UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INDEPENDENCE RESIDENCES, INC.

and Case No. 29-CA-30566

WORKERS UNITED, SEIU

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

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and **Case Nos. 29-CA-30566**

WORKERS UNITED, SERVICE EMPLOYEES INTERANTIONAL UNION

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("the Board"), Counsel for the Acting General Counsel submits the following Answering Brief to Respondent, Independence Residences Inc.'s ("IRI"), Exceptions to the Decision and Order of the Administrative Law Judge ("ALJ"):

- Exception #2: Respondent objects to the ALJ's restatement of the findings that he made on June 7, 2004 regarding Respondent's election objections.

The restatement of the ALJ's own findings in the related representation case, Case No. 29-RC-10030, was not a factual finding in the instant matter. Rather, the ALJ was simply providing background information regarding the history of the instant case and prior cases related thereto. Thus, it is inappropriate for Respondent to except to this background information. The subject matter described in the ALJ's recitation of the findings in 29-RC-10030 was not at issue in the instant case. Indeed, Respondent presented no evidence on this issue, nor did Respondent seek to re-open the record on the issues involved in the representation case.

Moreover, the ALJ's decision on the representation case was upheld by the Board in its Decision and Certification of Representative dated August 27, 2010. Consequently, the ALJ had no authority to reconsider the case had evidence been presented. This exception should be denied.

- Exceptions #3 and 7: Respondent objects to the ALJ's finding of fact that the record was unclear as to which entity of UNITE! the individuals who organized the IRI unit belonged; Respondent objects to the conclusion that the factor of continuity of leadership strongly supports a finding of continuity.

The portions of the record cited by Respondent for the proposition that the IRI unit organizers were part of UNITE!'s "Disability Services Council" (DSC) do not support that conclusion. Secretary Treasurer Edgar Romney remained firm in his testimony that it was his understanding that the organizing of the IRI employees was performed by the International caucus of UNITE, and thus by employees of the International. (Tr.118, 127, 142,143-144) When asked whether the IRI unit had ever actually been assigned to any joint board or local union, Romney replied, "No they were not." (Tr.102)

Respondent did place into evidence some IRI campaign materials containing the name "UNITE Disability Services Council." (R-1-R-7) However, neither Edgar Romney nor Richard Guido, the only union witnesses presented, were able to testify about these materials, the organization in general or its relationship, if any, to UNITE!'s campaign at IRI. (Tr.141,144,185) Similarly, the campaign materials themselves do not answer the question to which UNITE! entity the IRI organizers belonged. (R1-R-7) In the absence of

testimony or documentary evidence, the ALJ's conclusion that the record is unclear as to the affiliation of the IRI organizers is sound and should be upheld.

In Exception #7, Respondent assumes that "a Joint Board...was responsible for organizing IRI's employees...," and that it is undisputed that this Joint Board remained affiliated with UNITE HERE. Respondent relies heavily in its Exceptions on the argument that because the DSC is not a part of Workers United there is no continuity of representation. As discussed above, the record evidence does not support the conclusion that the IRI unit was organized by any particular Joint Board or other local organization. Although the Union witnesses might have heard the name DSC, they were unable to elaborate or explain what that organization was. Thus, it is immaterial whether any employee of any particular organization or Joint Board remained with UNITE HERE or with Workers United as there is no evidence that any entity other than the UNITE! International Union organized IRI's employees. What is material to the continuity analysis is the fact that sixty-five percent of the union officials that worked for UNITE, the certified union, continue to work for Workers United. Western Commercial Transport, 288 NLRB 214, 217 (1988).

It must be emphasized that Respondent's argument regarding who organized the IRI employees is the proverbial red herring because the entity for whom employees voted was UNITE, AFL-CIO, CLC-the International Union. (GC-1; Tr.214 DeNatale) There was no evidence presented that any joint board or affiliate ever represented the IRI unit. Thus, the substantial continuity inquiry must be focused solely on whether UNITE, AFL-CIO, CLC, the international union, is the same union as Workers United, SEIU, the international union. While it may be true that had Respondent recognized UNITE back in

2003, the IRI unit may have been assigned to the Disability Services and Allied Workers (DSAW) Joint Board, the fact remains that it never was so assigned because Respondent challenged the results of the election.

- Exception #4 and #13: Respondent excepts to the ALJ's conclusion that its proposed current number of employees in the bargaining unit was inflated; Respondent excepts to the ALJ's conclusion that the changes to the bargaining unit in the seven years between the election and the certification were irrelevant to the issue of whether a bargaining order should be imposed.

Respondent's Human Resource Manager Clifford Emmerich testified that since the 2003 election, Respondent has added new residences and day programs. Thus, the unit now contains about 234 employees. (Tr.199) When asked on cross examination how many employees work in the new residences and day programs created by the Respondent since 2003, HR Manager Clifford Emmerich testified that there were about 24 employees servicing the four new day programs. (Tr.203) He then stated that 3 employees work at the Rosato Apartment, 14 employees work at the Eastchester Residence, and 13 work at the Elaine and David Radisch Residence. (Tr.203) Thus, according to Respondent, 54 employees work in Respondent's new residences and day programs. The ALJ simply added this number to the number of employees in the original unit, 151, and determined that Respondent's 234 figure was inflated. This exception should be denied as well as the ALJ's mathematical conclusion is well supported by the record.

