UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COUNTY AGENCY INC., AND ESPLANADE PARTNERS LTD. d/b/a ESPLANADE VENTURE PARTNERSHIP d/b/a THE ESPLANADE HOTEL, Joint Employers — **Cases 02-CA-188405**

and

305 WEST END HOLLING, LLC d/b/a 305 WEST END AVENUE OPERATING, LLC AND ULTIMATE CARE MANAGEMENT ASSITED LIVING MANAGEMENT, LLC, A DIVISION OF THE ENGEL BURMAN GROUP d/b/a ULTIMATE CARE MANAGEMENT, LLC Joint Employers — **02-CA-189863**, **02-CA-195031**

And

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 2013

Zachary E. Herlands, Esq. and *Jacob Frisch, Esq*.,
for the General Counsel.

Paul Wagner, Esq., *Arch Stokes, Esq*., and *Anne-Marie Mizel, Esq*.,
(Stokes Wagner), for the Respondents.

Robert F. O'Brien, Esq. and *W. Daniel Freehan, Esq*.,
(O'Brien, Belland & Bushinsky) for the Charging Party.

DECISION

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in New York, New York on March 19, 20, April 4, 18, 19, May 30, and 31, 2018. The General Counsel contends that Respondents County Agency, Inc. (County) and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel (Esplanade), as joint employers,[1] violated Section 8(a)(5) and (1) of the Act by failing to furnish requested information regarding the sale of their facility[2] to the United Food & Commercial Workers Union, Local 2013 (Union).

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[1] References herein to "Respondent**s** Esplanade" include Respondent County, while references to "Respondent Esplanade" do not.

[2] The facility at issue is the Esplanade Hotel, a residential building located at 305 West End Avenue, New York, NY 10023.

The General Counsel also contends that Respondent 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC (West End) and Respondent Ultimate Care Management Assisted Living Management, LLC, a Division of the Engel Burman Group d/b/a Ultimate Care Management, LLC (Ultimate), as joint employers[3] and the successor of Respondents Esplanade, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the incumbent Union as the representative of the predecessor's unit employees. Finally, the General Counsel contends that Respondents West End violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire 15 of the predecessor's employees.[4]

The Respondents, except Respondent Ultimate, filed answers to the complaint denying the substantive allegations.[5] Respondent Esplanade admits in its answer that it owned and operated an assisted living facility located 305 West End Avenue, New York, New York. In its post-hearing brief, Respondent West End states that the "property was owned by the Scharf family, and was operated for a long time by Solomon Scharf, and thereafter by his son Alexander, known as 'Ali."[6] (Resp. Brf. p. 5) Respondent County Agency admits in its answer that it is in the business of providing professional employer organizational services, including the provision of personnel, payroll, and other human resources functions to customers. In its post-hearing brief, Respondent West End states that Respondent County was "a company under contract with (Respondent) Esplanade to supply workers." (Resp. Brf. p. 5)

As discussed below, I find that Respondents Esplanade, as joint employers, violated the Act by failing to provide the Union with requested information. I also find that Respondents West End, as joint employers and successors of Respondents Esplanade, unlawfully refused to bargain with the Union as the representative of the predecessor's unit employees. Lastly, among the merit allegations, I find that Respondents West End unlawfully refused to hire Union shop steward Trinidad Hardy because of her union position and/or activity. However, I do not find, and herein dismiss, the allegation that Respondents West End violated the Act by refusing to hire 14 other employees in a failed attempt to avoid successorship.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs filed by the General Counsel, the Union, and Respondent West End,[7] I make these

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[3] References herein to "Respondent**s** West End" include Respondent Ultimate, while references to "Respondent West End" do not.

[4] The complaint originally plead a refusal-to-hire 16 employees, but the General Counsel has withdrawn, with my approval, the allegation pertaining to Harpal Sudeshkumar.

[5] Toward the end of the trial, the General Counsel moved to include Respondent Ultimate as a joint employer of Respondent West End. I granted this motion and an amendment to the complaint was entered into evidence. Respondent Ultimate did not file an answer to the amended complaint, but Respondent West End did and denied it was a joint employer with Respondent Ultimate.

[6] References herein to Scharf refer to Alexander, not Solomon.

[7] Until March 23, 2018 (day 3 of the trial), the law firm of Stokes Wagner represented Respondent Esplanade and Respondent West End. Respondent County did not appear at the trial. On March 23, 2018, Stokes Wagner indicated that it might not be able to continue representing Respondent Esplanade because of a potential conflict caused by a pending criminal indictment of Scharf. The next day, Stokes Wagner withdrew as Respondent Esplanade's counsel and continued only as counsel for Respondent West End. Respondent Esplanade did not appear during the remainder of the trial through independent counsel or otherwise. Respondent West End was the only respondent that filed a post-hearing brief.

FINDINGS OF FACT[8]

I. LABOR ORGANIZATION STATUS AND JURISDICTION

In their answers to the complaint, Respondents Esplanade and Respondent West End denied sufficient knowledge to admit or deny the status of the Union as a labor organization within the meaning of Section 2(5) of the Act. The Union negotiated and was party to a collective-bargaining agreement covering a unit of employees employed at the Esplanade Hotel until that facility was sold on December 5, 2016.[9] The Union filed at least one grievance under the contract (which settled) and requested the information at issue in this case. The Union also contacted Respondent West End in an attempt to have that company assume the collective-bargaining agreement or at least bargain with the Union as the representative of the unit. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. See *Image Systems*, 285 NLRB 370, 374 (1987).

None of the Respondents deny commerce information or employer status as plead in the complaint as a basis for jurisdiction. At all material times, the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES[10]

The Operation of the Esplanade Hotel Prior to the Sale on December 5

Respondent Esplanade owned and operated the Esplanade Hotel as a senior independent living residence which provided certain nonmedical services. Those services included three meals a day (in the dining room or delivered to the resident's apartment); front desk concierge services such as greeting people entering the building, announcing visitors,

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[8] My factual findings are based upon a review and consideration of the entire record of this case. Testimony contrary to my findings has been discredited. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622 (2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness's demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 10 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

[9] All dates refer to 2016, unless stated otherwise.

[10] The General Counsel, in its brief, refers to the failure of Respondent West End to produce certain subpoenaed documents and failure to produce other subpoenaed documents in a timely manner at the start of the hearing. However, the General Counsel has not asked for inferences or the suppression of evidence that, in my opinion, would be dispositive of any of my findings herein. More concerning to me is Respondent West End's apparent failure to provide the General Counsel with a privilege log after representing at trial that it would. However, the General Counsel never submitted a motion regarding this issue and has not asked for a specific remedy. Accordingly, I do not address the matter further herein.

handling mail, answering phones, and fielding complaints; housekeeping with towel, linen, and paper replacement; activities and entertainment (e.g., singers, poetry, bingo, exercise classes); and a beauty parlor.

Respondent Esplanade was owned by the Scharf family. Marcy Levitt was the executive director and Eli Singer was the controller. Additional managers and supervisors included recreation director Leslie Brown, housekeeping director Alexander Francisca, maintenance engineering director Dzevat Bicic, customer service director Albert Etienne, and marketing director Ruth O'Connell.

