Local 707 delegate Jacqueline Allen. Tr. 387, 527-28. Allen's testimony also contradicted Machado's testimony on direct examination. Indeed, it is the Board's established policy not to overrule a hearing officer's credibility resolution unless the clear preponderance of all the evidence demonstrates that the finding was incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). The record evidence amply supports the ALJ's discrediting of Machado.

Intervenor also attempts to question Oyerinde's credibility by drawing inferences where there are none and relying on entirely conclusory statements. Indeed, the ALJ correctly found Oyerinde's actions in asking Machado to leave the building proper, as she was acting on both Board agent Flores' and the Employer's requests. ALJD 12. As established, not only was Machado's testimony regarding an alleged statement by Oyerinde not credible, Intervenor failed to prove dissemination of the alleged statement.<sup>5</sup> Finally, Oyerinde consistently testified, including under lengthy and persistent cross-examination, that she brought Board agent Flores

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<sup>5</sup> Even had dissemination been proved, Oyerinde's alleged conduct was not objectionable because, as discussed above in response to Exception 6, she was not a party agent nor was her conduct coercive.

and Local 707 agents to the break room and that Flores called her back to the break room for assistance with the door, all before the election started.

For the foregoing reasons, Exception 7 should be rejected.

### **Exception 8**

In Exception 8, Intervenor states that the ALJ erred in finding that Petitioner did not violate the no-electioneering rule by parking its van where it was visible from the break room, and by stating that only two voters saw the bus from the election area. As an initial matter, the ALJ correctly noted that Intervenor misstates the well-established “no-electioneering rule” under *Peerless Plywood*, which is inapplicable to the parking of the 1199 SEIU van. Further, the ALJ correctly stated the law that the parking of a union RV bearing the union’s banner, where it was clearly visible to anyone entering the premises to vote, is unobjectionable.

Intervenor failed to meet its burden of proving that the 1199 SEIU van was visible from the election area during voting hours.<sup>6</sup> As the ALJ noted, and even fully crediting the testimony of Local 707’s witnesses, Intervenor did not prove any dissemination so as to have impacted the outcome of the election. Intervenor appears to claim that testimony that two voters saw the van from the voting area established dissemination, ignoring well-established law that the Board does not simply presume dissemination. *See Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004); *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999). For the foregoing reasons, Exception 8 should be rejected.

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<sup>6</sup> 1199 SEIU respectfully refers the Board to pages 17-22 of Petitioner’s Post-Hearing Brief to the ALJ on Intervenor’s Objections to the Election, a copy of which is attached hereto for the Board’s convenience.

## Exception 9

In Exception 9, Intervenor states that the ALJ erred in finding that it was the Employer's responsibility to regulate conduct outside the election area and by not stating why the wearing of union paraphernalia in the election area was unobjectionable. Intervenor persists in relying on its misunderstanding of the *Peerless Plywood* rule, which specifically bans campaign speeches to groups of employees on company time within twenty-four hours of the start of an election, and not simply "campaign[ing] within 24 hours of the election." As the ALJ properly found, there was no evidence that there were any speeches by 1199 to employees within twenty-four hours of the election.

Even if Intervenor had proven instances of objectionable conduct, which it did not, Intervenor complains that the ALJ attributed responsibility to regulate conduct outside the election area to the Employer. However, Local 707's own President, Machado, testified that Board agent Flores was only concerned with the election area, and not with the remainder of the Employer's premises or beyond. Tr. 371-372.

Nor did Intervenor offer any probative evidence of the improper wearing of union paraphernalia in the election area. The ALJ properly noted that an 1199 representative who was neither an observer nor an employee wore a jacket bearing the union insignia, and Machado's testimony placed the representative in the voting area only during the pre-election conference. Tr. 525. Not only does Intervenor fail to provide authority that this constitutes objectionable conduct, to the contrary, the Board has refused to set aside an election even where *employees* have worn union t-shirts in the election area—let alone one union representative who is neither an employee nor an observer. See *Decible Products, Inc.*, 267 NLRB 1053 (1983).

Intervenor's further complaints have no basis. Despite the ALJ's carefully reasoned account of the facts and analysis, Intervenor merely insists that non-objectionable

and/or unproven conduct prevented the exercise of free choice. First, despite numerous attempts at the hearing, Intervenor failed to present any evidence through either photographs or testimony that the location of the 1199 SEIU van impacted the outcome of the election. Second and as stated above, given Machado's statement that Flores was not concerned with any area outside of the election area, the ALJ properly discredited Machado's testimony that Board agent Flores directed 1199 SEIU to move its van. Third, Intervenor proffered insufficient evidence that 1199 SEIU unlawfully campaigned on election day through the use of union paraphernalia or otherwise. Intervenor merely fishes for objectionable conduct where none exists.

For the foregoing reasons, Exception 9 should be rejected.

#### **Exception 10**

Similar to Exception 3, Exception 10 states that the ALJ failed to consider the conduct of 1199 SEIU supporters together with that of Employer agents and 1199 SEIU staffers on election day. Intervenor again fails to cite to any law or record evidence. Instead, Intervenor feebly attempts to sideline its own failure to prove dissemination of any allegedly objectionable conduct amongst enough unit members to have impacted the outcome of the election, as well as its failure to sufficiently prove improper acts by Employer agents or 1199 SEIU staffers.

Without any basis, Intervenor states that 1199 SEIU supporter conduct on election day was related to delayed grievances, withdrawal liability, and the pension fund. As established above, no objectionable electioneering by 1199 SEIU supporters or agents occurred on election day. As such, the ALJ properly found that all of Intervenor's Objections have no merit and should be overruled.

## Conclusion

For the foregoing reasons, as well as those cited in the ALJD and Petitioner's Post-Hearing Brief to the ALJ on Intervenor's Objections to the Election,<sup>7</sup> 1199 SEIU respectfully requests that the Board overrule all of Intervenor's Exceptions and fully adopt the ALJ's findings (except as noted in footnote 4 herein), conclusions and recommendations.

Respectfully submitted,

s/ William S. Massey

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Attorneys for Petitioner 1199 SEIU

Dated at New York, New York  
this 23<sup>rd</sup> day of August, 2011

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<sup>7</sup> Given the lack of merit of the Intervenor's Exceptions, 1199 SEIU has addressed the Exceptions in brief herein. To the extent the Board seeks a detailed account of the issues in the hearing, 1199 SEIU respectfully refers the Board to Petitioner's Post-Hearing Brief to the ALJ on Intervenor's Objections to the Election.

**CERTIFICATE OF SERVICE**

1199 SEIU's Answering Brief to the National Labor Relations Board is being electronically filed today (August 23, 2011) with the Board. A copy of this brief has been served today via email to Intervenor's counsel as follows:

Thomas Rubertone, Jr., Esq.

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s/ William S. Massey  
William S. Massey

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**PETITIONER’S POST-HEARING BRIEF TO THE ADMINISTRATIVE  
LAW JUDGE ON INTERVENOR’S OBJECTIONS TO THE ELECTION**

Petitioner, 1199 SEIU United Healthcare Workers East, New Jersey Region (“1199 SEIU”, “Local 1199” or “Petitioner”), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this brief in support of its position that the Objections to the Election filed by Local 707, H.E.A.R.T. (“Local 707” or “Intervenor”) should be dismissed in their entirety.

