

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

AFFIDAVIT OF CHRIS PECKHAM

Appearing before the undersigned notary, CHRIS PECKHAM, who, being duly sworn, deposes and states as follows, based on his personal knowledge:

1. My name is Chris Peckham, and I am employed with Ashford Hospitality Trust, Inc. ("AHT") as Associate General Counsel. I have held this position for 8 years. I am a practicing attorney, employed in-house with AHT, and a member of the Texas State Bar.
2. AHT is a publicly traded company. Archie Bennett and Monty Bennett (father and son) each own approximately a non-controlling 2.3% voting interest in AHT. They do not own, hold or control any other voting interests in AHT. The ownership of the Bennetts, even if their shares were combined, would not make them the largest voting shareholder in AHT.
3. Archie Bennett is the Chairman of the board of directors of AHT, and Monty Bennett is the Chief Executive Officer and a member of the board of directors of AHT. Both gentlemen serve on the board of directors, however, at the pleasure of the shareholders who own the remaining 95.4% of the company's shares. They do not hold, either individually or collectively, controlling voting power on the Board. The board of directors is comprised of 5 additional individuals who have no ownership interest in or relationship with Remington. Under the New York Stock Exchange

listing standards, these 5 additional individuals constitute "Independent Directors" of AHT and comprise all or a majority of the members of each committee of the board of directors of AHT.

4. 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 5 other independent Board members.
5. AHT was formed as a real estate investment trust ("REIT"). The Internal Revenue Code, at section 856 (26 USC 856), accords certain tax advantages to a REIT. In order to maintain those tax advantages, certain rules proscribed by IRC section 856 must be followed.
6. AHT, through its subsidiaries, is an owner of hotels, including the Sheraton Anchorage Hotel & Spa. In generally stated terms, however, AHT and its subsidiaries are not permitted – in order to maintain REIT status – 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.
7. Ashford TRS Nickel, LLC is a wholly owned indirect subsidiary of Ashford Hospitality Limited Partnership, the operating partnership for AHT, which functions as an operating lessee to an ownership subsidiary of AHT. As operating lessee, Ashford TRS Nickel, LLC entered into the Hotel Master Management Agreement, dated October 6, 2006 (subsequently amended, as indicated below), with Remington Management, LP, for the purpose of managing a portfolio of hotels owned by an AHT ownership subsidiary ("Master Agreement"). Among those hotels is the Sheraton Anchorage. Attached as **Exhibit A** is a true and correct copy of the Master Agreement. Also attached as **Exhibit B** is a true and correct copy of an Amendment to the Master Agreement, dated December 7, 2006, which specifically appoints Remington Management, LP as the "manager of the Sheraton Anchorage property." This Amendment further identified Ashford TRS Nickel, LLC as the operating lessee under the Master Agreement.

8. The Master Agreement makes plain that the “operation of the [Sheraton Anchorage] shall be under the exclusive supervision and control of [the Remington entity].” [Section 4.02]. The Master Agreement provides also that “[the Remington entity] 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.” [Section 9.01]. Further, “[the Remington entity] shall fix the employees’ terms of compensation and establish and maintain all policies relating to employment.” [Section 9.02].
9. Subsequent to the execution of the 2006 Master Agreement and Amendment, the management responsibilities under the Master Agreement and the Amendment were assigned from Remington Management, LP to Remington Lodging & Hospitality, LLC. And then, effective January 1, 2011, those responsibilities were assigned to Remington Anchorage Employers, LLC.
10. As stated above (paragraph 6), AHT and its subsidiaries are not permitted under the REIT provisions of the IRC to manage hotels or employ the employees and still retain the tax advantage of a REIT. Consequently, as spelled out in IRC section 856, a REIT is required to retain an “eligible independent contractor” to manage the hotels it owns. The Remington entities referred to above qualify as “eligible independent contractors.” Remington qualifies as an “independent contractor” under Section 856(d)(3) because Monty and Archie Bennett do not own more than 35% of the shares of AHT (in fact they own less than 5% of the shares of AHT on a combined basis), and no shareholder who owns more than 35% of the shares of AHT (of which there are none) owns an interest in Remington. Attached as Exhibit C is a private letter ruling from the Internal Revenue Service confirming the eligible independent contractor status of Remington with respect to AHT.