The Union represented a unit of employees who were employed at the Esplanade Hotel and the most recent collective-bargaining agreement was effective February 1, 2015 to January 31, 2018. The Union entered into this contract with "**County Agency Inc.**, located at 129 South Eighth Street, Brooklyn, NY 11211, for the employees employed at **The Esplanade Hotel** located at 305 West End Avenue, New York, New York 10023, hereinafter referred to as the 'Employer'." (R Exh. 1) Levitt testified that "we all worked for (Respondent) County." (Tr. 202) The contract was signed by Scharf as "partner" under a line identifying him as a representative of "County Agency Esplanade."

The recognition provision of the contract describes the unit as follows (R Exh. 1):

> {A]ll of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

Although the contract describes a wall-to-wall unit, Union director of collective-bargaining Eugene Hickey testified that he did not know recreation employees were employed at the facility and, therefore, never considered them to be included in the bargaining unit.[11]

The collective-bargaining agreement was a comprehensive contract. The contract included a union security clause requiring Union membership in good standing as a condition of employment. The contract also included provisions that dictated the terms and conditions of employment of unit employees, including wages, leave, health benefits, layoffs, discharges, suspensions, and subcontracting. Further, the contract included the following provision in Article 31 regarding successors and assigns (R Exh. 1):

> Section 1. This agreement shall be binding upon the parties hereto, their successors, administrators, executors, and assigns and shall survive a change of name, of location or place of business or re- organization. In the event the entire operation or any part thereof is sold, leased, transferred or taken over by the sale, transfer, lease, assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. It is understood by this Section that the parties

[11] Throughout the trial, Respondent West End's counsel took the position, in agreement with the Union, that recreation employees at the Esplanade Hotel were not historically included in the unit. In its brief, Respondent West End confirmed that "recreation employees . . . were not represented by the Union . . . .). Resp. Brf. p. 7. I find the unit, excluding recreation employees, to be appropriate.

> hereto shall not use any leasing device to a third party to evade this agreement. The Employer shall give notice to the existence of this agreement to any purchaser, transferee, assignee or lessee of the operation of this agreement or any part thereof. Such notice shall be in writing with a copy to the Union not later than thirty (30) days prior to sale.
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> Section 2. The Employer shall not have the right to assign this agreement or in any other manner to transfer the rights and obligations thereof to any other party, unless and until the purchaser, transferee, assignee or lessee shall first have assumed and accepted, in writing, all the terms and conditions of this agreement. Employees working under this agreement shall at all times be entitled, acting through the Union as their representative, to hold the Employer directly responsible for the full performance of all terms and conditions of this agreement.

The contract was negotiated by Scharf and Singer on behalf of the employer. The Union negotiators were Hickey, Hardy (a front desk concierge employee), and Union representative Idania Baldoquin.

In August 2015, the parties settled a grievance pertaining to the paid leave of unit employees under articles 4-6 of the collective-bargaining agreement. An internal email from Singer regarding this settlement stated, in part, that the "settlement offered herein [by the Union] is agreeable to the Esplanade and County Agency." (GC Exh. 42) Singer's email identified him as the controller of "Esplanade Senior Residences."

The contract, in Article 7, provided for all non-probationary employees to receive wage increases of $0.40 per hour on February 1, 2015 and February 1, 2016, and a $0.50 per hour wage increase on February 1, 2017. Article 3 of the contract provided for premium pay for overtime and hours worked on holidays. Respondent County's 2016 payroll records reflect that unit employees received pay increases and premium pay consistent with the contract.

The contract also provided, in Article 11, for employees to receive health benefits through a Union welfare fund. Under Article 11, employees paid nothing toward single coverage, but 100% (above the cost of single coverage) for a family or plus one plan.[12] Accordingly, as one might expect, prior to the sale, payroll records for the vast majority of Esplanade Hotel employees show no deductions for medical benefits.

The General Counsel called employee witnesses who testified that they understood their employer to be Respondent Esplanade (not Respondent County) and Respondent County to be the payroll company that issued paychecks. Front desk employee Dawn Capelli testified that she has been employed at the Esplanade Hotel since 2014 and understood the facility to be owned by the Scharf family. During Capelli's employment, she never met anyone she

[12] Respondent West End called and questioned employees Norman Campbell, William Londea, and Charlene Grant regarding their health benefits. Campbell testified that he received health care coverage through Respondent Esplanade. Londea testified he was offered coverage, but declined it because he was covered under a separate plan. Grant testified she never applied for health coverage. Thus, the employees did not effectively testify that they were denied health benefits under the contract. Further, the employees would not necessarily know whether their employer made welfare contributions on their behalf.

understood to be employed by Respondent County. Server Michelle Bellemy testified that she has been employed at the Esplanade Hotel for five years and only understood Respondent County to be the payroll company that prepared employee paychecks. Deannie "Joy" Duncanson[13] testified that she was employed at the facility from 1994 to December 4, 2016 and only knew Respondent County as the name on the paychecks. Like Capelli, neither Bellemy nor Duncanson met anyone they understood to be employed by Respondent County.

According to Levitt, certain employees were considered "union" while other employees in the same classifications were not. Levitt claimed that Singer kept a list of the employees who were not represented by the Union. No such list was entered into evidence and Singer did not testify. However, Levitt identified 10 employees she thought were not represented by the Union. Levitt also testified that she exercised discretion in giving such nonunion employees annual wage increases, which were inconsistent with and, in fact, higher than the contractual wage increases received by unit employees. However, as noted above, 2016 payroll records reflect that all employees received wage increases consistent with the contract.

In support of the proposition that some unit employees were "nonunion," Respondent West End notes that certain employees did not have union dues deducted from their paychecks (as reflected in the payroll records).

Duncanson testified that she was one of three "leads" in the kitchen (along with Mike Whyte and Terrell Brannon). Certain employees testified that they understood Duncanson to be the kitchen manager or supervisor. Bannon, in his resume, described himself as a supervisor. Levitt testified that Duncanson was the director of food service and Whyte/Bannon were supervisors. However, when asked whether Whyte reported to Duncanson, Levitt said they "worked in conjunction with each other." (Tr. 232) According to Levitt, Duncanson hired employees, directed them to do tasks, and worked with her (Levitt) to create menus for residents' meals. Levitt testified that Duncanson, like other department heads, had authority to discipline employees (but could not recall an instance when she did so). Levitt also testified that Duncanson's resume, which was submitted to Respondents West End, was generally accurate in its description of her duties. Duncanson's resume described her experience at the Esplanade Hotel as follows (GC 21):

> **Esplanade Luxury Senior Residences, New York, NY** January 2000-Present
> Director of Food Services
> - Manage a staff of thirty and the general operations of the kitchen including shift schedules and billing.
> - Create a premium service experience for seniors.
> - Responsible for the creating and executing four-cycle balanced menus.
> - Manage kitchen inventory including the ordering of groceries, produce, meats, and fish that meet Kosher standards.
>
> **Esplanade Luxury Senior Residences, New York, NY** April 1998—December 1999
> Dining Room/Kitchen Supervisor
> - Recorded senior attendance at every meal.
> - Created schedules for servers, cooks, and utility.
> - Ordered inventory including bread, ice cream, milk, and other beverages.

