

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

ASHFORD TRS NICKEL, LLC

and

CASE NO. 19-CA-32761

UNITE-HERE, LOCAL 878

**MOTION FOR SUMMARY JUDGMENT**

Ashford TRS Nickel, LLC (“TRS”), is a subsidiary of Ashford Hospitality Trust, Inc. (“AHT”), a publicly traded company whose primary business is the ownership of hotels. AHT qualifies as a real estate investment trust (“REIT”) under Internal Revenue Code § 856, which provides certain tax advantages to those companies who so qualify. *See*, attached Affidavit of Chris Peckham.

As a REIT, AHT acting through its subsidiaries – including TRS – “are not permitted to engage in the management of hotels, or to employ the employees of hotels, [and in] actual practice, AHT and its subsidiaries do not manage hotels, and do not employ the employees of any hotels it owns.” [Peckham, paragraph 6]. Various provisions within IRC § 856 (quoted verbatim in the attached affidavit of Chris Peckham) require companies qualifying as REITs to engage “eligible independent contractors” to actually manage the business – here, hotels – operated on the premises of the owned real estate.

Among the eligible independent contractors engaged by TRS to operate its hotels is Remington Hotels and its subsidiaries (other eligible independent contractors engaged by TRS to manage AHT-owned hotels include Hilton Hotels, Hyatt Corporation, Marriott Corporation, Interstate Hotels Corporation, as well as others [Peckham affidavit, paragraph 11]). A

Remington Hotels subsidiary, Remington Anchorage Employers, LLC (“RAE”) presently manages the Sheraton Anchorage Hotel & Spa, the hotel at issue in this litigation, under the terms of an amended Hotel Master Management Agreement (“Master Agreement”) [Peckham paragraph 7, and **Exhibits A and B** attached thereto].<sup>1</sup>

Consistent with the requirements for maintaining REIT status, the Master Agreement:

. . . makes plain that the ‘operation of the [Sheraton Anchorage] shall be under the exclusive supervision and control of [RAE].’ [Exhibit A, Section 4.02]. The Master Agreement provides also that ‘[RAE] shall hire, train, promote, supervise, direct the work of and discharge all personnel working [at the Sheraton Anchorage] . . . and is vested with absolute discretion in the hiring, discharging, supervision, and direction of such personnel . . . [and further], [RAE] shall fix the employees’ terms of compensation and establish and maintain all policies related to employment.’ [Exhibit A, Sections 9.01 and 9.02].

[Peckham affidavit, paragraph 8].

As noted above, AHT is a publicly traded company. Remington Hotels is privately held, however, and is owned primarily by two individuals, Archie Bennett and Monty Bennett (father and son). There is a slight degree of common ownership between AHT and Remington Hotels: the Bennetts own a non-controlling 2.3% interest each in AHT. “The ownership of the Bennetts, even if their shares went combined [at 4.6%], would not make them the largest shareholder in AHT.” [Peckham, paragraph 2]. Archie Bennett is the Chairman of AHT, and Monty Bennett is the Chief Executive Officer. “Both gentlemen serve on of the Board of Directors, however, at

---

<sup>1</sup> The parent company of Remington Hotels is Remington Holdings, LP. The Master Agreement entered into with TRS, dated October 6, 2006, was originally entered into by Remington subsidiary, Remington Management, LP. Subsequently, the management of the Sheraton Anchorage under the Master Agreement was assigned to Remington Lodging & Hospitality, LLC, which was the employer of the employees at the time of the underlying lawsuit at issue in this litigation. Subsequently, effective January 1, 2011, the management of the hotel was assigned to RAE, the current managing entity and employer of the employees at the hotel. RAE is a successor to Remington Lodging & Hospitality, LLC. [Peckham, paragraphs 7 and 9].

the pleasure of the shareholders who own the remaining 95.4% of the company's shares. They do not hold, individually or collectively, controlling voting power on the Board." [Peckham, paragraph 3]. In addition,

Because of Archie and Monty Bennett's ownership interests in Remington Hotels, they abstain from voting on any business transactions involving Remington. Those decisions are made by the five other independent board members who own no ownership interest in Remington.

[Peckham, paragraph 4; *see also*, paragraph 3].

The underlying lawsuit at issue in this case (see paragraph 7(a) of the Complaint) was filed by TRS against UNITE-HERE Local 878 ("Union"), and alleged that the Union violated non-preempted Alaskan state law during the course of a boycott engineered by the Union starting in November of 2010. The lawsuit alleged the Union engaged in non-protected concerted activity in carrying out the boycott, by communications containing barely veiled threats of violence and harm, and which therefore unlawfully and tortiously interfered with the hotel's business relationships, and by defaming the hotel.

