

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

KALTHIA GROUP HOTELS, INC.  
and MANAS HOSPITALITY LLC d/b/a  
HOLIDAY INN EXPRESS SACRAMENTO,  
a Single and/or Joint Employer

Cases . 20-CA-176428  
20-CA-178861  
20-CA-182449

and

UNITE HERE! LOCAL 49

**COUNSEL FOR THE GENERAL COUNSEL'S**  
**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**  
**TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

**I. INTRODUCTION**

Respondent casts a wide net with its Exceptions,<sup>1</sup> challenging essentially all of the violations found by the Administrative Law Judge (Judge). In doing so, Respondent set for itself a daunting task, as the Judge's decision rests on a solid foundation of amply supported factual determinations, well-supported credibility resolutions, and properly applied legal principles. However, instead of presenting a meaningful critique of the Judge's Decision, Respondent merely offers up many of the same arguments it advanced in its brief to the Judge, relying on a narrative engineered from discredited testimony. Respondent presents no compelling reason why these same arguments, now made to the Board, should produce a contrary result. Rather, the Board should sustain the Judge's determination, based in large part on his crediting of certain witnesses' testimony, that Respondent solicited employees to sign a petition to decertify UNITE

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<sup>1</sup> Citations to Respondent's Exceptions will be denoted by "Resp. Exc." followed by the appropriate number. Citations to Respondent's Brief in Support of Exceptions will be denoted by "Resp. Br." followed by the appropriate page and line numbers. Citations to the Judge's Decision will be denoted by "ALJD" followed by the appropriate page and line numbers. Citations to the transcript are noted as "Tr." followed by the page and line number(s). Citations to the General Counsel's exhibits are noted as "GC Exh." followed by the page number(s).

HERE! Local 49 (Union) and made various coercive and unlawful statements to employees regarding the Union and the decertification campaign. The Board should also affirm the Judge's conclusion, based on his proper consideration of the totality of Respondent's conduct, that Respondent engaged in unlawful surface bargaining.

**II. THE BOARD SHOULD DISREGARD EXCEPTIONS FOR WHICH RESPONDENT FAILED TO ASSERT ANY ARGUMENT (Resp. Excs. 1, 6, 13, 29, 30)**

Respondent's Brief omits entirely the references to its enumerated Exceptions required under Section 102.46(a)(2), leaving it to Counsel for the General Counsel, and the Board, to connect the dots between Respondent's Exceptions and the various arguments in its supporting brief.<sup>2</sup> The difficulty of this task is compounded by Respondent's apparent failure to address at all several of its enumerated Exceptions. Specifically, it does not appear that Respondent has offered any argument in support of Exception 1 (finding Respondent did not advance a business justification for proposing removal of the union security clause), Exception 6 (finding Respondent unlawfully instructed Vanessa Able not to join the Union during her interview), Exception 13 (finding Respondent bargained in bad faith regarding medical and dental proposal), Exception 29 (the notice-posting remedy), or Exception 30 (the Order). Arguments raised before the Board must be specific enough to "apprise the Board of an intention to bring up the question." *May Department Stores v. NLRB*, 326 U.S. 376, 386 fn. 5 (1945). In circumstances similar to these, the Board disregarded exceptions where "respondent merely recites the findings excepted to and cites to the judge's decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned." *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005). Counsel for the General Counsel

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<sup>2</sup> Respondent failed to include in its brief "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." 29 C.F.R. § 102.46(a)(2)(ii). Counsel for the General Counsel has therefore taken his best guess as to which Exceptions are supported by the various sections of Respondent's brief and listed those exceptions in the headings of the General Counsel's answering brief.

urges the Board to disregard Respondent's Exceptions 1, 6, 13, 29 and 30 in light of Respondent's failure to advance any argument supporting them.

