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September 28, 2011

**VIA FEDERAL EXPRESS DELIVERY**

Mr. Lester Heltzer  
NLRB Office of the Executive Secretary  
1099 14<sup>th</sup> St., N.W., Room 11602  
Washington, D.C. 20570

Re: Our Client: Taylor Made Transportation Services, Inc.  
Your Client: Kimberly Tutt  
Case No.: 05-CA-036646

Dear Mr. Heltzer:

In accordance with Section 102.24 of the Board's Rules and Regulations enclosed for filing please find the original and eight copies of the Respondent Brief in Support of Motion for Summary Judgment with exhibits.

Same were served on the Acting Regional Director of Region 5 and the charging party via regular mail as indicated in the affidavit of service. Should you have any question, please do not hesitate to contact me. We appreciate your assistance in this matter.

Very truly yours,



Fabian D. Walters

FDW/tlc  
Enclosures

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ORDER SECTION

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

TAYLOR MADE TRANSPORTATION  
SERVICES, INC.

and

KIMBERLY TUTT, AN INDIVIDUAL

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Case No. 05-CA-036646

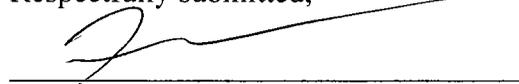
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**MOTION FOR SUMMARY JUDGMENT**

Respondent, Taylor Made Transportation Services, Inc. (“Taylor Made”), by its undersigned counsel, McKennon Shelton & Henn LLP, moves pursuant to Sections 102.24 and 102.28 of the National Labor Relations Board (the “Board”) Rules and Regulations, for the entry of summary judgment for the reasons set forth in the attached Brief in Support and Declaration of Allen Taylor filed simultaneously herewith. There are no genuine disputes of material fact and Taylor Made is entitled to an entry of summary judgment.

Dated: September 28, 2011

Respectfully submitted,



Paul D. Shelton  
Fabian D. Walters  
McKennon Shelton & Henn LLP  
401 East Pratt Street, Suite 2315  
Baltimore, Maryland 21202  
(410)843-3500  
*Attorneys for Taylor Made Transportation Services,  
Inc.*

TAYLOR MADE TRANSPORTATION  
SERVICES, INC.

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and

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Case No. 05-CA-036646

KIMBERLY TUTT, AN INDIVIDUAL

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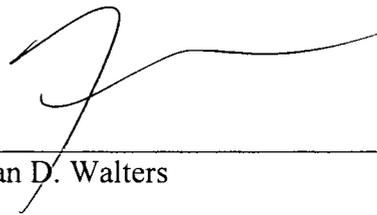
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of September, 2011, a copy of the foregoing Motion for Summary Judgment was mailed by first class, postage pre-paid to the following parties:

Ms. Kimberly Tutt  
Apartment F  
3014 Clifton Park Terrance  
Baltimore, MD 21213-1136

Wayne R. Gold  
Regional Director  
National Labor Relations Board Regions  
103 South Gay Street, 8<sup>th</sup> Floor  
Baltimore, Maryland 21202



\_\_\_\_\_  
Fabian D. Walters

TAYLOR MADE TRANSPORTATION SERVICES, INC.

\*

and

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Case No. 05-CA-036646

KIMBERLY TUTT, AN INDIVIDUAL

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**BRIEF IN SUPPORT OF RESPONDENT  
TAYLOR MADE TRANSPORTATION SERVICES, INC.  
MOTION FOR SUMMARY JUDGMENT**

Respondent, Taylor Made Transportation Services, Inc. (“Taylor Made”), by its counsel, McKennon Shelton & Henn LLP, and pursuant to Rules 102.24 and 102.28 of the National Labor Relations Board’s Rules & Regulations, respectfully submits this Brief in Support of its Motion for Summary Judgment.