[13] As discussed below, Duncanson's job title is disputed.

Esplanade Luxury Senior Residences, New York, NY October 1994-March 1998
Server

- Served seniors by taking food orders while clearing and resetting dining room when appropriate.

Duncanson claimed that she identified herself on her resume as the director of food services because "that's the position I was hoping to get with the new company." (Tr. 140) Duncanson denied she hired/fired employees or directed employees to do tasks. However, Campbell, a server/assistant chef, credibly testified that he was interviewed by Duncanson, merely introduced to Levitt the same day, and later notified by Duncanson that he was hired.

Duncanson denied she scheduled employees or ordered inventory. According to Duncanson, Whyte did the scheduling and Whyte/Brannon did the ordering. Duncanson testified that she was only a lead to the extent she created menus with Levitt and "managed kitchen inventory." Otherwise, Duncanson claimed she spent her time cooking, waiting tables, and washing dishes.

When owned by the Scharf family, the Esplanade Hotel was not a licensed assisted living facility regulated by the New York Department of Health (NY DOH). Medical personnel were not employed at the facility and medical care was not administered to the residents.

The Sale of the Facility and the Hiring Process

In about June, Scharf told Hickey the facility was going to be sold. Hickey notified Union counsel. On June 17, Union counsel emailed Scharf a proposal for a modified collective-bargaining agreement which identified "Northwind Group" as a successor employer. The Union proposal provided for the successor to recognize the Union as the bargaining representative of unit employees and abide by the terms of the contract. Union representatives later met with Scharf, Ran Eliasaf (identified by Hickey as the prospective buyer), and their attorney to discuss the proposed contract modification. The parties subsequently corresponded regarding the matter, but never signed an agreement for the buyer to recognize the Union and/or assume the contract. The sale was ultimately scheduled to close and take effect on December 5.

In about October, Respondent Ultimate designated regional executive director Faraz Kayani as the manager who would lead the operational transition during the sale.

In October, flyers were distributed at the facility which notified employees that they could interview for jobs with the new owner on October 27. Hardy notified Hickey of the flyers.

On October 26, Hickey visited the Esplanade Hotel. While there, Hickey held a meeting with about 30-35 unit employees and advised them to apply for employment with the buyer. A nonunit recreation employee attended the meeting and asked Hickey how recreation aides could "get in the Union." Hickey told the employee that recreation was not covered by the collective-bargaining agreement. According to Hickey, he was unaware, until October 26, that Respondents Esplanade employed recreation employees. Hickey did not consider whether the recreation employees might be covered by the wall-to-wall unit description in the contract.

On October 27, Union counsel emailed Scharf a letter requesting the following information (GC Exh. 9):

1. The identity of any purchaser or prospective purchaser including corporate name and contact information;

2. A copy of any purchase and sale documents including, but not limited to, Letters of Intent, Sales Agreements, Asset Purchase Agreements or Acquisition Agreements between any purchaser or prospective purchaser and Esplanade;

3. Any communications between Esplanade and any purchaser or prospective purchaser relating to the existing Collective Bargaining Agreement with Local 2013;

4. Any other documents which refer or relate to the sale of Esplanade's business assets or plans to convey such assets to 305 LLC or any other entity; and

5. Any communications or documents referring or relating to Esplanade's compliance with Article 31 the Parties' Collective Bargaining Agreement.

Union counsel explained in this letter that the Union was aware of the pending sale of Respondent Esplanade to Respondent West End and needed the information to monitor compliance with the collective-bargaining agreement, particularly Article 31 regarding successors and assigns.

On October 27, Union counsel also sent a letter to prospective buyers Eliasaf and Jan Burman, which stated as follows (GC Exh. 10):

> As you are aware, UFCW Local 2013 is the certified Collective Bargaining representative of employees working for the Esplanade Hotel ("Esplanade") and is party to a Collective Bargaining Agreement ("CBA") with that Company. We have been advised that 305 West End Avenue Operating LLC ("305 LLC") is acquiring the Esplanade and intends to operate the facility. We are in receipt of a notice which states that 305 LLC is interviewing for positions at the Esplanade. Please be advised that Local 2013 anticipates and expects that 305 LLC will assume the existing CBA and retain all bargaining unit employees in their current positions. All current employees want to continue their employment at the Esplanade. Be advised that we will take all necessary actions to ensure the rights of our members to their current positions.

On October 27, Respondents West End conducted interviews of Esplanade Hotel employees who applied for continued employment. Baldoquin went to the facility that day. While at the facility, Baldoquin approached a man who seemed to be in charge and asked whether he was "aware that this is [a] union shop?" The man answered, "to his knowledge, this wasn't going to be a union shop and that they had to reapply." (Tr. 327-329) Baldoquin did not attempt to determine this man's name and was not asked, at trial, to describe his appearance.

In addition to the interviews conducted on October 27, on November 18, Respondents West End held a job fair at a Marriot hotel which was attended by employee applicants who were, for whatever reason, not interviewed on October 27 and other applicants who were not previously employed at the Esplanade Hotel. Although outside applicants were interviewed,

Kayani testified that Respondents West End wanted to retain as many Esplanade Hotel employees as possible because current employees would require less training and it would be costly and time consuming to replace them.

Erik Anderson, Respondent Ultimate's vice present of human resources, helped organize and coordinate the interview process. However, he only interviewed a few applicants himself when the primary interviewers were occupied. The interviews were largely conducted by regional managers of Respondent Ultimate, including Kayani; Susan Murphy, regional director of dining services (front of the house dining as opposed to the kitchen); Paul Senken, regional director of food and beverage services; Randy Tremble, vice president of food and beverage services; Clement Walsh, regional director of housekeeping; Brian White, vice president of environmental services; and Richard Youngberg, regional director of operations. Applicants were generally interviewed by the manager who would be responsible for the department in which the applicant was seeking a job. However, Kayani interviewed applicants for all departments. Levitt was not involved in the hiring of employees. Some applicants were interviewed more than once and some were interviewed by more than one manager at a time.

The interviews generally lasted anywhere from 5 to 15 minutes. However, Murphy testified that she spent more time than that with the applicants.

According to Anderson, interviewers looked for applicants with "inner qualities" or "core values," which would allow the company to provide excellent customer service and succeed in a "relationship business." (Tr. 504) Thus, Respondents West End wanted employees with an engaging personality and attitude, good work ethic, and a commitment to team work. Anderson testified that an applicant's skills and technical abilities were valued, but noted that such skills/abilities could be taught. Anderson believed inner qualities and core values were more difficult to teach and a priority in selecting employees. Moreover, Anderson testified that a significant percentage of the staff of the Esplanade Hotel were unskilled employees (e.g., porters and housekeepers) who could be trained.

