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

ASHFORD TRS NICKEL, LLC,
a subsidiary of ASHFORD HOPSITALITY
TRUST, INC.

and CASE NO. 19-CA-32761

UNITE-HERE, LOCAL 878

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

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First Exception

The ALJ erred in recommending a holding that Respondent Ashford TRS Nickel can be held liable – notwithstanding the undisputed fact it is not the employer of the employees of the Sheraton Anchorage hotel – based on its supposed "control" over those employees. In committing this error, the ALJ applied Fabric Services, 190 NLRB 540 (1971), which this Board should either reverse or not extend to the factual circumstances of this case, and the ALJ made inappropriate findings of fact related to so-called "control" by Respondent over the hotel employees, findings which this Board on *de novo* review should reject.

Shortly after the original complaint in this matter, Respondent filed a motion for summary judgment with this Board. The motion was supported by two affidavits – by Chris Peckham and by Todd Stoller. The affidavits are a part of the record. *See,* **Exhibit R-1**. The facts set forth in these affidavits were never rebutted, contradicted or challenged, and were stipulated to by the parties. *See,* **Joint Exhibit 1.** :

- Respondent Ashford TRS is a subsidiary of Ashford Hospitality Trust, Inc. ("AHT"), a publicly traded company engaged in the investment ownership of hotels. [**Joint Exhibit 1**, par. 1-2].
- AHT and its affiliated entities, including Respondent, constitute an integrated business enterprise which qualifies and functions as a real estate investment trust ("REIT"), subject to Internal Revenue Code section 26 U.S.C. 856. Material portions of this IRS Code section are quoted and explained in Mr. Peckham's affidavit. The bottom line, as plainly set forth in 26 U.S.C. § 856, and as shown by Mr. Peckham's explanation, is that REIT owners of improved real property may *not* directly operate the businesses owned. [**Id.**].
- Accordingly, as Mr. Peckham further explained, "[a]s an aspect of its business [as a REIT], Respondent contracts with eligible independent contractors by entering into

management agreements with hotel management companies to operate hotels owned by AHT and/or AHT's subsidiaries." [**Joint Exhibit 1**, par. 2].

- "One such [independent contractor] management company is Remington Lodging and Hospitality, LLC ('Remington Lodging'), along with its successor Remington Anchorage Employer, LLC ('Remington Anchorage')." [**Joint Exhibit 1**, par. 1].
- When the underlying federal-court lawsuit at issue in this case was filed by Respondent, in September, 2010, Remington Lodging & Hospitality, LLC ("Remington Lodging") was managing the Hotel and was the employer of the employees. [**Joint Exhibit 1**, par. 7 and 10].
- Remington Lodging was succeeded by Remington Anchorage Employer, LLC ("Remington Anchorage"), which has been the manager of the Hotel and the employer of the employees since January 1, 2011. [Id.].
- Both 'Remington' entities managed the Hotel pursuant to the Management Agreement entered into with Respondent Ashford TRS. [**Joint Exhibit 1**, par. 6, 7 and 10]. A copy of the Management Agreement is in the record as **Joint Exhibit 2**. This Agreement – consistent with the above-referenced REIT restrictions – and as discussed further below, provides that the "operation of the [Hotel] shall be under the exclusive supervision and control of [the 'Remington' entities]." [**Joint Exhibit 2**, section 4.02].
- "Counsel for the Acting General Counsel does not allege . . . that Respondent and Remington Lodging are a single employer or a single integrated enterprise under the Act. The same is true with respect to Respondent and Remington Lodging's successor, Remington Anchorage." [**Joint Exhibit 1**, par. 8].

- Separate from Remington, AHT and AHT's affiliated entities – including Respondent – do function as a "single employer." The AHT companies have "approximately 77 employees, most or all of whom are located in Dallas, Texas." [**Joint Exhibit 1**, par. 4]. The employees of the Hotel are, of course, employed in Anchorage, by the 'Remington' entities.
- Respondent Ashford TRS, therefore, is not an employer of the employees of the Hotel. [**Joint Exhibit 1**, all paragraphs].

Grounded in the undisputed affidavits of Peckham and Stoller (attached to **Exhibit R-1**), and consistent with the stipulations described above, the material facts in this case are the following:

As a real estate investment trust ("REIT"), AHT acting through its subsidiaries – including Ashford 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." [**Exhibit R-1**, Peckham, paragraph 6]. Various provisions within 26 U.S.C. sec. 856, of the Internal Revenue Code (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 Ashford TRS to operate its hotels are Remington Hotels and its subsidiaries. [1] A Remington Hotels subsidiary, Remington Anchorage, presently manages the Hotel, under the terms of the amended Hotel Master

[1] Other eligible independent contractors engaged by Ashford TRS to manage AHT-owned hotels include Hilton Hotels, Hyatt Corporation, Marriott Corporation, Interstate Hotels Corporation, as well as others [**Id**., paragraph 11]].

Management Agreement ("Management Agreement") [**Joint Exhibit 2**; *and see,* **Exhibit R-**1, Peckham paragraph 7, and Exhibits A and B attached thereto]. Consistent with the requirements for maintaining REIT status, the Management Agreement:

> . . . makes plain that the 'operation of the [Sheraton Anchorage] shall be under the exclusive supervision and control of [Remington Anchorage].' [**Joint Exhibit 2**, Section 4.02].
>
> The Management Agreement provides also that '[Remington Anchorage] 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], [Remington Anchorage] shall fix the employees' terms of compensation and establish and maintain all policies related to employment.' [**Joint Exhibit 2**, Sections 9.01 and 9.02].

[**Exhibit R-1**, Peckham affidavit, paragraph 8].

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 were combined [at 4.6%], would not make them the largest shareholder in AHT." [**Id.**, paragraph 2]. "Both gentlemen serve on of the Board of Directors, however, [they do so] at 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." [**Id.**, 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.

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

The underlying lawsuit at issue in this case was filed by Ashford TRS against UNITE-HERE Local 878 ("Union"), and alleged that the Union violated non-preempted Alaskan state law during the course of a boycott directed by the Union starting in November of 209. The lawsuit alleged the Union engaged in non-protected activity – *i.e.*, unprotected by preemptive federal labor law – in carrying out the boycott, by communicating 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 Ashford 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. This Remington subsidiary, like the current subsidiary, Remington Anchorage, managed the hotel "as agent and for the account of [Ashford TRS]." [**Joint Exhibit 2**, Section 4.01]. Under the Management Agreement, Remington Lodging was entitled only to a base management fee of 3% of the gross revenue for each accounting period, plus a small incentive fee of 1% of gross operating profit. [**Joint Exhibit 2**, 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 Ashford TRS. Accordingly, the non-protected and unlawful conduct associated with the boycott directly and substantially impacted Ashford TRS, and it chose to pursue its constitutionally protected remedy of filing a lawsuit to recover its losses. While Remington Lodging's interest in earning its fee was also tangentially impacted, the potential for injury was greatest to Ashford TRS.

Ashford TRS decided, therefore, to file suit. This was an independent decision by a company independent of Remington Lodging. AHT/Ashford TRS is not a "single employer"

with the Remington entities, and is not the employer of the employees of the Sheraton Anchorage Hotel. This fact has been stipulated, and will not be re-argued here. [2]

* * * * * * * *

The ALJ cites only a single case, Fabric Services, 190 NLRB 540 (1971), for the broadly stated proposition that an employer need not be the employer of the employees who engaged in Section 7 conduct in order to be found to have violated Section 8(a)(1) of the Act.