**I. STATEMENT OF FACTS**

Since the facts, as set forth below, are simple, Taylor Made requests that the Board dispense with a hearing and exercise its power to enter summary judgment in this matter. Taylor Made is engaged in the business of providing passenger transportation services in Baltimore, Maryland and the surrounding counties. (Declaration of Allen Taylor (“Taylor Dec.”), ¶ 2, attached as Exhibit A.) On or about March 1, 2011, Taylor Made hired Ms. Tutt as a part-time employee under a Social Security Administration Contract (“SSA Contract”). (Taylor Dec., ¶ 4.) Ms. Tutt, while working under the SSA Contract, complained on numerous occasions regarding her working hours. (Taylor Dec., ¶ 4.)

On or about March 31, 2011, to accommodate Ms. Tutt, Taylor Made transferred Ms. Tutt to a new contract for Center for Medicare Medicaid Services (“CMS”). While working under the CMS contract, Ms. Tutt displayed on several occasions unprofessional behavior. On April 1, 2011, a meeting was held with Ms. Tutt and Taylor Made management and James B. Kearny, her supervisor. See Exhibit B memorandum to Kimberly Tutt. At this meeting Ms. Tutt was advised to maintain professional demeanor while working and advised to watch her conduct around clients, supervisors and co-workers. On or about April 22, 2011, Ms. Tutt was again reprimanded regarding the use of her personal cell phone by James B. Kearny. See a copy of the letters from James B. Kearny detailing such occurrence as Exhibit C. Mr. Kearney also suggested that Ms. Tutt silence her ringtone due to the graphic nature of the ringtone. It was during this time that Ms. Tutt’s unprofessional behavior was noticed by others at CMS. Ms. Tutt shared personal information with passengers and was not maintaining a professional working relationship with CMS.

On or about April 25, 2011, Ms. Tutt was suspended for unprofessional behavior. (Taylor Dec., ¶ 6.) During this time management evaluated Ms. Tutt based on her performance. On or about April 29, 2011, Ms. Tutt was terminated. (Taylor Dec., ¶ 7.) Ms. Tutt was hired on or about March 1, 2011 and was therefore still in her probationary period of employment at Taylor Made.

On or about May 31, 2011, Ms. Tutt filed a charge with National Labor Relations Board. According to Taylor Made’s Employee Handbook (the “Handbook”) in place all new employees are under a probationary period for the first 90 calendar days after the date of being hired and during this period it is within Taylor Made’s discretion to terminate an employee with or without cause or advance notice.

## **II. Argument**

### **A. Violation of Company Policies**

#### **1. Probation Period**

All new employees of Taylor Made are in a probationary period for the first 90 calendar days to allow Taylor Made the opportunity to evaluate the abilities, work habits, and overall performance of the employee. Taylor Made maintains the following probation policy for new employees within the Handbook.

#### **PROBATIONARY PERIOD**

The probationary period is intended to give new employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets their expectations. Taylor Made Transportation Services, Inc. uses this period to evaluate employee capabilities, work habits, and overall performance. Either the employee or Taylor Made Transportation Services, Inc. may end the employment relationship at will at any time during or after the probationary period, with or without cause or advance notice.

All new and rehired employees work on a probationary basis for the first 90 calendar days after their date of hire. Employees who are promoted or transferred within Taylor Made Transportation Services, Inc. must complete a secondary probationary period of the same length with each reassignment to a new position. Any significant absence will automatically extend a probationary period by the length of the absence. If Taylor Made Transportation Services, Inc. determines that the designated probationary period does not allow sufficient time to thoroughly evaluate the employee's performance, the probationary period may be extended for a specified period.

Each employee must receive and review a copy of the Handbook prior to employment. Taylor Made's records indicate that Ms. Tutt did receive the Handbook. As stated in Section I, Ms. Tutt was warned several times on the use of inappropriate actions at the client sites, and attitude, failure to follow directions and use of her personal cell phone prior to her suspension and subsequent termination. Ms. Tutt also received several warnings for her lack of professionalism, the volume of her personal cell phone alert, the graphic language of such alert and the disruption it caused the clients of Taylor Made, and the use of her personal cell phone while on duty. Ms.

Tutt was also warned regarding her persistent complaining about her hours despite her status as a part-time employee that was employed on a probationary period. Ms. Tutt's complaints regarding hours and failure to adhere to personnel policies during her probation period was disruptive for management at Taylor Made.