Tremble largely echoed Anderson's testimony to the extent he believed personality and attitude were most important for "front of the house" staff who are easily trained and have regular interaction with residents. However, according Tremble, "back of the house" employees, such as cooks, who do not have as much contact with residents and are more skilled, need to demonstrate experience and skill before being hired. Similarly, White testified that maintenance engineers need to come with prior knowledge, skills, and experience.

Respondents West End was not given access by Respondents Esplanade to employee personnel files. Tremble noted that interviewers do not normally have access to personnel files when hiring employees in situations that do not involve the sale of a business. Tremble further testified that employees were being interviewed "without prejudice." Senken testified that he did not believe personnel files would be especially helpful as documents contained therein largely reflect the subjective opinions of supervisors.

Upon cross-examination by Union counsel, Anderson testified that he did not know whether the interviewers checked references of newly hired employees who had not previously worked at the Esplanade Hotel. Anderson testified that, ideally in a normal situation, it is good practice to check the references of applicants if time allows. Anderson asserted, however, that references are rarely reliable and this was not a normal situation. Other than Anderson, none of the managers who conducted interviews were examined about whether they checked applicant references.

According to Anderson, interviewers had no prior experience conducting interviews in a union environment. Therefore, he included the following directive among instructions to interviewers in advance of the interviews (R Exh. 24):

- All interviewing must be done without ANY regard whatsoever to any individuals' union or non-union status.
- There must be no discussion in any manner of "union" topics.

Respondent Ultimate's human resource department provided the interview team with "Applicant Evaluation" forms. These applicant evaluations contained a rating matrix with a list of categories for job qualifications, and boxes next to each category to be checked with a rating of poor, fair, average, good, or excellent. Interviewers testified that they only used the applicant evaluations as a tool to the extent it was useful and did not necessarily complete the form for every applicant. Tremble testified that it was typical to hire applicants with ratings of "average" because "average is decent." (Tr. 573)

Kayani testified that he did not need approval from anyone to hire an applicant as he was the person who was ultimately responsible for hiring decisions. If Kayani "decided to hire someone, there was no other discussion." (Tr. 434) Kayani further testified that other interviewers were also high ranking regional managers who largely had authority to hire employees without approval. By contrast, Anderson testified that the interviewers made hiring decisions which were reviewed by Respondent Ultimate vice president of operations Maryellen McKeon. However, Anderson admitted that all the recommendations of the interview team were approved by McKeon.

The New York Displaced Building Service Workers Protection Act (DBSWPA), N.Y.C. Admin. Code § 22-505, requires covered employers to retain certain "building service employees" (BSE) following the sale of a business. This city ordinance identifies BSEs as, excluding supervisors, those who earn less than $35 per hour and are engaged in the care or maintenance of a building. DBSWPA limits the ability of an employer to sever BSEs as follows:

> 2. Upon termination of a building service contract, any covered employer or the successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, shall retain those building service employees employed at the buildings covered by the terminated contract for a 90-day transition employment period.
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> 3. If at any time the covered employer or successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, determines that fewer building service employees are required to perform building services at the affected buildings than had been performing such services by the former building service contractor, the covered employer or the successor building service contractor shall retain the building service employees by seniority within job classification; provided, that during the 90-day transition period, the covered employer or successor building service contractor shall maintain a preferential hiring list of those building service employees not retained at the buildings who shall be given a right of first refusal to any jobs within their classifications that become available during that period.

> 4. Except as provided in paragraph 3 of this subdivision, during the 90-day transition period, the covered employer or successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, shall not discharge without cause a building service employee retained pursuant to this section.
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> 5. At the end of the 90-day transition period, the covered employer or successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, shall perform a written performance evaluation for each building service employee retained pursuant to this section. If such employee's performance during such 90-day transition period is satisfactory, the covered employer or successor building service contractor shall offer such employee continued employment under the terms and conditions established by the covered employer or successor building service contractor.

Respondents West End interpreted this ordinance to require the retention for 90 days of certain BSEs employed at the Esplanade Hotel, including housekeepers, porters, laundry assistants, and maintenance engineers. Walsh testified that he was responsible for hiring the housekeepers and porters. According to Walsh, in December, he made determinations whether to hire housekeepers and porters even though they had to be retained until March 5, 2017 as a matter of law. Walsh claimed he did not know until after the interview process was over that BSEs had to be retained for 90 days. However, Kayani testified that BSEs were identified before December 5, and no determination was made in December whether to retain them beyond the mandatory 90-day period. Rather, according to Kayani, BSEs were given the same training and opportunity for continued employment as other employees and, like other employees, Respondents West End preferred to retain them if possible instead of replacing them.

Respondents West End has identified 15 predecessor employees who were retained in what it understood to be BSE classifications (7 housekeepers, 3 porters, 1 laundry assistant, 4 maintenance assistants).

On December 2, McKeon sent an email to Respondent West End owner Steven Krieger with an attachment purporting to list the names of 29 former employees who were not being hired. Of those employees, 18 employees (16 kitchen and 2 front desk) were identified as non-BSEs and 11 employees (7 housekeeping and 4 porters) were identified as BSEs. McKeon was not called to testify at trial.

The following alleged discriminatees were not hired by Respondents West End:[14]

Last Name	**First Name**	**Department**	**Job Title**[15]
Brannon	Terrel	Kitchen	

[14] Of these employees, Cabness and Roberts were not among the employees identified in McKeon's December 2 email as employees who would not be hired.

[15] The record does not clearly indicate the job title of certain alleged discriminatees, including Brannon (whose title is disputed).

Cabness	Anthony	Kitchen	Waitstaff Server
Colon	Augstina	Kitchen	Waitstaff Server
Dalmage	Davian	Kitchen	Waitstaff Server
Dejesus	Dora Y.	Kitchen	
Duncanson	Deannie	Kitchen	
Hardy	Trinidad	Front Desk	Front Desk Concierge
James	Lisa	Kitchen	Waitstaff Server
Jerome	Henry	Kitchen	Waitsfaff Server
Joseph	Lynda	Kitchen	
Mullen	Virginia	Front Desk	Front Desk Concierge
Roberts	Kimeyetta	Kitchen	
Smith	Astley	Kitchen	Waitstaff Server
Terrier	Laurent	Kitchen	Chef
Weber	Denis	Kitchen	Waitstaff Server

Certain employees of Respondents Esplanade who were not hired by Respondents West End, including Hardy, signed releases in exchange for monetary compensation. These agreements indicate that the employee "release(s) County Agency. Inc. and Esplanade Venture Partnership and their respective affiliates, successors and assigns, from all claims, whether known or unknown, arising from or in connection with the . . . National Labor Relations Act;. . ." The release agreements further state:

> Nothing in this Release shall be construed so as to prohibit me from filing a charge with, or participating in any investigation or proceeding conducted by a local, state, or federal agency, including but not limited to the EEOC. This Release shall, however, prohibit me from recovering any individual relief, compensation, or damages in any such charge, complaint, or claim filed by anyone.