### **III. RESPONDENT HAS NOT MET THE HIGH STANDARD REQUIRED TO OVERTURN THE JUDGE'S CREDIBILITY DETERMINATIONS (Resp. Excs. 2-5)**

Several of Respondent's Exceptions directly challenge the Judge's credibility determinations. The Board does not overrule a Judge's credibility determinations unless the clear preponderance of all the relevant evidence requires it. *Standard Dry Wall Products*, 91 NLRB 544 (1950). Respondent has not shown how the "preponderance of all the relevant evidence" necessitates a reversal of any of the Judge's credibility determinations.

Respondent has failed to advance any argument addressing the factors the Judge relied on in discrediting its witnesses. For example, the Judge discredited Rajneel Singh's testimony based on material inconsistencies between Singh's testimony and that of Respondent's witness Mohammed Nazeem as to when the decertification campaign began, as well as a photograph of the decertification petition taken by employee Vanessa Able that shows her signature on the document. (ALJD 16:44-17:7) Without attempting to explain these contradictions, Respondent merely reiterates Singh's discredited testimony. Respondent similarly fails to explain the contradictions between the testimony of Respondent's manager Elsa Gutierrez and employee Damon Griffin that the Judge properly relied on in discrediting Gutierrez's testimony as "contour[ed] . . . to fit what she believed would fit Respondent's case" (ALJD 17:23-24). Nor did Respondent offer an explanation for Sanjita Nand's altering of Sylvia Arteaga's human-rights-training form (ALJD 18:30-19:6) or Nazeem's repeated flip-flopping on the subject of

verbal warnings (ALJD 18:16–26; Tr. 983:3–5).<sup>3</sup> The Board should therefore uphold the Judge’s credibility determinations and reject Respondent’s Exceptions 2 to 5.

#### **IV. RESPONDENT COERCED EMPLOYEES AND UNLAWFULLY DIRECTED AND SUPPORTED A DECERTIFICATION CAMPAIGN (Resp. Excs. 7–10, 18–24)**

In an apparent reprise of its brief to the Judge, Respondent’s argument regarding its support for the decertification campaign and related coercive statements to employees refers repeatedly to the General Counsel’s contentions, but lacks any references to the Judge’s decision. (Resp. Br. 28–34) Respondent wholly fails to address the evidence relied on by the Judge—primarily all testimonial evidence the Judge credited over contradictory testimony offered by Respondent—to find a litany of Section 8(a)(1) violations. To the extent that Respondent’s argument can be read as a challenge to the testimony credited by the Judge, it has not met the high bar required to overturn such credibility determinations. *See* Section III, *supra*. Rather, Respondent simply offers its own version of events, drawing on testimony that the Judge properly discredited. (Resp. Br. at 29–33) The Board should therefore reject Respondent’s Exceptions regarding its unlawful support for the decertification campaign and related statements to employees.

##### **A. Respondent unlawfully solicited employee signatures on a decertification petition through its agents Elsa Gutierrez, Sanjita Nand, Rajneel Singh, and Olga Villa. (Resp. Excs. 7, 8, 18, 19, and 25)**

Relying on credited evidence, the Judge properly concluded that Managers Gutierrez and Nand presented the decertification petition to employee Silvia Arteaga under false pretenses (ALJD 20:15–19); that Gutierrez directed employee Suhad Salman to sign the petition (ALJD 20:26–30); and that Gutierrez directed employee Vanessa Abel to sign the petition that Olga

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<sup>3</sup> Although not expressly relied on by the Judge in discrediting his testimony, Nazeem also contradicted himself when testifying about his research into health plans (ALJD 28 n.43) and regarding the origins of Respondent’s refusal to discuss wages which further undermines Nazeem’s credibility. *See* Section V.B, Wages, *infra*.

Villa, acting as Respondent's agent, presented her and threatened Abel with discharge if she did not comply.<sup>4</sup> (ALJD 20:39– 21:1) Respondent has raised no legal argument challenging the Judge's conclusion, based on these factual findings, that Respondent violated Section 8(a)(1) of the Act. Similarly, Respondent failed to advance any argument as to why Singh and Villa are not its agents under the facts established by the credited testimony. (ALJD 22:9–32) Instead, Respondent attacks the credited testimony by offering a counter-narrative engineered from the already-debunked testimony of its agents Singh, Nazeem, Gutierrez, and Nand. See Section III, *supra*. The Board should see this gambit for what it is—an indirect attack on the Judge's credibility determinations—and reject Respondent's Exceptions as they relate to its participation in the decertification campaign.