1199 SEIU won the April 14, 2011 election by the wide margin of 130 to 78 (Local 707), with one ballot cast against both unions and with three non-determinative challenged ballots. In a Report on Objections and Notice of Hearing dated May 19, 2011, the Regional Director directed that a hearing be held on Intervenor’s Objections 1 through 3 and 5 through 7.<sup>1</sup> The

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<sup>1</sup> Local 707 withdrew Objection 4 on May 12, 2011. Report on Objections and Notice of Hearing

remaining Objections should be dismissed as Local 707 has failed to provide any probative evidence to support its allegations that Newark Extended Care Facility (“NEC” or “the Employer”), 1199 SEIU, or any employees engaged in objectionable conduct during the critical pre-election period, January 25, 2011, when the petition was filed, through April 14, 2011, the date of the election.

It is well settled that representation elections are not lightly set aside. There is a strong presumption that ballots cast express employees’ true desires. Accordingly, the burden of proof placed on a party seeking to set aside an election is a heavy one. *Delta Brands, Inc.*, 344 NLRB 252-253 (2005). The burden of proof on objecting parties is particularly heavy where the margin of victory is significant. *Avis-Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986); see also *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002) (the Board overruled the hearing officer’s recommendation where the hearing officer failed to sufficiently take into consideration the margin of victory in the election).

Much of the evidence presented by Local 707 related to the conduct of employees or other third parties. In order to prevail on objections based on third party conduct, the conduct “must be so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible.” *Cal-West Periodicals, Inc.*, 300 NLRB 599 (2000).<sup>2</sup> See also, *Accubuilt*,

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at 3, n.2; Bd. Ex. 1.

<sup>2</sup> Unlike with the delegates of Local 707, there is no basis for finding any of the Employer’s employees to be agents of 1199 SEIU. There is no evidence that 1199 SEIU, during the critical period, had an organizing committee, a delegate body, or any other shop steward or leadership structure that its employee supporters could join. Even had evidence been presented that employees accused of wrongdoing were members of an 1199 SEIU organizing committee, their conduct could not be attributed to 1199 SEIU under an agency theory unless it were established that 1199 SEIU authorized the alleged agent(s) to perform the act(s) in question. See, *Foxwoods Resort Casino*, 352 NLRB 771, 771-772 (2008); *Corner Furniture Discount Center*, 339 NLRB 1122, 1122 (2003).

*Inc.*, 340 NLRB No. 161 (2003).

With regard to party conduct, the Board applies an objective standard for evaluating a party's conduct during the critical pre-election period. In order to prevail, the objecting party must establish that the conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991), citing *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986). In deciding whether interference affecting the results of an election has occurred under this standard, the Board considers the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they are likely to cause fear among bargaining unit employees; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the eligible employees; (6) the extent of dissemination of the misconduct among eligible employees; (7) the closeness of the final vote; and (8) the size of the voting unit. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004).

## **Objection 1**

NEC, both independently and in collusion with Local 1199, created a hostile environment that assisted 1199 to get more votes than 707 HEART by engaging in the following Unfair Labor Practices:

Employer continuous discipline, including, suspension and discharge of workers by utilizing 1199 supporters to write statements against 707 HEART delegate and other employees;

Employer purposefully ignored the Collective Bargaining Agreement discipline and grievance provisions by delaying the grievance process and schedule of meetings to address discipline including, suspensions and discharges causing employees to be disaffected of 707 HEART;

Local 707's first Objection, set forth above, is wholly without merit for several reasons.

First, with respect to the first of the two alleged unfair labor practices, Local 707 did not present any evidence even suggesting that the Employer used 1199 supporters to write statements against Local 707 delegates or other employees. The only evidence that possibly relates to this allegation is testimony showing that employee Marie St. Louis, a delegate (shop steward) of Local 707, encouraged an unnamed employee to report to NEC management an incident of alleged ear twisting by a fellow employee, Okwuchi Onyeneho. Tr. 203-205.<sup>3</sup> Clearly there was nothing improper or objectionable about St. Louis' recommendation to the alleged victim of the ear twisting.<sup>4</sup>

The other 'unfair labor practice' alleged in this Objection is similarly without merit. Local 707 has alleged that the Employer ignored and delayed the grievance procedure contained in its collective bargaining agreement with NEC. First, it is noted that Local 707 did not offer into evidence or produce a copy of its grievance procedure (which had been subpoenaed by Petitioner prior to the hearing), on the grounds that it had been misplaced. Tr. 428-429, 443-445. When the ALJ volunteered at the hearing to reopen the record prior to the filing of briefs in order to receive into evidence the grievance procedure, counsel for Local 707 stated that he would try and obtain a copy of the grievance procedure from the Employer's counsel if he could not locate it himself. Still, Local 707 has failed to produce its own grievance procedure, even after filing its post-hearing brief. An adverse inference is thus warranted, namely that the grievance procedure, if produced, would not support this Objection. In addition to failing to produce a copy of its

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<sup>3</sup> Page references preceded by "Tr." are to the official transcript of the hearing held on July 5, 6 and 7, 2011. Numbers preceded by "Bd.," "Int." and "Pet." refer to the exhibits of the Board, Local 707, and 1199 SEIU, respectively. References to "Int. Brief" are to Local 707's post-hearing brief, which it filed prior to the due date.

<sup>4</sup> Local 707's Carlette Parker testified that she, like St. Louis, would have urged the alleged victim to report the incident to the Employer. Tr. 255-256.

grievance procedure, Local 707 failed to present detailed or credible witness testimony concerning the various steps of the grievance and arbitration procedure. Even Local 707's president, Odette Machado, could not describe its grievance procedure with any specificity or confidence. Tr. 422-425. The record is therefore largely devoid of specific evidence concerning the time limitations, if any, for investigating possible grievances, filing grievances, amending grievances, scheduling grievance meetings, holding such meetings, the parties' obligation to follow up or respond following grievance meetings, processing grievances to the next step of the procedure, etc.<sup>5</sup> Local 707 is therefore unable to meet its heavy burden of proof.

Second, Local 707's request that the election be set aside due to NEC's frustration of the grievance procedure must be rejected on the additional grounds that the Employer's alleged dilatory tactics took place prior to the critical pre-election period, and thus cannot, as a matter of law, serve as the basis for objectionable conduct. See *Ideal Elec. Mfg. Co.*, 134 NLRB 1275 (1961); *Novotel New York*, 321 NLRB 624, 639, fn. 68 (1996); *Accubuilt, Inc.*, 340 NLRB No. 161 (2003); *Gibraltar Steel Corp.*, 323 NLRB No. 100 (1997) (it is the objecting party's burden to establish that objectionable conduct occurred during the critical period); *Int'l Ship Repair & Marine Services*, 329 NLRB No. 27 (1999).

Moreover, the record evidence reflects that once 1199 SEIU's petition was filed, the Employer ceased engaging in delay tactics. The evidence thus completely undermines Intervenor's assertion that NEC acted to further the interests of Petitioner in the election; rather, it suggests the opposite. Finally, even considering the whole period from the certification of

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<sup>5</sup> The record does reflect, however, that Local 707 did have the right, if the Employer failed to timely respond to a grievance, to process the grievance to the next step of the procedure, including to the final step of binding arbitration. Tr. 253. The record evidence also establishes that grievances are typically not resolved in an initial meeting and that follow-up and additional meetings are often required to achieve settlements. Tr. 431.