11. AHT also engages other independent contractors to manage its hotels, including without limitation Marriott Corporation, Hilton Hotels, Hyatt Corporation and Interstate Hotels Corporation.

12. Reproduced below are relevant provisions found within IRC sections 856(d)(3), 856(d)(8)(B) and 856(d)(9). The provisions are complex. However, I have underlined and placed in bold-face certain provisions for ease of reference, and will comment in summary, below. Allow me to note in advance that Ashford TRS Nickel, LLC – the operating lessee under the Master Agreement, as shown above – is a “taxable REIT subsidiary,” as referred to below:

(8) Special rule for taxable REIT subsidiaries. For purposes of this subsection, amounts paid to a real estate investment trust by a taxable REIT subsidiary of such trust shall not be excluded from rents from real property by reason of paragraph (2)(B) if the requirements of either of the following subparagraphs are met:

(A) Limited rental exception.

(i) In general. The requirements of this subparagraph are met with respect to any property if at least 90 percent of the leased space of the property is rented to persons other than taxable REIT subsidiaries of such trust and other than persons described in paragraph (2)(B).

(ii) Rents must be substantially comparable. Clause (i) shall apply only to the extent that the amounts paid to the trust as rents from real property (as defined in paragraph (1) without regard to paragraph (2)(B)) from such property are substantially comparable to such rents paid by the other tenants of the trust's property for comparable space.

(iii) Times for testing rent comparability. The substantial comparability requirement of clause (ii) shall be treated as met with respect to a lease to a taxable REIT subsidiary of the trust if such requirement is met under the terms of the lease--

(I) at the time such lease is entered into,

(II) at the time of each extension of the lease, including a failure to exercise a right to terminate, and

(III) at the time of any modification of the lease between the trust and the taxable REIT subsidiary if the rent under such lease is effectively increased pursuant to such modification. With respect to subclause (III), if the taxable REIT subsidiary of the trust is a controlled taxable REIT subsidiary of the trust, the term "rents from real property" shall not in any event include rent under such lease to the extent of the increase in such rent on account of such modification.

(iv) Controlled taxable REIT subsidiary. For purposes of clause (iii), the term "controlled taxable REIT subsidiary" means, with respect to any real estate investment trust, any taxable REIT subsidiary of such trust if such trust owns directly or indirectly--

(I) stock possessing more than 50 percent of the total voting power of the outstanding stock of such subsidiary, or

(II) stock having a value of more than 50 percent of the total value of the outstanding stock of such subsidiary.

(v) Continuing qualification based on third party actions. If the requirements of clause (i) are met at a time referred to in clause (iii), such requirements shall continue to be treated

as met so long as there is no increase in the space leased to any taxable REIT subsidiary of such trust or to any person described in paragraph (2)(B).

(vi) Correction period. If there is an increase referred to in clause (v) during any calendar quarter with respect to any property, the requirements of clause (iii) shall be treated as met during the quarter and the succeeding quarter if such requirements are met at the close of such succeeding quarter.

(B) **Exception for certain lodging facilities** and health care property. The requirements of this subparagraph are met with respect to an interest in real property which is a qualified lodging facility (as defined in paragraph (9)(D)) or a qualified health care property (as defined in subsection (e)(6)(D)(i)) leased by the trust to a taxable REIT subsidiary of the trust if the property is operated on behalf of such subsidiary by a person who is an eligible independent contractor. For purposes of this section, a taxable REIT subsidiary is not considered to be operating or managing a qualified health care property or qualified lodging facility solely because it--

(i) directly or indirectly possesses a license, permit, or similar instrument enabling it to do so, or

(ii) employs individuals working at such facility or property located outside the United States, but only if an eligible independent contractor is responsible for the daily supervision and direction of such individuals on behalf of the taxable REIT subsidiary pursuant to a management agreement or similar service contract.

