UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

| | |
|---|---|
| P.J. ROSALY ENTERPRISES, INC.<br>d/b/a<br>ISLANDWIDE EXPRESS<br><br>And<br><br>UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS | Cases 12-CA-218464<br>12-CA-219677<br>12-CA-221809 |
| | |

**ISLANDWIDE'S ANSWER TO CONSOLIDATED COMPLAINT**

**TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:**

Comes now, **P.J. ROSALY ENTERPRISES, INC. d/b/a ISLANDWIDE EXPRESS (IWE)** through its undersigned attorneys and very respectfully states and prays as follows:

1. (a) The allegations in paragraph 1(a) of the Consolidated Complaint are neither admitted nor denied since the appearing party lacks sufficient information or knowledge to form a belief of the allegation in paragraph 1(a) of the Consolidated Complaint. It is affirmative alleged that IWE received copy of the charge in Case 12-CA-218464 after April 16, 2018. We also assert that copy of said charge was not served to the undersigned as the legal representative of IWE. Despite that we had filed before the Board the annual notice of appearance and that since 2012 we have been the legal representative of IWE before the Region. More importantly, the union's allegations in charge 12-CA-218464 must be dismiss since the National Labor Relations Board (NLRB) does not have jurisdiction as to the same since the same were submitted and resolved by the Federal Bankruptcy Court in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. **Accordingly, the**

**allegations in paragraph 1(a) of the Consolidated Complaint must be dismiss**.

(b) The allegations in paragraph 1(b) of the Consolidated Complaint are neither admitted nor denied since the appearing party lacks sufficient information or knowledge to form a belief of the allegation in paragraph 1(b) of the Consolidated Complaint. It is affirmatively alleged that IWE received copy of the original charge in Case 12-CA-218464 after May 7, 2018. We also assert that copy of said charge was not served to the undersigned as the legal representative of IWE. Despite that we had filed before the Board the annual notice of appearance and that since 2012 we have been the legal representative of IWE before the Region. More importantly, allegations of charge 12-CA-218464 must be dismiss since the National Labor Relations Board (NLRB) does not have jurisdiction as to the union's allegations regarding the abrogation of the entire collective bargaining agreement and payment of the 2017 Christmas Bonus. Both of these issues were submitted and resolved by the Federal Bankruptcy Court in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. In this case the Federal District Court for the District of Puerto Rico rejected the entire CBA. The rejection of the CBA was in effect since December 7, 2017 because the union never requested a stay of the Court's decision. Moreover, the Union's bad faith actions in violation of the Act are so egregious that when they filed charge 12-CA-219677 on May 4, 2018 requesting the payment of the 2017 Christmas bonus, they did it after having consent on March 28, 2018 to the terms propose by IWE to pay said Bonus to the unit employees. The Union consented to said proposal during the March 28, 2018 hearing before the Bankruptcy Court in case In Re: P.J. ROSALY ENTERPRISES, INC., supra. Moreover, at the time of the filing of the charge IWE had already began its compliance with the terms of the payment plan. **Accordingly, the allegations in**

**paragraph 1(b) of the Consolidated Complaint must be dismiss.**

(c) The allegations in paragraph 1(c) of the Consolidated Complaint are neither admitted nor denied since the appearing party lacks sufficient information or knowledge to form a belief of the allegation in paragraph 1(c) of the Consolidated Complaint. It is affirmatively alleged that IWE received copy of the amended charge in Case 12-CA-219677 after June 29, 2019. We also assert that copy of said charge was not served to the undersigned as the legal representative of IWE. Despite that we had filed before the Board the annual notice of appearance and that since 2012 we have been the legal representative of IWE before the Region. More importantly, the National Labor Relations Board (NLRB) does not have jurisdiction as to the union's allegations regarding the abrogation of the entire collective bargaining agreement (CBA) and all the alleges violations by IWE as the result of said abrogation of the CBA. The collective bargaining agreement mentioned in the charge was rejected by the Federal District Court for the District of Puerto Rico on December 7, 2017 in in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. The rejection of the CBA was in effect since December 7, 2017 because the union never requested a stay of the Court's decision. In the amended charge, the union withdrew its allegation as to the 2017 Christmas Bonus after IWE proved to the Regional Office that the payment of the 2017 Christmas Bonuses was part of the Confirmation Plan approved by the Bankruptcy Court in In Re: P.J. ROSALY ENTERPRISES, INC., supra. **Accordingly, the allegations in paragraph 1(c) of the Consolidated Complaint must be dismiss.**

(d) The allegations in paragraph 1(d) of the Consolidated Complaint are neither admitted nor denied since the appearing party lacks sufficient information or knowledge to form a belief of the allegation in paragraph 1(d) of the Consolidated Complaint. It is affirmatively alleged

that IWE received the original charge in Case 12-CA-221809 after June 12, 2018. We also assert that copy of said charge was not served to the undersigned as the legal representative of IWE. Despite that we had filed before the Board the annual notice of appearance and that since 2012 we have been the legal representative of IWE before the Region. Moreover, the allegation in the original charge merely stated that IWE has failed to provide information requested in letter dated April 9, 2018. IWE objected said allegations since the union had send 3 separate letters to IWE in April 9th. **Accordingly, the allegations in paragraph 1(d) of the Consolidated Complaint must be dismiss.**