**B. Respondent's Manager Elsa Gutierrez Coerced Employees Regarding Their Union Activity. (Resp. Excs. 9, 10, 20–24)**

As with its challenge to the Judge's finding that it unlawfully orchestrated the decertification campaign, Respondent's Exceptions to the findings regarding Elsa Gutierrez's unlawful statements are a thinly veiled attempt to circumvent the Judge's credibility determinations. For example, Exceptions 9 and 20 take aim at the Judge's finding that Gutierrez unlawfully told Salman not to sign any documents given to her by Union representative Roxana Tapia (ALJD 22:37-39, 23:22-23), while Exception 23 challenges the Judge's finding that Gutierrez misled Salman about the benefits of paying Union dues. The Judge properly credited Salman's testimony and, applying well-settled legal principles, found Gutierrez's statements to Salman to be unlawfully coercive. (ALJD 22:37–41, 23:4–25)

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<sup>4</sup> In his finding, the Judge inadvertently refers to "Villa" instead of "Abel" when concluding that Gutierrez had unlawfully threatened Abel with discharge if she did not comply with Gutierrez's directions. (ALJD 20:41, 21:1)

Indeed, in an argument apparently supporting Exception 24, Respondent underscores its reliance on discredited testimony when it contrasts two “version[s]” of a telephone conversation, in which, as the Judge found, Gutierrez coercively interrogated Salman about removing her name from the decertification petition. (Resp. Br. 30:11–15) Respondent asserts that Salman’s testimony is not credible because “there is no evidence that Ms. Gutierrez knew about” the rescission of the signature, followed by a convoluted syllogism regarding what Gutierrez knew and when she knew it. Contrary to Respondent’s assertion, there is evidence that Gutierrez knew about the rescission of Salman’s signature on the decertification petition, namely, Salman’s credited testimony regarding Gutierrez’s unlawful questioning. In short, Respondent’s argument in support of Exception 24 is yet another circuitous—and substantially unsupported—attack on the Judge’s credibility determinations.

Similarly, presumably in support of Exceptions 10 and 21, Respondent argues that Sylvia Arteaga’s credited testimony regarding Gutierrez’s unlawful statements should be put aside in favor of Gutierrez’s version of events. Specifically, Respondent contends that Arteaga’s recollection that the relevant conversation occurred on Thursday, March 3, 2016, contradicts Gutierrez’s testimony that she did not work at the Hotel on Thursdays during a period of several years, ending in July 2016. However, Gutierrez undermined her own testimony about not working on Thursdays when she admitted to hand-writing a hotel log entry on Thursday, May 5, a day falling within the period she claims she worked no Thursdays at the Hotel. (Tr. 651–52, 665:2–6; Rsp. Exh. 15) Respondent also argues that Gutierrez’s work day ended before 4:00 p.m., when Arteaga testified the conversation between the two of them took place, but Gutierrez also admitted that she left work at various times depending on how busy they were at the Hotel. (Tr. 606:9-25, 607:1-6, 652:2-3) Thus, Respondent has failed to offer any compelling reason to

disturb the Judge's finding that the unlawful conversation occurred, and Respondent has offered no basis for challenging the Judge's legal conclusion that Gutierrez's statements violated the Act.

In Exception 22, Respondent challenges the Judge's conclusions regarding Manager's Gutierrez's unlawful statements to Vanessa Abel.<sup>5</sup> Respondent's only argument in support of this Exception is that Abel gave "highly dubious testimony that Gutierrez told her not to associate with the Union "every day" because, according to Respondent, Gutierrez had been instructed not to involve herself in the decertification campaign. (Resp. Br. 31:7-8)

Respondent's argument is flawed for two reasons. First, it relies on Gutierrez's discredited testimony. Second, even if credited, Gutierrez's testimony does not refute Abel's testimony, because Respondent's purported instructions not to interfere in the decertification campaign did not prohibit Gutierrez from telling employees not to associate with the Union.