Local 707 in early 2008 through the April 14, 2011 election, there is nothing unusual or remarkable about the nature of Intervenor's labor relations with NEC. As is often the case, at various times during this period, the parties' relationship was smooth and strong; at other times, it was rocky. The parties reached agreement on many issues; other issues were never resolved. As Local 707's president conceded at the hearing, it is not at all unusual for nursing home employers to drag their feet and violate collective bargaining agreements absent union vigilance. Certainly there must have been a level of employee dissatisfaction with Local 707's administration and enforcement of its collective bargaining agreement with NEC; if not, employees would not have signed 1199 SEIU's representation petition. This dissatisfaction, however, well pre-dated the filing of 1199 SEIU's petition.<sup>6</sup>

Local 707 replaced 1199 SEIU as the collective bargaining agent for the Employer's employees in early 2008. Tr.139, 322. Local 707 and NEC promptly executed an interim agreement on July 15, 2008 that provided benefits retroactive to May 15, 2008. Tr. 422; Pet. Ex. 9. Shortly after that, on August 28, 2008, NEC and Local 707 reached agreement on their initial collective bargaining agreement. Tr. 426-427; Pet. Ex. 10. Labor relations between Local 707 and NEC went smoothly at first, but took a turn for the worse in early 2009. Tr. 322-323, 411-412. The first contentious issue was payment of a 4% wage increase that had been negotiated by the parties. Tr. 411-412, 458. That issue was submitted to binding arbitration and resolved by an arbitrator's award on December 1, 2009. Tr. 324-325; Pet. Ex. 1.

Another contentious issue that came to the forefront in 2009 was that of unpaid health insurance/medical bills. Tr. 412. NEC and Local 707 held a joint meeting for unit employees with the health insurance broker/provider in late 2009 or early 2010, in an attempt to resolve

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<sup>6</sup> 1199 SEIU began talking to and meeting with NEC employees during the first week of January 2011, and began circulating its representation petition for employees to sign during the second week of that month. Tr. 505. The representation petition was filed with the NLRB on January 25, 2011.

employees' health insurance bill problems. Tr. 413. Some of the health insurance issues were quickly resolved, namely problems with reimbursement for anesthesia and lab bills. Tr. 335. But the insurance billing problems didn't go away; instead they got progressively worse beginning in the spring of 2010. Tr. 336, 413-414. There was a second such meeting held later in 2010 between NEC, Local 707, the insurance broker/provider, and unit employees. Tr. 459:16, 460. Upon Intervenor's request, Local 707 and the Employer held a third joint meeting at NEC with unit employees and the health insurance broker on February 14, 2011, three weeks after 1199 SEIU filed its representation petition and two months prior to the election. Tr. 414; Pet. Ex. 2. On March 11, Local 707, following up on a February 18, 2011 discussion with NEC, submitted additional medical bills to NEC. Int. Ex. 23. On March 20, 2011, Odette Machado agreed to give the Employer additional time to try and resolve the health insurance problems. Tr. 415; Pet. Ex. 3. On March 29, 2011, Local 707, via Machado, amended the health care grievance that it had initially filed. Tr. 415-416; Pet. Ex. 4. On April 12, 2011, prior to the election, the Employer provided Local 707's Machado with detailed written responses to all of the employee health insurance bill problems; some of the responses were positive and some were negative. Tr. 416; Pet. Ex. 5. Although the Employer transmitted these detailed responses on April 12, 2011, Local 707 had been previously provided with some of the responses. Tr. 456-457. Machado conceded that for the most part, the Employer addressed the employees' ongoing health insurance grievances in a timely fashion. Tr. 333, 346, 374:6-8; 459:17-22.

Besides the 4% wage increase and the health insurance issues discussed above, the Employer began to drag its feet with respect to grievance handling shortly after the 4% raise issue surfaced in 2009. Tr. 326:6-15; 328-329. Labor relations improved in May 2010. Tr. 343-344:9. In September, October and November of 2010, months before the start of the critical

period, and months prior to 1199 SEIU's arrival on the scene, Local 707 again had difficulties enforcing its contract and scheduling several grievance meetings with the Employer. Tr. 344, 396:1-3, 416-417, 446-447.<sup>7</sup> In February 2011, the Employer stopped dragging its feet and resumed scheduling grievances. Tr. 448:8-10. On February 28, 2011, Local 707 and NEC had a Labor-Management meeting. Tr. 435-436; Pet. Ex. 12. Prior to the meeting, on February 22, 2011, Machado sent the Employer a correspondence that included a proposed agenda for the meeting. The very next day, February 23, 2011, the Employer responded to Machado, and resolved some of the issues that Local 707 proposed to place on the agenda for February 28. The Employer also provided Machado with a schedule to hold seven grievance hearings by the end of first week of March 2011. Tr. 435-437; Pet. Ex. 12. The Employer continued to process grievances during the months of March and April 2011. Tr. 453:5-14. On April 11, 2011, Local 707 and NEC had a Labor-Management meeting. Two days later, prior to the election, the Employer responded to grievances that had been discussed at the meeting. Tr. 435; Pet. Ex. 11. As discussed above, this evidence establishes that during the critical period, NEC worked to resolve issues with Local 707, and in no way created an environment that was hostile to Intervenor and friendly to Petitioner.

Although not alleged as part of this or any other Objection, in its brief, Local 707 asserts that (1) Employer agents campaigned for 1199 SEIU; and (2) NEC allowed unit employees to campaign for 1199 during work hours. Presumably, Intervenor makes these two assertions in an attempt to further its argument that the Employer's labor relations (grievance processing delay) tactics were out of the ordinary, and were orchestrated to assist Petitioner's campaign. In

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<sup>7</sup> Local 707 did not take any action until after 1199 SEIU filed its representation petition. On or about January 29, 2011, Local 707 filed unfair labor practice charges against NEC and two other nursing home employers in an attempt to block 1199 SEIU's petitions from being processed and to prevent employees at NEC and the other two nursing homes from voting to rejoin 1199 SEIU. Tr. 417.

support of the first assertion, Intervenor cites testimony that NEC's Ms. Elky stated in 2009, "Maybe the workers should have stayed in 1199." Int. Br. 2. This comment is unremarkable, benign, and completely unobjectionable, especially given that it was made years before the critical period.<sup>8</sup> More relevant was Ms. Elky's comment on the day of the election, "Good luck to both sides." Tr. 292-293.

Also in support of its assertion that NEC agents campaigned for Petitioner, Intervenor references testimony concerning a comment allegedly made by David Serrano on the day of the election. Int. Br. 2. Like the comment made by Ms. Elky in 2009, Serrano's remark was non-coercive.<sup>9</sup> Regardless of the nature of Serrano's remark, the record shows that he was a NEC employee, not an Employer agent. He worked in the Employer's gift shop and performed handyman tasks, messenger work, and other errands. Tr. 54-55, 289, 297. Since Intervenor failed to establish Serrano's status as a supervisor or agent of NEC, his remark at issue is completely irrelevant and does nothing to support the conspiracy theory that NEC acted unlawfully to assist Petitioner.

With respect to its assertion that the Employer allowed unit employees to campaign for 1199 SEIU during work hours, the record contains no such evidence.<sup>10</sup> In its brief, Local 707

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<sup>8</sup> Moreover, an employer may lawfully prefer one union over another as long it does not engage in coercive conduct in doing so. *Flamingo Hilton-Laughlin*, 324 NLRB 72 fn. 1 (1997), enf'd. as modified 148 F.3d 1166 (D.C. Cir. 1998); *Regency Grande Nursing and Rehabilitation Center*, 355 NLRB No. 109 (2010), incorporating by reference *Regency Grande Nursing and Rehabilitation Center*, 354 NLRB No. 75 fn. 7 (2009); citing *Virginia Electric Power Co.*, 260 NLRB 408, 414 (1982) (distinguishing employer's noncoercive preference for one union over another from antiunion animus).

