UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AEG BROOKLYN MANAGEMENT, LLC,	:	
Employer,	:	
-and-	:	
		Case No. 29-UD-097113
MICAH WHEELER,	:	
Petitioner	:	
-and-	:	
LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION,		
Union		

EMPLOYER'S ANSWERING BRIEF TO PETITIONER'S EXCEPTIONS TO THE ACTING REGIONAL DIRECTOR'S REPORT ON OBJECTIONS

Although AEG has no stake in the outcome of the election, AEG Brooklyn Management, LLC ("AEG") submits this answering brief in response to Petitioner's inaccurate statements regarding AEG's actions prior to the unit deauthorization in the above-captioned matter. In short, the Acting Regional Director's findings with respect to the objections implicating AEG were absolutely correct as a matter of fact and law.[1]

The Acting Regional Director Properly Recommended Overruling Petitioner's Objections 1 and 2.

AEG provided an accurate Excelsior list of 131 members of the Arena's conversion crew based on the information contained in its payroll files as of February 15, 2013. AEG previously filed the same list of 131 employees to the Region to confirm the showing of interest, and, AEG confirmed the fact that these employees were on the current roster in a February 5, 2013 e-mail to Board Agent Kareema Alston. On February 14, 2013, Petitioner signed the Stipulated UD Election Agreement with full knowledge that AEG's *Excelsior* list would contain 131 names, and Petitioner never challenged any of the names provided on the list nor did he request a hearing regarding the eligibility of voters. Moreover, the Regional Director found that four individuals that Petitioner alleged were improperly included on the *Excelsior* list voted without objection. *See* Report on Objections ("Report") at 6.

In the course of the Region's investigation into Petitioner's objections AEG again reviewed its payroll files. At that time, the files demonstrated that 17 of the 20 employees questioned by Petitioner in his objections were still active employees. The remaining three employees identified by Petitioner were all employed in the bargaining unit as of the payroll cut-off date. In sum, the *Excelsior* list was completely accurate at the time of its submission.

Petitioner did not present any evidence calling AEG's records into question in the course of the investigation or in his submission to the Board. Petitioner only identified individuals who he believed to be incorrectly listed without stating the basis of such belief or in any way rebutting AEG's records. Petitioner provides absolutely no evidence whatsoever explaining why he believes certain individuals should not be included in the list. Instead, Petitioner somehow attempts to claim that the Excelsior list was incorrect because it contained two individuals who were terminated after the payroll cut-off date but prior to the election. *See* Pet. Brief at 4. That claim is farcical as it obviates the purpose of using a payroll cut-off date for Excelsior lists and implies that an employer must continually update the *Excelsior* list up to the moment before an election occurs. Such a proposition simply is incorrect.

Moreover, Petitioner's attempt to cast the alleged errors in the *Excelsior* list as sufficient to order a rerun election fails. The Board's concern with Excelsior lists erroneously omitting individuals is a result of the potential prejudice to a party's ability to communicate with voters prior to an election. *See Automatic Fire Systems*, 357 NLRB

[1] Petitioner's remaining two objections do not concern alleged conduct by AEG and, thus, AEG has no basis to evaluate the Acting Regional Director's findings with respect to those objections.

No. 190, 11-RC-6757 (2012). The inclusion of additional individuals – even if Petitioner's claims were correct, which they are not – does not invoke the same concern. Even if, *arguendo,* there were additional names on the *Excelsior* list*,* Petitioner still had full access to the entire electorate.