Fabric Services should not be applied or extended to the facts of the present case. That case involved a plant operator ("Fabric Services") and Southern Bell Telephone Company, which was performing services in its plant. An employee for Southern Bell by the name of Smoak was lawfully on Fabric Services' property to perform these services. He was wearing at the time a pen pocket-protector bearing a union insignia, with the words: "IT DOESN'T COST – IT PAYS. JOIN CWA-AFL-CIO." Apparently concerned by the solicitation inherent in this message, Fabric Services directed Smoak to remove the insignia. The resulting 8(a)(1) charge was defended by Fabric Services "solely and entirely upon the ground that because [Fabric Services] was not Smoak's employer, it cannot, as a matter of law, be found to have violated Section 8(a)(1) of the Act." 190 NLRB at 541.

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[2] Respondent previously argued this point in its Motion for Summary Judgment submitted to this Board. Briefly, Respondent demonstrated that a "single employer" will be found only "where two ongoing businesses" are shown to be "coordinated by a single master." Chemical Sovereign, 2012 NLRB LEXIS (ALJ Sandron, May 15, 2012), *citing to,* Cadillac Asphalt Paving, 349 NLRB 6, 8 (2007). Four factors are considered: common ownership, common management, functional interrelationship of operations, and – most important of the four – common control of labor relations. The evidence presented on summary judgment showed only a slight overlap in ownership and management, but absolutely no operational interrelationship and – again, most importantly – absolutely no common control of labor relations. On the basis of this evidence, counsel for the General Counsel stipulated to the absence of a single employer entity, as set forth at the beginning of this section of this brief.

Upon holding that the absence of an employer-employee relationship between Fabric Services and Smoak was not an impediment to a finding of liability under 8(a)(1) – unlike cases arising under 8(a)(3) – the decision went on to make the following important point:

> In such a situation [an 8(a)(1) allegation, where no 8(a)(3) discrimination is involved], the absence of a proximate employer-employee relationship may still have a relevant bearing on the factual question as to whether the conduct complained of was an interfering, coercive or restraining kind.

190 NLRB at 542 (*emphasis added*). The decision goes on to conclude:

> Fabric Services, by virtue of its ownership of the property and its power to evict Smoak from its premises, was in a position of sufficient control effectively to enforce its direction to Smoak, in substance, either to remove his union pocket-protector or get off its property.

Id. (*emphasis added*).

Fabric Services, at its essence, is a "union access" case. The counsel for the General Counsel, in her opposition to Respondent's Motion for Summary Judgment, cited only Fabric Services and two other cases, both of which directly involved union access issues – New York New York Hotel & Casino, 356 NLRB No. 119 (March 25, 2011), and Nova Southeastern University, 357 NLRB No. 74 (August 26, 2011). In the line of these access cases, the courts and the Board have balanced the right of access by union organizers and activists to private property in a variety of settings, and related to a variety of exercises of Section 7 rights. *See*, Republic Aviation v. NLRB, 324 U.S. 793 (1945); Babcock & Wilcox v. NLRB, 351 U.S. 105 (1956); Hudgens v. NLRB, 424 U.S. 507 (1976); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

All of these cases, including Fabric Services, involved a primary exercise of Section 7 rights by employees or non-employee union agents engaged in organizing (with the exception of

Hudgens, which involved access related to a communication effort by striking picketers, another primary exercise of a Section 7 right [3]).

The holding in Fabric Services – particularly given its single-issue disposition noted above – should not be assessed or relied upon, as the ALJ has done here, as a one-size-fits-all holding for the overly broad proposition that *any entity* under *any circumstances* can be held liable at *any time* under Section 8(a)(1), without regard to whether the entity so charged is or is not the employer of the employees whose Section 7 rights are at issue. The holding in Fabric Services itself, as quoted above, recognized that the "absence of a proximate employer-employee relationship *may still have a relevant bearing*" on precisely this issue of 8(a)(1) liability, and proceeded to resolve the issue raised by the defense in that case by focusing on the exercise of "control" that Fabric Services was able to impose directly on Smoak's exercise of his primary Section 7 rights. Id., 190 NLRB at 542 (*emphasis added*). Implicitly, therefore, the *absence* of such control – and the corresponding absence of any direct causal impact on an employee or group of employees while in the exercise of primary Section 7 rights – yields the conclusion that where there is no such control, there can be no 8(a)(1) liability as a matter of law.

The more fundamental inquiry calls for the balancing of an entity's property rights against the rights of employees under Section 7 of the Act. Hudgens, 424 U.S. at 521-522 ("Accommodations between employees' Section 7 rights and employer's property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other'." [*citation omitted*]). In addition, as addressed in the Second through Sixth Exceptions below, a property owner's First Amendment right to petition for redress of grievances, by filing a lawsuit seeking to protect its property interests, must also be balanced against section 7 rights

[3] Albeit, a "low hierarchy" exercise of a Section 7 right, as shown and discussed below.

under the Act. As shown below, this particular balancing weighs heavily in favor of First Amendment protection.

Both sides of the fulcrum between property rights and section 7 rights must be weighed and considered. The Supreme Court has noted, on the 'Section 7' side of the balancing: "What is 'a proper accommodation' in any situation may largely depend upon the content and the context of the Section 7 rights being asserted." Id. The Board in New York New York, 356 NLRB No. 119, at p. 9, *citing to*, United Food & Comm'l Workers v. N.L.R.B.,74 F.3d. 292, 298 (D.C. App, 1996), similarly noted appellate authority "for finding certain Section 7 rights weightier than others." The D. C. Circuit Court stated, in the case cited:

> Supreme Court precedent clearly establishes that, as against the private property interests of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees. A long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employee's own employees being the strongest, [compared, first, to *non-employee* organizing] . . . [and] attempting to communicate with an employer's customers, being weaker still."

74 F3d. at 298 (*emphasis added*); *see also,* N.L.R.B. v. Great Scot, Inc., 39 F3d. 678, 682 (6th Cir., 1994) ("Under the section 7 hierarchy of protected activity imposed by the Supreme Court," non-employee activity in which the "targeted audience was not [an employer's] employees but its customers . . . warrants even *less* protection than non-employee organizational activity." [*emphasis in original*]).

The low hierarchy of consumer-directed action is significant to the present case, in that the actions of the union at issue here – which led to the filing of the lawsuit by Ashford TRS – was the union's pursuit of a consumer boycott aimed at the Hotel.

The Board in New York New York, *supra,* similarly stated that an important consideration was the fact that the employees at issue in that case – who had been handbilling

their employer's restaurant inside a casino complex, on the non-employer casino's owner's property – "were *exercising their own rights* under Section 7 in organizing *on their own behalf*" at the time of the alleged 8(a)(1) violation by the non-employer casino owner. Id. (*emphasis added*). Implicitly, therefore, alleged 8(a)(1) conduct which does *not* "interfere with, restrain or coerce" *employees while engaged* in "exercising their own rights" – such as the lawsuit at issue here, aimed at the union-directed boycott effort – falls farther down the hierarchy scale.

In the present case, unlike *all* of the access cases reviewed above, there was no primary exercise of a Section 7 right involved. Ashford TRS has not been charged with 'interfering with, restraining or coercing' any organizing activities, or with 'interfering with, restraining or coercing' communication efforts by employees conducted in or on the property of the Hotel. Ashford TRS, in fact, took no direct action of any sort against any individual employee or group of employees while in the act of exercising a primary Section 7 right. Ashford, instead, filed a lawsuit against the union, protected by the First Amendment.

The Supreme Court in Lechmere, *supra*, brought into focus the importance of the distinction between the exercise of primary Section 7 rights by employees and the mere derivative rights of unions. The Court's holding in Lechmere was premised on the following noted statutory foundation, as set forth in the first paragraph of its analysis, in Section II of the opinion:

> Section 7 of the NLRA provides in relevant part that 'employees shall have the right to self-organization, to form, join, or assist labor organizations.' Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.' By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their non-employee organizers.