In short, by relying on its own version of events, without addressing the Judge's factual findings and credibility determinations, Respondent has failed to advance any compelling argument for overturning the Judge's conclusions regarding Respondent's unlawful support for a decertification campaign and its related coercive conduct. Respondent's entire argument regarding these violations amounts to nothing more than an indirect attack on the Judge's credibility determinations, which are afforded substantial deference. The Board should therefore reject Respondent's Exceptions on these points and affirm the Judge's conclusions that Respondent unlawfully assisted with the decertification campaign and unlawfully coerced employees with respect to their union activity.

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<sup>5</sup> As discussed in Section II, *supra*, Respondent offered no argument in support of Exception 6, which also relates to unlawful conduct directed at Vanessa Abel.

**V. THE TOTALITY OF RESPONDENT'S CONDUCT ESTABLISHES BAD-FAITH BARGAINING. (Resp. Excs. 11–17, 25–26)**

As with the violations relating to the decertification campaign, much of Respondent's argument regarding its bargaining conduct is directed at the General Counsel's position, not at the Judge's decision. One could, however, read Respondent's brief as taking issue with the Judge's reliance on Respondent's bargaining conduct, much of which was not *per se* unlawful, to support a finding of overall bad faith bargaining. Ironically, Respondent accuses the General Counsel (and, by extension, the Judge) of relying on a "snapshot" of bargaining (Resp. Br. 19:17–19), then defends itself by arguing that various aspects of its conduct, when viewed independently and in isolation, are not unfair labor practices.<sup>6</sup> This, of course, misses the point; the Judge properly considered the entirety of Respondent's conduct—including its blatant orchestration of a decertification campaign—in concluding that Respondent bargained in bad faith.

Respondent advances several arguments that simply do not bear on the Judge's decision. For example, Respondent argues that its bargaining position on successorship was reasonable and that changes to its position on sick leave were not regressive (Resp. Br. 25–26), even though the Judge did not rely on this conduct to find a violation. While asserting the appropriateness of bargaining conduct that is not even at issue, Respondent wholly fails to present any argument in support of its Exception to the Judge's finding that Respondent's bargaining regarding medical and dental benefits was evidence of bad faith. (ALJD 28:11–39)

The obligation to bargain in good faith does not "require the yielding of positions fairly maintained." *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 231–32 (5th Cir. 1960). However,

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<sup>6</sup> Respondent's misapprehension of the Judge's analysis is reflected in the way it phrases its Exceptions, whereby it incorrectly asserts that the Judge found its various bargaining positions to be unlawful. e.g., Resp. Exc. 16 (finding that Respondent bargained in bad faith on the issue of union security); Resp. Exc. 17 (finding that Respondent's bargaining positions on sub-contracting and seniority were unlawful).

“the statutory right to refuse to agree or make a concession may not be used as a cloak . . . to conceal a purposeful strategy to make bargaining futile.” *H.K. Porter Co.*, 153 NLRB 1370, 1372 (1965) (quoting *Herman Sausage Co.*, 275 F.2d at 232). “Bad faith is prohibited though done with sophistication and finesse . . . [Good-faith bargaining] takes more than mere ‘surface bargaining’ or ‘shadow boxing to a draw.’” *Herman Sausage Co.* at 232.

In determining whether a party has engaged in surface bargaining, the Board looks to the “totality of the Respondent’s conduct,” including unreasonable bargaining demands, delay tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid Continent Concrete*, 336 NLRB 258, 261 (2001) (finding surface bargaining where, in addition to exhibiting bad faith during negotiations, an employer made unilateral changes and stated that bargaining was futile and the union would be there only one year) (citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1974); *N.L.R.B. v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377 (9th Cir. 1955)), *enf’d*, 308 F.3d 859 (8th Cir. 2002). Avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, an employer will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement. *Regency Service Carts*, 345 NLRB at 671–72 (citing *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000)). The Board will ordinarily find surface bargaining where it determines that the Employer has “gone through the motions” of bargaining and frustrated the chances of an agreement in order to foster or support an effort to decertify the employees’ bargaining representative. *Regency Service Carts*, 345 NLRB 671, 713 (2005) (citing *Bryan & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996); *Radisson*

*Minneapolis*, 307 NLRB 94, 94–96 (1992), *enfd*, 987 F.2d 1376 (8th Cir. 1993); *Prentice Hall Inc.*, 290 NLRB 646, 647 (1985)).

