UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31

HOTEL BEL-AIR

and **Case No. 31-CA-29841**

UNITE HERE LOCAL 11

COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT

Pursuant to Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel submits these cross exceptions and brief in support thereof to the Administrative Law Judge Jay R. Pollack's Recommended Decision and Order (ALJD).

Exception 1: The Administrative Law Judge Mistakenly Referred to Respondent's April 9, 2010 "Last, Best and Final Offer" as the April 19 or April 29 "Last Best and Final Offer" (ALJD at 6:50-51, 8:35, 9:18-19, and 9:44)

As evident in the Statement of Facts, the Respondent presented to the Union a severance pay plan on April 9, 2010 that Respondent referred to as its "last, best and final offer." (ALJD at 4:19-26). Administrative Law Judge (ALJ) Jay Pollack's references to last, best and final offers of April 19 or April 29 appear to be typographical errors and should be corrected. (ALJD at 6:50-51, 8:35, 9:18-19, and 9:44)

Exception 2: ALJ Pollack Improperly Failed to Prohibit Respondent from Attempting to Recover From Employees Money Paid Pursuant to the Waiver and Release Forms (ALJD at 10:6-36)

While ALJ Pollack properly concluded that Respondent should be required, upon request by the Union, to rescind the waiver and release forms signed by bargaining unit employees, he erred by failing to prohibit Respondent from attempting to recoup amounts paid to employees pursuant to those unlawfully implemented waivers and releases in the event the Union requests rescission. (ALJD at 10:6-36). Allowing Respondent to attempt to recoup the payments it made pursuant to unlawfully implemented waivers and releases would cause hardship to those unit employees who no longer have the funds.

Given that more than a year has passed since Respondent unlawfully implemented its severance pay package in July 2010, it is likely that many employees have already spent some or all of their severance payment. Thus, the Union would be effectively precluded from exercising its right to demand rescission of the unlawfully implemented severance pay package in order to avoid that hardship to unit employees. The end result would allow Respondent to enjoy the benefit of its own unlawful conduct.

Prohibiting a respondent from requiring repayment of monies, paid to employees pursuant to respondent's unfair labor practice, is supported in Board law. *See, e.g., Joe & Dodie's Tavern*, 254 NLRB 401, 415 (1981) ("no employee shall be required to repay Respondent any sum of money by reasons of the recomputation of earnings required by this Decision"); *Chateau de Ville, Inc.*, 233 NLRB 1161, 1170 (1977) (same). Both of these cases involved restaurant employers that unlawfully reduced the number of waitress

stations for unit employees and discriminatorily reduced the number of shifts for union supporters. Given that the payments to employees were a result of Respondent's unlawful implementation and direct dealing with unit employees, employees should be spared from bearing the brunt of the impact of remediating the Respondent's misconduct.

Such a remedy would not result in a windfall to employees as the parties could agree, through good faith bargaining, to apply the severance already received toward whatever severance amount is ultimately agreed upon. *See, e.g.*, *Baltimore News American*, 230 NLRB 216, 220-21 (1977); *A.S. Abell Co.*, 230 NLRB 17, 21 (1977). In both of those cases, the Board affirmed the ALJ's findings that the employer had unlawfully directly dealt with represented employees by offering them voluntary retirement plans whereby employees were paid a lump sum and granted other benefits in exchange for retiring early. The Board orders required that all employees be offered reinstatement and made whole for lost wages if they returned to work. For those employees who accepted reinstatement, the lump sum payment was treated as interim earnings and deducted from the employees' backpay amounts. Applied here, that same principal dictates that Respondent be precluded from attempting to recover the amounts it paid to employees pursuant to its own unlawful conduct.

Dated at Los Angeles, California, this 11th day of October, 2011.

Steven Wyllie
Counsel for Acting General Counsel

Re: Hotel Bel-Air
Case No: 31-CA-29841

CERTIFICATE OF SERVICE

I hereby certify that I served the attached copy of the **COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT** on the parties listed below on the 11th day of October, 2011.

VIA E-FILE

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
www.nlrb.gov

VIA E-MAIL:

Kristin L. Martin
Davis, Cowell & Bowe LLP
klm@dcbsf.com

Arch Y. Stokes, Esq.
Stokes Roberts & Wagner, ALC
astokes@stokesroberts.com

Mara Estudillo
Secretary to the Regional Attorney
NLRB, Region 31