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Attorneys for Employer  
EKO PAINTING, INC.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

EKO PAINTING, INC.

Employer,

and

INTERNATIONAL UNION OF PAINTERS AND  
ALLIED TRADE, PAINTERS UNION 1791,

Union.

Case No. 20-RC-082348

EKO PAINTING, INC.'S SPECIAL REQUEST FOR  
LEAVE TO APPEAL THE ORDER OF A MAIL  
BALLOT ELECTION SCHEDULED FOR APRIL 15

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EKO PAINTING, INC.'S SPECIAL REQUEST FOR LEAVE TO APPEAL THE ORDER OF A MAIL  
BALLOT ELECTION SCHEDULED FOR APRIL 15, 2013

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Employer EKO PAINTING, INC. ("Eko") hereby respectfully submits its special request for leave to appeal the order of a mail ballot election scheduled for April 15, 2013. The order was issued by NLRB Regional Director Joseph Frankl on March 29, 2013 and is a response to Eko's request for reconsideration of the Regional Director's Decision as stated in his letter of March 25, 2013. See the letter of March 29, 2013, attached hereto as Exhibit "A". See also letter of March 25, 2013, attached hereto as Exhibit "B".

***Eligible Workers Are Not Scattered***

Eko requests that the Board reverse the order and instead order a manual election. Conducting an election by mail is not appropriate here and contravenes the NLRB Case Handling Manual as well as longstanding NLRB practices and policies. Section 11301.2 of the Case Handling Manual (“CHM”) states that “[t]he Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually.” While the CHM identifies certain circumstances that may make it difficult for eligible employees to vote in a manual election, such circumstances are not present here.

Although the decision to order a mail ballot election is within the discretion of the Regional Director, the decision must have a reasonable basis and should be supported by the policies and practices of the NLRB as stated in the CHM. “The decision to conduct an election either completely or partially by mail ballot is based on specific employment factors (i.e. wide geographic disbursement of employees or staggered work schedules) that make on-site elections impractical.” NLRB v. Cedar Tree Press, Inc., 169 F.3d 794, 797 (3d Cir. 1999). “The purpose of such narrow criteria is to ensure that mail balloting is employed in a limited number of cases each year.” Id. See Shepard Convention Servs. v. NLRB, 85 F.3d 671, 674 (D.C. Cir. 1996) (holding that “in the absence of any new evidence indicating ‘infeasibility’ of a manual election,” the Regional Director “properly denied the Union’s request for an election by mail” and this denial “was in accord with the Board’s established policy favoring manual elections”).

San Diego Gas & Electric, 325 NLRB 1143 (1998), cited by the Regional Director sets forth clearly when a mail ballot should be held, and it directly contradicts the rationale of the Regional Director in the current case.

San Diego Gas & Electric states:

When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses

for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern. n8 We also recognize that there may be other relevant factors that the Regional Director may consider in making this decision, but we emphasize that, in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above.

n7 Thus, employees may be deemed to be "scattered" where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules. The "scattered" criteria are intended to apply in any situation where all employees cannot be present at the same place at the same time. See, e.g., London's Farm Dairy, Inc., 323 NLRB No. 186 (June 20, 1997); and Reynolds Wheels International, 323 NLRB No. 187 (June 20, 1997).

First, in San Diego Gas and Electric, the Board lists the following criteria that a Regional Director should examine in determining whether or not to hold a mail ballot or manual election. "the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress.

The facts of this case do not support the order of a mail ballot election. In the current case, (1) the eligible voters are **NOT "scattered"** over a wide geographic area because their job sites are all located within 5 miles of the Eko shop where all parties, including the Subregion initially agreed that a manual election be held; (2) the eligible voters are **NOT "scattered"** in the sense that their work schedules vary significantly because all Eko employees work regular 8-hour, full time shifts on Monday to Friday from either 8am to 4:30pm or 7am to 3:30pm; and (3) there is no strike, lockout or picketing in progress. Oahu is merely 20 miles by 40 miles and all of the jobsites are in Honolulu near the Eko headquarters. All Eko employees can easily meet at the Eko shop at the beginning of their shift, as they often do for Company-wide meetings.

