UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

RITZ-CARLTON WATER TOWER
PARTNERSHIP

and Case 13-CB-19622

UNITE HERE LOCAL 1

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

Counsel for the General Counsel and Employer focus on persuading the Board that the Employer's interpretation of the Me-Too Agreement is the correct interprettion. That is not the issue before the Board. The issue is whether the dispute between the parties – how the Me-Too Agreement should be interpreted -- should be decided by the Board or should be deferred to arbitration. There is no dispute that the parties' dispute centers on interpretation of that agreement. The Employer concedes this key point in the very first paragraph of its brief: "Specifically, the parties' dispute centers around whether the Me Too Agreement required them to bargain over nine separate issues or only three as the Union argues." CP Br., at 1. This dispute should be deferred to arbitration because the Me-Too Agreement is at its heart.

Neither exception to deferral of contract interpretation disputes applies here. Local 1 has not repudiated its bargaining obligation under the Me-Too Agreement. It is undisputed that Local 1 continues to bargain with the Employer and even offered to resolve this dispute by arbitration, as the Me-Too Agreement requires. Local 1's interpretation of the agreement is not patently erroneous. The Agreement is admittedly ambiguous, as the ALJ found, and a plausible interpretation of an ambiguous agreement is not patently erroneous.

ARGUMENT

A. The Board did not order the ALJ to decide this case on the merits

Counsel for the General Counsel and the Employer seem to argue that the Board's order denying Local 1's motion for summary judgment compelled the ALJ to interpret the Me-Too Agreement. That is wrong. While the Board stated that a hearing was necessary to resolve factual questions, the Board did not state that the issue of material fact was how the Me-Too

Agreement should be interpreted. In fact, the Board's order makes clear that this is not the factual question it intended the ALJ to resolve after holding a hearing. The order states that "[t]he Respondent has failed to establish that there are no genuine issues of material fact *regarding its argument that the complaint allegations should be deferred* . . . ." GC Exh. 1(g) (emphasis added). In its motion for summary judgment, Local 1 did not ask the Board to decide that the case should be deferred because Local 1's interpretation is correct. It asked the Board to defer because, in Local 1's view, there were no disputed issues of fact regarding the criteria for deferral, set out in *Textron, Inc.*, 310 NLRB 1209, 1210 (1993). That is the only issue the Board's order required the ALJ to decide.

The Board's order also states that Local 1 can renew its argument that the case should be deferred. If the Board intended that the ALJ decide the merits of the parties' contract interpretation dispute, then it would not have invited Local 1 to renew its deferral argument.

B. This case presents a contract dispute

Counsel for the General Counsel and the Employer argue, albeit in different ways, that this case does not present a contract dispute. Counsel for the General Counsel says that the case does not present a contract dispute because there is not language in the Me-Too Agreement that "specifically address[es] the legal dispute here." GC Br., at 7. That argument makes no sense. This dispute is about what issues are covered by paragraph III of the Me-Too Agreement's provision for direct bargaining and what issues are covered by paragraph II's me-too promise.

The Employer asserts that interpretation of the Me-Too Agreement is not at the center of this dispute because the dispute is about Local 1's "actions", i.e., Local 1's refusal to bargain.[1]

[1] This argument directly contradicts the Employer's admission at the beginning of its brief that the Me-Too Agreement is at the heart of this dispute: "Specifically, the parties' dispute

CP Br., at 25-26. That is a meaningless distinction. Local 1 refused to bargain about issues that Local 1 contends are covered by the me-too promise in paragraph II of Me-Too Agreement, and are not covered by the exceptions from the me-too promise in paragraph III of the Me-Too Agreement. That is the only basis for Local 1's alleged refusal to bargain.