502 U.S. at 531-32. (*emphasis added; citations omitted*). The court then noted its past recognition, in the context of an earlier access case, Babcock & Wilcox, *supra*, of the merely derivative right of "unions" and "non-employee union organizers." Such derivative rights may, but only "in certain limited circumstances," restrict a property owner's "right to exclude non-employee union organizers from his property." Id. (*citations omitted*); s*ee also,* Prune Yard Shopping Center v. Robins, 447 U.S. 74, 82 (1980) ("[O]ne of the essential sticks in the bundle of property rights is the right to exclude others").

On the 'property rights' side of the fulcrum, there are, of course, other property rights in the "bundle of sticks" of such rights. The Board, for example, recently recognized that property owners have a "legitimate interest in preventing interference with the use of its property," which it recognized as a "property right or a 'management interest,' perhaps ultimately derived from property ownership." This property right or management interest is "entitled to appropriate weight." New York New York, 356 No. 119, at p. 10.

Consistent with this recognition of property rights, Ashford TRS, by filing the state-law lawsuit in the U.S. District Court in Anchorage, asserted its property right interest in not being subjected to tortious interference with its business relationships and in not being subjected to the defamation of its business – a property right naturally inclusive of the use and enjoyment of profits generated by the property. Further, as addressed in the Exceptions below, by filing this suit, Ashford TRS engaged in an exercise of its First Amendment right to "a redress of grievances," which the Supreme Court has identified as "'one of the most precious of the liberties safeguarded by the Bill of Rights'." BE&K v. N.L.R.B., 536 U.S. 516, 524 (2002), *citing,* United Mine Workers v. Illinois Barr Association, 389 U.S. 217, 222 (1967). *See*, Section III of this brief, below.

Accordingly, upon the balancing of rights at issue in this case, the ALJ's recommended decision must be rejected. The filing of the lawsuit did not "interfere with, restrain or coerce" individual employees engaged in an exercise of primary Section 7 rights. The lawsuit was aimed only at the union, which enjoys only derivative rights, and the lawsuit was prompted by a consumer boycott which, as shown, ranks low in the hierarchy of protected activity under Section 7. When balanced against Ashford TRS's right to protection against interference with its property, as well as balanced against the immense importance of its rights under the First Amendment, dismissal of the complaint is mandated.

* * * * * * * *

The small handful of cases, like Fabric Services, where the Board has taken the extraordinary step of extending 8(a)(1) liability to non-employers, can be further understood by observing that the Board has done so only based on special circumstances, where (a) the expediency of alter ego, joint- or single-employer theories are unavailable, and (b) violations of Section 7 rights are otherwise proven. The circumstances warranting an extension of 8(a)(1) liability to a non-employer turn usually on situations where the non-employer responding to the charge was in a position of power – or "control," as was the focus in Fabric Services – and exercised that power over the actual employer, thereby directly impacting the section 7 rights of the employee or employees in question.

However, in these cases of special circumstance, the focus is more appropriately placed on the motivation behind the conduct of that respondent *vis a vis* its *own employees*. More "appropriate," that is, given the wording of the Act. First, the Board has justified its decisions in this small handful of cases by pointing to the wording of section 2(3), which defines "employee"

to include "any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." Notwithstanding the broadness of the reach of this definition, the fact remains that Section 8(a) of the Act imposes liability only on "an employer" who commits any of the prohibited acts listed at 8(a)(1) through (5). While the term "employee" is given expansive scope, the term "employer" is not, and 8(a) is concerned specifically with violations committed by "an employer." In ordinary English usage and common sense, this connotes violations only by "an employer" toward its employees. It is the employment of its employees which defines its status as "an employer."

Had Congress intended the availability of 8(a) liability against *non*-employers, it could have easily made that clear by, for example, including language in section 8(a) that parallels section 2(3). Ashford TRS respectfully submits that the broad definition in section 2(3) was inserted only for limited purposes, such as was recognized by an early 1941 Supreme Court decision, in Phelps Dodge v NLRB, 313 US 177 (1941) (holding that the Board, in ordering the reinstatement of striking workers, had the authority to also order reinstatement of two additional pro-union *former* employees, rejecting the argument that these individuals – who resigned prior to the strike – were not "employees" whom the Board could order reinstated). [4]

In Fabric Services, the Board imposed 8(a)(1) liability on a plant operator which, had it been Smoak's actual employer, would have been held blatantly in violation. The Board concluded that Smoak's rights – which he clearly possessed *vis a vis* his own employer, Southern Bell – should "not be curtailed simply because [he came] in contact with customers in the course of [his] work." Smoak was lawfully on the plant operator's premises engaged in work for Southern Bell. Liability was properly imposed on Southern Bell, by virtue of its agreement to

[4] This Board in New York New York, 356 NLRB No, 119, at p. 5, cites footnote 3 in Hudgens, *supra*, as support for application of 8(a)(1) to a non-employer. The footnote, however, constitutes dicta, and certainly was not the basis for the Court's holding in that case.

the request of Fabric Services to enforce the banishment of the union-message pocket-protector. Ashford submits it was unnecessary for the Board in Fabric Services to also impose liability on Fabric Services, and overreached its authority in doing so by ignoring the plain language in 8(a), which is aimed only at violations *by* "an employer."

Ashford TRS calls on the Board to reverse Fabric Services, to the extent it imposes liability in the absence of findings concerning the motivation of the plant operator to insulate its own employees from the pro-union message Smoak carried into its plant.

The result in cases like Fabric Services can thus be upheld, provided the Board establishes a requirement that an employer in a position similar to that of Fabric Services would be held liable only to the extent its motivation in committing the violation was to prevent the exposure to *its own employees* of information concerning unionization and the right to organize. This will often be the case, and will be generally and typically an easy element for the General Counsel to prove. Indeed, though not discussed in Fabric Services, such motivation provides the only likely explanation for the actions of that plant operator. Liability under 8(a)(1) could have been imposed without doing violence to the language in 8(a)(1), which proscribes violations only by "an employer."

Should the Board adopt this modification to the holding in Fabric Services, it would not be available to impose liability here. The facts in the present case do not suggest in any possible way that Ashford TRS was motivated in filing the lawsuit to curtail the Section 7 rights of its own employees (*i.e.*, its 77, primarily white-collar employees based in Dallas, Texas).

The holding in Fabric Services, for the reasons stated above, should not be extended to situations like the present case. The fundamental inquiry calls for a balancing of a property owner's rights against the rights of employees under section 7. The balance to be struck, here,

for the reasons shown above, distances this case from Fabric Services, and from the only two other cases cited by the counsel for the General Counsel in her opposition – New York New York, *supra*, and Nova Southeastern University *supra*.

Finally, to the extent this case is analyzed by the question of "control" which a non-employer Respondent, like Ashford TRS, may have over the employees of another company, the findings of the ALJ regarding Ashford TRS's supposed control must be rejected by this Board pursuant to its *de novo* review of all the evidence in this case. The ALJ latched onto a single, insignificant provision found within the Management Agreement, providing that "Remington 'shall consult with [Respondent] on matters of policy concerning management, sales, room rates, wage scales, personnel, general operating procedures, economics and operations'." (ALJD, at p. 3, lines 17-19, citing to the Management Agreement, **Joint Exhibit 2** at 31-32). This language, which gives Ashford TRS nothing more than the right to be 'consulted,' stands in diminished contrast to the more important, actual operative language in the Agreement, appointing Remington "as its soles, exclusive and continuing operator and manager to supervise and direct, for and at the expense of [Respondent], the management, and operations of the premises." **Joint Exhibit 2** at 17. Further, the Management Agreement makes plain, as quoted and described in the Peckham affidavit (**Exhibit R-1**), the following:

> . . . the 'operation of the [Sheraton Anchorage] shall be under the exclusive supervision and control of [Remington Lodging and subsequently Anchorage].' [**Joint Exhibit 2**, Section 4.02].
>
> The Management Agreement provides also that '[Remington] 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], [Remington Anchorage] shall fix the employees' terms of compensation and establish and maintain all policies related to employment.' [**Joint Exhibit 2**, Sections 9.01 and 9.02]. (emphasis added)

Further, this relinquishment of control by Ashford TRS, vesting "absolute discretion" and "exclusive supervision" in Remington, is mandated by law, as Ashford TRS and its parent AHT are integrated as a real estate investment trust (REIT) under IRS code section 26 U.S.C § 856. Hence, as Peckham explains, AHT acting through its subsidiaries – including Ashford TRS – "are not permitted to engage in the management of hotels, or to employ the employees of hotels." [**Exhibit R-1**, Peckham, paragraph 6]. And, "[in] actual practice, AHT and its subsidiaries do not manage hotels, and do not employ the employees of any hotels it owns."