<sup>9</sup> As per Local 707 delegate, Serrano stated, "... some reason why some of the staff was not voting for 707 is because they like 1199, they, they want they [sic] 1199 pension, because 1199 staff told them they were going to lose it if they don't vote for 1199. Because she [sic] say he receiving his and a couple of housekeeping guys receiving theirs and they might lose it." Tr. 54-55. The record does not reflect that this remark was made on election day.

<sup>10</sup> Local 707 delegate Gail Chatman testified that employee Yvette Montalvo campaigned a bit on work time for 1199 SEIU, but did not do so in front of management. Tr. 57-58. See also Tr. 244-245.

refers to largely irrelevant testimony concerning NEC employee Robin Billings, who served as Petitioner's observer during the afternoon voting session. As per Local 707's delegate witnesses, NEC's Ms. Elky questioned whether Billings had been on the list of employees submitted by Local 707 for release from work duties on election day. Tr. 291-292. This in no way demonstrates NEC collusion with or sympathy for 1199 SEIU. Rather, it demonstrates, if anything, that Ms. Elky did not know for which union Billings was serving as an observer, and/or that Elky forgot, or never knew, whether either union (or a union attorney) had requested release time for Billings on the day of the election.<sup>11</sup> That NEC granted Local 707's request to release all of its delegates with pay on election day further undermines Intervenor's argument that the Employer acted unlawfully to assist Petitioner. For all of the foregoing reasons, Objection 1 should be overruled.

## **Objection 2**

Employer utilized a Local 1199 supporter and CNA/Ward Clerk, Marie St Louis, in the capacity of Staffing Coordinator on the evening shift, and improperly gave her the responsibility to assign duties to staff. Marie St Louis thereupon misused her authority to coerce and intimidate employees, by reporting them to the supervisor causing employees to be beholden to her and support 1199 in the election.

Ms. St Louis also gave more favorable CNA assignments to Haitian workers to gain their support for 1199.

Ms. St Louis a union delegate also intentionally blocked employees Health Insurance and other issues from being addressed at union and labor-management-meetings by falsely stating that employees on her shift had no complaints. Ms. St

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<sup>11</sup> Prior to serving as an 1199 SEIU observer during the afternoon voting session, employee Billings, like the president and delegates of Local 707, was present on the first floor of the Employer's facility, outside of the voting center. While the record reflects that she may have spoke with a few employees while the polls were open, she was not in a no-electioneering area, and there is no evidence that she campaigned or even spoke with unit employees who were on line to vote. Tr. 283. Regardless, Billings had not yet assumed her role as Petitioner's observer. Her conduct in the morning session, considered under the third party standard, is completely unobjectionable.

Louis said openly at a recent union meeting that she had no problem with the Health Insurance, yet she withheld information for processing employees Health Insurance claims from employees on her shift.

Local 707's second Objection, set forth above, is also wholly without merit. First, as discussed above, the record evidence clearly establishes that at all relevant times St. Louis was a delegate (shop steward) and agent of Local 707. See *Tyson Fresh Meats, Inc.*, 343 NLRB No. 129 (2004) (union stewards are typically union agents, especially where they investigate and process grievances, enforce agreements with the employer, meet with management, and where employees seek information from them and generally identify them with the union). St. Louis was one of two Local 707 delegates for the 3 p.m. to 11 p.m. shift. Tr. 82, 96, 213, 380:15-16. She attended Local 707 delegates meetings, Labor Management meetings, and grievance meetings. Tr. 149.<sup>12</sup> A few days prior to the election, Local 707's president called St. Louis and requested that she campaign on behalf of Local 707 amongst NEC's Haitians employees. Tr. 442. Although there was some criticism of her style (described as nonchalant (Tr. 149)) and/or performance as a delegate, St. Louis was never voted out or otherwise removed from her position as a delegate. Tr. 170-171, 408. She played no role in circulating or mobilizing support for the representation petition that 1199 SEIU filed with the NLRB, nor did she even sign said petition. Tr. 506:4-12.<sup>13</sup>

It is therefore illogical and contrary to Board precedent to suggest that St. Louis' conduct

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<sup>12</sup> As per the testimony of Odette Machado, Local 707's delegates were either elected by their co-workers or appointed by Local 707's leadership. These delegates were trained by Local 707, were provided with certificates, and functioned as delegates. Tr. 407-408. This meant that they were authorized to file and handle grievances and otherwise deal with the Employer on behalf of Local 707. Tr. 70-71; 86, 101.

<sup>13</sup> On April 12, 2011, two days prior to the election, St. Louis stated, for the first time, that although she was a delegate of Local 707, she intended to vote for 1199 SEIU. Tr. 151, 506:13-19. All of the alleged improper conduct attributed to St. Louis occurred prior to April 12, 2011; this is the first date where she could arguably be considered an employee supporter (but not an agent) of 1199 SEIU and no longer an agent of Local 707.

could serve as the basis for Local 707 objecting to an election it lost. In *Camp Milling Co.*, 109 NLRB 471 (1954), the Board held that the Employer was estopped from objecting to the election based upon its own speech. The Board ruled that in order to prevent a party from profiting by its own wrongdoing, the Board cannot entertain objections to an election based upon the objector's own wrongdoing. The Board explained that otherwise, its election proceedings would have no integrity and would be turned into a meaningless merry-go-round. *Id.* at 473. See also *General Dynamics Corp.*, 181 NLRB 874, 875 (1970) (election not set aside where losing petitioner objected based upon the improper conduct of its agent). Even if it were somehow found that St. Louis was not a delegate and agent of Local 707, she would be an employee of the Employer and her conduct would be evaluated under the lenient third party standard set forth above.<sup>14</sup>

With regard to the first paragraph/allegation of Objection 2, there is no record evidence suggesting that St. Louis coerced or intimidated employees by reporting them to a supervisor or any other Employer agent. As discussed above with respect to Objection 1, the record shows merely that St. Louis encouraged a unit employee to report to NEC management the twisting of her ear by a fellow employee. Tr. 190.

The second paragraph/allegation of Objection 2 is similarly unsubstantiated by the record evidence. First, while Local 707 presented testimony suggesting that St. Louis played favorites when handing out assignments, the record evidence clearly indicates that her practice of doing so pre-dates the critical period, and had nothing to do with Petitioner or its campaign. Tr. 91, 139-

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<sup>14</sup> Local 707 did not assert in its Objections or argue in its post-hearing brief that St. Louis was a 2(11) supervisor; nor was St. Louis' possible supervisory status litigated at the hearing. The record shows that she was employed as a CNA/Ward Clerk and also served as a delegate of Local 707 when she assigned duties to staff. Although the record reflects that through the years, St. Louis may have exercised some favoritism in assigning duties, Local 707 did not establish (or attempt to establish) that she exercised the independent judgment necessary to be treated as a statutory supervisor. Local 707 did not challenge St. Louis' ballot in the election; as per the testimony of Odette Machado, there was no reason to challenge her ballot. Nor did any other party challenge her ballot. Tr. 442. For all of the foregoing reasons, St. Louis cannot be considered a supervisor or Employer agent for purposes of these Objections.