(e) The allegations in paragraph 1(e) of the Consolidated Compliant are neither admitted nor denied since the appearing party lacks sufficient information or knowledge to form a belief of the allegation in paragraph 1(e) of the Consolidated Complaint. It is affirmatively alleged that IWE received the first amended charge in Case 12-CA-221809 after June 19, 2018. We also assert that copy of said charge was not served to the undersigned as the legal representative of IWE. Despite that we had filed before the Board the annual notice of appearance and that since 2012 we have been the legal representative of IWE before the Region. More importantly, the National Labor Relations Board (NLRB) does not have jurisdiction as to the union's allegations regarding the request of information regarding Cardinal and any new contracts requested in one of their Aprils 9th, letters since said request has been submitted and resolved by the Federal District Court for the District of Puerto Rico on December 7, 2017 in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. In that case the court concluded that IWE did not had to provide the union said information. Moreover, the union's request did not comply with the requirements established by law to find a violation of the National Labor Relations Act (NLRA) for failure to the duty to furnish information.

Likewise, it is our position that the union's request was made in bad faith. Moreover, said information constitute confidential business records subject to further protections. **Accordingly, the allegations in paragraph 1(e) of the Consolidated Complaint must be dismiss**

(f) The allegations in paragraph 1(f) of the Consolidated Compliant are neither admitted nor denied since the appearing party lacks sufficient information or knowledge to form a belief of the allegation in paragraph 1(e) of the Consolidated Complaint. It is affirmatively alleged that IWE received the second amended charge in Case 12-CA-221809 after August 27, 2018. It is our position that the additional allegation in the Second Amended Charge must be dismissed. The union amended the charge to allege that IWE had failed to provide them information as to new hires requested in one of their April 9th letters. The amendment to charge 12-CA-221809 was made by the union in bad faith since IWE on April 13th, 2018 had provided the union the information requested of the new hire employees. As to the other allegation in the amended charge regarding the information regarding Cardinal and any new contracts we reaffirm that the NLRB does not have jurisdiction over said allegation since said request has been submitted and resolved by the Federal District Court for the District of Puerto Rico on December 7, 2017 in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. In that case the court concluded that IWE did not had to provide the union said information. Moreover, the union's request did not comply with the requirements established by law to find a violation of the National Labor Relations Act (NLRA) for failure to the duty to furnish information. Likewise, it is our position that the union's request was made in bad faith. Moreover, said information constitute confidential business records subject to further protections. **Accordingly, the allegations in paragraph 1(f) of the Consolidated Complaint must be dismiss.**

2. (a) The allegations in paragraphs 2(a) through 2(d) of the Consolidated Complaint are admitted.

3. The allegation in paragraph 3 of the Consolidated Complaint is admitted.

4. It is admitted that the following individual held the position mentioned in paragraph 4 of the Consolidated Complaint: Hiram Miranda, Luis Rodriguez, Maricarmen Santiago, and Carlos Torres. The rest of the allegations in paragraph 4 of the Consolidated Complaint are denied as to the position of Noel Gonzalez, Hector Irizarry, Jesus Rosa and Pablo Vargas. It is also denied that Mildred Figueroa is a supervisor, since she is part of the unit represented by the Union.

5. (a) The allegation in paragraph 5 (a) of the Consolidated Complaint is denied. The appropriate unit represented by the Union pursuant to the definition agreed by the parties in the lasts collective bargaining agreements is:

"All full time and part time parcel pick up and delivery chauffeurs, warehouse employees, warehouse clerks, cashier and customer service employees employed by IWE throughout Puerto Rico".

(b) The allegation in paragraph 5 (b) of the Consolidated Complaint is admitted.

(c) We denied that the terms included in the collective bargaining agreement, extend until September 30, 2019. The collective bargaining agreement and its terms were terminated by the Federal District Court for the District of Puerto Rico on December 7, 2017 in case <u>In Re: P.J. ROSALY ENTERPRISES, INC</u>., Case No. 16-07690. The rest of the allegations in paragraph 5(c) of the Consolidated Complaint are admitted.

(d) The allegation in paragraph 5 (d) of the Consolidated Complaint is admitted.

6. (a) The allegation in paragraph 6 (a) of the Consolidated Complaint is admitted.

(b) The allegation of paragraph 6(b) of the Consolidated Complaint is

denied. On December 7th, 2017 the Bankruptcy Court issued an *Opinion and Order* (*Opinion & Order*) rejecting the collective bargaining agreement mentioned in paragraph 5 (c) of the Consolidated Complaint. Even thou the bankruptcy court had the alternative of: (a) ordering the rejection of the collective bargaining agreement, (b) limit the modification to the collective bargaining agreement to IWE's last proposal; or (c) reject any modification to the collective bargaining agreement. The court chose to reject the totality of the collective bargaining agreement without any limitation, exceptions, qualifications nor conditions.

The collective bargaining agreement that was rejected by the Court is the same one referred to by the union in its allegations in charges 12-CA-218464 and 12-CA-219677 against IWE. It is also the same collective bargaining agreement whose terms the Regional Director alleges IWE violated in paragraphs 7; 9(a) through 9(h) and 12 of the Consolidated Complaint, and that allegedly constituted a violation of the Act. The premise of the Consolidated Complaint as stated in paragraph 6 is contrary to the Court's December 7th, 2017 ruling in case In Re: P.J. ROSALY ENTERPRISES, INC., supra. Although the Regional Director recognized in paragraph 6(a) that the collective bargaining agreement was rejected by the Court on December 7, 2017. In paragraph 6(b) the Regional Director wrongly tries to limit the rejection of the collective bargaining agreement to only the provisions mentioned in said paragraph. The Regional Director's interpretation of the Court's Opinion and Order in case In Re: P.J. ROSALY ENTERPRISES, INC., supra is not supported by the record nor the applicable laws.