Here, the Judge properly found that the totality of Respondent’s conduct, both at and away from the bargaining table, demonstrated its intent to avoid reaching a collective-bargaining agreement, undermine employee support for the Union, and lead a rigged decertification campaign by soliciting employee signatures on a decertification petition. (ALJD 27:25-28) In evaluating an employer’s intent, the Board does not inquire into whether bargaining proposals are reasonable *per se*. *Regency Service Carts* at 671 n.2. The Board will, however, evaluate an employer’s proposals to determine whether in combination and by the manner proposed they evidence intent not to reach agreement. *Id.* (citing *Reichhold Chemicals*, 288 NLRB 69 (1988)) Respondent’s intent in this case is evidenced by the circulation of a decertification petition by its managers and agents, the coercion of vulnerable employees by managers, and the gerrymandering of an employee’s signature on the decertification petition by exploiting her inability to read or speak English— activity that took place only months after Respondent signed a settlement in which it agreed not to engage in such conduct. At the bargaining table, Respondent employed shrewd and sophisticated delay tactics, pushing back the start of bargaining by several months and forestalling discussion of wages for over a year, even though the Union identified a long-overdue wage increase as its most pressing concern on day one. Having largely ensured that the parties would not reach an agreement by refusing to bargain over the key economic term of the contract, Respondent offered superficial concessions while adamantly maintaining predictably unacceptable positions on union security and seniority, and delaying meaningful discussion of healthcare. And while Respondent has moderated its delay

tactics more recently, this progress has come only since the Board's proceeding—and the related Section 10(j) injunction—cast a spotlight on Respondent's conduct.

**A. Refusal to Bargain Over Wages (Resp. Exc. 14)**

The Judge properly found that Respondent's three-month delay in making any wage proposal, and its subsequent demand that discussion of wages be "put on hold" completely for one year, was evidence of bad faith. (ALJD 29:3–21) On brief, Respondent attempts to re-cast its bargaining position regarding wages as "request[ing] a one-year wage freeze," rather than an outright refusal to discuss wages. (Resp. Br. 20:22) However, Respondent pursues this casual revisionism without citing any testimony in the record that would support its wholesale disregard of the Judge's factual findings and the testimony offered at the hearing. Indeed, the only evidence Respondent offers is its editorial on Union President Rak's bargaining notes, which were entered into evidence as General Counsel's Exhibit 17 and which Respondent claims lack any evidence to its refusal to discuss wages. (Resp. Br. 22:7–14)

Respondent's characterization of Rak's notes is questionable at best. In his notes, Rak summarized Respondent's position at the table as "premature to propose an increase until [it] owned property for a year," which directly contradicts Respondent's assertion. (GC Exh. 17 at 1) More significantly, in relying only on Rak's notes, Respondent simply ignores the testimony of its own witness, General Manager Nazeem, who admitted under questioning from Respondent's own attorney that Respondent's position at the bargaining table as of March 8, 2016, was that it "wanted to . . . have the property for at least one year *before we discussed the wages.*" (Tr.

759:22–24) (emphasis added) Similarly, Respondent’s March 22, 2016 written contract proposal addresses wages only by suggesting a re-opener on wages if the parties reached a contract before July 31, 2016, a re-opener that would only be necessary if, as the testimony of both the Union’s and Respondent’s witnesses shows, Respondent refused to discuss wages. (GC Exh. 18 at 39)

Indeed, Respondent’s acknowledgement that it did not present its first proposal on wages until December 13, 2016, is hard to square with their assertion that they did not refuse to bargain over wages; one must walk a fine line to find bargaining in the absence of any proposals. *Cf. NLRB v. Yutanga Barge Lines*, 315 F.2d 524, 530 (9th Cir. 1963) (“The measure of an employer’s duty in bargaining is to ‘participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . .’ to make ‘sincere effort . . . to reach a common ground.’”) (quoting *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943)) It is clear based on the internal logic of Respondent’s proposals and the consistent testimony of both parties’ witnesses that Respondent did not propose a wage freeze, but rather refused to discuss wages during its first year of operations.