Ashford possesses merely the right to be consulted. This is nothing more than the right to keep AHT and Ashford TRS informed. At most, it opens the door for Remington to solicit Ashford's opinion, or for Ashford to volunteer its opinion. At the end of the day, Remington has sole, exclusive discretion and authority, and exercises this authority with respect to the employment of the employees, and with respect to its relationship with the employees' collective bargaining representative. Ashford is an investment company. It is not a hotel management company, and its expertise does not lie in hotel management; it relies instead on Remington and the other "independent contractor" hotel management companies it engages to manage the hotels it owns (including Hilton, Hyatt, Marriott and others; see footnote 1, above).

Thus, the so-called "Bad Acts" referred to by the ALJ in his decision are those of Remington only. There is no evidence anywhere in this record or in the record of any of the cases involving Remington, and cited by the ALJ, reflecting any part having been played by Ashford TRS or AHT in the commission of these so-called Bad Acts.

The ALJ grounded his "control" theory also on the assertions of attorney-client privilege by Respondent's counsel at trial – assertions which the ALJ sustained. From this, the ALJ references a so-called "community of interest [between Respondent and Remington] related to

the Union, their common opponent." (ALJD, p. 5, line26 – p. 6, line 4). The Union, however, is only a "common" opponent with respect to this present case, and only to the extent the Union's interests are advanced by the General Counsel in this case (there has been no other litigation with Ashford involving the Union or the NLRB). As the transcript references surrounding the record cited by the ALJ reflects, Respondent simply asserted an attorney-client privilege with respect to Remington attorney Todd Stoller who, because of his greater familiarity with the background legal issues involving Remington's defense in other NLRB proceedings, was a logical, expedient point of contact for Ashford at the time it decided to move forward with the underlying lawsuit. It is far too much of a leap, in light of all other evidence shown here, to deduce from this assertion of a privilege by Ashford in this one case – merely because Stoller was an attorney employed by Remington – a "community of interest" for any and all other purposes between Ashford and Remington with respect to the Union.

Ashford TRS never dealt with the Union. Ashford TRS had no control whatsoever over the collective bargaining relationship with the Union. Ashford TRS simply filed a First Amendment protected lawsuit to protect its investment property interest in the hotel. It did not seek otherwise to interfere with the section 7 rights of the employees of the hotel.

Second Exception

The ALJ erred in section III.2 of his Analysis by relying on a so-called exception found in footnote 5 in Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983), and stating based thereon that "preempted lawsuits are outside the scope of First Amendment protection." The proper test, as announced in BE&K Construction v. NLRB, 536 U.S. 516 (2002) and in the remand decision by the Board at BE&K Construction, 351 NLRB 451 (2007), is whether – regardless of the success or failure of the lawsuit (i.e., here, regardless of whether ruled preempted or not) – the lawsuit was reasonably based (i.e., a reasonable litigant could realistically expect success on the merits), and, if so, the motive in the filing of the lawsuit is irrelevant.

Third Exception

The ALJ erred in finding that the underlying lawsuit at issue was not reasonably based; that is, the ALJ erred by contrarily finding that the lawsuit was objectively baseless, defined as a lawsuit as to which "no reasonable litigants could realistically expect success on the merits." BE&K Construction, 351 NLRB 451, 451 NLRB No. 29, at **11 (2007).

Fourth Exception

Because the underlying lawsuit was reasonably based, the ALJ erred in proceeding to analyze the Respondent's motive in filing the lawsuit, as motive is irrelevant when the lawsuit is reasonably based.

A. Ashford TRS's Lawsuit, Filed in the U.S. District Court in Anchorage, Alleging State Law Claims for Tortious Interference with Contract and Defamation

The General Counsel's Amended Complaint alleges, and the ALJ in his recommended decision found, that the lawsuit filed by Respondent Ashford TRS was filed with a retaliatory motive, in violation of Section 8(a)(1) of the Act.

As shown below, however, motive is irrelevant given the facts of this case. Further, to the extent motive is considered, as will be addressed below by the Sixth Exception in this brief, and upon application of the correct standard which balances First Amendment considerations, there is insufficient requisite evidence of such motive. Instead, the evidence points only to a non-employer hotel owner which filed a lawsuit because it had suffered, over the preceding 10

months, real losses as a consequence of an over-zealous boycott by UNITE-HERE's national and local leadership. While Ashford TRS recognizes the Union's right to engage in a primary consumer boycott, Ashford TRS nonetheless had a reasonable basis to conclude – when filing the suit – that UNITE-HERE had crossed an actionable line by engaging in conduct that was not privileged or justified within the meaning of Alaskan tort law. *See, e.g.*, Long v. Newby, 488 P.2d 719 (AK, 1971) (first Alaska Supreme Court case establishing the "tortious interference" cause of action, and holding that "actual malice [in the act of interfering] need not be shown," and that "mere persuasive . . . inducement" in interference is "sufficient"); *see also*, Sisters of Providence v. A.A. Pain Clinic, 81 P.3d 989, 997 (AK. 2003); *and*, J&S Services v. Totner, 139 P.3d 544, 551 (AK, 2006) (cause of action extended to tortious interference with prospective economic advantage).

Specifically, Ashford had good reason to believe the Union had pursued the boycott by intimidating prospective hotel guests with threats of violence, and reasonably believed therefore that its lawsuit advanced meritorious, non-preempted claims under state law. The state of Alaska has a "compelling state interest" in the "maintenance of domestic peace," which overrides the Board's preemptive authority to regulate a national labor relations policy. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247-48 (1959). The scope of this state interest includes protection against, and remedial redress for, acts of "intimidation and *threats* of violence." Garmon, 359 U.S. at 248, *citing*, United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954) (*emphasis added*) (pointing to the focus in the 1954 decision on a state's right to exercise non-preempted jurisdiction in a "situation involving violence and *threats* of violence," [*emphasis added*], and pointing further to International Union v. Wisconsin Board, 336 U.S. 245, 253 (1949), which recognized the state's non-preempted power to police conduct,

"which consists of 'actual or *threatened violence* to persons or destruction of property'." [*emphasis added*]). *See also,* International Union v. Russell, 356 U.S. 634, 638 (1958) (state may "award damages for injuries caused by 'mass picketing and *threats* of violence'." [*emphasis added*]).

Ashford TRS's lawsuit – *Ashford TRS Nickel v. UNITE-HERE, Local 878,* U.S.D.C. - Alaska; case No. 3:10-cv-0213 – alleged facts showing, first, that the Union's boycott was far from a passive affair. The Union didn't simply announce a boycott, and then sit back waiting for favorable consumer reaction. To the contrary, not only did the Union reach out for public support from groups deemed sympathetic, the Union reached out directly to the "businesses, organizations and individuals who had scheduled business at Sheraton Anchorage to persuade them not to patronize the Hotel." [**Joint Exhibit 3 – Pacer doc. 50**; Third Amended Complaint, par. 13; and *see,* testimony of Union activist Jessica Lawson in *Remington Hotel Corp.*, 19-CA-32148, *et seq*., **Id. – Pacer doc. 50-1**].