(9) **Eligible independent contractor.** For purposes of paragraph (8)(B)--

(A) In general. The term "**eligible independent contractor**" means, with respect to **any qualified lodging facility** or qualified health care property (as defined in subsection (e)(6)(D)(i)), **any independent contractor if, at the time such contractor enters into a management agreement or other similar service contract with the taxable REIT subsidiary to operate such qualified lodging facility** or qualified health care property, **such contractor (or any related person) is actively engaged in the trade or business of operating qualified lodging facilities** or qualified health care properties, respectively, **for any person who is not a related person with respect to the real estate investment trust or the taxable REIT subsidiary.**

(B) **Special rules.** Solely for purposes of this paragraph and paragraph (8)(B), **a person shall not fail to be treated as an independent contractor with respect to any qualified lodging facility or qualified health care property (as so defined) by reason of the following:**

(i) **The taxable REIT subsidiary bears the expenses for the operation of such qualified lodging facility** or qualified health care property **pursuant to the management agreement or other similar service contract.**

(ii) **The taxable REIT subsidiary receives the revenues from the operation of such qualified lodging facility** or qualified health care property, **net of expenses for such operation and fees payable to the operator pursuant to such agreement or contract.**

(iii) The real estate investment trust receives income from such person with respect to another property that is attributable to a lease of such other property to such person that was in effect as of the later of--

(I) January 1, 1999, or

(II) the earliest date that any taxable REIT subsidiary of such trust entered into a management agreement or other similar service contract with such person with respect to such qualified lodging facility or qualified health care property.

(C) Renewals, etc., of existing leases. For purposes of subparagraph (B)(iii)--

(i) a lease shall be treated as in effect on January 1, 1999, without regard to its renewal after such date, so long as such renewal is pursuant to the terms of such lease as in effect on whichever of the dates under subparagraph (B)(iii) is the latest, and

(ii) a lease of a property entered into after whichever of the dates under subparagraph

(B)(iii) is the latest shall be treated as in effect on such date if--

(I) on such date, a lease of such property from the trust was in effect, and

(II) under the terms of the new lease, such trust receives a substantially similar or lesser benefit in comparison to the lease referred to in subclause (I).

(D) **Qualified lodging facility.** For purposes of this paragraph--

(i) In general. The term "**qualified lodging facility**" means **any lodging facility unless wagering activities are conducted** at or in connection with such facility by any person who is engaged in the business of accepting wagers and who is legally authorized to engage in such business at or in connection with such facility.

(ii) Lodging facility. **The term "lodging facility" means a--**

(I) **hotel,**

(II) **motel, or**

(III) **other establishment more than one-half of the dwelling units in which are used on a transient basis.**

(iii) **Customary amenities and facilities.** The term "lodging facility" includes customary amenities and facilities operated as part of, or associated with, the lodging facility so long as such amenities and facilities are customary for other properties of a comparable size and class owned by other owners unrelated to such real estate investment trust.

(E) **Operate includes manage.** References in this paragraph to operating a property shall be treated as including a reference to managing the property.

(F) **Related person.** Persons shall be treated as related to each other if such persons are treated as a single employer under subsection (a) or (b) of section 52 [26 USCS § 52].

Subsection 8(l) also contains relevant provisions:

(l) **Taxable REIT subsidiary.** For purposes of this part [26 USCS §§ 856 et seq.]--

(1) In general. The term "taxable REIT subsidiary" means, with respect to a real estate investment trust, a corporation (other than a real estate investment trust) if--

(A) such trust directly or indirectly owns stock in such corporation, and

(B) such trust and such corporation jointly elect that such corporation shall be treated as a taxable REIT subsidiary of such trust for purposes of this part [26 USCS §§ 856 et seq.].