Although not addressed in detail by the Judge, General Manager Nazeem’s bizarre and inconsistent testimony regarding the refusal to discuss wages further undermines Respondent’s revisionist narrative. Nazeem first stated he was directed to seek one-year delay by parent company Kalthia’s Vice President, Dean Chauhan to demand a one-year delay in discussing wages. (Tr. 773:11–12) Then, moments later, Nazeem contradicted himself, asserting that he

decided on his own not to discuss wages, defying Chauhan's purported instruction to offer an immediate across-the-board pay increase of 10 cents per hour. (Tr. 775:16-776:24) Nazeem then testified that his reason for refusing to discuss wages for the first year was to evaluate the employees' performance before setting base wage rates. (Tr. 776:15-21)

Nazeem's proffered justification is both inherently nonsensical and irreconcilable with Respondent's statements and conduct at the bargaining table. The relative performance of various employees would reasonably affect whether they received a performance differential in their pay, which is provided for in the predecessor collective-bargaining agreement and which the parties agree was not at issue in bargaining. (GC Exhs. 15 at 16, 36 at 14) However Nazeem's testimony was that this one-year employee evaluation period would have to occur before discussing wage rates applicable to all employees (Tr. 776:18-21), implying that base wage rates would be determined based on some unexplained aggregate objective evaluation of unit employees' individual performance. Nazeem further confused his position when he testified that this one-year delay in discussing wages for the entire bargaining unit would run on an individual basis from the date of hire for employees hired after Respondent took over the Hotel (Tr. 777:22-778:1), an impracticable proposition unless, incredibly, Nazeem intended to bargain base wage rates for all of the employees on an individual basis.<sup>7</sup>

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<sup>7</sup> Respondent's counsel had an opportunity on redirect examination to clarify Nazeem's testimony about the refusal to discuss wages but chose not to, a staggering omission that further undermines the credibility of Nazeem's statements.

Likewise, Nazeem's justification for the refusal to discuss wages in the first year of operations cannot be reconciled with Respondent's other statements and proposals at the bargaining table. When Respondent's Counsel Scott Wilson first asserted during bargaining that Respondent would not discuss wages for the first year of operations, the justification for that position was to evaluate the profitability of the Hotel (Tr. 234:18; GC Exh. 17), not Nazeem's subsequent rationale that it was to gauge the performance of the individual employees before discussing a base wage scale. Moreover, Nazeem's purported intention to obtain a one-year hiatus from bargaining over wages which he supposedly formed in late February or early March 2016, is inconsistent with parties' tacit agreement as of January 26, 2016 to include performance-based premium pay in the collective-bargaining agreement without any discussion of a one-year employee evaluation period, and with Respondent's stipulation that the premium-pay clause of the contract was never in dispute. Even though Nazeem attended every bargaining session, he apparently never saw fit to correct the course of bargaining to align with his supposed intentions regarding the one-year delay, nor did he correct Wilson's statement at the bargaining table that the delay was necessary to evaluate the Hotel's overall profitability.

Respondent's offhand attempt to re-brand its refusal to discuss wages, offered without compelling factual support, flies in the face of the testimony of its own manager and overwhelming weight of the record evidence. The Judge therefore properly found that

Respondent refused to bargain over wages and that such conduct contributed to Respondent's overall bad faith bargaining.