The groups and persons targeted by the Union were contractually bound to conduct scheduled meetings at the hotel and consume hotel services on specified future dates. These groups and persons were not simply encouraged to support the boycott, they were given specific information on how to break their contracts by utilizing *force majeur* clauses. The Union's standard letter, under a letterhead for "Hotel Workers Rising" and Local 878 – copy attached to Denis Artiles's Affidavit, as part of Ashford's Third Amended Complaint [**Id. – Pacer doc. 50-2, p. 8 of 15**] – was sent to "more than 50" groups that had contracted business at the Sheraton, advising them to "review the *force majeur* clause." [Lawson testimony, p. 2362; **Id. – Pacer doc. 50-1**]. Enclosed with the letter was a sample clause to ensure that readers of the letter would recognize the type of clause at issue.

The Union did more than send letters. The Union contacted, met with and telephoned persons connected with these guest-groups, in order to try and have "a discussion with them about what's actually going on at the Hotel, and ask them not to stay." [Lawson testimony, pp. 2355 and 2363; **Id.**]. Ashford alleged in the lawsuit, with supporting facts, that the union in the course of these contacts intimidated these individuals, by threatening a significant potential for encountering violence if they attended their scheduled events at Sheraton Anchorage.

Indeed, the standard letter sent to "more than 50" made the specter of violence quite plain, by painting the following picture of what Hotel guests would face if they ignored the boycott plea and stayed at the Sheraton:

> A boycott means rallies, bullhorns, worker actions and vigorous picket lines that attendees will have to cross when entering and exiting the premises. (emphasis added).

[**Id. – Pacer doc. 50-2, p. 8 of 15**]. This was no idle threat. The Union – following the November 2009 boycott announcement – did indeed hold numerous, boisterous rallies and mass pickets that surrounded the hotel building. The Sheraton Anchorage sits on a single, small city block with sidewalks closely hugging the building and entrances. The above-quoted statement in the Union's letter was intended to send a message:

> *If you don't cancel your meeting, do not expect a peaceful stay. You will not only witness and hear "rallies, bull horns, worker actions and vigorous picket lines," you will have to "cross" through these vigorous picket lines. You will come face-to-face with these picketers who – given the grievances described – are justifiably angry.*

This message, undoubtedly, was amplified during the personal and telephonic contacts. And, the response to this message was predictable – numerous cancellations, costing Ashford several hundreds of thousands of dollars, as described below.

There can be little doubt, and it was reasonable for Ashford to conclude, that the personal phone calls and visits made by the Union resulted in "intimidation and threats of violence" toward these future hotel guests … the very conduct the Supreme Court in *Garmon* declared reachable by state law.

Because discovery was wrongfully not allowed in the lawsuit – as addressed below – it is not fully known how many persons connected with these groups were intimidated by threats of violence. It is known, however, that threats of violence did in fact occur, as reflected in the May 27, 2010 letter from Laura Badeaux of the Louisiana Center for Women in Government to the Hotel's General Manager, Denis Artiles. [**Id. – Pacer doc. 50-2, p. 5 of 15**]. In the letter, Ms. Badeaux states that "Panelists/speakers and attendees received threatening phone calls from the labor union's coordinator" two days earlier, on May 25, which resulted in "prompting [these] speakers and panelists to cancel." (emphasis added).

Mr. Artiles subsequently spoke with Ms. Badeaux, who explained to him that the Union representatives had "inform[ed]" the "scheduled panelists" that they "should be concerned for their safety if they attended the LCWG conference at the Hotel." [**Id. – Pacer doc. 50-2**; Artiles Affidavit, par. 5]. Because of these cancellations, driven by the "Union's threats and [the] ongoing safety concerns," Ms. Badeaux said she was "forced to cancel her agreement with the Hotel." [**Id**.; *and see*, **Pacer doc. 50-2, p. 5 of 15**]. Mr. Artiles concluded, based on his conversation with Ms. Badeaux, that the Union's reference to being "required to cross 'vigorous picket lines' [was] . . . understood [by her] to be a threat to the safety of her attendees." [**Id**. – **Pacer doc. 50-2**].

Another group representative, a Ms. Eagen, described to Mr. Artiles that the communications by the Union were "very aggressive." She was told she should be "ashamed of doing business with the Hotel," and that the Union had "attempted to intimidate [her]." [**Id**., par. 4]. Yet another group representative was also concerned by the threat of being "forced to cross 'vigorous picket lines'." Mr. Artiles concluded – based on his conversation with this latter individual and "many others" – that this assertion by the Union was perceived by many as a "veiled threat to the safety of attendees" at meetings. [**Id**.].

The Union also defamed the Hotel with untrue statements. Mr. Artiles testified in his Affidavit attached to Ashford's Third Amended Complaint that a "package" of documents – primarily news articles and press releases – had been "circulated to all our potential or future guests." [**Id. – Pacer doc. 50-2, pp. 11-15**]. Mr. Artiles testified: "This package alleges that Hotel management 'has proposed to strip [hotel employees] of the core benefits.' This is false . . . [and was asserted] as part of the Union's campaign to drive business away from the Hotel." [**Id**., par. 8]. The Union also told guest–group contacts that the Hotel was "guilty of doing 'illegal things by illegally terminating workers'," another statement that Mr. Artiles declared as "false." [**Id**., paragraph 4].

B. The Dismissal of Ashford's Lawsuit Was In Error

Judge Holland of the U.S. District Court in Anchorage, in his August 4, 2012 dismissal of Ashford's lawsuit, erred in his application of the standard to be applied when ruling on a motion to dismiss pursuant to FRCivP 12(b)(6). [**Joint Exhibit 3 – Pacer doc. 58**].

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff provide only "a short and plain statement of the claim showing that the pleader is entitled to relief." As the Supreme Court

noted in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" (internal citations omitted). The facts alleged in a complaint are "accepted as true," and will be sufficient to survive a motion to dismiss if those facts "'state a claim to relief that is *plausible* on its face'." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), *citing,* Twombly, at 570 (*emphasis added*).

The issue in Twombly was whether plaintiffs had alleged sufficient facts to establish the existence of an "agreement" to price-fix among the defendants in a Sherman Antitrust Act case, as opposed to alleging mere observation of "parallel conduct" among the defendants that would be merely consistent with an agreement to price-fix. Proof of such an agreement is essential to a section 1 Sherman Antitrust Act claim.

In the absence of alleged facts suggesting the formation of such an agreement, the Court held that claims under Section 1 of the Sherman Act would fail to survive a Rule 12(b)(6) motion to dismiss. In the summary statement of its holding, the court said: "[W]e hold that stating [a Section 1 Sherman Act] claim requires a complaint with *enough factual matter* (taken as true) to suggest that an agreement was made." Twombly, 550 U.S. at 556 (*emphasis added*). The court then stated the following, concerning the standard for "plausibility" with respect to sufficiency of pleaded "factual matter":

> Asking for plausible grounds to infer an agreement [for unlawful price-fixing] does not impose a probability requirement at the pleadings stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'

[Id.; internal citations omitted; *emphasis added*].

In short, as stated in Iqbal, 129 S. Ct. at 1950: "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Therefore, for example, it is not enough to merely assert the bare legal conclusion that "defendants entered into an illegal agreement," a plaintiff must further make factual allegations that "suggest," as stated in Twombly, at 556, that "an agreement was [in fact] made." Where there are such "well-pleaded factual allegations" the court in Iqbal went on to state, "a court should assume their veracity *and then determine* whether they *plausibly* give rise to an entitlement to relief" (*emphasis added*).

In further describing the 'plausibility' standard, the court in Twombly explained: "[W]hen a complaint adequately states a claim, it may *not* be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the fact-finder." *Id*., 550 U.S. at 564, n. 8. The Court in Twombly also cited to its earlier decision in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), pointing to the statement by the Court that "a district court weighing a motion to dismiss asks 'not whether a plaintiff will ultimately prevail but whether the claimant is *entitled to offer evidence to support the claims'*." Id.(emphasis added).