The Regional Director stated that the reason for utilizing a mail ballot

election is because Eko employees work at various job sites and do not regularly report to the Eko office/shop. As stated above, all Eko employees are currently working at job sites located on the island of Oahu with an average distance of less than 2 miles from the Eko shop where a manual election could be held. Replacement workers will not be needed to cover for any workers during the period that they would be voting in a manual election. Furthermore, until late last year, all Eko employees regularly reported to the Eko office/shop on a weekly basis and none of the Eko employees expressed having any difficulty in getting to the Eko office/shop on a regular basis. Thus, the Regional Director's statement is erroneous and was made without even consulting any Eko officers, administrative personnel, or workers.

***Mail Ballot Election Will Not Facilitate Better Employee Participation.***

The Regional Director's statement that "numerous voters who are eligible to vote by virtue of qualifying periods of employment by the Employer during the past one or two years are likely also to be widely scattered geographically" is incorrect and misleading See Exhibit "B". Although it was noted in the *Decision and Direction of Election* issued on June 29, 2012, **that the *Daniel/Steiny* eligibility formula applies, that formula only affects 6 past employees.** As a consequence, there are only 6 voters who are eligible to vote by virtue of qualifying periods of employment during the past one or two years, and no one knows, as the Regional Director speculates, whether they are "likely also to be widely scattered geographically, and currently to be working schedules that would preclude their participation were the vote to be conducted manually." In sum, to hold a manual ballot election would entail that all voters who are eligible to vote merely make a commonly made trip to a single location for the purpose of voting at their regular starting time, before they proceed to their job site. In contrast, **to hold a mail ballot election would put the interests of 6 *Daniel/Steiny* employees ahead of the interests of 56 current Eko employees in having maximum secrecy and integrity in the voting process.**

Furthermore, several factors weigh strongly against implementing a mail ballot election. A mail ballot election is much more susceptible to voting fraud and irregularities. Ballots can easily be taken from mailboxes and may not reach the intended

recipient for a variety of reasons including the vagaries of the postal service, misplacement of mailed ballots by family members retrieving the mail, etc. Similarly, problems with the postal service could result in ballots not being received by the NLRB. In addition, as many as 30% of Eko workers may not be able to clearly read and understand mail ballots or the detailed and specific instructions accompanying them as these workers have immigrated to Hawaii from other countries and English is not their first language.

Under these circumstances, it is simply not possible that a mail ballot would facilitate employee participation in the election. Additionally, conducting this election by mail would require the Agency to unnecessarily utilize scarce resources, when contrasted with a single site mail ballot. San Diego Gas & Electric, 325 NLRB 1143 (1998). A manual ballot election would merely entail a Board Agent traveling the few blocks from the Regional Office to the Eko Headquarters. A manual election would require no additional scarce resources and the entire matter could be disposed of in a few hours.

Finally, NLRB agent, Scott Hovey, informed Eko's counsel on July 12, 2012 that the Regional Director was inclined to hold the election at Eko's office/shop on July 28, 2012. See Exhibit "C" There appears to be no reasonable basis or explanation why the decision directing a manual election is now suddenly being changed into a decision directing a mail ballot election.

Based on the foregoing, Eko respectfully requests a decision directing a manual election, in accordance with the Regional Director's original decision.

DATED: Honolulu, Hawaii, April 9, 2013.



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CID H. INOUE  
KRISTI L. ARAKAKI  
Attorneys for Employer  
EKO PAINTING, INC.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

EKO PAINTING, INC.

Employer,

and

INTERNATIONAL UNION OF PAINTERS AND  
ALLIED TRADE, PAINTERS UNION 1791,

Union.

Case No. 20-RC-082348

EKO PAINTING, INC.'S AMENDED CERTIFICATE  
OF SERVICE RE: SPECIAL REQUEST FOR LEAVE  
TO APPEAL THE ORDER OF A MAIL BALLOT  
ELECTION.