**B. Failure to Bargain Over Union Security (Resp. Exc. 16)**

The Judge also properly found that Respondent's position on Union Security was evidence of bad faith. (ALJD 29:32–30:4) Respondent argues that its refusal to agree to a union-security clause was lawful, citing *Midwest Television Inc.*, 349 NLRB 373 (2007). In *Midwest Television*, the Board overturned the Judge's finding that a proposal to eliminate union security "*standing alone*" violated Section 8(a)(5) of the Act. *Id.* at 373. The Board overturned the finding of a violation because, "contrary to the judge, the [r]espondent asserted a valid reason for its proposal on union security," namely a concern that the clause could be used to damage the employer's business by causing the removal of on-air personnel. *Id.* at 374. Here, unlike in *Midwest Television*, the Judge properly found that Respondent failed to advance any business justification for its position on Union Security.. (ALJD 29:43) Although Respondent took an Exception to this finding, it points to no evidence that it presented a business justification for its position on Union Security. Rather, Respondent notes that all other hotels operated by Respondent's parent company are non-union and that its proposal would be the status quo in a "Right to Work" state (Resp. Br. at 23), which only serves to underscore the Judge's conclusion that Respondent is simply philosophically opposed to union security.

**C. Failure to Bargain Over Seniority (Resp. Exc. 17)**

Likewise, in defending its bargaining position regarding Seniority, Respondent fails to address the Judge's finding that its limited movement away from its predictably unacceptable initial position, which involved "radically altering" the status quo so that Seniority would apply only between employees Respondent considered equally qualified, was designed "to feign a

concession and to delay bargaining.” (ALJD 30:8–26) Instead, in a bizarre turn, Respondent argues that its proposal on seniority is reasonable because non-union employers “are not bound by strict seniority regulations.” (Resp. Br. 24:18), *Cf. Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992) (finding bad faith where employer insisted on such discretion to alter terms and conditions that the union “could do just as well with no contract at all.”). Moreover, Respondent’s argument, however unorthodox it may be, goes only to the reasonableness of the Seniority proposal itself. Respondent simply failed to address the Judge’s finding that its bargaining conduct regarding Seniority was part of a scheme to obscure its intention to frustrate bargaining. (ALJD 30:8–10)

In short, Respondent has failed to address the Judge’s conclusion, based on well-settled legal principles, that its intent to delay bargaining is shown by its entire course of conduct during the relevant period, including: the unjustified initial delay to commence bargaining, while simultaneously supporting a decertification campaign; the failure to provide timely counterproposals on the major economic terms of the contract; the refusal to discuss wages until it had owned the Hotel for a year, even though its Vice President had approved a wage increase to become effective a few months into bargaining, coupled with its shifting, dubious justifications for the delay, even though its bargaining representatives knew wages were the Union’s key issue and had already promised the Union that a wage proposal was forthcoming; and the predictably unacceptable positions on non-economic terms such as union security and seniority. Taken as a whole, and considered in the context of Respondent’s egregious Section 8(a)(1) violations, this course of conduct shows that Respondent intentionally avoided reaching agreement to hold open the possibility of coercing employees to vote out the Union through an unlawful decertification campaign.

**VI. AS A SUCCESSOR EMPLOYER, RESPONDENT HAD A DUTY TO BARGAIN WITH THE UNION. (Resp. Excs. 11, 26)**

In its Brief, Respondent argues that it is absolved of any wrongdoing during bargaining because the predecessor employer's collective-bargaining agreement "had never been terminated by either party." (Resp. Br. 18:14) To reach this conclusion, Respondent relied on the Judge's conclusion that Respondent "accepted the Contract as a 'successor' and continued to bargain as if the Contract were in full effect." (Resp. Br. 2:25) According to Respondent's argument, it had no obligation to bargain with the Union after the Union failed to request bargaining prior to November 1, 2015. Respondent ignores the fact that the parties discussed a bargaining schedule at their first meeting in July 2015, and cites no legal authority to support its contention that it had no obligation to bargain because it was bound by the predecessor's contract. (ALJD 3:30-35) Indeed, it would be hard-pressed to find any. The law is well-settled that the obligations inherited by a successor employer may extend to the maintenance of the terms and conditions of employment, but not to the compulsory adoption of a contract.<sup>8</sup> Moreover, Respondent's course of conduct during bargaining is wholly inconsistent with the contention that it now seeks to advance; not once during bargaining did Respondent assert that the termination-and-renewal clause in the predecessor employer's contract applied to Respondent's current negotiations with the Union.