The lawsuit was brought by TRS, as it was an injured party. The Remington entity which managed the Anchorage Sheraton at the time, in November of 2010, was Remington Lodging & Hospitality, LLC ("RLH"). As noted in footnote 1, above, RAE is the successor to RHL. This Remington subsidiary, like the current subsidiary, RAE, managed the hotel "as agent and for the account of [TRS]." [Exhibit A to Peckham Affidavit, Section 4.01]. Under the Master Agreement, RLH was entitled only to a base management fee of 3% of the gross revenue for each accounting period, plus an incentive fee of 1% of gross operating profit. [Exhibit A, Sections 11.01 and 11.02]. All other profits, including and below the gross operating profit line, as well as all risk of loss, goes to TRS. Accordingly, the non-protected and unlawful conduct

associated with the boycott directly and substantially impacted TRS, and it chose to pursue its constitutionally protected remedy of filing a lawsuit to recover its losses. While RLH's interest in earning its fee was also tangentially impacted, the potential for injury was greatest to TRS.

The decision to bring the lawsuit was made by AHT subsidiary TRS. This was an independent decision by an independent company, and as shown by the facts above and by the law below, AHT/TRS is not a "single employer" with the Remington entities. While it can be said the lawsuit, had it been successful, would have marginally benefitted RHL – by restoring revenue which would have slightly increased its 3% base and 1% incentive fees – the fact nonetheless remains that the lawsuit was filed and maintained by an entity that is neither a "single employer" with RHL, nor is it a so-called alter-ego.

#### **Argument and Citation of Authority**

The Regional Director has initiated this 8(a)(1) complaint based on the filing of the lawsuit referenced above. Ashford TRS Nickel LLC v. UNITE-HERE, Local 878; United States District Court for the District of Alaska, Case No.: 3:10-cv-0213 ("Lawsuit"). It is fundamental to the jurisdiction of this Board, as stated in the very wording of Section 8(a)(1), that an action thereunder may only be brought against an employer within the meaning of the Act: "It shall be an unfair labor practice for an *employer* – (1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7". (emphasis added). The question, therefore, is whether TRS is an employer. To establish this, the General Counsel must meet the elements of the "single employer" analysis. This analysis, as opposed to an "alter-ego" analysis, is used "where two ongoing businesses" are alleged to be "coordinated by a common master."

Chemical Sovereign, 2012 NLRB LEXIS 264 (ALJ Sandron, May 15, 2012), citing to Cadillac Asphalt Paving, 349 NLRB 6, 8 (2007); *see also*, APF Carting, Inc., 336 NLRB 73, fn. 4 (2001), and NLRB v. Hospital San Rafael, 42 F.3d 45, 50 (1<sup>st</sup> Cir. 1994). The test is set forth succinctly, as follows, in the recently issued Chemical Sovereign decision (at \* 119):

In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) functional interrelationship of operations, and (4) common control of labor relations.

No single factor is controlling, and all not need to be present. Rather, single-employer status depends on all of the circumstances and ultimately is based on the absence of an arm's-length relationship between seemingly independent companies. *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007), *enfd.* 551 F.3d 722 (8th Cir. 2008); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001).

The most important single factor is whether there is centralized control over labor relations. *Mercy Hospital*, *id.* at 1284; *AG Communications Systems Corp.*, 350 NLRB 168, 169 (2007). Common ownership, while significant, is not determinative in the absence of centralized control over labor relations. *AG Communications Systems*, *ibid*; *Mercy Hospital of Buffalo*, *supra* at 1284.

Applying the above four factors, the undisputed facts above show the following:

1. Common ownership. This factor is insignificant. As shown above, while the Bennetts are the two sole owners of Remington, together they own only 4.6% of AHT.
2. Common management. As stated in the attached affidavit of Todd Stoller: "The day-to-day operations and all matters related to the business and strategic planning of Remington Hotels, LLC and its related entities ("Remington") are handled and overseen by Remington's president Mark Sharkey. Within Mr. Sharkey's broad realm of authority are all matters related to the company's employment policies, practices and procedures. Mr. Sharkey is not an officer of, and plays no role whatsoever with respect to, AHT." Although Archie Bennett and Monty Bennett hold the titles of Chairman and CEO,

respectively, neither gentleman “is actively involved in the day-to-day operations of Remington.” [Id.]. Further, Archie Bennett is “a non-executive chairman,” and Monty Bennett “allocates the vast majority of his time to the day-to-day operations of AHT.” [Id.].