The federal court in Anchorage failed to correctly apply the above standards. The Third Amended Complaint filed by Ashford TRS – together with the attached supporting affidavit of Denis Artiles, the correspondence and news articles attached and referenced therein, and the attached testimony of Lawson – set forth "well-pleaded factual allegations" of non-preempted

claims for tortious interference and defamation under Alaska law, as to which Respondent was "entitled to offer evidence to support the claims." Twombly, 550 U.S. at 564.. [5]

The allegation that UNITE-HERE Local 878 engaged in acts of intimidation and made threats of violence was not a mere pleading of a "legal conclusion," or simply a "formulaic recitation of [an] element[] of a cause of action." To the contrary, this allegation was supported by "factual allegations" clearly showing threats of violence. Specifically, the Third Amended Complaint pointed to:

- The standard Union letter, and the corroborating testimony of Ms. Lawson, establishing that "more than 50" future guest-groups of the Sheraton Anchorage were told their attendees would be forced to "cross" through "vigorous picket lines . . . when entering and exiting the premises."
- The letter from Ms. Badeaux with the LCWG, wherein she reports that her speakers and panelists had received "threatening phone calls from the labor union's coordinator."
- The fact that these "threatening phones calls were troubling enough to cause these "speakers and panelists to cancel" … and, the fact these cancellations were made almost immediately (as stated in her letter, dated May 27, the threatening calls were received on May 25).
- The affidavit testimony of Artiles, describing his discussion with Ms. Badeaux of the LCWG, which made it clear that the cancellation of the group as a whole was driven by the "Union's threats and on-going safety concerns."
- The other letters and under-oath statements by Artiles, corroborated by Lawson's testimony, reflecting a substantial likelihood that numerous other guest-groups were subjected to similar acts of intimidation and threats of violence.

These facts taken together amount to "well-pleaded factual allegations" of an Alaskan state law claim for tortious interference, carried out by threats of violence. This is a claim that

[5] Judge Holland was correct in stating, at pages 7-8 of his August 4 Order, that the "court may consider" exhibits attached to a complaint in assessing a motion to dismiss. Similarly, the argument set forth here, showing that Ashford's Third Amended Complaint did in fact contain sufficiently "well-pleaded factual allegations," relies upon the exhibits and testimony attached to that Complaint. [**Joint Exhibit 3 – Pacer doc. 58**].

meets the *Garmon* exception to Board preemption, in that it invokes Alaska's interest in protecting against, and providing remedial redress for, acts of "intimidation and threats of violence."

The facts shown above meet the plausibility standard, and such pleaded facts must be accepted "as true" when ruling on a 12(b)(6) motion to dismiss. The court erred by "impos[ing] a probability requirement," contrary to the instruction given in Twombly, 550 U.S. at 555. Had the court ruled correctly, the court would have held that these facts are sufficient to "raise a reasonable expectation that discovery will reveal evidence of" a non-preempted claim of tortious interference. As shown above, this "reasonable expectation" standard is applied regardless of a judge's personal opinion that ultimate proof of a claim may be "improbable" or "remote."

C. The General Counsel Failed to Prove a "Bill Johnson's Restaurant" ULP

There is no 8(a)(1) violation because Ashford possessed an objective reasonable basis to bring this lawsuit. Further, had discovery not been wrongly denied – including, for example, subpoenas to the LCWG to compel identification of the panelists victimized by the "threatening phone calls," and take their depositions – Ashford TRS is confident it would have proven its tortious interference claims. The standard under a *Bill Johnson's Restaurant* ULP, however, doesn't require such 'confidence.' The standard, instead, as stated in the summary holding in BE&K Construction Co., 351 NLRB 451, 351 NLRB No. 29, at **10 and **11 (2007), is as follows:

> [W]e hold that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating lawsuits. (*emphasis added*).
>
> *****

> In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'

This standard is narrowly drawn in view of the balancing required with the First Amendment right to "petition the government for a redress of grievances." As stated by the Supreme Court in its 2002 "BE&K" decision, the First Amendment right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights'." BE&K Construction v. NLRB, 536 U.S. 516, 525-24 (2002) (internal citations omitted).

In the Supreme Court's earlier decision, in Bill Johnson's Restaurant v. NLRB, 461, 731, 741 (1983) – the case that provides the common name for this ULP – the Court described previous holdings in similar cases decided in the antitrust context:

> In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a 'mere sham' filed for harassment purposes. Id. at 511.

See also, the Supreme Court's subsequent holding in the antitrust context, Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993). The Court in its opinion in *Bill Johnson's* went on to note:

> We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized, '[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.' [citation omitted].

Id.

When the issue of retaliatory lawsuits came before the Board on remand from the Supreme Court's 2002 decision in BE&K, the Board had before it the issue – left open by the 2002 decision – of whether to apply the same standard followed in the antitrust context. The Board answered this question in the affirmative, and held: "[A] lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits'," BE&K, 351 NLRB at 457, citing to Professional Real Estate Investors, 508 U.S. at 60.

BE&K was a five-member decision. The three-member majority was correct in criticizing the dissenting minority as "reiterat[ing] the view, twice rejected by the Supreme Court, that . . . the Board is empowered to impose unfair labor practice liability on such [retaliatory] suits even if they are reasonably based." Id., at 351 NLRB at 457.

The Board majority also noted that the Court, in its BE&K decision, recognized that "reasonably based lawsuits, even if unsuccessful, embody First Amendment interests," and that the Court thus "reaffirm[ed] the primacy of the First Amendment right to petition . . . even in circumstances where the right to petition collides with the interests underlying the Act." 351 NLRB at 458. The Board, however, then noted the following:

> We recognize that the Court in BE&K expressly stated that it was not deciding 'whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity'."

Id., quoting the Court's opinion, 536 U.S. at 536-37 (emphasis added). In leaving this question open, the Board majority said the Court was "merely following the bedrock principle of judicial restraint," and rejected the view – attributed to the two-member minority – that this open

question by the Court was "a suggestion that the Board is free to engage in a balancing process in the general run of cases." *Id*. Such a "balancing process" was rejected by the majority as:

> [A] disguised method for the Board to preserve the general rule the Court condemned in BE&K, with the added dimension of unpredictability and its attendant chilling effect on the First Amendment right to petition.

Id. The Board majority also rejected the suggestion that the concurring opinion by Justice Breyer supported the argument for a "balancing process." The "broad and indefinite standard suggested by Justice Breyer" was expressly rejected by the Board majority, noting that "only three justices joined" with Breyer, and noting also that this "broad and indefinite standard . . . was expressly disavowed by Justice Scalia," joined by Justice Thomas. Id. [6]

Finally, Justice Scalia articulated a particularly compelling point in his opinion, described as follows by the Board majority: "Justice Scalia expressed serious reservations about permitting reasonably based lawsuits to be held unlawful based on a determination of motive made by an executive agency that lacks the independence of an Article III court." Id.

Accordingly, the question in the present ULP Charge is whether Ashford's lawsuit meets the "reasonably based" standard, without reference to motive. As noted above, a lawsuit lacks a reasonable basis *only* if it can be said that "no reasonable litigant could realistically expect success on the merits." BE&K, 351 NLRB at 457.