## 2. Cell Phone Policy

Taylor Made maintains a policy against personal cell phones which is found in the Handbook. The Handbook contains the following provisions "The use of personal cell phones, while driving is prohibited for all drivers while on duty" and "The use of personal cell phones in the office is prohibited unless prior approval is received". Ms. Tutt's blatantly violated this policy and received several warnings as such. The Handbook clearly states under the "Employee Conduct and Work Rules" section, that "violation of personnel policies" and "unsatisfactory performance or conduct" are infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment. Ms. Tutt violation of the policies in place during her probation period and was terminated. She was directed to plug in the company phone but she continued to plug her personal cell phone into the vehicle system.

### **B. The Complaint fails to allege facts sufficient to satisfy the burden of *Wright Line***

The Board has consistently applied the burden found in *Wright Line*, 251 NLRB 1083 (1980), emfd.622 f.2d 899 (1<sup>st</sup> Cir. 1981) in case that involve employer motivation. Applying *Wright Line*, the Board must first prove, by preponderance of evidence, that the employee conduct protected by the Act was the motivating factor in the employer's decision to terminate the employee. To meet this burden, the Board must offer evidence showing that the employee engaged in protected activity, that the employer was aware of the activity, that the employer had animus against the activity and that there was a causal connection between the activity and the

termination.<sup>1</sup> If this burden is met, then employer that must show evidence sufficient to establish that it would have discharged the employee even in the absence of the protected activity.

The Board has not satisfied its burden of proof or offered any evidence proving Ms. Tutt engaging in a protected activity. Nor has the Board establish that Taylor Made was aware of any protected activity by Ms. Tutt. Taylor Made maintained policies regarding disclosing pay rates prior to Ms. Tutt's employment and the intent of such policies were to protect Taylor Made's confidential bidding process in obtaining government contracts not to discourage employees from engaging in protected activity.

In *Covanta Bristol*, the charging party was an employee subject to a probationary period that submitted reports regarding employee safety. The employer in Covanta Bristol used such reports as one of the reasons for termination. Here, there is no evidence to suggest Taylor Made terminated Ms. Tutt for engaging in protected activity.

In *Wright Line* the employer failed to meet its burden that it would have taken the same action against the employee despite the involvement in a protected activity because it was found that the reasons for termination were a part of a "predetermined plan to discover a reason to discharge" that stemmed from the protected activity. Here, Taylor Made was engaged in disciplinary action throughout the term of Ms. Tutt's employment. Taylor Made met with Ms. Tutt on April 1, 2011 to discuss her lack of professionalism, which was more than 20 days prior to Ms. Tutt's termination and prior to any alleged protected activity. Further, in the April 25, 2011 meeting between Ms. Tutt and Taylor Made regarding her suspension, Taylor Made's management acknowledged that pay rates may be discussed and only asked Ms. Tutt to use caution with disclosing such information.

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<sup>1</sup> Covanta Bristol, Inc. and Luis Mota. 356 NLRB 46

Ms. Tutt constant use of her cell phone, failure to charge the Taylor Made cell phone, inappropriate comments to clients and refusal to follow directions interfered with the production and operation of Taylor Made repeatedly.

### CONCLUSION

Taylor Made is entitled to an entry of summary judgment in its favor. There are no genuine disputes with respect to any material facts. As a result, this matter should be dismissed with prejudice as to the claims against Taylor Made.

Dated: September 28, 2011



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Paul D. Shelton  
Fabian D. Walters  
McKennon Shelton & Henn LLP  
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Suite 2315  
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*Attorneys for Taylor Made Transportation  
Services, Inc.*

TAYLOR MADE TRANSPORTATION SERVICES, INC.

\*

and

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\* Case No. 05-CA-036646

KIMBERLY TUTT, AN INDIVIDUAL

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\* \* \* \* \*

**DECLARATION OF ALLEN TAYLOR**

1. I am over the age of 21 and competent to testify to matters contained in this affidavit. I give this affidavit freely and voluntarily and I understand that it will be used in connection with the above-captioned matter. The facts set forth herein are based on my personal knowledge.