Nonetheless, even in the case of omissions, Board precedent in the context of representation elections is clear that Petitioner's alleged *Excelsior* list errors of 15% of the bargaining unit (Brief at 6) without bad faith is insufficient to order a rerun of an election. Recently in *CCS Trucking*, 359 NLRB No. 67, 13-RC-022018 (2013) the Board applied the analysis articulated in *Woodman's Food Markets*, 332 NLRB 503 (2000), in a case that presented almost the exact percentage of omissions as Petitioner claims there were additions in the instant matter. The Board held "that the relevant *Woodman's* factors support a finding that the Employer substantially complied with the *Excelsior* requirements: the percentage of voters omitted from the list is relatively small (15.4 percent), there is no showing of bad faith on the part of the Employer, and, perhaps most importantly, the number of voters omitted from the list does not constitute a determinative number." *Id.* at *3-4. Notably, the Board noted that the election in *CCS Trucking* was between two unions (with employees voting for no representation) and both competing unions were equally affected by any errors in the *Excelsior* list. *Id.* Similarly, here AEG had no interest in the election and if any errors were present in he *Excelsior* list – which they were not – it would equally affect both the Petitioner and Local 32BJ. Accordingly, the Regional Director was correct in overruling Petitioner's first objection.

The Petitioner's second objection, claiming that errors in the *Excelsior* list were willful, also is without merit and was properly recommended to be overruled. First, as discussed above, there were no errors in the *Excelsior* list submitted by AEG. Second, the Report indicates that Petitioner provided no evidence of the alleged conversation with an agent of the Employer that he claims supports the objection. (Report at 7) Petitioner did not even identify the agent, the content of the discussion with the agent, the agents position with AEG, or any other specifics that would warrant further investigation. (*Id.*) Without any evidence regarding the alleged conversation, and, especially, without any errors in the *Excelsior* list, the Acting Regional Director properly overruled Petitioner's second objection.

The Acting Regional Director Properly Recommended Overruling Petitioner's Objection 3.

AEG's cancellation of a scheduled training sessions could have no adverse impact on the election and, indeed, if it anything would have had a positive impact on voter turnout. First, AEG initially scheduled the training after the election was already scheduled and only cancelled it because of a good faith grievance filed by Local 32BJ. Second, the election could not have had an adverse impact on the election as nothing whatsoever prevented any member of the bargaining unit from coming to the Arena that day to vote. Moreover, there were only 32 people who were actually confirmed to attend the training session – only a small portion of the overall bargaining unit. Finally, the second training session was to be held from 6 PM to 8 PM – the precise times of the

second and final voting session. Contrary to Petitioner's objection, therefore, the cancellation of the training actually had the effect of increasing the available time for bargaining unit members to vote in the election by removing a direct scheduling conflict with the election times.

In apparent understanding that the cancellation could not have adversely affected the election, at the conclusion of the investigation, Petitioner also attempted to claim that the cancellation, while lawful, constituted an elimination of a benefit prior to the election that should result in a rerun election. The case relied upon by Petitioner for this proposition, *Fred Meyer Stores,* 355 NLRB No. 93 (2010), actually demonstrates that the Acting Regional Director's decision in this matter was correct. In *Fred Meyer Stores, Inc.*, large unexpected deductions were withheld from employees paychecks prior to a representation election. Despite the deductions being proper, the employees did not receive advance notice or any explanation of the deductions. *Id.* Accordingly, the Board held, reasonable employees would be upset by the deductions and the objective facts supported by evidence demonstrated that it caused employees to be angry at the Union, which lost the election. *Id.* In the instant matter, unlike in *Fred Meyer Stores, Inc.*, Petitioner admits that the reason for the cancellation was e-mailed to the employees (*see* Pet. Exhibit A) so there could be no confusion among the employees. Petitioner also provides no objective evidence that any employees were confused or in any other way influenced in how they voted in the election. Finally, given the clear explanation that the training was cancelled due to the Union's grievance, if any anger among employees affecting the election existed – and there is no evidence to suggest that it did – such anger would reasonably be directed toward the Union and not Petitioner. Accordingly, AEG's lawful cancellation of the training did not – and in no way could have – influenced the results of the election.

* * *

In sum, Petitioner's election objections pertaining to AEG were properly rejected by the Regional Director.

New York, New York
May 20, 2013

Respectfully submitted,

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Certificate of Service

This is to certify that copies of the within Employer's Answering Brief To Petitioner's Exceptions To The Acting Regional Director's Report On Objections in Case No. 29-UD-097113 has been served by electronic mail on this date on:

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Dated: May 20, 2013
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_/s/Brian S. Rauch_____
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