140, 163. For example, Local 707 delegate Carol Sheffield testified that she had scheduling difficulties with St. Louis as far back as 2008. At that time, like prior to the election in 2011, both were Local 707 delegates. Tr. 164.

Similarly, Carol Sheffield testified that employee and 1199 SEIU supporter D. Hood received favorable treatment from St. Louis. Tr. 145. Sheffield later recanted her testimony, stating, “I’m not saying that she received favorable treatments [sic] from St. Louis.” Tr. 167. Regardless, the evidence does not establish that St. Louis had any knowledge of employee Hood’s alleged support for 1199 SEIU. Tr. 167.

Another Local 707 delegate, Besse Thompson, testified that St. Louis gave favorable assignments to her friends and other people that she likes, including Haitians, Hispanics, and Americans. Tr. 265-6, 298:18-299:8. Thompson also testified that employee Yahil, an alleged supporter of 1199 SEIU, received less than favorable treatment from St. Louis, but then altered her testimony and stated that Yahil received favorable treatment from St. Louis. Tr. 274-275. According to Thompson, Local 707 delegate Carol Sheffield received the short end of the stick when St. Louis afforded preferential treatment to Yahil. Again, Intervenor’s attempt to link St. Louis’ conduct to Petitioner and its campaign comes up well short, as St. Louis and Sheffield had differences that went back years and that had nothing to do with 1199 SEIU or its campaign.<sup>15</sup> Similarly, documentary evidence relied upon by Local 707 pre-dated the filing of the petition. Tr. 301-304. Int. Ex. 15.

Finally, the third and final paragraph/allegation of Objection 2 is also unsubstantiated by the record evidence. While there is evidence indicating that St. Louis may not have done a great job of communicating with all employees on the evening shift and/or with Local 707’s

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<sup>15</sup> Besides the previously mentioned scheduling disputes, St. Louis and Sheffield had an old dispute concerning accusations made by St. Louis about Sheffield’s alleged criticism of Local 707’s president, Odette Machado. Tr. 150.

leadership, it is a stretch to suggest that she abused her position as Local 707 delegate and sabotaged the grievance process. Int. Br. 2. In particular, Local 707 presented evidence at the hearing that a couple of employees on the evening shift had health insurance problems which St. Louis failed to report to the delegate body. Even if true, St Louis was not the only Local 707 delegate on the evening shift. Further, several of the day shift delegates worked schedules that overlapped with the 3-11 shift and/or worked overtime on the 3-11 shift. The Local 707 day shift delegates and the other evening shift delegate therefore, like St. Louis, had the opportunity to communicate with evening shift employees and bring their issues to Local 707's leadership and/or the Employer. Moreover, on several occasions during the critical period, several Local 707 delegates from the day shift and Odette Machado stayed late into the evening to talk with and campaign amongst the evening shift employees. On these occasions, these Local 707 agents learned that a couple of evening shift employees had health insurance problems, and they referred them to the appropriate avenue to address these issues. Finally, as set forth above in response to Objection 1, Local 707 and the Employer held another joint meeting at NEC to resolve billing problems with unit employees and the health insurance broker on February 14, 2011. Tr. 414; Pet. Ex. 2. Employees on the evening shift were invited to attend. The following month, Local 707 amended its health care grievance by adding an additional claim. Tr. 415-416; Pet. Ex. 4. For all of the foregoing reasons, St. Louis' conduct in failing to report a couple of health insurance issues hardly sabotaged the grievance process.<sup>16</sup> For all of the reasons cited above, Objection 2 should be overruled.

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<sup>16</sup> In its brief, Intervenor alleges that "St. Louis spearheaded a campaign improperly based on ethnicity and nationality, securing the Haitian vote for Local 1199." The brief also alleges that St. Louis and others stated, "if you are Haitian, you must vote for Local 1199." Int. Br. 3-4. The record evidence, none of which is specifically cited by Intervenor, does not at all support these two allegations.

### **Objection 3**

NEC Security Guard, Victoria “unknown” harassed Union President Odette Machado from the incumbent union, by demanding Ms. Machado to move from the lobby of the facility, while permitting Local 1199 representatives to remain in the area. Ms. Machado was not electioneering in said area at that time;

NEC, Security Guard Victoria “unknown” who was stationed near to the election area was campaigning for 1199 by saying to employees “did you vote yet, go vote for 1199, check the green paper”; when Ms. Machado witnessed this Ms. Machado asked Victoria, is this why you wanted me to leave the lobby so you can campaign for 1199, Victoria said I was only playing, they are my friends;

Local 707’s third Objection, set forth above, is also devoid of merit. First, with regard to the first allegation/paragraph of this Objection, security guard Victoria Oyerinde did not engage in objectionable conduct when she asked Odette Machado to leave the lobby of the Employer’s facility during the morning voting session. In doing so, she was not singling out Machado for unequal treatment. Rather, she reasonably focused her efforts on convincing Machado to leave, as 1199 SEIU’s officers had already announced their willingness to exit the facility, while Machado resisted doing so. Tr. 220. When Machado refused to leave, Oyerinde properly sought help from NEC’s house supervisor on duty and from the Board agent. Petitioner’s officials promptly exited the facility, while Machado largely remained in the facility throughout the day. In the unlikely event that Oyerinde did anything wrong or improper during this incident, Intervenor failed to establish how her conduct had any impact whatsoever on unit employees or on the integrity of the election.

Concerning the second allegation/paragraph of this Objection, Oyerinde credibly testified that she did not encourage any employees to vote for Petitioner. The testimony of Local 707’s president should not be credited over that of Oyerinde.. Besides the fact that Oyerinde’s testimony was consistent, including under lengthy and persistent cross-examination, Oyerinde was a neutral - she was not a member or agent of any party. In its brief, Intervenor asserts that

Oyerinde was not a credible witness and accuses her of lying based on her testimony that she handed Machado the key to the restroom. Int. Br. 4. When called as rebuttal witnesses, Machado and Local 707's delegate Jacqueline Allen testified that Allen, not Oyerinde, gave the restroom key to Machado. Intervenor failed to point out, of course, that on direct testimony during its case in chief, Machado testified that she obtained the restroom key from the security guard.<sup>17</sup>

Even if Machado's account of the incident at question were credited over Oyerinde's denial, there was nothing objectionable about Oyerinde's alleged statement, "go vote for 1199". Oyerinde was employed, at all relevant times, by Esteem Patrol, Inc., an outside contractor. Tr. 466. To the extent that it tried, Intervenor failed to meet its burden of establishing that Oyerinde was an agent of NEC. Odette Machado testified that Oyerinde was mistaken and was not carrying out the Employer's position on the day of the election. Tr. 440. Later in the day, the Employer's Ms. Ekly clarified, contrary to Oyerinde's earlier requests that Machado leave the facility, that a couple of Local 707 agents, including Machado, could remain in the NEC lobby. Tr. 440. Later in her testimony, Machado again conceded that there is no evidence that Oyerinde was acting on the Employer's instructions on election day. Tr. 455. As an employee of a third party, Oyerinde was clearly entitled to express her preference for one union over another.<sup>18</sup> For all of the foregoing reasons, Objection 3 should be overruled.

## **Objection 5**

Local 1199 staffers were campaigning at the facility in violation of the "no campaign within 24 hours of the election" rule:

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<sup>17</sup> Per Machado, "Later on in the day I got the keys from the security..." Tr. 387:1

<sup>18</sup> Even assuming arguendo that Oyerinde was an Employer agent, her alleged comment was not coercive. Finally, even if it were considered coercive, there is no evidence that her comment was disseminated amongst enough unit members to have impacted the outcome of the election.