The extent of the decision of the Court rejecting the totality of the collective bargaining agreement mentioned in paragraph 5(b) of the Consolidated Complaint was reaffirm by the Bankruptcy Court in its March 28, 2018 Minute of Entry in case In Re: P.J. ROSALY ENTERPRISES, INC., supra. Specifically, the Court held, among other things: "**That a**

**review of this court's order, particularly the last paragraph, shows that the court rejected the CBA in its entirety. There were no qualifications, conditions or exceptions"** (Emphasis supplied)

Furthermore, on July 24, 2018 the Bankruptcy Appellate Panel (BAP) in its decision in case In Re: P.J. ROSALY ENTERPRISES, INC., supra regarding the Appeal filed by the Union objecting the rejection of the CBA, confirmed the rejection of the totality of the collective bargaining agreement mentioned in paragraph 5(b) of the Consolidated Complaint.

Finally, on September 20th, 2018 the Honorable Enrique S. Lamoutte of the United States Bankruptcy Court of the District of Puerto Rico reaffirm and restated in case In Re: P.J. ROSALY ENTERPRISES, INC., supra, that the totality of the CBA has been rejected on December 7, 2017 and that it no longer existed. Specifically, the Court reaffirm the following as to IWE's bargaining obligations after the Court's December 7th, 2016 Order rejecting the CBA: (Emphasizes provided)

- *This Honorable Court already stated* ***that it has no jurisdiction to Order the Debtor to make union dues deductions upon the rejection of the CBA in its entirety****. The Court was clear when it denied the Union's prior request. It stated in open court as follows:*

***The bankruptcy court does not have authority to order a chapter 11 debtor, after rejection of the CBA, to make employee Union quota deductions****. In re: San Rafael Baking Co., 219 BR 860 (9th Cir. BAP 1998). A review of this Court's order, particularly the last paragraphs, show that the court rejected the CBA in its entirety.* ***There were no qualification, conditions or exceptions.*** *(Our Emphasis)*

- *It should be noted that the Union appealed the Opinion and Order granting the rejection of the collective bargaining agreement to the Bankruptcy Appellate Panel for the First Circuit ("BAP") and such appeal was dismissed. It had the opportunity to seek revision of the*

*BAP's determination to the First Circuit Court of Appeals and yet it chose not do so.* ***Thus, the law of the case is that the collective bargaining agreement was rejected in toto and it is no longer in vigor****.* ***This has been recognized by this Honorable Court and by the BAP.***

- ***The Union is claiming here, and before the NLRB, "alleged rights" under the rejected collective bargaining agreement in an attempt to revive contractual obligations of the Debtor that no longer exist. This is an attempt to revisit matters that have already been resolved and adjudicated by this Honorable Court in the Opinion and Order granting the rejection of the collective bargaining agreement. The ruling of this Honorable Court is final and not subject to further appeals.*** *Any alleged "fear" and "harm" is of the Union's own making.*
- ***It is the Union who has gone with unclean hands to the NLRB and before this Honorable Court.*** *The Union and its counsel are very well aware that it has already sought before the NLRB the same remedies it is seeking before this Honorable Court and that such proceedings are ongoing. It now seeks to tarnish the image and reputation of the Debtor before this Honorable Court stating that the Debtor lacks good faith.*

**Accordingly, paragraph 6(b) of the Consolidated Complaint must be dismiss.**

7. (a) The allegations in paragraph 7(a) of the Consolidated Complaint are denied. The allegation of paragraph 7(a) of the Consolidated Complaint must be dismiss pursuant to the Board's Rules and Regulations since the same lacks the specific facts required to establish a violation of the Act. Said allegation does not mention any fact as to how IWE allegedly withdrew recognition from the Union. **Accordingly, paragraph 7(a) of the Consolidated Complaint must be dismiss.**

8. (a) The allegations of paragraph 8(a) of the Consolidated Complaint are denied. Moreover, the allegation of paragraph 8(a) of the Consolidated Complaint must be dismiss pursuant to the Board's Rules and Regulations since the same lacks the specific facts required to establish a violation of the Act. Said allegations lacks any fact as to when, where or why said individual incurred in said alleged violation and what specifically was said. **Accordingly, paragraph 8(a) of the Consolidated Complaint must be dismiss.**

(b) The allegations of paragraph 8(b) of the Consolidated Complaint are denied. Moreover, the allegation of paragraph 8(b) of the Consolidated Complaint must be dismiss pursuant to the Board's Rules and Regulations since the same lacks the specific facts required to establish a violation of the Act. Said allegations lacks any fact as to when, where or why said individuals incurred in said alleged violation and what specifically was said. **Accordingly, paragraph 8(b) of the Consolidated Complaint must be dismiss.**

(c) The allegations of paragraph 8(c) of the Consolidated Complaint are denied. Moreover, the allegation of paragraph 8(c) of the Consolidated Complaint must be dismiss pursuant to the Board's Rules and Regulations since the same lacks the specific facts required to establish a violation of the Act. Said allegations lacks any fact as to when, where or why said individuals incurred in said alleged violation and what specifically was said. **Accordingly, paragraph 8(c) of the Consolidated Complaint must be dismiss.**