Youngberg interviewed front desk concierge employees, including Hardy. According to Youngberg, Hardy "came in with a look of anger and disgust that we were even going through this process. Just a body language, angry face." (Tr. 756) Youngberg testified that Hardy was not hired "because we are a business of attitude, customer service, professionalism, and if my loved one was moving into one of our communities, I would truly want someone that would greet me in a professional, positive attitude." (Tr. 757) However, Youngberg completed an applicant evaluation that graded Hardy as "excellent" (the highest grade) in the categories of "guest service & hospitality personality" and "enthusiasm."[16] Youngberg admitted that these categories would encompass customer service, and a rating of "excellent" in those categories would not normally be consistent with someone who showed "anger and disgust" during the interview. Youngberg offered no explanation for this discrepancy between his testimony and the applicant evaluation he completed for Hardy.

Tremble interviewed Duncanson and decided not to hire her. According to Tremble, he did not hire her because she was in charge of an area that appeared to be in particularly poor

[16] Youngberg graded Hardy as "good" in all other categories except flexibility (which was rated "average"). Youngberg did not explain why Hardy was only rated "average" in flexibility.

condition. Tremble also noted that Duncanson did not have experience with formal dining.[17] Tremble testified that Duncanson said during the interview she could do things other than manage, but did not indicate she would accept a lower position than the one she currently held.

Other than Hardy and Duncanson, the alleged discriminatees largely received ratings on their applicant evaluations of "average" or worse (to the extent an applicant evaluation was completed and entered into evidence). Only three of the alleged discriminatees (Brannon, Terrier, and Dejus) received ratings of "good" in any category. Brannon received ratings of "good" in the categories of "appearance/presentation" and "communication skills," but "poor" in "enthusiasm" and "fair" in "team building." His overall assessment was "fair." Terrier received a rating of "good" in "guest service & hospitality personality," but was not graded in any other category. Dora Dejesus received a rating of good in "enthusiasm," but "poor" in "team building" and "initiative." Her overall rating was "fair."

Server Barbarba Nichols, a server of Respondents Esplanade who was hired by Respondents West End, received ratings of "average" in all categories.

Among the new employees who were hired even though they did not previously work at the Esplanade Hotel, three were referenced in the General Counsel's brief in connection with an argument of disparate treatment: Cook Jose Cabrera, server Deandra Williams, and utility aide/dishwasher Augustine Batista. On his applicant evaluation, Cabrera received ratings of "good" in six categories. Two additional categories were checked "average," but with an arrow pointing toward the box for "good." One category, "appearance/presentation," was clearly checked "average." Williams received ratings of "good" in seven categories, and "average" in two categories ("initiative" and "time management"). Batista received ratings of "average" in five categories, and "fair" in one category ("communication skills"). Batista was not rated in three categories.

Respondents West End believed the Esplanade Hotel had been overstaffed at the front desk and in the food and beverage department (i.e., the kitchen and waitstaff). Respondents West End maintained the engineering staff in full as, according to White, the existing staff fit the needs of the new employer.

The interviewers generally testified that they understood the old Esplanade Hotel staff to include union and nonunion employees, but claimed that hiring decisions were not made on the basis of union affiliation. Respondent Ultimate does not manage other unionized facilities.

Post–Sale

Respondent Ultimate took over the management of the facility following the sale. Initially, Respondent Ultimate's regional managers maintained a near daily presence at the facility to train employees and bring the new operation up to desired standards. Although these managers stopped coming as often once the operation stabilized, they maintained responsibility for the facility and continued to visit on a less frequent basis. Among their responsibilities, regional managers were involved in disciplinary and discharge determinations.

[17] Like Hardy, Duncanson was rated "excellent" in the categories of "guest service & hospitality personality" and "enthusiasm," and "good" in all other categories except "flexibility" (which was rated "average").

The General Counsel asserts that Respondents West End initially hired 44 employees in unit classifications and, of those, 36 were former employees of the predecessor. My count reflected the same results.[18] Respondents West End also hired five nonunit recreation employees who were previously employed by the predecessor.

Respondents West End identified 15 predecessor employees it hired as individuals, whom it believed, were not dues paying members of the Union. Those 15 employees included the five nonunit recreational employees.[19]

Scharf, Levitt, and Singer maintained a presence at the facility after the sale. Levitt was initially retained as the executive director without an adjustment in salary, but was later transferred to the position of director of resident relations. Scharf has maintained an office at the facility, but it is not clear what type of work he has done after the sale. Singer continued as controller until about April 2017, when he separated.

According to Levitt, residents of the building were not affected by the sale and "there was a complete continuity of services." (Tr. 207) Residents continued to receive three meals a day, housekeeping services, laundry services, concierge services, recreation, and entertainment. Levitt also testified that she was unaware of any change in employees' job duties.

On December 20, Kayani sent the following email to managers/superisors, including Tremble, Murphy, Walsh, Levitt, O'Connell, and Brown (GC Exh. 34):

> Please make sure ANY and ALL new hires go through me including those that will go into the kitchen/dining. This means that I meet them, even if it is for 5-minutes. I also would like their new hire packet completed given to me, hand delivered OR if I am NOT in the Community; scanned over to Maria and myself
>
> including Eli. And this should be done BEFORE they start not after. (original packet left for me to collect. I will review and FedEx over to Bohemia).

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[18] This count includes predecessor employees hired on December 5 and new employees hired no later than December 8 (the first pay day). (GC Exh. 32) Respondent West End asserted in its brief that 46 non-supervisory/non-recreation positions (i.e., unit classifications) were initially filled. This number seems to include Mike Whyte (listed on GC Exhibit 32 as hired and terminated December 5) and Tyler Bogen (listed on GC Exhibit 32 as hired July 12). However, GC Exhibit 32 is some sort of chart and does not appear to be actual payroll records. Whyte does not appear on the payroll as having worked for Respondents West End and Bogen does not appear on the payroll until January 2017. (GC 18) Thus, I have not included Whyte or Bogen among the initial complement. Attached to this decision is a list of personnel hired by Respondents West End with references to employees' positions, hire dates, separation dates, and BSE status (according to Respondent West End).

[19] Throughout the trial, the General Counsel and Union objected to the introduction of evidence regarding dues paid by employees and/or their status as Union members. I largely sustained these objections to the extent Respondents West End was not merely attempting to establish its awareness and understanding of the same. The General Counsel has not contended that Respondents West End discriminated against employees on the basis of their respective Union membership. Rather, the General Counsel alleges that Respondents West End failed to hire predecessor employees to avoid successorship.

> Same goes for termination - If someone resigns that is a different story, but if someone will be terminated, I MUST be notified immediately and it must be done in my presence. After the termination the respective Department head MUST complete a West End Termination Form and hand deliver it to me or SCAN if over to Maria, Eli and myself. (original one to be given to me when I am in the building and I will get that to Bohemia).
>
> I understand we have a lot going on but at the same time, inconsistencies in these areas can and will lead to potential payroll errors that we do not want. Therefore, I want everyone to take this very seriously.