Local 1199 continued to drive its purple SEIU bus around the facility on the day before and on the day of election;

Local 1199 parked its purple bus in front and around the facility, the day before and during both voting shifts on the day of election; this violation was brought to the attention of the NLRB;

Local 1199 willfully disregarded the direction of NLRB agent Frank Flores who told Local 1199 to move the bus;

Local 1199 was distributing tee-shirts and purple ribbon holders for ID cards to employees from their purple bus in front and around the facility, the day before and during both voting shifts on the day of election.

Local 1199 was distributing alcohol to NEC employees (including employees with known alcoholism problems) from its purple bus in front and around the facility, the day before and on the day of election;

Local 1199 was openly rallying and drinking alcohol with NEC employees from their purple bus in front and around the facility, the day before and on the day of election.

Local 707's fifth Objection, set forth above, first alleges that 1199 SEIU campaigned at the facility "in violation of the 'no campaign within 24 hours of the election' rule." Such a rule does not exist. Intervenor has misstated the well-established *Peerless Plywood* rule, which bans campaign speeches to groups of employees on company time within twenty-four hours of the start of an election. See *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). The *Peerless Plywood* ban on campaign speeches does not interfere with the right of any party to circulate campaign literature, on or off an employer's premises, at any time before or after the start of an election. *Moody Nursing Home*, 251 NLRB 147, 148 (1980).

Here, Intervenor did not allege nor prove any such campaign speech as, at best, the evidence showed that 1199 SEIU's bus was parked across the street from the voting center prior to the start of the election; this does not constitute objectionable electioneering. Further, the record does not show that 1199 SEIU engaged in any objectionable electioneering during the

election. Specifically, Intervenor alleges that 1199 SEIU's van drove and parked in front of and around the facility on the day before and on the day of the Election.

As an initial matter, there was no designated "no-electioneering area" outside of the voting area (the break room of the facility) itself. Tr. 371:23-372:4 (testimony from Local 707 President that the voting area (break room) was the only area with which the Board Agent was concerned). Additionally, the only evidence about the location of the van is with regard to the day of the Election, and not the day before the Election.<sup>19</sup>

Regarding the day of the election, 1199 SEIU's Rickey Elliott testified with specificity as to the location of 1199 SEIU's van during specific times. First, Elliott's testimony that the van was not on company property at any time is undisputed. Tr. 514:16-17. In particular, Elliott credibly testified that the van was parked: (a) during the pre-election conference, prior to the opening of the polls, on Jay Street, across the street from the facility, approximately 150 feet from the voting center (break room); (b) during the initial part of the morning voting session, from approximately 5:30-6:00 a.m., three blocks from the Employer's facility; (c) for the remainder of the morning voting session, from approximately 6:00-8:30 a.m., at Dickerson Street and Jay Street, approximately 300 feet from the voting room; and (d) during the afternoon voting session, again near the corner of Dickerson Street and Jay Street and never less than 200 feet from the voting center. Tr. 513:7-514:15.

Intervenor failed to prove that 1199 SEIU's van was visible from the voting area at any time during the Election. Local 707's lead delegate Gail Chatman testified that the van was parked on election day as shown in Intervenor's Exhibit 1—that is, "in fact around the corner" from the "front of [the facility]." Tr. 10:24, 11:9; 120:20-22 (lead delegate). Referring to the

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<sup>19</sup> Intervenor's first witness, Gail Chatman, testified that all of the photographs she took were on the day of the election. Tr. 9:21-23 (referring to Intervenor's Exhibits 1-12).

diagram of the facility, Intervenor’s Exhibit 16 (drawn by Local 707 delegate Carol Sheffield (Tr. 182:20-21 (diagram); 125:17-18 (delegate))), Chatman’s testimony places the van on Dickerson Street. Tr. 11:9, 10:24, 11:2-3 (“around the corner” from the “front” and “J [sic] Street and Dickerson”). Chatman also testified that, with the van in this position, she did not see the van from the voting area. Tr. 11:16-17. Chatman’s testimony is consistent with the diagram of the facility, which shows the voting area on the *other* side of the facility and set back from Jay Street, and shows the only window in the voting area facing the opposite direction of Dickerson Street.<sup>20</sup> Hence, on Dickerson Street (as identified by Chatman) near Jay Street—and as identified by Elliott during the voting (except from 5:30-6:00 a.m.)—it was impossible to see the van from the voting center’s lone window, which faces the opposite direction.

Local 707 also failed to prove that the van was visible from the voting area between 5:30-6:00 a.m., when it was three blocks away from the facility. There was no evidence presented as to the van’s exact location during this time and, at best, it can be inferred that the van was further up or down Dickerson Street. Either way, as evident from the diagram, the van would not have been visible from the window of the voting center.

Intervenor’s additional evidence regarding 1199 SEIU’s van is irrelevant and inconsistent. For instance, Ms. Chatman’s testimony regarding Intervenor’s Exhibit 2 was confused and did not identify the van’s location during any time during the voting. Chatman first testified that the photograph showed the van further down Dickerson Street, but later seemed confused that said street was Jay Street. Tr. 13:5-12, 14:3. Chatman also testified that

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<sup>20</sup> Ms. Chatman was confused regarding the orientation of the voting area. She testified that the break room, where the voting was held, faces Dickerson Street. Tr. 17:4-7. The diagram of the facility submitted by Intervenor flatly contradicts this, showing the break room on the *other* side of the facility from Dickerson Street and the only window facing the opposite direction onto Sussex Avenue. Tr. 129:18-22; 236:21 (witness explanation that street opposite window is Sussex Avenue). Sheffield, a six-year employee, also testified that the break room window faces only that one wall, facing the opposite direction from Dickerson Street. Tr. 132:15-16.

the van was at that location (whichever it was) before the second voting session and that she took the photograph “right before the next round of election,” indicating that the van was not parked there during the actual voting. Tr. 13:20-22. Intervenor’s Exhibit 3 is similarly irrelevant. Chatman testified that the van was parked by the employee entrance at the back of the facility, but not did specify that this was during any voting session. Tr. 15:3-6. She offered no evidence that she could see the van in that location from the voting area, which she testified was on the opposite side (the front side) of the facility. Tr. 15:9-10.

Intervenor’s Exhibit 4 speaks for itself. It shows the van down Jay Street, past Dickerson Street and across from the side of the facility (as shown by the gates). Tr. 16:17-18 (Ms. Chatman also testified that the van was “across the street”). While Chatman testified that she “believe[d]” she could see the van in that position from the voting area, Tr. 17:4-7, Local 707 delegate Carol Sheffield and lead delegate Carlette Parker testified without any doubt that one could not see the van from the voting area from this position or from any other position shown in each of Intervenor’s Exhibits 1 through 4. Tr. 127:19-24, 225:24-226:6; 120:20-21 (Parker as lead delegate). Further, Chatman did not testify that the van was in that position during either voting session. Finally, as described above, the placement of the only window in the voting area makes it impossible to see the van in that location from the voting area.

Ms. Sheffield’s testimony was also insufficient to prove that the van was visible from the voting area during the voting hours. After making a general allegation that the van was so visible, she could not place when the van was visible despite having voted that day. Tr. 126:13-17. When questioned specifically, Sheffield admitted that the van could not be seen from the break room window in any of the positions shown in Intervenor’s Exhibits 1-4. Tr. 127:19-24. Nor did she testify that the van was parked in any particular location during the voting. Ms.