It must be emphasized that Counsel for the Acting General Counsel does not seek to include any programs or residences in the bargaining unit that were not in existence at

the time of the 2003 election. Thus, for purposes of this proceeding, employees working at Respondent's new residences and at Respondent's new day programs should not be included in the overall unit number. Looking at the figures from a different angle, if one subtracts the 54 new employees from Respondent's 234 figure, we see that the original unit has only grown by 29 employees. When asked if classifications in the original certification still exist, the Respondent answered that they were all still in existence. (Tr.195,198) Consequently, Respondent's claim that there have been substantial changes to the composition of the bargaining unit is without merit as the record revealed that the same classifications exist today and that the overall number of employees has grown by 29 only. These exceptions should be denied.

- Exceptions #5 and 6: Respondent excepts to the ALJ's conclusion that IRI has not met its burden of establishing that the merger and disaffiliation UNITE! created such substantial changes as to alter the identity of the union; and Respondent excepts to the ALJ's conclusion that Workers United is virtually the same organization as UNITE! despite the merger and disaffiliation.

These exceptions are based on the assumption that the IRI unit was organized and/or represented by the DSC or the Disability Services and Allied Workers Joint Board (DSAW). As discussed earlier, there is no basis in the record to support such a conclusion. The testimony elicited at the hearing demonstrated that the UNITE international union organized the IRI employees. (Tr.118,127,142,145) Thus, Respondent's argument that the continuity analysis should focus on whether Workers United is the same union as the DSC or the DSAW, is wholly without merit. The ALJ properly focused on the issue of whether there was substantial continuity of

representation between the certified union, UNITE, AFL-CIO and Workers United. These exceptions should be denied.

- Exception #8 and 9: Respondent objects to the ALJ's conclusion that there was no confusion as to the representative of Respondent's employees and that there was no attempt to transfer representational responsibilities; and Respondent excepts to the ALJ's conclusion that Respondent bore the burden of proof regarding lack of continuity.

The ALJ correctly pointed out that Workers United requested bargaining as the successor to UNITE, AFL-CIO. (GC-1) Workers United did not ask the Respondent to recognize it as having been delegated or transferred the representational rights to the IRI unit. Thus, the inquiry is whether Workers United is in fact the successor to UNITE not whether Workers United is the 9(a) representative. Implicit in the successorship argument is the argument that Workers United has already achieved 9(a) status via its predecessor UNITE.

Board law dictates that the party asserting lack of continuity has the burden of proof in establishing that defense. CPS Chemical Co., 324 NLRB 1018, fn. 7 (1997). Thus, the General Counsel presented overwhelming evidence that there is substantial continuity of representation between UNITE, AFL-CIO and Workers United. As the party asserting that there was actually a lack of continuity, Respondent bore the burden of proving that defense under extant Board law. This exception should also be denied.

- Exception 10-12: Respondent excepts to the ALJ's conclusion that the absence of Workers United officials with experience in representing MRDD shops is insufficient to establish the claim that a new union has been substituted for the

certified one; Respondent excepts to the ALJ's determination that Workers United's affiliation with the SEIU is a relevant issue; and Respondent excepts to the ALJ's reliance on SEIU and employer websites.

The ALJ was correct in concluding that as the certified union, UNITE, the international, has the right to select a local or joint board to as its agent to service the IRI unit. Citing for example Mountain Valley Care, 346 NLRB 281, 282-283, 288 (2006). As its successor, Workers United enjoys the same right of selection. Thus, it is immaterial that Workers United, and its New York Metropolitan Joint Board, may not have any experience in representing MRDD facilities.

With regard to the ALJ's discussion of Workers United's affiliation with the SEIU, the ALJ stated, "As I have related above, I have concluded that even absent Workers United's affiliation with the SEIU that Respondent has failed to prove that Workers United was an 'entirely different' labor organization than UNITE...My findings with respect to Workers United's affiliation with the SEIU *serves only to reinforce this conclusion."(* Emphasis added) ALJ Decision, pg. 30, fn 42. Consequently, the SEIU affiliation does not serve as the basis for any of the ALJ's conclusions. He uses the SEIU simply to reinforce a conclusion based on other portions of the record. Respondent's exceptions in this regard should be denied because they are exceptions to dicta and not actual findings.

- Exceptions #14-17: Respondent excepts to the ALJ's conclusions that Workers United is the successor to UNITE, ALF-CIO and that IRI engaged in unfair labor practices; Respondent objects to the ALJ's entire remedy and entire order.

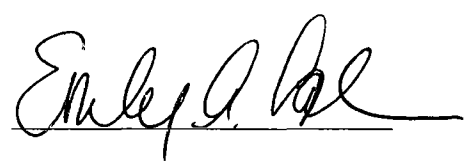
These exceptions are overly board and vague, making it impossible for the Counsel for the Acting General Counsel to respond. Respondent does not indicate exactly to what it objects regarding these ALJ conclusions or his remedy and order. These exceptions should be denied as well.

CONCLUSION

It is respectfully requested that the Administrative Law Judge's findings, based on the judge's credibility determinations and the application of the law to the record evidence, be affirmed.

Dated at Brooklyn, New York, this 4th day of October, 2011.

Respectfully Submitted,



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WORKERS UNITED, SERVICE EMPLOYEES INTERNATIONAL UNION

Date of Emailing: October 4, 2011

STATEMENT OF SERVICE OF: COUNSEL FOR THE ACTING GENERAL COUNSEL'SANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE.

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in according with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

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