It was the intent of Respondents West End to operate the Esplanade Hotel as a high end assisted living facility with appropriate certification from the NY DOH and high-level services/amenities. Levitt testified that an assisted living facility has certified home-health attendants and a round-the-clock nursing staff who keep medical records for each resident and monitor their medication. Kayani testified that an assisted living facility needs to monitor health care providers entering the building by having them sign in/out and ensuring, through a background check, that they are properly licensed. According to Kayani, an assisted living facility must also monitor and comply with the dietary restrictions of residents while an independent living facility does not. Kayani further testified that, in an assisted living facility, even nonmedical employees need to be aware of and ready to report potential medical problems of residents. As an example, Kayani said a porter should report blood in the toilet after seeing a resident exit the bathroom. According to Levitt, the primary difference between an assisted and independent living facility is that the former provides medical services and the latter does not.[20] As of the trial, Respondents West End had not begun providing medical services to residents or medical training to staff members.

Several managers of Respondents West End testified that the condition of the Esplanade Hotel prior to the sale was deplorable, particularly the kitchen, dining room, and employee lounge. Anderson testified that the administrative records were also extremely disorganized. The General Counsel did not attempt to rebut this characterization of the facility.

As of the trial, Respondents West End were in the process of renovating the building and applying for a license from the NY DOH to operate as an assisted living facility. Renovations were scheduled to occur in two phases with phase 1 being renovations from the basement to the seventh floor and phase 2 being renovations from the eighth floor to the roof. These renovations started in the basement in about the spring of 2017. Kayani estimated that Phase 1 is about 35-40% done and would be finished in about 5 or 6 months. Phase 2 was expected to begin in January 2019 and, according to Kayani, the entire process could take 2 years.

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[20] Although the record contains testimony regarding NY DOH licensing requirements for the medical care of residents in assisted living facilities, Respondent West End did not specifically cite to state law or regulations regarding the same. I take administrative notice that the NY DOH website, under "Adult Care Facilities/Assisted Living," states that "Adult Care Facilities (ACF) provide long-term, non-medical residential services to adults who are substantially unable to live independently due to physical, mental, or other limitations associated with age or other factors. Residents must not require the continual medical or nursing services provided in acute care hospitals, in-patient psychiatric facilities, skilled nursing homes, or other health related facilities, as Adult Care Facilities are not licensed to provide for such nursing or medical care." https://www.health.ny.gov/facilities/adult_care/. Legal information regarding what assisted living facilities can and cannot do may be found in the New York public health law and applicable rules and regulations. NY Pub Health L § 4651*2; 10 CRR-NY 1001.

Kayani represented that he expected the NY DOH to grant the facility a license on a rolling floor-by-floor basis as renovations progressed. Kayani testified (on April 4, 2018) that construction on the seventh floor is complete and he hoped to receive a license for assisted living on that floor within the month. However, the record closed on May 31, 2018 and contains no evidence that the facility has been licensed in whole or in part for assisted living.

The record is largely silent with regard to the size and composition of the medical staff Respondents West End intends to employ once the facility is licensed for assisted living. Kayani testified that a registered nurse (RN) has been retained with the hope that the facility would be licensed for assisted living on the seventh floor by the end of April 2018. This RN would not actually start work until the facility received a license to operate on at least one floor. The record contains no evidence that the RN has started working.

Respondents West End presented evidence of changes it has or plans to implement following the sale. Front desk employees were provided with uniforms and reduced in number from a maximum of three per shift to a maximum of two per shift. The waitstaff employed on each shift was reduced as well. Managers described the kitchen and dining area as filthy, unorganized, and cluttered, with expired food, broken appliances, missing ceiling tiles, and missing lights. Accordingly, these areas have been cleaned, restocked, and fixed.

Kayani testified that all employees, including BSEs, were reevaluated by about April 20, 2017. However, there was no formal process for preparing written reviews during an initial probationary period. Rather, according to Kayani, written evaluations were only prepared for employees who were terminated during the probationary period. The remaining employees received standard annual evaluations at some point during the year.

Respondents West End did not, on March 5, 2017, 90 days after the sale, discharge the nine BSEs who remained after being identified in the attachment to McKeon's December 2 email as employees who would not be hired.[21] As of March 6, 2017, Respondents West End employed 55 employees in unit classifications. Of those employees, 31 were still incumbent employees who worked at the Esplanade Hotel prior to the sale.

Seven BSEs were terminated on March 23 or 24, 2017. Two of the BSEs allegedly designated for termination on the December 2 list were, nonetheless, retained indefinitely. Kayani testified that these two BSE porters were retained because they, like other employees who were not discharged, demonstrated competence during the first 90 days of their employment. Walsh testified that BSEs who were terminated had problems with attendance and taking direction. Respondents West End replaced all of the BSEs who separated (either by resignation or termination). By my count, once the last BSEs were terminated, new employees outnumbered predecessor employees 26 to 24.[22]

ANALYSIS AND CONCLUSIONS

[21] Two of these BSEs apparently resigned during the retention period.

[22] The General Counsel asserted that the complement was still 32 to 27 employees in favor of predecessor employees as of March 30, 2017. This count appears to be based on names in the payroll records for the payday, March 30, 2017. However, GC Exhibit 32 indicates that BSEs were discharged on March 23 and 24, 2017. It seems that these employees were paid on May 30, 2017 even though they were no longer employed as of that date.

I. Joint Employers

Respondents Esplanade

The General Counsel contends that Respondent Esplanade and Respondent County are joint employers. I agree.

Under the current standard, "(t)he Board may find that two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) quoting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982). "(T)he question is whether one statutory employer 'possesse(s) sufficient control over the work of the employees to qualify as a joint employer with' another employer." *Id.* quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

It is uncontested that Respondent Esplanade was owned and operated by the Scharf family. Scharf and Singer negotiated the most recent collective-bargaining agreement, which was a comprehensive contract that governed unit employees' terms and conditions of employment. Scharf signed the contract as a representative of "County Agency Esplanade." Shortly thereafter, in settling a grievance regarding paid leave, Singer indicated that the Union's offer was "agreeable to the Esplanade and County Agency." Thus, Scharf and Singer appeared to be acting on behalf of two employers, Respondent Esplanade and Respondent County. As Respondent County admits that it employed unit employees and the record demonstrates that Respondent Esplanade codetermined the essential terms and conditions of employment of those employees, I find that Respondents Esplanade are joint employers.

Levitt's conclusory testimony that "we all worked for (Respondent) County" was neither credible nor convincing. Rank-and-file employees were called by both sides to testify and none indicated they understood anyone at the Esplanade Hotel to be employed by Respondent County. Rather, employees testified that they understood the employer to be the Esplanade Hotel as owned by the Scharf family.

Respondents West End

The General Counsel contends that Respondent West End and Respondent Ultimate are joint employers. Once again, I agree.

Respondent Ultimate's regional managers hired the initial complement of employees, and continued to visit and maintain authority over the facility after the sale. Thus, regional managers have remained involved in employee discipline. On December 20, Kayani sent an email to managers (including regional managers Tremble, Murphy, and Walsh) indicating that he (Kayani) must approve any subsequent hires and terminations. Although the record is not entirely clear on the point, it stands to reason that Respondent Ultimate managers responsible for hiring employees also set the terms and conditions of their employment. Certainly, no evidence was introduced to the contrary. Accordingly, I find that Respondents West End codetermined the essential terms and conditions of employment of unit employees, and are joint employers.