As shown by the facts alleged in the lawsuit, above in subsection A, Ashford TRS possessed – when filing the lawsuit – a more than adequate factual and legal basis to assert the

[6] Justice Kennedy did not join either the Breyer or the Scalia opinion. It is reasonable to project, however, that if this issue came before the Supreme Court today, Scalia and Thomas would adhere to their opinion in BE&K, and would most likely be joined by Roberts, Alito and – Ashford respectfully submits – Kennedy, to form a majority, while Ginsburg, Sotomayor and Kagan would likely join with Breyer as the minority.

claims made. In short, Ashford TRS had reason to "realistically expect success on the merits'," and it would go much too far to conclude, under this standard, that "no reasonable litigant could realistically expect success on the merits'." BE&K, 351 NLRB at 457 (*emphasis added).* Had Judge Holland not frustrated Ashford's right to discovery, in violation of the Supreme Court's standard set forth in Twombly and Iqbal, as addressed in subsection B above, the claims would have only gotten stronger. The claim was plausible because actual threats of violence were indicated by the facts alleged – facts which must be taken as true for purposes of ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. It was certainly plausible, for example, for there to have been testimony from one or more of the LCGW panelists that the reason they cancelled – immediately upon contact by the Union, as shown by the factual allegations – was because they had received threats of, and feared and fully anticipated the occurrence of, violence upon crossing a "vigorous picket line" full of demonstrators characterized as justifiably angry.

Upon the foregoing, applying the standard announced by the Board in its remand decision in BE&K, Ashford TRS respectfully submits the ALJ's recommended decision should be rejected.

Fifth Exception

The ALJ erred by failing to recognize that an NLRB administrative law judge and the Board do not possess expertise in matters relating to application of the First Amendment and do not possess expertise in matters relating to determining the objective merit of federal lawsuits, and thus failed to recognize that ALJ and Board decisions involving these interests do not warrant the same level of deference usually accorded to Board decisions in matters limited solely to national labor policy.

Justice Scalia's concurring opinion, in which he fully joined the Court's majority, makes a compelling point worthy of particular consideration in the present case. The Board in its 2007 remand decision, as noted above, found significant support in this point; *i.e.*, the "serious reservations" expressed in the concurring opinion over "permitting reasonably based lawsuits to be held unlawful based on a determination of motive made by an executive agency that lacks the independence of an Article III court." In expressing this reservation, Justice Scalia drew contrast to the fact that "the determination of motive" in the antitrust setting "would have been [dealt with by] an Article III court," and noted further: "even with that protection, we thought the right of access to Article III courts too much imperiled [by holding that objective reasonableness ends the inquiry, as held in the antitrust context, in Professional Real Estate Investors, 508 U.S. 49 (1993)]." BE&K, 536 U.S. at 538. By contrast, though, if balancing were allowed in "objectively reasonable" cases by the Board, the balancing would be handled by "an *executive agency* . . . given the power to punish a reasonably based suit filed in an Article III court whenever *it* concludes – insulated from *de novo* review by the substantial-evidence standard of 29 U.S.C. §§ 160(e), (f) – that the complainant had one motive rather than another." Id. Justice Scalia then states:

> This makes resort to the courts a risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts. It would be extraordinary to interpret a statute which is silent on this subject to

> intrude upon the courts' ability to decide *for themselves* which postulants for their assistance should be punished.
>
> For this reason, I am able, unlike Justice BREYER, to join the Court's opinion in full – including its carefully circumscribed statement that "nothing in our holding today should be read to question the validity of common litigation sanctions *imposed by courts themselves*," *ante*, at 2402.

Id. (*emphasis in original*). Primary among the "litigation sanctions" referenced in the *majority* opinion is Rule 11 of the Federal Rules of Civil Procedure, as well as "statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff." BE&K, 536 U.S. at 537.

It is here – in the "carefully circumscribed" statement by the majority – that we come to the crux of the problem identified by Justice Scalia. It is evident the majority of the Court believes, as Justice Scalia states – noting his agreement with Justice Breyer – that "in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process." Id. (Scalia concurrence) (*emphasis in original*). As noted in the majority opinion in BE&K, 536 U.S. at 526, in the antitrust context, a "two-part definition of sham antitrust litigation" was set forth in Professional Real Estate Investors, *supra*. The suit must be objectively baseless ("no reasonable litigant could realistically expect success on the merits"). The lawsuit must also be subjectively baseless, defined as: "[T]he litigant's subjective motivation must 'concea[l] an attempt to interfere *directly* with the business relationships of a competitor ... through the use [of] the governmental *process* - as opposed to the *outcome* of that process - as an anticompetitive weapon.' [citing, 508 U.S. at 60-61]. For a suit to violate the antitrust laws, then, it must be a sham *both* objectively and subjectively."

Moreover, because Rule 11 *does* apply in trial-level cases under the Sherman Act – but *not* in cases before the Board – and, because Board decisions *are* insulated from *de novo* review,

Ashford TRS submits that the Court will in fact hold – in a "future appropriate case" – that even "objectively baseless" lawsuits will be held subject to 8(a)(1) liability *only* where the motive shown – relative to an 8(a)(1) violation – is found to be "in the heightened sense that the motive is only to impose the cost of litigation on the opposing party," as noted by the Sixth Circuit recently in NLRB v. Allied Mechanical Services, ___ F3d ___, 2013 WL 5811585 (October 30, 2013). That is, the General Counsel will have to *also* show a "heightened sense" motive to abuse process in the same sense defined for the subjective motive prong in the antitrust context, as shown just above in Professional Real Estate Investors.

The Sixth Circuit in reaching this conclusion, guided by the Court's decision in BE&K, pointed to the fact that Board cases of this type – involving not only First Amendment considerations, but involving also a determination of the objective merits of a federal lawsuit – do not warrant the usual deference (substantial evidence, rather than *de novo* review) accorded to its decisions. The Sixth Circuit reasoned as follows:

> This is neither a case where the agency is in a better position to find facts, nor a situation where the NLRB's expertise in labor relations or its special role as a primary source of national labor policy serves as a basis for deference in fact finding.
>
> Deference to agency fact finding can be justified partly on the agency's having heard witnesses and seen the evidence. This rationale does not apply to the question of whether the previous lawsuit in this case was reasonable. We are dealing with, after all, the likelihood of success of a case in federal court, and not with questions of credibility. Drawing inferences from basic facts can be done just as easily—if not more so—by the reviewing court as it can be by the Board.
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> * * * * * * *
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> . . . the instant case deeply implicates the First Amendment right to bring suit, and courts, more than agencies, have expertise in determining the scope of that right, although the Board has presumed expertise in how protecting that right will affect labor relations. The court also has more expertise than the Board in determining the objective merit of federal lawsuits.

Allied Mechanical Services, 2013 WL 5811585, at *4 (internal citations omitted).

There are other indications in the Court's *majority* opinion that it will lean this way. The Court pointed to the fact that while, by analogy, false statements do not *generally* have First Amendment protection, nonetheless, the Court stated, this does not suggest "that a class of baseless litigation is *completely* unprotected." 536 U.S. at 531 (*emphasis at original*). Instead, the Court's doctrine of "breathing space" protection would apply. The Court stated:

> And while false statements may be protected for their own sake, '[t]he First Amendment requires that we protect some falsehood in order to protect some *speech that matters*.' An example of such 'breathing space' protection is the requirement that a public official seeking compensatory damages for damages prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity."

Id. (*citation omitted*; *emphasis in original*).

Given the foregoing, and applying it to the present case, it is to be noted that the charging party Union (the defendant in the underlying lawsuit) did not allege a Rule 11 violation by Ashford TRS. *See*, the entire record in the underlying case, at **Joint Exhibit 3**. Neither did the court, which has the power under Rule 11(c)(3) to impose sanctions *sua sponte*. Id. Rule 11 provides, in pertinent part, that sanctions may be imposed by the court for a violation of the affirmative directives in Rule 11(b) – *i.e.*, that all pleadings presented to the trial court, by operation of the Rule, contain the following representations:

> **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

> **(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Respondent respectfully submits that Rule 11, together with other "common litigation sanctions," provide the *only* appropriate sanction which can be imposed on a litigant accused of committing an unfair labor practice by abusing the process of an Article III court. As Justice Scalia makes clear, it would be "extraordinary" to permit the Board, or any other federal agency lacking the "independence of an Article III court," the power to decide "which postulants for [the courts'] assistance should be punished." BE&K, 536 U.S. at 538.