9. (a) The allegations of paragraph 9 (a) of the Consolidated Complaint are denied. At the time IWE removed the bulletin boards from the terminals there was no collective bargaining agreement in effect. On December 7, 2017 the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 rejected the totality of the collective bargaining agreement extant at the time,

terminating all its terms, including Art. XXV mentioned in paragraph 9(a) of the Consolidated Complaint. Therefore, IWE did not incurred in an unfair labor practices within the meaning of the Act. **Accordingly, the allegations in paragraph 9(a) of the Consolidated Complaint must be dismiss.**

(b) The allegations of paragraph 9 (b) of the Consolidated Complaint are denied. On December 7, 2017 the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 rejected the totality collective bargaining agreement extant at the time, terminating all its terms, including Art. VIII mentioned in paragraph 9(b) of the Consolidated Complaint. Therefore, IWE did not incurred in an unfair labor practices within the meaning of the Act. **Accordingly, the allegations in paragraph 9(b) of the Consolidated Complaint must be dismiss.**

(c) The allegations of paragraph 9 (c) of the Consolidated Complaint are denied. Despite that Art. XIV, mentioned in paragraph 9(c) of the Consolidated Complaint was not in effect since December 7, 2017 for the reasons we have previously mentioned in this Answer, IWE in compliance with the Act, continued to honor the seniority of the unit employees for purposes of overtime assignments, job opening, work schedules, work assignments and vacations in compliance with the Act and the rights confer by the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. In fact, of all the allegations regarding seniority violations included in paragraph 9(c) of the Consolidated Complaint the Region could identified only **ONE** employee from the **231 employees** in the unit, and among all of IWE's terminals in which allegedly seniority rights were violated by the assignment of overtime to an employee with lesser seniority. Said deviation cannot be consider a violation of the Act by IWE but rather an unforeseen error. The good faith of IWE in its continuance of honoring the

seniority of the employees within the rights conferred by the Bankruptcy Court is evidence by the record. **Accordingly, the allegations in paragraph 9(c) of the Consolidated Complaint must be dismiss.**

(d) The allegations of paragraph 9 (d) of the Consolidated Complaint are denied. On December 7, 2017 the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 rejected the totality of the collective bargaining agreement extant at the time, terminating all its terms, including Art. IX mentioned in paragraph 9(d) of the Consolidated Complaint. Therefore, IWE did not incurred in an unfair labor practices within the meaning of the Act. Moreover, in an attempt to preserve necessary peace and order in their terminals after the rejection of the CBA, IWE proposed to the union, in good faith a reasonable procedure to allow access of the union's representatives to their facilities. The same merely require a prior notice of their visit to the Human Resources Director. The Union refused to discuss IWE's proposal by stating that the CBA was in full force and effect. IWE never denied a union representative access to visit the terminals. **Accordingly, the allegations in paragraph 9(d) of the Consolidated Complaint must be dismiss.**

(e) The allegations of paragraph 9 (e) of the Consolidated Complaint are denied. On December 7, 2017 the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 rejected the totality of the collective bargaining agreement extant at the time, terminating all its terms, including Art. XII mentioned in paragraph 9(e) of the Consolidated Complaint. Therefore, IWE did not incurred in an unfair labor practices within the meaning of the Act. **Accordingly, the allegations in paragraph 9(e) of the Consolidated Complaint must be dismiss.**

(f) The allegations of paragraph 9 (f) of the Consolidated Complaint are denied. On December 7, 2017 the Federal District Court for the District of

Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 rejected the totality of the collective bargaining agreement extant at the time, terminating all its terms, including Art. IV mentioned in paragraph 9(f) of the Consolidated Complaint. Moreover, the rejection of the CBA by the Federal Bankruptcy Court was as a result of the union's bad faith refusal to bargain any of the modification to the CBA proposed by IWE reaching the parties a good faith impasse in said negotiations. Therefore, IWE's obligation to continue deducting and remitting the dues to the union ceased upon the impasse reached by the parties that resulted in the rejection of the CBA. The same also allowed IWE to unilaterally implement the modifications proposed to the CBA besides the termination of Article IV included in the CBA mentioned in paragraph 9(f) of the Consolidated Complaint. IWE does not owe the Union any union dues. **Accordingly, the allegations in paragraph 9(f) of the Consolidated Complaint must be dismiss.**

(g) The allegations of paragraph 9(g) are neither admitted nor denied since the same is an allegation of law that does not require an answer. If an answer is required, we reaffirm and restate our answers to paragraphs 9 (a) through 9(f) of the Consolidated Complaint, including our request to dismiss said allegations. **Accordingly, the allegations in paragraph 9(g) of the Consolidated Complaint must be dismiss.**

(h) The allegations of paragraph 9 (h) of the Consolidated Complaint are denied. Contrary to the allegations of paragraph 9 (h) the parties had in fact reached a good faith impasse on an overall collective bargaining agreement during precisely the negotiations of the modifications to the collective bargaining agreement propose by IWE in case In Re: P.J. ROSALY ENTERPRISES, INC., supra. As the result of said impasse the Federal District Court for the District of Puerto Rico on December 7, 2017 rejected the totality of the collective bargaining agreement extant at the time, terminating all its terms, including those mentioned in paragraphs

9(a) through 9(f). Since the union never requested a stay of the Court's order terminating the CBA, the same was in effect since December 7, 2017 and continued during all the material times mentioned in the Consolidated Complaint. We also reaffirm and re-state our answers to paragraphs 9(a) through 9(f). **Accordingly, the allegations in paragraph 9(h) of the Consolidated Complaint must be dismiss**.

