

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**LABOR PLUS, LLC, AND ITS SUCCESSOR  
WYNN LAS VEGAS, LLC**

**and**

**Case 28-CA-161779**

**LABOR PLUS, LLC**

**and**

**Case 28-CA-166571**

**WYNN LAS VEGAS, LLC**

**and**

**Case 28-CA-166890**

**INTERNATIONAL ALLIANCE OF  
THEATRICAL STAGE EMPLOYEES  
AND MOVING PICTURE TECHNICIANS,  
ARTISTS AND ALLIED CRAFTS OF THE  
UNITED STATES AND CANADA  
LOCAL UNION 720 (IATSE)**

**ORDER DENYING  
MOTION TO DISMISS**

**I. Background**

Based upon charges filed by IATSE Local Union 720 (Union), on August 31, 2016, the Regional Director for Region 28 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) alleging that Labor Plus, LLC (Labor Plus) and Wynn Las Vegas, LLC (Wynn), violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. Specifically, the Complaint alleges, in relevant part, that on December 1, 2015, the Union was certified as the collective-bargaining representative for a unit of Labor Plus stagehands working at the Wynn Showstoppers Theater (Theater);<sup>1</sup> the representation election was held on May 2, 2015, based upon an election petition filed by the Union on April 15, 2015.<sup>2</sup>

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<sup>1</sup> The unit description set forth in the certification is as follows: All full-time and regular part-time on-call stagehand employees in the Wynn Showstoppers Theatre in Las Vegas, Nevada; excluding all other employees, including wardrobe, hair, makeup employees, guards and supervisors as defined in the Act (referred to as the "Unit").

<sup>2</sup> I take administrative notice of the Certificate of Representative dated December 1, 2015, and the Tally of Ballots. *Rockwell Automation/Dodge*, 330 NLRB 547 fn.4 (2000) (Board takes administrative notice of the tally of ballots in a related representation proceeding); *International Metal Co*, 286 NLRB 1106, 1107 fn.4 (1987) (ALJ takes administrative notice of the Regional Director's second supplemental decision, certificate of representative, and formal documents in related representation proceeding).

The Complaint further alleges that, since about April 17, 2015, just days after the representation petition was filed, Wynn assumed the operations of Labor Plus at the Theater and became a successor to Labor Plus. On June 26, 2015, the Union requested that both Wynn and Labor Plus recognize and bargain with the Union, but that both entities have refused to do so. Thereafter, the Complaint asserts that in about November 2015, Wynn subcontracted with a third-party to perform Unit work for a performance called the “Frank Sinatra Celebration Show,” and that from about November 30, 2015 through December 7, 2015, Labor Plus performed this Unit work. The General Counsel contends that Labor Plus violated Sections 8(a)(1) and (5) of the Act by: (1) performing Unit work for the Frank Sinatra show from about November 30, 2015 through December 7, 2015 without bargaining with the Union; and (2) failing and refusing to recognize and bargain with the Union pursuant to the Union’s June 26, 2015 request for bargaining. *Compl.* para. ¶¶5(d), 5(e), 5(k), 5(n), 6.

On October 14, 2016, Labor Plus filed a Motion to Dismiss the Complaint (Motion) asserting that the unfair labor practices alleged against Labor Plus must be dismissed because the Complaint alleges that Wynn became a successor to the Labor Plus bargaining obligation in April 2015, and assumed operations at the Theater, employing a majority of workers who were previously employed by Labor Plus.<sup>3</sup> *Motion*, at p.2. Regarding the Complaint allegation that Labor Plus performed Unit work from November 30 to December 7, 2015, Labor Plus asserts this allegation fails because of “the complete absence as to any allegations that these employees were part of any bargaining unit for which a bargaining obligation existed.” *Id.*

The General Counsel filed an opposition to Respondent’s Motion on October 21, 2106. In its opposition, the General Counsel asserts that the Complaint meets the Board’s minimal notice-pleading requirements, properly alleges that the Union was certified as of May 2, 2015, and that Labor Plus has refused to bargain with the Union, notwithstanding the Union’s bargaining request and the fact that Labor Plus allegedly performed Unit work as late as December 2015. *GC Opp.*, at 4-5. Regarding the Frank Sinatra show, the General Counsel asserts that, if Labor Plus employed a majority of the Wynn stagehands for the show, then Labor Plus became a successor to Wynn for purposes of the Unit work performed at show.