Turning to the present case, by virtue of the absence of any Rule 11 sanctions in the lawsuit filed by Ashford TRS – indeed, even the absence of any *allegation* of a Rule 11 violation, particularly in view of the Union's competent counsel defending the lawsuit – it has been established that the lawsuit was neither objectively baseless nor filed or maintained for purposes of harassment. More specifically, upon application of the above-quoted standard set forth in Rule 11, there was no finding or holding by the U. S. District Court in Anchorage, or even an allegation, that the Lawsuit was filed "for any improper purpose, such as to harass . . . or to needlessly increase the cost of litigation"; and no finding or even allegation that Respondent's "claims . . . and other legal contentions are [not] warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law." F. R. Civ. P. 11(b). A Rule 11 claim could have been raised in the Article III court. The fact no such claim was alleged, ruled upon and granted is now dispositive and binding on the Board.

The Board is bound by this outcome in a case that was overseen by an Article III court. The Board may not now substitute its judgment for the judgment of that court, and rule to the contrary. This complaint must be dismissed.

Sixth Exception

Assuming the underlying lawsuit was objectively baseless, thus requiring an analysis of motive, the ALJ erred in section III.3 of his Analysis by finding motive through inference derived from "the fact the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the lawsuit obviously lacked merit." (ALJD, p. 11, line 37 – p. 12, line 3, applying Allied Mechanical Services, 357 NLRB No. 101, at 10-11 (2011). This Board should adopt and follow, with respect to motive analysis, the decision by the Sixth Circuit in NLRB v. Allied Mechanical Services, __ F3d ___, 2013 WL 5811585, at *7 (Oct. 30, 2013), which reversed this Board and held there must be a showing "in the heightened sense that the motive is only to impose the costs of litigation."

The Sixth Circuit decision in Allied Mechanical Services, discussed and quoted at some length in the Fifth Exception discussion above, involved a case in a similar posture to the present case. In both cases, the Respondent employer had filed a lawsuit against a union which was dismissed on a Rule 12(b)(6) motion to dismiss. Unlike the present case, though, the dismissal of the underlying lawsuit had been upheld by the same circuit court of appeals – the Sixth – which wrote the decision under discussion here.

In the ALJ's recommended decision in Allied Mechanical Services, and in the 2-1 Board decision adopting that decision, the Board held that the "retaliation prong [was] satisfied on the basis of Allied's history of unfair labor practices against the unions and individual employees, the timing of the lawsuit, "[r]espondent's avowed purpose to 'get even' with the unions," passages in

Allied's pleadings maligning the unions' and employees' protected activity, and the lack of a reasonable basis in bringing the suit." 2013 WL 5811585, at *3. Similarly, in this case, the ALJ's recommended decision finds the retaliation prong met by "the fact the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the lawsuit obviously lacked merit." (ALJD, p. 11, line 37 – p. 12, line 3). The ALJ cited the Board's decision in Allied Mechanical Services, 357 NLRB No. 101, at 10-11 (2011), as support for this recommended finding.

The Sixth Circuit reversed the Board's decision in Allied Mechanical Services, 357 NLRB No. 101, at 10-11 (2011), persuaded in part by the respondent-employer's argument that the Board decision "underprotects First Amendment rights to file suit in federal courts." 2013 WL 5811585, at *3. As noted in the Fifth Exception discussion above, the Sixth Circuit concluded the usual deference accorded to Board decisions is not warranted when First Amendment considerations are at stake, and further unwarranted by the Board's lack of expertise in determining the "objective merits of federal lawsuits," and because the Board's decision "did not rest on the agency's having heard witnesses and seen the evidence." Id., at *4. Instead, the issue rested on "the likelihood of success of a case in federal court, and not with questions of credibility." Id.

The Sixth Circuit then concluded, notwithstanding its own affirmance of the Rule 12(b)(6) dismissal of the underlying lawsuit, that "[w]hile Allied may have lost in court, its claims do not sink to the level that no reasonable litigant could have expected to succeed on the merits of the case." Id., at *5. This holding was supported by a lengthy discussion of the merits of the dismissed claims, which essentially sought an expansion of secondary boycott doctrine.

The court stated in conclusion: "But our narrow construction does not require a conclusion that an alternate, broad construction was not a possible outcome of the litigation. This chance of success — even if small — makes clear that Allied's secondary-boycott claims, while unsuccessful, were not objectively baseless." Id., at *6. Similarly, another judge than Judge Holland may have concluded that the factual allegations of threats of violence deserved a chance to be proven and allowed discovery to proceed. In that event, Respondent may very well have proven – through testimony from those individuals who were contacted by the Union – that they were in fact subjected to communications intended to place the fear of violence upon crossing the "vigorous picket line" of justifiably angry demonstrators. It simply cannot be said, therefore, that Respondent did not have a "chance of success — even if small."

Turning finally to the subjective retaliation prong, as noted in the Fifth Exception discussion above, this court referred to that prong as requiring a finding of such motive "in the heightened sense that the motive is only to impose the costs of litigation on the opposing party." Id., at *7. The court proceeded to find no such evidence: ". . . the NLRB made no finding that Allied's suit was retaliatory in this stricter sense, nor is there evidence apparent in the record to support such a finding." Id. Instead, "it shows the more run-of-the-mill type of animus that the Court was reluctant to penalize in its discussion in BE&K [citing, 536 U.S. at 533-35]." Id. The evidence thus rejected by the Sixth Circuit, as shown above, was of the same "run-of-the-mill type" relied upon by the ALJ in this case. "[T]he evidence in the record is not substantial enough to show that Allied's motive was specifically to punish the unions through litigation costs. Rather, the record indicates that the retaliatory motive, if any, related to the "ill will [that] is not uncommon in litigation [citing to BE&K, 536 at 534]." Id., at *8. The same is true here. The counsel for the General Counsel put on evidence of only the so-called "Bad Acts" of – not

Ashford, but Remington – and the ALJ pointed to that evidence only. There is not a shred of evidence anywhere in the record that Ashford, or Remington for that matter, was motivated "to punish the unions through litigation costs."

The holding and reasoning of the Sixth Circuit is mandated in this case. It is mandated for the First Amendment reason given by the Supreme Court on this particular issue. As noted by the Sixth Circuit: "In BE&K, the Court reaffirmed it precedent that "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." Id.

CONCLUSION

For the reasons stated above, and based upon the authority stated above, the ALJ's recommended decision should be rejected.

Respectfully submitted, this 17th day of January, 2014

STOKES WAGNER HUNT MARETZ & TERRELL, ALC

__/s/ Karl M. Terrell_____
Karl M. Terrell
3593 Hemphill Street
Atlanta, Georgia 30337
Telephone: (404) 766-0076
Fax: (404) 766-8823
terrell@stokeswagner.com

Counsel for ASHFORD TRS NICKEL, LLC

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

ASHFORD TRS NICKEL, LLC,
a subsidiary of ASHFORD HOPSITALITY
TRUST, INC.

and CASE NO. 19-CA-32761

UNITE-HERE, LOCAL 878

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief in Support of the Exception to the Administrative Law Judge's Recommended Decision was electronically filed with the Board's e-filing system and with the Executive Secretary's Office and emailed to the following counsel:

Dmitri Iglitzin
Larry Schwerin
Schwerin Campbell Barnard Iglitzin & Lavitt, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

Mara Anzalone
Rachael Cherem NLRB Region 19
915 2nd Avenue
Room 2948
Seattle, WA 98174-1078

Dated: January 17, 2014

/s/ Karl M. Terrell
Karl M. Terrell