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<sup>8</sup> A new employer is a successor to the old—and thus required to recognize and bargain with the incumbent labor union—when there is "substantial continuity" between the two business operations and when a majority of the new company's employees had been employed by the predecessor. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42-44, 46-47 (1987). The successor is not, however, required to adopt the existing collective-bargaining agreement between the predecessor and the union. *NLRB v. Burns International Security Services*, 406 U.S. 272, 287-291 (1972). Rather the successor is free to set initial terms and conditions of employment unilaterally, without first bargaining with the union, except in situations where it is "perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit," in which case the successor must "initially consult with the employees' bargaining representative before [it] fixes terms." *Burns*, 406 U.S. at 294-95. This requirement to bargain before fixing terms and conditions of employment does not, however, obligate a successor to adopt the predecessor's collective-bargaining agreement. *Burns* at 287-291.

**VII. EXTENSION OF THE SUCCESSOR-BAR PERIOD IS APPROPRIATE. (Resp. Excs. 27–28)**

Respondent summarily challenges the extension of the six-month successor bar that the Judge ordered in accordance with *UGL-UNICCO*, 357 NLRB 801 (2011). Once again, Respondent relies on its unsupported argument that there is, or possibly was, a collective-bargaining agreement in effect between the parties,<sup>9</sup> but it marshals no legal authority or record evidence to support its position. Having found Respondent failed to bargain in good faith for the required reasonable period, the Judge appropriately ordered a six-month extension of the successor bar. *Cf. Bryant & Stratton Business Institute*, 321 NLRB 1007, 1007 n.5 (1996) (ordering an extension of the one-year certification bar “to allow the Union a reasonable period of time for good-faith bargaining free from the influences of the unfair labor practices previously committed by the Respondent.”). The Board should therefore reject Respondent’s unsupported argument and affirm the six-month extension of the successor bar as recommended by the Judge.

**VIII. CONCLUSION**

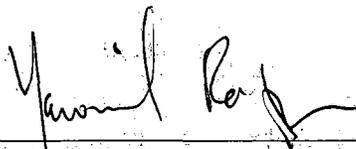
Counsel for the General Counsel respectfully submits that the Judge's credibility rulings were correct based on the testimony and demeanor of the witnesses and should not be disturbed. Moreover, the Judge's findings of facts and conclusions of law were fully supported by the record evidence and by appropriate legal standards. Accordingly, the Decision and Recommended Order should be adopted by the Board as modified by the General Counsel’s Limited Exceptions to the Judge’s Decision.

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<sup>9</sup> Counsel for the General Counsel is at a loss to understand the second prong of Respondent’s argument: “[E]ven if the Contract is terminated, the Board should not bootstrap an extended six month bargaining remedy, for conduct that occurred when the Agreement was in effect, and order that such remedy be implemented post Contract termination.”

Dated: November 14, 2017

Respectfully submitted,



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Joseph Richardson  
Yaromil Ralph  
Counsel for the General Counsel  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20**

**KALTHIA GROUP HOTELS, INC. AND MANAS  
HOSPITALITY LLC D/B/A HOLIDAY INN  
EXPRESS SACRAMENTO, A SINGLE  
EMPLOYER**

**and**

**UNITE HERE! LOCAL 49**

**Cases 20-CA-176428;  
20-CA-178861; and  
20-CA-182449**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE'S DECISION.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **November 14, 2017**, I served the above-entitled document(s) by **electronic mail** upon the following persons, addressed to them at the following addresses:

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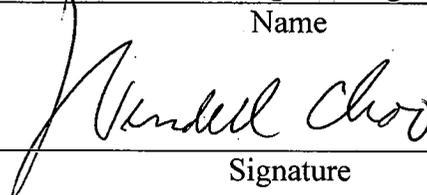
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November 14, 2017

Date

Wendell Choo, Designated Agent of NLRB

Name



Signature