10. (a) It is denied that the Union requested to bargain a successor collective bargaining agreement. The rest of the allegations of paragraph 10(a) of the Consolidated Complaint are admitted.

(b) The allegations of paragraph 10(b) of the Consolidated Complaint are denied. It is a violation of the Act by the Regional Director and a violation of IWE's the rights under the Act for the Regional Director to:

- Illegally force IWE to continue complying with a collective bargaining agreement that was terminated by the Federal Bankruptcy Courts since December 7, 2017
- Illegally limit the rejection of the collective bargaining agreement by the Federal Bankruptcy Courts to only the articles mentioned in paragraph 6(b) of the Consolidated Complaint.
- Allege that IWE violated the terms of a collective bargaining agreement that is no longer in effect.
- And at the same time allege that, although the terms of the collective bargaining agreement mentioned in the Consolidated Complaint continue in effect, IWE had to bargain a successor collective bargaining agreement with the Union.

IWE did not refuse to bargain a successor collective bargaining agreement with the Union because the union never proposed to bargain a successor collective bargaining agreement. Instead, the union requested to bargain a new collective bargaining agreement. Despite their appeal pending and potential effect of the Appeal's result in any agreements the parties may reach in a successor agreement.

Moreover, the union's bargaining request contradicted their allegation that the CBA continued in full force and effect until September 30, 2019. According to the Union, the Court's Opinion and Order rejecting the CBA in case In Re: P.J. ROSALY ENTERPRISES, INC., supra, only modified the CBA as to the last modifications proposed by IWE. The union's ambiguity and picking and choosing of their obligations and rights constitutes a violation of the Act and the Federal Bankruptcy Code. IWE's position regarding the union's April 9th request to bargain was explained to the Union's in their multiple replies to said request. The same was: As long as there was the possibility that the BAP could overturn the rejection of the CBA, the costs and disruption to the operations associated to the bargaining of a new collective bargaining agreement, that may or not be implemented, constituted an undue hardship for IWE. This could affect its capacity to comply with the Confirmation Plan and its creditors, including the union. This scenario was considered by the BAP and concluded in favor of the dismissal of the union's appeal, where the Union also alleged that IWE had failed to bargain a new collective bargaining agreement. The union did not appeal the BAP decision. Moreover, the appellate procedures before the BAP lasted more than usual due to the union's bad faith litigation of the same. As to this allegation the BAP in its Decision held: "The union's shortcoming in this Appeal include its failure to order or pay for a hearing transcript, failure to comply with various procedural rules when filing its brief and appendix, failure to provide English translation of Spanish documents, and failure to timely cure deficiencies in its brief and appendix. The union also made multiple requests to extend time to file its brief and appendix and to provide English translations". As to this matter the BAP also held to support its decision to dismiss the appeal filed by the Union: "While the union has dragged his heels throughout the appellate process, the Joint Plan has been substantially

consummated and distributions to all of its creditors have commenced". Have the Union acted in good faith and diligence in the appellate process the parties probably would have begun bargaining a successor collective bargaining agreement earlier. The union's acted in bad faith and has unclean hands to alleged a violation of the Act for failure to bargain. **Accordingly, the allegations in paragraph 10(b) of the Consolidated Complaint must be dismiss**.

11. (a) It is admitted that the Union on April 9th requested IWE to furnish the information mentioned in paragraph 11(a) of the Consolidated Complaint. The rest of the allegations of paragraph 11(a) of the Consolidated Complaint are denied. The Union only made one request, and the same was in one of their April 9th, 2018. Moreover, it is our position that the National Labor Relations Board (NLRB) does not have jurisdiction as to the allegations included in paragraph 11(a) of the Consolidated Complaint. The union's request of information regarding Cardinal and any new contracts has been submitted and resolved by the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. In that case the court concluded that IWE did not had to provide the union said information. Moreover, the union's request did not comply with the requirements established by law to find a violation of the National Labor Relations Act (NLRA) for failure of the duty to provide information. **Accordingly, the allegations in paragraph 11(a) of the Consolidated Complaint must be dismiss.**

(b) The allegations of paragraph 11(b) of the Consolidated Complaint are denied. The union's request of information did not comply with the requirements established by law to find a violation of the National Labor Relations Act (NLRA) for failure to provide the same. **Accordingly, the allegations in paragraph 11(b) of the Consolidated Complaint must be dismiss.**

(c) The allegation of paragraph 11(c) of the Consolidated Complaint is denied. We reaffirm and re-state our answer to paragraphs 11(a) through 11 (b) of the Consolidated Complaint, including our request to dismiss said allegations. **Accordingly, the allegations in paragraph 11(c) of the Consolidated Complaint must be dismiss.**

12. The allegations of paragraph 12 of the Consolidated Complaint are denied. We reaffirm and re-state our answer to paragraphs 8(a) through 8 (c) of the Consolidated Complaint, including our request to dismiss said allegations. **Accordingly, the allegations in paragraph 12 of the Consolidated Complaint must be dismiss.**

13. The allegations of paragraph 13 of the Consolidated Complaint are denied. We reaffirm and re-state our answer to paragraphs 7, 9(f), 9(h), 10(b) and 11(c) of the Consolidated Complaint, including our request to dismiss said allegations. **Accordingly, the allegations in paragraph 13 of the Consolidated Complaint must be dismiss.**

14. The allegation of paragraph 14 of the Consolidated Complaint is neither admitted nor denied since it is an allegation of law that those not require an answer. If an answer is required, we denied the allegation of paragraph 14 of the Consolidated Complaint since IWE did not incurred in a violation of the Act. **Accordingly, the allegations in paragraph 14 of the Consolidated Complaint must be dismiss.**

## ADDITIONAL AFFIRMATIVE DEFENSES

1. The allegations in the Consolidated Complaint do not state a claim upon which relief could be granted against IWE under any of the legal provisions included in the Consolidated Complaint.