C. Local 1 did not repudiate the Me-Too Agreement

Counsel for the General Counsel and the Employer correctly point out that, even in cases involving contract disputes, the Board will not defer to arbitration when the respondent has repudiated its bargaining obligation. But here, it is clear that Local 1 has not done so. Local 1 (a) continues to negotiate over the issues that it believes are covered by paragraph III of the Me-Too Agreement; (b) at the time of the hearing, had reached agreement on one of those issues; and (c) offered to arbitrate, under the Me-Too Agreement's arbitration provision, whether the Me-Too Agreement requires it to bargain about the other issues about which the Employer wants to bargain. TR 181-88, 209, 219-20, 233. These facts are undisputed. If Local 1 had repudiated its bargaining obligation, it would not be doing any of these things. If, as opposing parties argue, disagreement about what a contract means amounts to a repudiation of the bargaining obligation by the party on the losing side of that contract interpretation dispute, then every contract dispute would automatically be transformed into a repudiation by the losing party. That is not what the Board holds. *See, e.g., ACS, LLC*, 345 NLRB 1080, 1083 (2005); *Velan Valve Corp.*, 316 NLRB 1273, 1274 (1995); *Cherry Hill Textiles*, 309 NLRB 268, 269 (1992); *Dallas Morning News*, 285 NLRB 807, 807 (1987); *Mid-America Milling Co.*, 282 NLRB 926, 926 (1987); *United Technologies Corp.*, 268 NLRB 557, 560 n.21 (1984).

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centers around whether the Me Too Agreement required them to bargain over nine separate issues or only three as the Union argues." CP Br., at 1.

Counsel for the General Counsel and the Employer argue that the offer by Local 1 Vice President Karen Kent to arbitrate the parties' dispute is irrelevant. GC Br., at 12; CP Br., at 13 n.5. This argument shows that Counsel for the General Counsel and the Employer do not understand the critical difference between a dispute over contract interpretation and repudiation of an agreement. Local 1's undisputed willingness to arbitrate[2] demonstrates that Local 1 did not

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[2] Counsel for the General Counsel asserts that Local 1 did not really offer to arbitrate because Kent did not clearly specify what she wished to arbitrate, and speculates the offer to arbitrate could have been limited to the issues that Local 1 considered to be unique. That argument is frivolous and makes no sense. Local 1 never disputed its obligation to negotiate over the unique issues (since they are covered by paragraph III). It is illogical that Local 1 would offer to arbitrate issues over which there was no dispute. Moreover, the Employer's counsel understood exactly what Kent was offering to arbitrate, as his testimony shows:

> Q. Okay. And, at any one of those sessions, do you recall a discussion about arbitration of this dispute over whether the Union had to negotiate over those issues?
>
> A. I believe during one session, I do not recall the date, but I do believe at one point in those discussions Ms. Kent said then let's go to arbitration or, something to that effect.
>
> Q. Okay and, what was your response to that statement?
>
> A. That, in our position, there was nothing to arbitrate. That we had a pretty clear agreement that Mr. Johansen had made on behalf of the hotel with the Union and that, from the hotel's perspective, the Union was going back on its word, not to be too dramatic, to say we're not going to bargain over all those things.
>
> Q. And, the agreement that you just referred to from the hotel's perspective, you said we had a pretty clear agreement, was Joint Exhibit 2 [the Me-Too Agreement]?
>
> A. Yes.

TR 233.

repudiate the Me-Too Agreement. Local 1 asked the Employer to resolve the dispute in the manner the parties agreed to use when they entered into the Me-Too Agreement.

D. Local 1's interpretation of the Me-Too Agreement is not patently erroneous

Counsel for the General Counsel and the Employer recite the evidence in support of the Employer's theory how the Me-Too Agreement should be interpreted. That evidence does not make Local 1's position is patently erroneous. There is a dispute, so it is to be expected that there is evidence supporting both sides of the dispute. The Employer asserts that Local 1 did not introduce any evidence to support its position, but that is not true. Local 1 did not call any witnesses, but it did cross-examine the Employer's witnesses, obtain admissions from them, and introduce documents through them. The evidence in support of Local 1's position is recited in Local 1's opening brief (Section B.4.c). The Employer and Counsel for the General Counsel simply ignore this evidence.

Counsel for the General Counsel argues that "'patently erroneous' means that an employer's or union's position during litigation is clearly or obviously wrong." GC Br., at 9. In support of this position, the General Counsel cites three cases which have nothing to do with *Collyer* deferral, and offers no theory about how the "patently erroneous" exception should be applied in the deferral context.

In the deferral context, "patently erroneous" means that the respondent's position is implausible. *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529, 1530 n.5 (2000); *Caritas Good Samaritan Medical Center*, 340 NLRB 61, 63-64 (2003). A less rigorous definition would prevent the Board from ever deferring to arbitration without first holding a full-blown hearing on the merits. That would contradict well-established Board policy which requires deciding the deferral question before deciding the merits. *Servomation Corp.*, 271 NLRB 1112, 1112 (1984);

L.E. Myers Co., 270 NLRB 1010, 1010 n.2 (1984); *E.I. du Pont & Co.*, 293 NLRB 896, 896 n.2 (1989); *Consolidated Freightways Corp.*, 288 NLRB 1252, 1267 (1988) *enf'd* 925 F.2d 1486 (D.C. Cir. 1991).