Such an election, once made, shall be irrevocable unless both such trust and corporation consent to its revocation. Such election, and any revocation thereof, may be made without the consent of the Secretary.

(2) Thirty-five percent ownership in another taxable REIT subsidiary. The term "taxable REIT subsidiary" includes, with respect to any real estate investment trust, any corporation (other than a real estate investment trust) with respect to which a taxable REIT subsidiary of such trust owns directly or indirectly--

(A) securities possessing more than 35 percent of the total voting power of the outstanding securities of such corporation, or

(B) securities having a value of more than 35 percent of the total value of the outstanding securities of such corporation.

The preceding sentence shall not apply to a qualified REIT subsidiary (as defined in subsection (i)(2)). For purposes of subparagraph (B), securities described in subsection (m)(2)(A) shall not be taken into account.

(3) **Exceptions.** The **term "taxable REIT subsidiary" shall not include--**

(A) **any corporation which directly or indirectly operates or manages a lodging facility or a health care facility, and**

(B) **any corporation which directly or indirectly provides to any other person (under a franchise, license, or otherwise) rights to any brand name under which any lodging facility or health care facility is operated.**

Subparagraph (B) shall not apply to rights provided to an eligible independent contractor to operate or manage a lodging facility or a health care facility if such rights are held by such corporation as a franchisee, licensee, or in a similar capacity and such lodging facility or health care facility is either owned by such corporation or is leased to such corporation from the real estate investment trust.

(4) Definitions. For purposes of paragraph (3)--

(A) **Lodging facility.** The term "**lodging facility**" has the meaning given to such term by subsection (d)(9)(D)(ii).

(B) Health care facility. The term "health care facility" has the meaning given to such term by subsection (e)(6)(D)(ii).

Finally, subsection (d)(3) is relevant:

(3) **Independent contractor defined.** For purposes of this subsection and subsection (e), the term 'independent contractor' means any person--

(A) **who does not own, directly or indirectly, more than 35 percent of the shares, or certificates of beneficial interest, in the real estate investment trust;** and

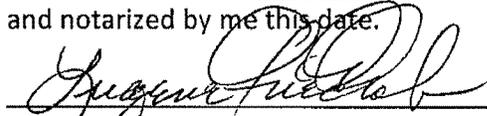
(B) **if such person is a corporation, not more than 35 percent of the total combined voting power of whose stock (or 35 percent of the total shares of all classes of whose stock), or, if such person is not a corporation, not more than 35 percent of the interest in whose assets or net profits is owned, directly or indirectly, by one or more persons owning 35 percent or more of the shares or certificates of beneficial interest in the trust.**

In the event that any class of stock of either the real estate investment trust or such person is regularly traded on an established securities market, only persons who own, directly or indirectly, more than 5 percent of such class of stock shall be taken into account as owning any of the stock of such class for purposes of applying the 35 percent limitation set forth in subparagraph (B) (but all of the outstanding stock of such class shall be considered outstanding in order to compute the denominator for purpose of determining the applicable percentage of ownership).

13. In summary, these provisions of the tax code make it impermissible for AHT and its subsidiaries to engage in the management of the Sheraton Anchorage Hotel, and make it impermissible for AHT and its subsidiaries to employ the employees and to set or maintain employment policies, practices and procedures. Consistent with the Master Agreement, AHT and its subsidiaries, including Ashford TRS Nickel, LLC, in fact do not manage the hotels, do not employ the employees, and do not set or maintain any employment policies, practices or procedures. These matters have been left solely and exclusively to the Remington entities (currently, Remington Anchorage Employers, LLC).


Chris Peckham

Sworn to and subscribed before
me this 29th day of JUNE, 2012,
and notarized by me this date.


Notary Public – My Commission Expires: 3-11-16