I HEREBY CERTIFY that a copy of EKO PAINTING, INC.'s Sepcial Request for Leave to Appeal the Order of a Mail Ballot Election Scheduled for April 15, 2013, was duly served on the following parties by the means indicated on the dates shown below:

HERBERT R. TAKAHASHI, ESQ.  
REBECCA L. COVERT, ESQ.  
DAVINA W. LAM, ESQ.  
345 Queen Street, Room 506  
Honolulu, Hawaii 96813  
*Attorney for Union*

Via email on 04-09-13

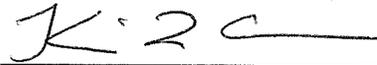
THOMAS CESTARE, ESQ.  
NLRB SUBREGION 37  
300 Ala Moana Blvd. Suite 7-245  
Honolulu, Hawaii 96850

Via email on 04-09-13

JOSEPH F. FRANKL  
Regional Director  
NLRB Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1735

Via email on 04-09-13

DATED: Honolulu, Hawaii, April 9, 2013.

A handwritten signature in black ink, appearing to read "K. L. Arakaki", written over a horizontal line.

CID H. INOUE  
KRISTI L. ARAKAKI  
Attorneys for Employer  
EKO PAINTING, INC.

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**NATIONAL LABOR RELATIONS BOARD****Region 20**

901 Market Street, Suite 400  
San Francisco, California 94103-  
1735

Telephone: 415/356-5154  
FAX: 415/356-5156  
Website: [www.nlr.gov](http://www.nlr.gov)  
Region 20's E-Mail: [region20@nlrb.gov](mailto:region20@nlrb.gov)

March 29, 2013

**VIA FACSIMILE & REGULAR MAIL**

**Kristi L. Arakaki, Esq.**  
O'Connor Playdon Guben LLP  
733 Bishop Street, Floor 24  
Honolulu, HI 96813-4070

**Herbert Takahashi, Esq.**  
**Rebecca L. Covert, Esq.**  
Takahashi & Covert  
345 Queen Street, Suite 506  
Honolulu, HI 96813-4711

**Re: Eko Painting, Inc.**  
**Case 20-RC-082348**

Gentlepersons:

I have carefully considered your March 28, 2013, Request for reconsideration and/or request for stay of the election, and hereby deny it. A mail ballot election is appropriate in this case for the reasons set out in my letter of March 25, 2013. Your Request for reconsideration does not introduce any new facts or law not already considered. Field Attorney Woodcock was acting pursuant to my direction when she communicated my determination to conduct a mail ballot in this election. We have on multiple occasions informed you the reasons for my decision. Unlike a stipulated election, a Regional Director may decide to conduct a mail ballot in a directed election such as this, after considering the best way to assure the employees' ability to exercise their right to vote.

Accordingly, the Subregional office will mail out ballots to eligible voters on Monday, April 15 (all subsequent dates refer to 2013), and they will be due back in the Subregional Office by Monday, April 29. The ballots will be counted at the Subregional office on Wednesday, May 1, at 2:00 pm.

To be timely filed, the Employer must submit the eligibility list to the NLRB Subregion 37 Office, 300 Ala Moana Blvd., Rm. 7-245, P.O. Box 50208, Honolulu, Hawaii 96850 on or before April 1, 2013. The eligibility date will be the payroll period ending date for the period immediately prior to March 25, the date of my previous letter.

Exhibit "A"

Very truly yours,



Joseph F. Frankl  
Regional Director

cc:

Mr. Warren H. Eko, President  
Eko Painting, Inc.  
3363 Campbell Avenue  
Honolulu, HI 96815-4127

International Union of Painters and Allied Trades  
2240 Young Street  
Honolulu, HI 96826-2304

**NATIONAL LABOR RELATIONS BOARD****Region 20**

901 Market Street, Suite 400  
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1735

Telephone: 415/356-5154  
FAX: 415/356-5156  
Website: [www.nlrb.gov](http://www.nlrb.gov)  
Region 20's E-Mail: [region20@nlrb.gov](mailto:region20@nlrb.gov)

March 25, 2013

**VIA FACSIMILE & REGULAR MAIL**

**Kristi L. Arakaki, Esq.**  
O'Connor Playdon Guben LLP  
733 Bishop Street, Floor 24  
Honolulu, HI 96813-4070

**Herbert Takahashi, Esq.**  
**Rebecca L. Covert, Esq.**  
Takahashi & Covert  
345 Queen Street, Suite 506  
Honolulu, HI 96813-4711

**Re: Eko Painting, Inc.**

Case 20-RC-082348

Gentlepersons:

After careful consideration, I have decided for the reasons that follow that a mail ballot is appropriate for the election in this matter.