2. Taylor Made is engaged in the business of providing passenger transportation services in Baltimore, Maryland and the surrounding counties.

3. I am the President and Chief Executive Officer of Taylor Made. As the President and Chief Executive Officer my duties include overseeing the hiring and termination of employment and overseeing the management of employees.

4. On or about March 1, 2011 Taylor Made employed Ms. Tutt as a part-time employee under a Social Security Administration Contract (“SSA Contract”). During Ms. Tutt’s time under the SSA Contract, she complained on several occasions regarding her working hours.

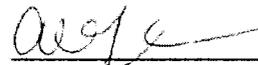
5. On or about March 31, 2011, to accommodate Ms. Tutt, Taylor Made transferred Ms. Tutt to a new contract for Center for Medicare Medicaid Services (“CMS”).

6. Taylor Made obtained these contracts and other work through a competitive bidding process. It does not disclose its bids including rates to competitors or the general public in order to maintain a competitive position.

7. On or about April 25, 2011 Ms. Tutt was suspended for unprofessional behavior. During this time management evaluated Ms. Tutt based on her performance.

8. On or about April 29, 2011 Ms. Tutt was terminated. Ms. Tutt was still in her probationary period during her time at Taylor Made.

I declare that the foregoing is true and to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
Allen Taylor

## Memorandum

**To:** Kimberly Tutt  
**From:** L. Saxon, M. Willis  
**Date:** 4/1/2011  
**Re:** Professionalism while working at the CMS client site

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On 4-1-2011 a brief meeting was held with Kimberly Tutt, L. Saxon, M. Willis, and J. Kearney

Ms. Tutt was advised to keep a professional demeanor while representing Taylor Made.

Comments had gotten back to Mr. Taylor such as needing full time work, and simply too much chatter. She was advised to watch her conduct and conversation around clients, supervisor and fellow employees.

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MAIL ROOM

PAGE 01/02

April 22, 2011.

Taylor Made Transportation Services, Inc  
2901 Druid Park Circle  
Baltimore, Maryland 21215

Attn; Mr. Allen Taylor

M's Kim Tutt was cautioned on the use of her cellphone on Wednesday , April 22, 2011.  
I recommended that the company cellphone be plugged into the charger instead of her  
personal cellphone. I had previously suggested that she turn down the call alert of her phone  
due to the graphic language. She lowered the volume of her call alert and stated the company phone  
was fully charged.

Sincerely,

James B. Kearney

Cc. Maryce Willis

Lionel Saxxon

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MAIL ROOM

PAGE 02/02

August 12, 2011

**Taylor Made Transportation  
2901 Druid Park Drive  
Suite 206  
Baltimore, Maryland 21215**

To whom it may concern:

RE: Termination of Ms Kim Tutt

**Use of Phone, Mail System and Cell Phone Usage Page 23 of Taylor Made Transportation Services Inc, Employee Handbook.**

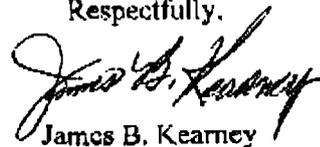
-The use of personal cell phones, while driving is prohibited for all drivers while on duty.

On Wednesday, April 22, 2011 Ms. Tutt was cautioned on the use of her cell phone. I observed her personal cell phone plugged into the charger on several occasions. I suggested on more than one occasion that she plug the company phone into the charger instead. On a separate occasion I heard Ms Tutts ringtone and it was inappropriate for the work place. The ringtone used graphic language that could possibly be heard by Government employees.

**Probationary Period**

The probationary period is intended to give new employees the opportunity to demonstrate their abilities to achieve a satisfactory level of performance. Taylor Made Transportation Services Inc uses this period to evaluate employee capabilities, work habits, and overall performance. Termination may occur at anytime with or without cause or advance notice. Ms. Tutt's continued complaints about her pay, and hours, was detrimental to the team spirit and effort. Since this was a new venture, little or no negativity is acceptable.

Respectfully,



James B. Kearney

CMS- Transportation Supervisor

Cc: Mr. Allen Taylor

Ms. Maryce Willia

Mr. Lionell Saxxon

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