Parker's testimony was similarly general and failed to place the van in a particular spot at any particular time during the voting hours. When asked specifically, she too admitted that the van could not be seen from the break room window in any of the positions shown in Intervenor's Exhibits 1-4. Tr. 225:24-226:6. Despite a last-minute attempt to identify Intervenor's Exhibit 17 (a dark and blurry photograph) as placing the bus as seen from the break room and despite repeated leading inquiries from Intervenor's counsel, Parker could not specify from where, by whom, or when the photograph was taken.<sup>21</sup> Such general testimony of Parker and Sheffield should be afforded little (if any) weight, compared to the specific and credible testimony of Mr. Elliott.

Regardless, even where a union representative conversed with voters only 30 feet from the building where the voting was held, the Board has found such conduct non-objectionable where voters could not see the representative from the voting area. See *U-Haul Co. of Nev., Inc.*, 341 NLRB 26 (2004) (citing *Harold W. Moore & Son*, 173 NLRB 1258 (1968)). Similarly, the Board has found the posting and distribution of campaign literature as close as 50 feet from the voting area on election day permissible. See *Am. Med. Response*, 339 NLRB 1 (2003).

Here, 1199 SEIU's van was never visible from the voting area during the voting hours and, at its closest, was 200 feet away from the voting area while the polls were open. Even if the testimony of Intervenor's witnesses were to be completely credited, only (arguably) three voters claimed to have seen the van from the single window in the voting area—nowhere near enough voters to have affected the outcome of the election given the 52 vote margin of victory. More importantly, there was no evidence of campaign speeches, music, or any type of campaigning coming from or near the van. Further, there is no evidence that the van was covered with

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<sup>21</sup> As such, Intervenor's Exhibit 17 should be afforded no weight.

Petitioner's literature or campaign messages. Moreover, there was not even any evidence that any 1199 SEIU representatives (or any other people) were in or near the van during the election. As such, the presence of 1199 SEIU's van parked at its various locations on the day of the election was entirely non-objectionable.<sup>22</sup>

Intervenor presented no probative evidence in support of the last three allegations/paragraphs of this Objection. For all of the foregoing reasons, Objection 5 should be overruled.

## **Objection 6**

Coercion and Threats of physical violence and abusive language was used by Local 1199 staff and directed at Local 707 HEART supporters and to voting NEC employees. Such conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible:

Gloria Campbell said openly at a Local 1199 meeting at NEC that "anyone who did not vote for 1199 would have to answer to me."

Local 1199 supporter, Montalvo, incited animus and unwarranted complaints against pro-Local 707 HEART employees by reporting them to management and coercing patients to complain about them;

Local 1199 supporter, Lilian Smith, continuously threatened and used obscene language to pro-707 HEART employee Marie Valentine in the presence of other employees, saying "I'll get that whore, don't listen to that bitch with her 707 Heart bullshit; I will whip her f--cking ass if she keep talking that shit about 707 heart."

Lilian Smith continuously threatens and uses obscene language to pro-707 HEART employees in the presence of other employees.

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<sup>22</sup> Petitioner's Rickey Elliott credibly denied that the NLRB agent conducting the election instructed him to move the van from where it was parked during the pre-election conference. Elliott's testimony was corroborated by that of Machado, namely that the Board agent instructed the parties that he was only concerned with what occurred inside the voting center.

Local 707's sixth Objection, set forth above, is also without merit. With respect to the second allegation/paragraph of this Objection (the first is general/introductory), Local 707's Carol Sheffield testified that employee Gloria Campbell stated that if employees did not vote for 1199 SEIU, "they would hear from her." At the urging of Intervenor's counsel, Sheffield altered her testimony, later testifying that Campbell stated that if employees did not vote for 1199 SEIU, "they would have to answer to her." Tr. 134-135.

Regardless of which of Sheffield's versions is credited (the first is entirely more credible), Gloria Campbell's statement was entirely unobjectionable. First, Intervenor did not establish that Campbell's statement was made during the critical period. Nor did it establish how many employees heard or heard of the statement.<sup>23</sup>

Moreover, the Board has long recognized that hostile feelings and behavior are unavoidable in hotly contested elections. *Cal-West Periodicals, Inc.*, 300 NLRB at 600. Statements (and actions) much worse than that of Campbell are not at all uncommon in the heat of contested elections. For example, in *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) the Court upheld the Board's overruling of objections based on the stoning of an anti-union employee's house and a statement by a third party union supporter that "your name is being mentioned by everyone on the street, and your co-workers aren't going to be the same with you as before", and reasoning that a certain measure of bad feeling and hostile behavior is inevitable in any hotly contested election. Similarly in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, 61 (1966), the Supreme Court noted that "representation campaigns are frequently characterized by bitter and extreme charges ... [and] vituperations"), and noted with

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<sup>23</sup> The Board does not presume dissemination, even where plant closure threats or other highly coercive statements were made to employees. *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004); *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999) (objection overruled where threats not disseminated).

approval that “the Board tolerates intemperate ... statements made by the union during attempts to organize employees.”

No evidence was presented that supports the third paragraph/allegation of this Objection, that concerning employee Montalvo.

With respect to the fourth allegation/paragraph of this Objection, like employee Campbell’s comment, statements made by employee Lillian Smith were unobjectionable. First, it is noted that Marie Valentine is a delegate of Local 707, yet she was inexplicably not called to testify at the hearing, in spite of the fact that she is the subject of this Objection. Tr. 82. An adverse inference is thus warranted. The only witness to provide evidence concerning this fourth allegation was Local 707’s president, Odette Machado. As per Machado, Valentine reported to her that Smith cursed her and called her “a whore” in the elevator. Tr. 394:6-8. There was no evidence of any threat<sup>24</sup>, nor was it established that this name-calling incident had anything to do with the election campaign or unions in general.<sup>25</sup> Machado also provided hearsay testimony concerning a separate incident between Smith and Valentine that was related to election campaign activity. It involved neither foul language nor a threat. Tr. 394:10-12.<sup>26</sup>

With respect to the fifth and final allegation/paragraph of this Objection, there is no evidence that employee Lillian Smith used obscene or threatening language towards NEC employees (other than calling delegate Marie Valentine “a whore”, as addressed above). There

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<sup>24</sup> In Intervenor’s post-hearing brief, Local 707’s counsel asserts that Smith threatened Valentine by stating, “I will kick her ass if she keeps talking about 707 heart.” Intervenor, however, cites no record evidence, nor even credits the assertion to a particular witness. Int. Br. 6. This is because the record evidence contradicts the assertion.

<sup>25</sup> Similarly, again, Local 707 failed to meet its burden of proving that this incident occurred during the critical period. Nor did Intervenor prove that any unit employees other than Valentine observed or later learned of this incident in the elevator.

<sup>26</sup> Smith interrupted Valentine and stated that 707 “is a liar”. Tr. 394:10-12

is evidence that Smith directed foul, disrespectful, and colorful language at officers of both Petitioner and Intervenor (but particularly directed at Local 707's Machado). This evidence will be addressed below in response to the second allegation/paragraph of Objection 7.