II. Successor Analysis

Respondents West End as a Successor of Respondents Esplanade

The General Counsel contends that Respondents West End is a successor of Respondents Esplanade. I agree.

A successor employer has a duty to recognize and bargain with an incumbent union when, after assuming the business of a predecessor, it maintains a continuity of the enterprise and a continuity of the work force with the presumption of majority support in an appropriate unit. *N.L.R.B v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987). Respondent West End contests the continuity of the enterprise, the continuity of the work force, and the appropriateness of the unit. In contesting the unit, Respondent West End contends that Respondents Esplanade and the Union maintained a members-only arrangement whereby only dues paying Union members received wages and benefits pursuant to the contract.

Unit

The Board has held that an incumbent union will not retain a presumption of majority support within a unit if the unit lacked clarity or the parties administered their contract on a members-only basis. *Arthur Sarnow Candy Co.*, *Inc.*, 306 NLRB 213 (1992); *Brower's Moving & Storage*, 297 NLRB 207, 208 (1989); *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645 (1968). In *Browser's Moving & Storage*, 297 NLRB at 208, the Board stated as follows:

> [I]t is well established in Board law that an incumbent union generally enjoys a presumption of continued majority status during the term of a collective-bargaining agreement. In *Ace-Doran Hauling & Rigging Co*., supra, the Board found a narrow exception to that general rule when two factors undermined the validity of the contract and the presumption of majority status. First, the Board found that the unit was not defined with sufficient clarity "to warrant a finding that the contracts are ones to which a presumption of majority status can attach." (Id. at 645) Second, the Board found that both parties' practice under the agreements showed that the parties did not intend them to be effective collective-bargaining agreements, but merely arrangements to check off dues and to procure benefits for union members only. (Id. at 646) Similarly, in *Bender Ship Repair Co*., (188 NLRB 615, 615 (1971)), the Board found a "patent ambiguity" in the contractual unit definition and that the union acquiesced in the application of the contract to only a few favored employees. (Id. at 616)

Here, Levitt testified that she gave higher raises than the contract required to employees who were considered nonunion. However, Levitt was not a credible witness and I do not rely on her testimony in the absence of documents to substantiate her claim that the contract was not applied to certain employees. The best evidence would be payroll records and other documents showing the receipt of wages and benefits by employees. See *Electronic Data Systems International Corporation*, 278 NLRB 125 (1986). Contrary to Levitt's self-serving testimony, the

2016 payroll records show that employees received wage increases of $0.40 per hour and premium pay consistent with the contract.[23]

At most, Respondent West End has arguably demonstrated that the Union did not enforce the union security clause with respect to certain employees who were not paying dues. I make no factual finding in this regard as, even if true, it is not controlling of the legal issue. The Union's alleged failure to demand the discharge of employees pursuant to the union security clause does not mean those employees were denied representation or that the presumption of their support for the Union should not apply. As noted above, the credible evidence indicates that employees were covered by the collective-bargaining agreement and paid accordingly. In fact, the employees' receipt of contractual pay without incurring the cost of bargaining would arguably make the Union more attractive rather than less. See *Pacific Coast Supply, LLC*, 360 NLRB 538, 545, fn.11 (2014) citing *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970)) (ALJ observes that, in *Terrell*, the court did not find employee nonmembership in right-to-work state suggestive of employees' disaffection from the union as employees could be content with benefits of representation without paying for them).[24] Regardless, the law provides for a presumption regarding the union support of incumbent unit employees and does not turn on or require a hearing as to their subjective feelings.

It is admittedly puzzling that the Union was not aware that recreation employees were employed at the Esplanade Hotel and failed to take the position, once it found out, that recreation employees must be included in the wall-to-wall unit. However, the contractual unit was specifically described and the Union's failure to seek the inclusion of five previously unknown recreation employees did not render the unit description ambiguous.

Based upon the foregoing, I will not apply the "narrow exception" referenced in *Ace-Doran Hauling & Rigging Co*. to find that the Union lacks majority support because the unit lacked clarity or the predecessor's contract was administered on a members-only basis.

Continuity of the Enterprise

In determining the continuity of the enterprise between predecessor and successor operations, the Board considers the following factors among the totality of the circumstances: "(1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers."[25] *Allways East Transportation, Inc.*, 365 NLRB No. 71 (May 11, 2017) citing *Fall River Dyeing*, 482 U.S. at 43. These factors

[23] Respondent West End did not indicate that it attempted, with subpoena power, to obtain records from Respondent County as would establish that employees received pay and/or benefits inconsistent with the contract.

[24] If Respondent West End's theory were adopted, nonmember employees who do not pay Union dues or financial core fees in right-to-work states would not be counted toward an incumbent union's support in a successor analysis. The Board has not adopted such an approach to continuity. See, e.g., *Empire Janitorial Sales & Service, LLC*, 364 NLR No. 138 (Nov. 3, 2016).

[25] The Supreme Court has observed that succession rests largely "in the hands of the successor" in that it must make "a conscious decision to maintain generally the business" and "take advantage of the trained work force of its predecessor." *Fall River Dyeing*, 482 U.S. at 41.

are analyzed from the perspective of unit employees and whether they "'understandably view their job situations as essentially unaltered."' Id. quoting *Golden State Bottling Co.*, 414 U.S. 168, 184 (1973). Accordingly, "the essence of successorship . . . is not premised on an identical re-creation of the predecessor's customers and business . . . ." *A.J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip. op. at 7.

Here, Respondents West End did not significantly alter the operation following the sale. According to Levitt, the existing residents experienced a "complete continuity of services," and the evidence does not indicate that the cleaning and ongoing renovation of the building had the effect of significantly changing the nature of the business. Respondents West End determined that the facility was somewhat overstaffed and reduced the number of certain employees on certain shifts, but did not change the tasks those employees performed or their working conditions. The record also indicates that Levitt, Scharf, Singer, and at least some supervisors, were retained by Respondents West End. Although certain managers and supervisors did change, the operation was not impacted in such a significant way as to undermine, from the perspective of unit employees, a continuity of the enterprise. See e.g., *Empire Janitorial Sales & Service, LLC*, 364 NLR No. 138 (Nov. 3, 2016).

Respondents West End contend that certain changes were planned and would take effect once the Esplanade Hotel transitioned to an assisted living facility. However, Respondents West End acquired the property on December 5 and had not received a license, in whole or in part, up to and through the litigation of this matter, 16 months later. I do not rely on Kayani's self-serving testimony that at least one floor was going to be licensed by the end of the month since the trial continued for another two months without evidence of the same. The record indicates that Respondents West End has done no training of employees with regard to the provision of medical services and the record does not contain significant evidence as to how specific unit positions would change once the facility is licensed for assisted living.[26]

The limited evidence Respondent West End presented regarding future changes to its operation are not of a type that, even if already implemented and described in greater detail, would defeat a finding of successorship. In *Morton Development Corp.*, 299 NLRB 649 (1990), the Board rejected an employer's contention that it had no obligation to bargain with an incumbent union after closing for over 4 months in order to convert its intermediate care facility for the intellectually disabled to a skilled nursing home.[27] In so doing, the Board found the new operation "sufficiently similar to its old business" to sustain a continuity of its bargaining obligation even though it changed its mission and customers, made some physical changes to the facility, sold/purchased certain equipment, and increased its medical services. Id. See also *Empire Janitorial Sales & Service, LLC*, 364 NLR No. 138 (Nov. 3, 2016). The Board, in *Morton Development*, 299 NLRB at 651, noted in part, as follows:

> [T]here were minor changes in the way the service and maintenance employees performed their jobs. Cooks and dietary aides now prepare more specialized

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[26] Although Respondents West End has retained one RN, the RN has not begun working and cannot be included in a non-professional unit without choosing the same in a self-determination election. The law is also unclear as to the type of medical services an assisted living facility may provide.