The Union also filed an opposition to the Motion on October 21, 2016. In its opposition, citing *Volkswagen Group of America, Inc.*, 364 NLRB No. 110 (2016), the Union asserts that an employer who is later certified bears responsibility for post-election, but precertification, unfair labor practices. The Union asserts that, at the time the alleged violation on June 26, 2015, “Labor Plus had no basis to assume it would not be the employer for whom the Certification of Representative would issue.” *Union Opp.*, at 2. The Union also notes that “Labor Plus’s Motion presumes, without authority, that a bargaining obligation can only exist towards one employer at a time,” arguing that the transition between Wynn and Labor Plus “merely added obligations” for Wynn and did not extinguish the Labor Plus bargaining obligation. *Id.* at 2-3. Furthermore, because the certification had not issued, the Union argues that Labor Plus’s return to the Theater

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<sup>3</sup> On October 14, 2016, the Board’s Executive Secretary notified the parties that the Motion was not filed within the time period allowed under Section 102.24(b) of the Board’s Rules and Regulations so as to be forwarded to the Board for ruling.

in late November 2015 re-established Labor Plus's bargaining obligation. *Id.* at 3. Finally, the Union states that the facts alleged herein are "unique" and "novel" requiring a hearing. *Id.* at 3.

On October 26, 2016, Labor Plus filed a Reply brief asserting that the General Counsel's "double successor" theory is not pled in the Complaint, and that the "belatedly-issued Certificate of Representative" cannot create a perpetual bargaining obligation. *Reply* at p. 2-3.

## II. Analysis

"A Complaint cannot be dismissed for failure to state a claim upon which relief may be granted when the allegations of the Complaint, if true, set forth a violation of the Act." *See The Boeing Co.*, 2011 WL 2597601 (June 30, 2011) (ALJ Denying employer's Motion to Dismiss) (*citing Children's Receiving Home of Sacramento*, 248 NLRB 308, 308 (1980)). "In considering a motion to dismiss, the Board construes the Complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Id.* (*citing Detroit Newspapers*, 330 NLRB 524, 524, n. 1 (2000)). There is a "powerful presumption against rejecting pleadings for failure to state a claim." *Id.* (*citing Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002)) (reversing district court's decision to dismiss RICO complaint for failure to state a claim). Granting a motion to dismiss is "a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Id.* (*citing Morse v. Regents of University of Colorado*, 154 F.3d 1124, 1127 (10th Cir. 1998)).

Here, I find that, assuming the Complaint allegations as true, and construing the Complaint in light most favorable to the General Counsel, dismissal is not appropriate. On December 1, 2015, Labor Ready was certified as the collective-bargaining representative of the stagehands working at the Theater. At the time the certification issued, the Complaint alleges that Labor Ready was performing Unit work at the Theater, and was refusing to recognize and bargain with the Union.<sup>4</sup> *Compl.* ¶ 5(e), 5(k). If true, this would be sufficient to find a violation.

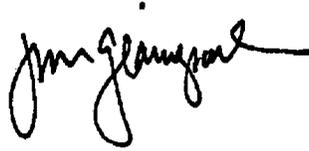
As for the Complaint allegations that Wynn was a successor to Labor Plus, nothing precludes the government from pleading alternate and various theories, regardless of consistency. *See, e.g.*, Fed.R.Civ.P. 8(d)(3); *U.S. v. Van Nguyen*, 602 F.3d 886, 900 (8th Cir. 2010) (district court did not abuse its discretion in submitting all the government's alternate theories to the jury); *U.S. v. Montes*, 2013 WL 1411113, at \*4 (N.D.W. Va. 2013) (trial court denies defendant's motion to compel the government to make pretrial election between inconsistent alternate theories of liability in the indictment). Significantly, Labor Plus has presented no case law that would preclude finding a violation where, as alleged in the Complaint, an employer is named in the certification, is actively employing workers identified in the certification, and is refusing to recognize the union named in the certification, notwithstanding the fact another employer had also been performing that same work at various times during the

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<sup>4</sup> An employer's duty to bargain relates back to the date of the election. *Mission Foods*, 350 NLRB 336, 346 (2007). The Union enjoys an irrebuttable presumption of majority status for one-year year following the certification. *Re Easton Hospital*, 335 NLRB 1091, 1092 (2001).

period between the date of the election and the date of the certification.<sup>5</sup> Absent such precedent, and considering the powerful presumption against rejecting pleadings for failure to state a claim, Labor Plus's Motion to Dismiss is DENIED.<sup>6</sup>

Dated: San Francisco, California  
October 28, 2016



John T. Giannopoulos  
Administrative Law Judge

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<sup>5</sup> I agree with Labor Plus's argument that the Complaint does not allege a "double successor" theory, i.e., that Labor Plus became a "successor" to Wynn, and my ruling is not premised on the General Counsel's unpled theory.

<sup>6</sup> See *Labor Plus, LLC*, 2015 WL 5093568 (August 28, 2015) (unpublished order) (Board denies Motion to Dismiss Complaint stating that "Respondent has not demonstrated that the complaint fails to provide facts necessary to state a claim upon which relief can be granted").

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**DiCrocco, Brian**

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**From:** DiCrocco, Brian  
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**Subject:** 28-CA-161779 - LABOR PLUS:  
**Attachments:** Order Denying Motion to Dismiss Labor Plus.pdf

Dear Counsel,

Please see the attached document.

Brian

**Brian C. DiCrocco, Legal Tech.**  
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