3. Functional interrelationship of operations. There is no interrelationship. First, the two businesses are set up for very different operational purposes. AHT is an ownership entity that does not manage hotels, and Remington is engaged solely in the business of managing hotels. As noted above, Remington is not the only hotel management company engaged by AHT, and by the same token Remington manages hotels for owners other than AHT. [Stoller affidavit, paragraph 4]. Second, as noted just above, Mr. Sharkey runs Remington, while Monty Bennett devotes the “vast majority of his time to AHT” and Archie Bennett is a “non-executive chairman.” Moreover, the two companies deal with each other at arm’s length. This is evident from the content of the attached Master Agreement, and is carried out in practice. As noted above, the two Bennetts “abstain from voting on business transactions involving Remington,” leaving those decisions to the “five other independent Board members . . . who have no ownership interest in or relating to Remington,” and “who compose all or a majority of the members of each committee of the board of AHT.”
4. Common control of labor relations. Finally, with respect to the “most important single factor,” the attached Master Agreement establishes beyond any doubt that AHT exerts

no control whatsoever over labor relations. This absence of such control is mandated, as shown above and in Mr. Peckham's affidavit by IRC section 856.

Taken together, while there is a slight degree of common ownership, and a similarly slight degree of common management – essentially, at a nominal level only – there is no interrelationship of operations. And, with respect to the most critical factor, there is no common control over labor relations.

Other cases which have come before the Board under the single-employer analysis, with facts showing a similar presence of the four factors, have not found the companies in question to be functioning as a single employer for purposes of enforcement under the Act. Alabama Metal Products, 280 NLRB 1090, 1090 (1986) (evidence of common ownership and interrelationship of operations, but with no evidence of common management and centralized control of labor relations, was “insufficient to establish single employer status”); Madison Industries, 307 NLRB 405 (1992) (Common ownership was shown, but the Board concluded that “none of the other indicia of single-employer status” was met, and so held, notwithstanding the fact – regarding the “common management” prong – that the “three officers of the Parent Company are also officers of each of the subsidiaries” that were at issue in that case); *and see*, Chemical Solvents, Inc., *supra*, at \*119 – 124 (common ownership of businesses that worked closely together, but nonetheless found no single-employer status.)

On the above authority, respondent Ashford TRS Nickel, LLC respectfully submits that it is not a ‘single employer’ with Remington Anchorage Employers or Remington Lodging &

Hospitality, LLC, and on this basis, as the former is therefore not an employer of the employees organized by the Union in this case, this case should be dismissed.

CONCLUSION

Respondent requests summary judgment dismissal of this case.

Respectfully submitted, this 29th day of June, 2012.

STOKES ROBERTS & WAGNER, ALC

s/s Karl M. Terrell  
Peter G. Fischer  
3593 Hemphill Street  
Atlanta, Georgia 30337  
404-766-0076 (phone)  
404-766-8823 (fax)  
Attorneys for Ashford TRS Nickel, LLC

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

ASHFORD TRS NICKEL, LLC

and

CASE NO. 19-CA-32761

UNITE-HERE, LOCAL 878

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Motion for Summary Judgment was electronically filed with the Division of Judges and Region 19 using the NLRB's filing system at [www.nlr.gov](http://www.nlr.gov) and was sent to the following via email and regular mail as follows:

Dmitri Iglitzin, Attorney  
Schwerin Campbell Barnard Iglitzin & Lavitt  
LLP  
18 W Mercer Street, Suite 400  
Seattle, WA 98119  
[Iglitzin@workerlaw.com](mailto:Iglitzin@workerlaw.com)

Marvin Jones, President  
UNITEHERE! Local 878  
530 E. 4<sup>th</sup> Ave  
Anchorage, AK 99501-2624  
[marvinj@union878.com](mailto:marvinj@union878.com)

Ronald K. Hooks, Regional Director  
Region 19  
915 2nd Avenue, Room 2948  
Seattle, WA 98174-1078  
[Ronald.hooks@nlrb.gov](mailto:Ronald.hooks@nlrb.gov)

Joyce A. Coleman  
Division of Judges  
901 Market Street, Suite 300  
San Francisco, California 94103-1779  
[Joyce.coleman@nlrb.gov](mailto:Joyce.coleman@nlrb.gov)

Rachel Feller  
915 2nd Avenue, Room 2948  
Seattle, WA 98174-1078  
[Rachel.feller@nlrb.gov](mailto:Rachel.feller@nlrb.gov)

John Fawley  
915 2nd Avenue, Room 2948  
Seattle, WA 98174-1078  
[John.fawley@nlrb.gov](mailto:John.fawley@nlrb.gov)

Doreen Gomez  
915 2nd Avenue, Room 2948  
Seattle, WA 98174-1078  
[Doreen.gomez@nlrb.gov](mailto:Doreen.gomez@nlrb.gov)

This 29<sup>th</sup> day of June, 2012.

s/s Karl M. Terrell