Employees who are currently on the payroll of Eko Painting, Inc. (Employer) work at various sites scattered around the Island of Oahu, and they do not normally assemble at a central work location. Additionally, as noted in the *Decision and Direction of Election* that I issued in this matter on June 29, 2012, the *Daniel/Steiny* eligibility formula applies. As a consequence, numerous voters who are eligible to vote by virtue of qualifying periods of employment by the Employer during the past one or two years, are likely also to be widely scattered geographically, and currently to be working schedules that would preclude their participation were the vote to be conducted manually. In sum, to hold a manual ballot election would entail that all voters who are eligible to vote make a special trip to a single location for the purpose of voting.

In these circumstances, it is highly likely that a mail ballot will facilitate better employee participation in the election. Additionally, although not a primary factor, conducting this election by mail will enable the Agency to conserve scarce resources. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Finally, I note that Petitioner has advised that it has no objection to a mail ballot in this matter.

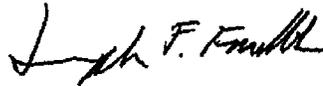
**EXHIBIT "B"**

Accordingly, the Subregional office will mail out ballots to eligible voters on Monday, April 15 (all subsequent dates refer to 2013), and they will be due back in the Subregional Office by Monday, April 29. The ballots will be counted at the Subregional office on Wednesday, May 1, at 2:00 pm. The Parties are welcome, of course, to witness the tally of ballots.

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Consequently, I hereby direct that within seven days of the date of this letter, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). As noted above, the Daniel/Steiny criteria will determine eligibility to vote for individuals who are not currently employed by the Employer but who were in the past. *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967). The list must be of sufficiently large type to be clearly legible. To speed the tally of ballots, the names on the list should be alphabetized. I shall make the list available to Petitioner.

To be timely filed, the list must be received in the NLRB Subregion 37 Office, 300 Ala Moana Blvd., Rm. 7-245, P.O. Box 50208, Honolulu, Hawaii 96850 on or before April 1, 2013.

Very truly yours,



Joseph F. Frankl  
Regional Director

cc:  
Mr. Warren H. Eko, President  
Eko Painting, Inc.  
3363 Campbell Avenue  
Honolulu, HI 96815-4127

International Union of Painters and Allied Trades  
2240 Young Street  
Honolulu, HI 96826-2304

**Kristi L. Arakaki**

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**From:** Hovey Jr., Scott E. [Scott.HoveyJr@nlrb.gov]  
**Sent:** Thursday, July 12, 2012 10:41 AM  
**To:** Kristi L. Arakaki  
**Subject:** RE: Your Call Regarding Eko's Election

Kris,

As this is a directed election, the Region determines the appropriate time, date and place of the election. The Region is inclined to hold the election on June 28, 2012 for four hours from 10:00 am to 2:00 pm. The Region is inclined to hold the election at the employer's shop in Kaimuki (3363 Campbell Ave).

Please let me know as soon as possible whether Eko will make it's Kaimuki facility available for holding the election on June 28, 2012. The time needed for Eko's Kaimuki facility includes an hour before the election to set up the election area and hold a pre-election conference with the parties and a meeting with the parties election observers. The Board will also need time after the election to count the votes and breakdown the election materials. I estimate that the Board will need the facilities from 9:00 am to approximately 3:00 pm. Let me know if the Eko facilities will be available for use on June 28, 2012 from 9:00 am to 3:00 pm.

Mahalo,

Scott

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**From:** Kristi L. Arakaki [mailto:KLA@opglaw.com]  
**Sent:** Wednesday, July 11, 2012 4:19 PM  
**To:** Hovey Jr., Scott E.  
**Subject:** RE: Your Call Regarding Eko's Election

Scott,

As I informed you earlier today, the election can be held at Eko's shop.