2. The alleged conducts by IWE do not constitute unfair labor practices prohibited by the Act nor a violation to the employees' rights.

3. At all relevant times IWE has acted in good faith and in compliance with all applicable laws.

4. The Consolidated Complaint must be dismissed because it lacks specific facts necessary to establish that IWE incurred in an unfair labor practice and because all of IWE's actions were allowed by the Federal Bankruptcy Code and/or the Act.

5. The right of IWE to unilaterally implement changes to the CBA was granted by the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690.

6. The articles of the collective bargaining agreement mentioned in the Consolidated Complaint were terminated upon the rejection of said collective bargaining agreement on December 7, 2017 by the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690.

7. At all relevant times the collective bargaining agreement mentioned in paragraph 5(b) of the Consolidated Complaint was not in effect since the union did not request a stay of the Order rejecting the CBA issued by the Federal District Court for the District of Puerto Rico on December 7, 2017 in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690.

8. IWE at all relevant times has bargained collectively in good faith with the union as the exclusive representative of the employees.

9. The Union's bad faith failure and refusal to bargain in good faith with IWE the much-needed modifications to the CBA due to the unexpected changes in its economic capacity and obligations as debtor in a chapter 11 proceeding, impedes the union from requesting protection from the Act.

10. The union's bad faith refusal to bargain any modification to the CBA with IWE also violated the Federal Bankruptcy Code and therefore impedes the union from requesting protection from the Act.

11. The NLRB does not have jurisdiction over the matters resolved by the Bankruptcy Court and/or the BAP in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690.

12. IN *RE HOFFMAN BROS. PACKING CO., INC.* BAP Nos. CC-93-1966-VJH,

CC-93-2044-VJH. Bankruptcy No. LA93-23593 BR., the Court held that **"**It is apparent that §1113 authorizes a bankruptcy court to authorize rejection of a CBA provided that a good faith bargaining effort takes place. Likewise, the bankruptcy court may authorize, depending on economic necessity, interim departures from the terms of the CBA. These actions by a bankruptcy court necessarily cause a limited displacement of the jurisdiction of the NLRB, and, to this extent, the orders of the bankruptcy court will preclude issues resolved in its orders from being brought before or acted upon by the NLRB".

13. In discussing the jurisdiction of the NLRB of matters resolved by the bankruptcy court, it held in *Re HOFFMAN*, supra "It is plain that at bottom the union is of the view that the NLRB should be the sole arbiter of labor relations matters. However, "The plain meaning of a statute is ordinarily dispositive unless that meaning is contrary to the legislature's intent or would lead to absurd results." *U.S. v. $191,910.00 in U.S. Currency,* 16 F.3d 1051, 1067 (9th Cir.1994). The drafters of § 1113 clearly meant to grant jurisdiction to the bankruptcy court to modify or otherwise alter the status *quo ante* rights and obligations between a debtor employer and its employees whether they exist under a currently existing CBA or are carried over by agreement or pursuant to the LMRA. **To eliminate bankruptcy court jurisdiction or provide for parallel or overlapping jurisdiction by two tribunals would lead to confusion, conflict and costly delay.**

14. The Union refused to accept the court's order rejecting the CBA in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 and with unclean hands proceeded to filed unfair labor practice charges that violated IWE's rights under section 1113 of the Federal Bankruptcy Code.

15. All the changes to the CBA were implemented by IWE **AFTER** the rejection of the CBA, pursuant to the rights confer by section 1113.

16. The bankruptcy court in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 reaffirmed in numerous occasions, as evidence in this answer, that the CBA was rejected in its totality since December 7th, 2017. And that said rejection included economic and non-economic clauses.

17. Contrary to the Union, IWE has demonstrated that it has acted in good faith and that it recognizes the Union as the exclusive representative of their unit employees.

18. The following terms mentioned in paragraphs9(a), 9(b), 9(d), 9(e) of the Consolidated Complaint do not supersede the termination on December 7, 2017 of the collective bargaining agreement mentioned in paragraph 5(b) of the Consolidated Complaint:

a. Inspection Privileges (Article IX)
b. Grievance and Arbitration Procedure (Article XII)
c. Shop Stewards (Article VIII)
d. Bulletin Boards (Article XXV)

19. The allegations included in the Consolidated Complaint are a clear intervention with IWE's rights under the Act and the federal Bankruptcy Code therefore must be dismissed.

20. Charges 12-CA-218464; 12-CA-219677 and 12-CA-221809 prove the Union's bad faith refusal to accept the rejection of the CBA and their denial of the rights confer by the Federal Bankruptcy Court to IWE in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690.

21. The filing of charges 12-CA-218464; 12-CA-219677 and 12-CA-221809 also demonstrate the union's bad faith attempt to minimize the Bankruptcy Court and the BAP's rulings in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. Looking for refuge in the NLRB to avoid its obligations under section 1113 and the Federal Bankruptcy Code.