### **Objection 7**

Threats of physical violence and abusive language was used by Local 1199 staff and directed at Local 707 HEART representatives in the presence of voting NEC employees:

Local 1199 representative, Lillian Smith, shouted to Local 707 HEART President Odette Machado in the presence of other employees, stating, "you ain't shit"

SEIU staffer threatened Odette Machado for standing in the lobby of the facility and told her to come out side so he can whip her ass;

SEIU staffer called Felix Lopez "Driving Ms. Daisy and a bitch ass" in the presence of other employees;

SEIU staffer took photographs of Employees without their consent;

SEIU staffer circulated photographs with slanderous material about Local 707 President Odette Machado, including photographs of her family friends without consent;

SEIU staffer called supporters of 707 HEART clowns and ignorant jackasses in the presence of other employees;

Local 707's seventh Objection, set forth above, is also wholly without merit for several reasons. Unlike Objection 6, which alleges third party conduct, Objection 7 purportedly alleges conduct by agents of Petitioner. However, with respect to the second allegation/paragraph of this Objection (the first is general/introductory), Intervenor erroneously characterizes employee Lillian Smith as a representative of 1199 SEIU. The record, however, clearly establishes (consistent with Intervenor's Objection 6) that Smith, was an employee of NEC and was never

an agent of Petitioner. Tr. 91-92, 515. The Board's third party standard is thus applicable to this second allegation of Objection 7.

Lillian Smith, a female employee over 70 years of age, referred to Local 707's Odette Machado as "a bitch", threatened to "kick her [Machado's] ass", and stated "707 ain't shit" and "Odette ain't shit". Tr. 52-53, 137. Smith also threatened to kick the ass of 1199 SEIU's Rickey Elliott. Tr. 515.

The Board considers the following factors in assessing the seriousness of a third party threat: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated at or near the time of the election. *Lamar Company*, 340 NLRB 979, 980 (2003), citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

First, with regards to the nature of the threat itself, the Board has held that the expression, "I'm going to kick your ass", does not convey an actual threat of physical harm. *Leasco, Inc.*, 289 NLRB 549, 549, n. 2 (1988). As the ALJ in *Leasco* pointed out, this expression, especially as used by Smith, is a "profane colloquialism used commonly to verbalize the speaker's desire to prevail over another person." *Id.* at 552. Similarly, in *Lamar Company*, 340 NLRB at 980, 981, the Board overruled objections to an election where third parties threatened to kick an employee's ass if he did not vote for the union. Likewise, in *Laborers' Local No. 496 (Newport News of Ohio, Inc.)*, 258 NLRB 1105 (1981), the Board found that a union officer's threat to "punch [the charging party's] mealy mouth" did not violate Section 8(b)(1)(A) where the words were nothing more than an expression of anger. *Id.* at 1105, n.2 and 1106. *See also Cal-West*

*Periodicals*, 330 NLRB at 600, citing *NLRB v. Hood Furniture Mfg.*, 941 F.2d 325 (5th Cir. 1991) (in an election decided by one vote, the Board properly overruled an objection based on a pro-union handbiller reacting to an employee's refusal to take a leaflet by calling the employee an obscene name, telling him he'd "better vote yes", and swatting his car).

Further, here, Smith's 'threats' were directed only at Machado (and Petitioner's Elliott), not at any unit employees.<sup>27</sup> Moreover, given her age (over 70), no employee would have reasonably believed that Smith was capable of carrying out her 'threat'. Finally, there is no evidence or even a likelihood that any employees acted in fear of Smith's capability of carrying out her 'threat'.<sup>28</sup>

The third allegation/paragraph of this Objection is not all supported by any record evidence. On the morning of the election, Petitioner's Rickey Elliott did not threaten Intervenor's Odette Machado. Rather, Elliott merely asked Machado to leave the facility and go outside. Tr. 221, 385. Similarly, the fourth allegation/paragraph of this Objection is frivolous and irrelevant, as the comment allegedly uttered by Elliott to Felix Lopez, Local 707's secretary-treasurer, was, as per Lopez, made after the election was over and the votes had been counted. Tr. 316:24- 317:14. Petitioner presented no evidence supporting the fifth allegation/paragraph of this Objection.

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<sup>27</sup> In *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1093 (1999), the Board, contrary to the hearing officer's recommendation, overruled an objection based on threats of physical and other harm because the employees subject to the threats were members of a different unit. Here, Smith's words about ass kicking were directed at no employee.

<sup>28</sup> This is because Smith's comments were precisely an emotional reaction that resulted from personal animosity and frustration, rather than a reflection of hostility toward any conduct protected by the Act. Any employee who witnessed Smith boast that she would kick Machado's ass would have reasonably viewed Smith's conduct as a display of personal frustration and anger towards Machado, rather than a direct response to employee Section 7 conduct. See *Plumbers Local No. 38 (Bechtel Corp.)*, 306 NLRB 511, 518 (1992); *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159, n. 29 (1997).

Finally, regarding the seventh and final allegation/paragraph of this Objection, Petitioner's Elliott told Local 707's top two officers, Machado and Lopez, to stop acting like clowns, because they were berating an 1199 SEIU organizer. Although two unit employees, including one Local 707 delegate, were present, Elliott informed the employees that his words were directed only at Machado and Lopez. Regardless, Elliott's conduct at issue is far less egregious than that in *Reliable Trucking*, 349 NLRB No. 79 (2007), a case where the Board *did not* set aside the results of the election. In that case, the day before ballots were mailed to employees, eight union officials, including the secretary-treasurer, defied the employer's directive and barged into the employer's meeting with 15-20 unit employees, shouted in a belligerent manner, refused to leave the meeting room at the request of security personnel, and insisted on remaining until the police arrived and escorted them out.

In the sixth allegation/paragraph of this Objection, Intervenor takes issue with a piece of campaign literature, namely one criticizing Local 707's use of its members' dues money. Int. Ex. 18. The leaflet is unobjectionable for a variety of reasons. First, under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board does not probe into the truth or falsity of campaign statements and will not set aside an election on the basis of misleading or false campaign statements, except in cases of forgery that preclude employees from recognizing campaign propaganda for what it is. *Id.* at 131-133. Here, there is no allegation, evidence, or likelihood that unit employees viewed or would have viewed the relevant leaflet as anything but a piece of campaign propaganda. It is therefore unobjectionable. Even *assuming arguendo* that the leaflet were somehow found to be objectionable, there is no evidence that it was drafted, issued, or distributed by agents of Petitioner.<sup>29</sup> Moreover, the record is unclear as to how many

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<sup>29</sup> Similarly, as per Machado, anti-1199 SEIU campaign literature (accusing it of stealing strike and pension funds) found at NEC was not issued or distributed by Local 707. Tr. 418-419; Pet. Ex. 6.

unit employees viewed or heard about the leaflet. Finally, the leaflet was observed in the Employer's facility one month prior to the election. Certainly Local 707, the incumbent union with contractual access to the NEC and its employees, had ample opportunity to rebut and clarify any misrepresentations or false statements that may have been contained in Int. Ex. 18. This is especially true given that the Department of Labor's audit report referenced in the leaflet was posted on the Department of Labor's web site. Int. Br. 7. For all of the foregoing reasons, this Objection should be overruled.

### CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Administrative Law Judge overrule all of Intervenor's Objections to the Election.

Dated: New York, New York  
July 21, 2011

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

Petitioner's Post-Hearing Brief to the ALJ is being electronically filed today (July 21, 2011) with the Division of Judges of the National Labor Relations Board. Copies of this brief have been served today via email on Intervenor's counsel, as follows:

Thomas Rubertone, Jr., Esq.

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s/ William S. Massey  
William S. Massey