Here, there is enough evidence in the record to show that Local 1's interpretation of the Me-Too Agreement is plausible. The ALJ found that paragraph III of the Me-Too Agreement is ambiguous, ALJD 14:15-23; and neither the Employer nor Counsel for the General Counsel filed an exception to that finding. A plausible interpretation of an ambiguous contract provision cannot be patently erroneous. It was not necessary for Local 1 to call witnesses and present a full-blown defense on the merits to show plausibility.

Counsel for the General Counsel asserts repeatedly that the nine issues about which the Employer seeks to bargain are "specifically enumerated in a side letter." GC Br. at 2; see also GC Br., at 13. That is not true. The Me-Too Agreement does not list the issues about which the Employer seeks to bargain. Jt. Exh. 2. There is not a side letter to the Me-Too Agreement. A side letter to the collective bargaining agreement does not list these issues. Jt. Exh. 1. The only document that lists the issues is General Counsel's Exhibit 2, which the Employer's representative admitted that he did not show to Local 1 when they negotiated and entered into the Me-Too Agreement. TR 215-16. Moreover, that document lists issues that the Employer says it raised on September 1, 2009. It does not say that the issues are unique to the Employer.

E. An arbitrator can order the parties to comply with the arbitrator's interpretation of the Me-Too Agreement

Counsel for the General Counsel argues that an arbitrator cannot address the consequences of Local 1's refusal to negotiate. This argument is circular because it assumes that Local 1 is refusing to negotiate. Whether Local 1 is refusing to negotiate depends on the

interpretation of the Me-Too Agreement, which is the question for the arbitrator. If an arbitrator determines that the subjects over which the Employer wants to arbitrate are covered by Paragraph II's me-too promise, then Local 1 is not refusing to negotiate. Local 1 already negotiated about those subjects and reached agreement.

Counsel for the General Counsel asserts that the Board's remedies are "more comprehensive" but does not explain how they are "more comprehensive." GC Br., at 10. Even assuming for the sake of argument that Local 1 is refusing to negotiate over issues covered by paragraph III, the arbitrator can remedy that refusal by issuing an order compelling Local 1 to negotiate over those issues. Local 1 has never suggested that it will not comply with the arbitrator's order, but if it does, the order can be enforced as an order of the federal court, violation of which is subject to contempt proceedings. *International Longshoremen's Ass'n Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64. 75-76 (1976). That is why the Board deems enforcement of arbitration award by the federal courts the preferred method for enforcing a labor contract. *Malwrite of Wisconsin, Inc.*, 198 NLRB 241, 242 (1972) *enf'd in rel. part* 494 F.2d 1136 (D.C. Cir. 1974). Counsel for the General Counsel simply ignores this law.

F. The ALJ's conclusion that the Employer had access to the Me-Too Agreement's arbitration provision is not before the Board on exceptions

The Employer challenges the ALJ's conclusion that the Employer could have sought arbitration under the Me-Too Agreement's arbitration provision. CP Br., at 21-24. Specifically, the ALJ concluded that "there is no impediment to the Employer's use of arbitration that would preclude deferral in this case." ALJD 19:26-27. The Employer's challenge to this conclusion should be disregarded because the Employer did not file exception to it. *Caterpillar, Inc.*, 355 NLRB No. 91 n. 6 (Aug. 17, 2010) (disregarding argument not raised by exceptions); 29 C.F.R.

§ 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived"); 29 C.F.R. § 102.46(d)(2) ("The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof.").

If the Board decides to reach this issue, it should adopt the ALJ's conclusion. The Me-Too Agreement plainly provides for its enforcement through arbitration. Paragraph VI of the Me-Too Agreement provides that it "is enforceable in accordance with the procedures set forth in Section 46 of the Collective Bargaining Agreement." Section 46 provides for arbitration. While Section 46(a) states that Local 1 or employees may file grievances, Section 46(f) provides that "either the Local Union or the Employer may refer the matter to arbitration." Jt. Exh. 1 (p.33).[3] It would not be logical to conclude that the parties intended that only Local 1 could enforce the Me-Too Agreement. Moreover, the Employer drafted the agreement so any ambiguities in the enforcement provision must be construed against it. *Chestnut Hill Bus Corp.*, 270 NLRB 212, 216 (1984); *Inta-Roto, Inc.*, 252 NLRB 764, 770 (1980), *enf'd* 661 F.2d 922 (4th Cir. 1981). This canon of contract interpretation keeps parties, like the Employer here, from benefitting from confusion created by their own sloppiness.