22. IWE has continue to comply with the seniority rights of its employees as to vacation leaves, overtime assignments and other terms and conditions of employment, provided they are not in content with the right to use temporary or part time employees as propose by IWE in its modifications to the CBA.

24. IWE has continue to arbitrate all the grievances filed by the Union, as the exclusive representative of their employees.

25. IWE has continued to notify the Union as the exclusive representative of their employees all the disciplines imposed to unit employees. Despite said notice, the Union has not requested to discuss any of the disciplines with IWE.

26. IWE has continue to participate in arbitration proceedings with the Union as the exclusive representative of their employees.

27. IWE has continue to bargain with the union, as the exclusive representative of their employees, settlements in arbitration cases.

28. The Union has violated the Act by filling various grievances directly before the Puerto Rico Department of Labor Arbitration and Mediation Bureau without copying IWE.

29. Pursuant to the Union's interpretation of the court's rejection of the CBA in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690, which we object, there was no need to bargain a new collective bargaining agreement because for them the only applicable amendments to the rejected CBA where the economic clauses included in IWE's last proposal.

30. The union's bad faith and unclean hands was confirmed by the Bankruptcy Court in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 when applying the nine (9) factors of Section 1113 of the federal Bankruptcy Code, in its Opinion and Order rejecting the collective bargaining agreement mentioned in paragraph 5(b) of the Consolidated Complaint.

31. In its December 7th, 2017 Opinion and Order the Bankruptcy Court in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 asserted its jurisdiction and in its application of the nine (9) factors of section 1113 held the following:

- As to the requirement that the "*Debtor must make a proposal to the Union to modify the Collective Bargaining Agreement*". The court held: "The Union does not contest the Debtor's compliance with this requirement.
- As to the requirement that ***"****The proposal must be based on the most complete and reliable information available at the time of the proposal*" the court held that: "Furthermore, although the Union disagrees with the quarter chosen by CPA Barroso to calculate economic impact of several clauses, it failed to present any counter-evidence. As a result,

the court concludes that the Debtor complied with the second requirement.

- As to the requirement that ***"****The modifications must be necessary to permit reorganization of IWE"* the Court held:
  i. ***The court notes that some of the clauses included in the Debtor's proposal do not relate to wages and benefits. Notwithstanding, the court finds that they have significant economic impact on the debtor's operation***.
  ii. The Union made several allegations related to the Debtor's financial condition but did not present any evidence to contradict the Debtor's evidence regarding the impact of the propose modifications to the CBA on the cash flow.
  iii. The forecasted statements of cash flow, both the original versions and the updated versions, show that the Debtor cannot afford the cost of the CBA as is.
  iv. **The court finds that the proposed modifications are necessary based on the uncontroverted evidence provided by the Debtor and the testimony of expert witness CBA Barroso**.
- As to the Union 's allegation that IWE failed to include a *snap-back* provision as it requested, the court found that:
  - The failure to include **a "snap-back" provision is not fatal to the Debtor's request to reject a collective bargaining agreement pursuant to Section 1113**. The Court explained that a "snap-back" provision restores some or all of the concessions required by the proposal in the event that a debtor's financial condition improves.
  - There is no doubt that the Union has made concessions and sacrifices in order to assist the Debtor. However, the evidence shows that the other parties in interest are also sharing in this burden.

  - Accordingly, the Court finds that the **Debtor's proposal is fair and equitable.**
- As to the requirement that "*IWE must provide to the Union such relevant information as is necessary to evaluate the proposal*". The court held, as previously mentioned, the following: "The court finds that the Debtor has provided the Union the necessary information for them to evaluate the proposal".
- As to the requirements that "*Between the time of making the proposal and the time of the hearing, on approval or rejection of the existing collective bargaining agreement, the Debtor must meet at reasonable times with the Union"* the court held: "The court will not expand on this requirement as the record reflects Debtor's compliance with the same and the Union agrees that this requirement has been satisfied".
- As to the Union allegation that IWE acted in bad faith the court concluded:
  - "**The court has ruled that the Debtor provided sufficient information to allow the Union to evaluate the proposals.**
  - In addition, although the sequence of events in this case is unfortunate, the fact that the Debtor filed for Bankruptcy one month after negotiating a CBA cannot lead to the conclusion it acted in bad faith.
  - **Section 1113 gives Debtor the right to file for rejection once a bankruptcy petition is filed under Chapter 11.**
  - Additionally, the evidence before the court shows the Debtor engaged in negotiations with its landlord to try to reach an agreement as to a $2.9 million-dollar debt prior to filling the bankruptcy petition. However, this agreement never materialized and was part of the reason why the Debtor filed for bankruptcy. The Debtor's president testified that the 2016 CBA

was negotiated in the assumption that the agreement with the landlord would be executed.