2 hours for the election is ample time. Please let me know why the NLRB is insisting that the election be held for four hours.

Also, please let me know why the NLRB is also insisting that the election be held on July 28? Has the Union refused to hold the election on July 24, 25, 26, 27? If so, what is the basis for the Union's objection to those aforesaid dates as Eko does not have an objection? If the Union has not objected to those dates, why is the NLRB forcing the scheduling of an election on the 28th when other dates are mutually agreeable to the Union and Eko?

Thank you,  
Kris

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**From:** Hovey Jr., Scott E. [mailto:Scott.HoveyJr@nlrb.gov]  
**Sent:** Tuesday, July 10, 2012 4:25 PM  
**To:** Kristi L. Arakaki  
**Subject:** RE: Your Call Regarding Eko's Election

The NLRB is inclined to have the election on a Saturday, due to the nature of the proposed unit. Eko had not previously indicated any problems with holding the election on June 28.

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**EXHIBIT** "C"

2/25/2013

**From:** Kristi L. Arakaki [mailto:KLA@opglaw.com]  
**Sent:** Tuesday, July 10, 2012 4:22 PM  
**To:** Hovey Jr., Scott E.  
**Subject:** RE: Your Call Regarding Eko's Election

Scott,

Answers to your questions are shown in red below:

I have a few questions regarding Eko's Kaimuki HQ as a potential election location.

- 1) How big are the offices? Is there a separate room/area, away from management offices for an election area? **Eko has a shop area that is completely separated from the office staff space. We can have a booth (s) set up there and it is of sufficient size for holding the election.**
- 2) Will the office be available during the weekend? It may be that the election will be directed to take place on a weekend and for up to 4 hours. Would Eko's offices be available to use during a weekend (possibly July 28<sup>th</sup>)? **Scheduling of an election on June 28 and June 29 is not agreeable to Eko and Eko was not informed that the NLRB was considering scheduling an election on those dates. Is there a problem or conflict with the date of June 24 requested by Eko?**
- 3) What is the parking situation at the Kaimuki location? Is there on-site parking? Off-site parking? Street Parking? **There is adequate parking space. There is both on-site parking and plenty of street parking available, especially during weekday normal business hours.**
- 4) Does Eko have any other facilities suitable for an election? **No. Eko's shop is an appropriate place for election. Eko's employees are well acquainted with the location and it is the most convenient place to hold the election.**

Thanks,  
kris

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**From:** Hovey Jr., Scott E. [mailto:Scott.HoveyJr@nlrb.gov]  
**Sent:** Tuesday, July 10, 2012 10:23 AM  
**To:** Kristi L. Arakaki  
**Subject:** RE: Your Call Regarding Eko's Election

Kris,

I have a few questions regarding Eko's Kaimuki HQ as a potential election location.

- 1) How big are the offices? Is there a separate room/area, away from management offices for an election area?
- 2) Will the office be available during the weekend? It may be that the election will be directed to take place on a weekend and for up to 4 hours. Would Eko's offices be available to use during a weekend (possibly July 28<sup>th</sup>)?
- 3) What is the parking situation at the Kaimuki location? Is there on-site parking? Off-site parking? Street Parking?
- 4) Does Eko have any other facilities suitable for an election?

Mahalo,

Scott

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**From:** Kristi L. Arakaki [mailto:KLA@opglaw.com]  
**Sent:** Friday, July 06, 2012 2:39 PM  
**To:** Hovey Jr., Scott E.  
**Subject:** Your Call Regarding Eko's Election

Scott,

I received your voice message stating that you had questions about Eko's location and election.

2/25/2013

Please send me your questions by email as I most likely will need to refer to Eko regarding the answers. Also, I am headed out of the office for a meeting for the rest of this afternoon.

Thanks,  
Kris

Kristi L. Arakaki , Esq.  
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Pacific Guardian Center – Makai Tower  
733 Bishop St. – 24th Floor  
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