That is consistent with the federal common law of labor contracts.[4] Federal courts hold that when a labor contract contains procedures for processing employee grievances that do not expressly include or exclude employer grievances, such grievances are subject to arbitration.

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[3] The Employer's representative conceded that he was not aware of any instance in which the Employer tried to submit a grievance to arbitration under Section 46(f). TR 115.

[4] The federal courts have jurisdiction under Section 301 of the Labor Management Relations Act to establish a federal common law of labor contracts. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812, 242 F.3d 52, 57 (2nd Cir. 2001); *Domino Sugar Corp. v. Sugar Workers Local 392*, 10 F.3d 1064, 1069 (4th Cir. 1993); *H.K. Porter Co. v. Local 37, United Steelworkers of America*, 400 F.2d 691, 695 (4th Cir. 1968); *International Union v. Clark*, 412 F. Supp. 2d 138, 145 (D.D.C. 2006).

The Employer relies on *Local No. 6-0682, PACE Int'l Union*, 339 NLRB 291 (2003), in which the Board did not defer to arbitration, but that case is unique. There, the collective bargaining agreement did not "empower [the Employer] to file a grievance or move a contract dispute into arbitration" and the union had repeatedly "objected to having the issue presented to arbitration." *Id.* at 297. Here, in contrast, the collective bargaining agreement does empower the Employer to submit a dispute to arbitration, and Local 1 offered to arbitrate the dispute. TR 233.

G. If the Board decides against deferral, Board law supports remanding the case for a full-blown hearing on the merits

Local 1 relied on *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 785 (2006) to request in its opening brief an opportunity to present evidence regarding the Me-Too Agreement's meaning if the Board decides against deferral. The Employer distinguishes *Doubletree Guest Suites Santa Monica* by blatantly misrepresenting the facts of that case. According to the Employer, that case involved a settlement of some of the issues in the complaint prior to the hearing before the ALJ. CP Br., at 20 n.8. That is false. There was no settlement of the complaint at issue in the case before the Board. Instead, the respondent asserted a "settlement bar" defense based on the settlement of a prior case. 347 NLRB at 783-84. Like Local 1 here, the respondent in *Doubletree Guest Suites Santa Monica* relied exclusively on its affirmative defense when presenting the case to the ALJ and did not litigate the merits of the alleged unfair labor practice. The Board rejected the settlement bar defense, but

remanded to allow the employer to litigate the merits. *Id.* at 785. In this respect, *Double Guest Suite Santa Monica* is on all fours with this case. If anything, this case presents an even stronger case for remand because Board policy requires that a *Collyer* deferral defense be decided before the merits. Local 1 refrained from presenting evidence on the merits in reliance on that policy.

Counsel for the GC ignores *Doubletree Guest Suites Santa Monica* and cites *Tortilleria La Poblanita*, 357 NLRB No. 22 (July 28, 2011) in support of his assertion that Local 1 has waived any defense on the merits. But *Tortilleria La Poblanita* involved a defense that was waived by entering into a settlement agreement. *Id.* at n.7. Local 1 preserved its defense by raising it in its answer. GC Exh. 1(d).

CONCLUSION

For all of the foregoing reasons, the Board should not adopt the recommended decision of the Administrative Law Judge and should instead dismiss the complaint.

DATED: February 1, 2012

Respectfully submitted,

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For all of the foregoing reasons, the Board should not adopt the recommended decision of the Administrative Law Judge and should instead dismiss the complaint.

DATED: January 31, 2012

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 years, and am not a party to the within action; my business address is 595 Market Street, Ste. 1400, San Francisco, CA 94105.

On January 31 2012, I served the following document(s) described as

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as follows:

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[X] **(BY U.S. Mail)** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit. I deposited such envelope(s) with postage thereon fully prepaid to be placed in the United States Mail at San Francisco, California.

[ ] **BY FACSIMILE:** I transmitted the documents listed above by facsimile machine to the facsimile number listed above.

[X] **(By E-Mail)** I transmitted a copy of the foregoing document(s) via e-mail to the addressee(s)

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 31, 2012 at San Francisco, California.

Jamie Cantwell