  - The court also concluded that: *"**Moreover, although the Union engaged in negotiations with the Debtor and submitted alternatives, it never submitted a counter-proposal to the Debtor***".
  - **The evidence before the court shows that the Debtor was willing to negotiate with the Union to try to reach an agreement.**

- As to the requirement that *"The Union must have refused to accept the proposal **without good cause**"*, the court held that: **(Emphasis Supplied)**
  - **The Union refused to accept the Debtor's proposal**.
  - **The evidence before the court shows that it is unlikely that the Union would have been willing to accept <u>any</u> proposal from the Debtor**. Lucas Alturet, a Union service representative, testified that the Union rejected the proposal because it understood it had already negotiated and made substantial concessions in August 2016. This is further evidenced by the fact that the Union never made a counter-proposal to the Debtor.
  - This court does not dispute that the Union made substantial concessions or minimize the same. However, **<u>the Union could not refuse to compromise once the Debtor filed for Bankruptcy and invoked its rights under section 1113</u>**.
  - Thus, the **court concludes that the Union did not have "good cause" to reject the proposal.**
- As to the requirement *"That the balance of the equities must clearly favor rejection of the CBA"*, the Court held:

  - The court has already found that the burden is spread among parties in interest and that the Debtor negotiated in good faith.
  - "The evidence before the court shows that the debtor will not be able to successfully reorganize if rejection is not permitted. Thus, the Debtor has satisfied this requirement.
- "*The court finds on the evidence before it, that the Debtor has complied with the Section 1113's requirements.* ***The Debtor has shown that it satisfied the nine-factor test****. Accordingly, the Debtor's Motion Requesting Rejection of the Collective Bargaining Agreement with the Union de Tronquistas is hereby granted*"

32. Moreover, the Court's determinations also prove that IWE bargained with the union in good faith and that the rejection of the collective bargaining agreement was the result of a good faith impasse reach by the parties, which justify the dismissal of the allegations in charges 12-CA-218464; 12-CA-219677 and paragraphs 9(a) through 9(h); 10(a) and (b); 13 of the Consolidated Complaint.

33. The analysis of the Bankruptcy Court in its application of the nine (9) factors of Section 1113 in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 also demonstrates that the parties had reached a good faith impasse in their negotiations of the modification to the collective bargaining agreement.

34. In a request of information the merely assertion that the information is "necessary" to represent the employees intelligently, is insufficient to establish relevance. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981).

35. Likewise, when a union has a vague or speculative explanation for its request of information, the NLRB has determined that an employer need not furnish the information requested. *Rice Growers Ass'n of Cal.,* 312 NLRB 837, 144 LRRM 1178 (1993) (denying the union's request for a copy of the employer's sales and distribution contract with its parent corporation).

36. The union's explanation of relevance must be made with some precision as a generalized, conclusory allegation is insufficient.

37. In its April 9th, 2018 letter requesting information of Cardinal and other contracts the Union merely made a vague explanation for its request. Therefore, IWE did not violated the Act by denying to furnish said information.

38. The union's request of information was made in bad faith and therefore, IWE had no obligation to supply the requested information.

39. The record supports IWE's assertion that the Union's request was made in bad faith.

40. During the proceedings before the Bankruptcy Court, the Union had made the same request of information to IWE. Since IWE is the only Puerto Rican courier service provider in an extremely competitive industry, dominated by UPS, USPS, Fed-Ex, DHL and other large American companies, whose employees are represented by the Union. And in which a $0.01 can be the difference between retaining a client or losing it, because the contracts are mostly based on volume. IWE, as a condition to provide the Union the requested information, required that the Union signed a confidentiality clause to protect said information. But the Union refused to sign said clause. As its secretary-treasurer testified during the November 2017 evidentiary hearing, in case In Re: PJ. Rosaly Enterprises Inc., supra, the union was unwilling to protect the information from competitors in which they also represent its employees. Under said circumstances the Bankruptcy Court concluded that IWE did not had to provide the union the documentation regarding Cardinal nor any of its clients' contracts.

41. The NLRB does not have jurisdiction as to the Union's request of information of Cardinal and other contracts, since said matter was resolved by the Federal Bankruptcy Court in In Re: PJ. Rosaly Enterprises Inc., supra.

42. In the alternative, IWE did not violated their duty to furnish because the union's request of information came after a good faith impasse and appeared to serve no purpose. *IN ACF Indus*., LLC, 347 NLRB 1040, 180 LRRM 1303 (2006).

43. In the alternative, the information regarding Cardinal and IWE's other clients is confidential protected information subject to additional protections under the Act.

44. In the alternative, the Union had access to the information requested as part of the Plan and supported documentation in case In Re: PJ. Rosaly Enterprises Inc.,

supra.

45. The NLRB does not have jurisdiction over the allegations of paragraphs 1(a) through 1(f); 5(a) through (d); 6(a) and (b); 9(a) through 9(h); 10(a) and (b): 11(a) and (b) of the Consolidated Complaint under the principles of res judicata.

46. The NLRB does not have jurisdiction over the allegations of paragraphs 1(a) through 1(f); 5(a) through (d); 6(a) and (b); 9(a) through 9(h); 10(a) and (b): 11(a) and (b) of the Consolidated Complaint under the principles of collateral estoppel.

47. We do not waive any additional defense that may emerge as a result of discovery.

**CERTIFICATE OF SERVICE**

I hereby certify that on this same date a true copy of this document has been send by regular mail to Isabel Bordallo, Representative, Union de Tronquistas de PR, Local 901, IBT 352 Calle Del Parque, Parada 23, Santurce, PR 00912-3702 and email: tronquistalu901@gmail.com.

**RESPECTFULLY SUBMITTED**

In San Juan, Puerto Rico, this 13th day of November 2018.

**DA SILVEIRA LAW OFFICE LLC**
**Bolivia 33, Suite 203**
**San Juan, Puerto Rico 00917**
**Tel (787)274-8383**
**Fax. (787) 281-6689**
**Cel (787)562-5061**

**By:** *Yolanda M. Da Silveira Neves*
**Yolanda M. Da Silveira Neves**
**Colegiado 11148**
**RUA 9821**
**E-mail: ydasilveira@gmail.com**
**ydasilveira@maza.net**