[27] *Morton Development* was not a successor case in the since that the putative successor was the same corporate entity as the predecessor. The Board "recognized, however, the usefulness of the factors applied in making successorship determinations" and relied on Board successor cases in conducting a continuity analysis. 299 NLRB at 650.

> foods and trays for the elderly residents; the housekeeping aides work around medical equipment and may work around residents who cannot be moved; and the laundry aides actually launder washables rather than showing residents how to perform laundry duties. Employees who were formerly living unit aides became nurses aides and have increased nursing responsibilities. Nevertheless, they, along with activities aides, basically ***652** remain responsible for assisting residents in their daily routine. The current residents are, however, more frail and less mobile than the former residents and can spend only a small part of their time in programmed activities. Maintenance employees now encounter fewer problems with equipment and furniture that has been damaged by residents. Nonetheless, upon the Respondent's reopening, as the judge originally observed, cooks still cooked, maintenance persons still repaired, and aides still aided residents.

Respondents West End does not purport to be planning more extensive changes to the operation than the changes implemented in *Morton*, and I find that Respondents West End maintained a continuity of the enterprise with its predecessor.

Continuity of the Work Force

A successor will be found to have maintained a continuity of the predecessor's work force and will be presumed to have majority support among unit employees if, upon hiring a "substantial and representative complement" or "full complement" of employees, a majority were employed by the predecessor in an appropriate unit. *N.L.R.B v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987). This is because Board policy presumes the employees of a unionized employer will continue to support the union after a new employer takes over, and generally requires the successor employer to recognize the union if a majority of its work force were employed by the predecessor in an appropriate unit. *Fall River Dyeing*, 427 U.S. at 40; *Labor Plus, LLC*, 366 NLRB No. 109 (June 14, 2018). The Supreme Court explained in *Fall River Dyeing*, 482 U.S. at 39-40, the importance of presumptions in the context of successorship as follows:

> The rationale behind the presumptions is particularly pertinent in the successorship situation and so it is understandable that the Court in *Burns* referred to them. During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.
>
> The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company

> following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

In deciding when the prospective successor has hired a full complement of employees, the Board considers whether the job classifications designated for the operation were filled or substantially filled, whether the operation was in normal or substantially normal production, the size of the complement on that date, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the employer's expected expansion. *Fall River Dyeing*, 482 U.S. at 49; *Labor Plus, LLC*, 366 NLRB No. 109 (June 14, 2018).

I find that Respondents West End was a successor as of the date of the sale, December 5. Respondents West End provided "a complete continuity of services," as described by Levitt, to the same residents when it assumed control of the Esplanade Hotel. Levitt also admitted that she was unaware of any change in employees' job duties. Employees offered credible and undisputed testimony that they continued to perform the same work and provided the same services before and after the sale. Respondent West End's assertion that certain employees should be included in the complement but not counted toward the Union's majority, because they were not dues paying Union members, has no legal support and misconstrues the concept of a presumption.

Nevertheless, Respondent West End contends it could not have hired a substantial and representative complement of employees until the DBSWPA 90-day period for retaining BSEs expired. This defense fails for a number of reasons.

First, Respondents West End did not actually reduce its staff by discharging some or all of the BSEs after the required 90-day retention period. All of the BSEs who were discharged were replaced. Since the BSEs were replaced, the complement of employees was unaffected by their ultimate severance, and was full as of December 5. By December 5, Respondents West End had filled desired classifications and was operating at normal production without any disruption of residential services.

Second, Respondent West End's math is unconvincing. McKeon's December 2 email identified 11 BSEs who were, allegedly, not going to be hired. However, two of those BSEs were retained indefinitely following the 90-day retention period. Thus, at most, only nine BSEs (not 11) could arguably be excluded from the count. In its brief, Respondent West End asserts, illogically, that none of the 15 BSEs should be counted toward the Union's majority support even though six (including four not mentioned in the December 2 email) were retained indefinitely (and all were unit employees employed by the predecessor). Those six predecessor BSEs, at the very least, would be counted toward the Union's support.

Even if I were to accept as fact that Respondents West End made a pre-sale decision not to hire 11 BSEs (which, as discussed below, I do not) and assume nine new employees would have been hired in place of those who were not ultimately retained, the amended count would be 27 predecessor employees to 17 new employees – a clear union majority. The record

contains no evidence that the complement was, in any other way, as of December 5, arguably distorted by local law. The normal turnover of non-BSEs while certain BSEs were in the process of being replaced has nothing to do with the DBSWPA, and Respondents West End has no basis for opportunistically reaping the benefits of the same to deny unit employees their bargaining representative.[28]

Third, as mentioned above, the factual assertion underlying Respondent West End's defense is unsubstantiated by the credible evidence. Respondent West End asserts in its brief that "the record is undisputed that none of the housekeeping staff would have been hired if Respondent had not been obligated to hire them under the [DBSWPA]." (Resp. Brf. p. 24) This is incorrect as the factual assertion was flatly disavowed by its own witness, Kayani. Kayani testified that no determinations were made to discharge BSEs in advance of the sale and Respondents West End preferred to retain them indefinitely (like all other former employees of the predecessor). I do not rely on McKeon's December 2 email, which is hearsay, to reach a finding to the contrary. Likewise, I do not rely on the testimony of Anderson or Walsh. Kayani credibly testified that he had the final say with regard to hiring the predecessor's employees. On December 20, Kayani sent an email cautioning his managerial team to consult with him in advance of any terminations. Since Kayani had authority over the hiring and retention of BSEs, and had no plans not to hire them in advance of the sale (or even discharge them after 90 days), I reject the contention that Respondents West End would not have hired certain BSEs but for the DBSWPA.

Last, but not least, in a case directly on point, the Board rejected the argument "that the successorship determination could not be made until after the DBSWPA-mandated retention period has ended." *GVS Properties,* LLC, 362 NLRB No. 194 (Aug. 27, 2015).[29] The Board, in *GVS Properties,* observed that it "has long held that the successorship determination is not affected by the temporary or probationary status of the predecessor's employees in the successor's work force, and it has found it inappropriate to defer successorship determinations until after the completion of employer-imposed probationary periods." Id. The Board further noted that this was so even where the retention of the predecessor's employees was required for a period of time as a provision of the contract of sale. Id.

Based on the foregoing, I find that, as of December 5, Respondents West End was a successor of Respondents Esplanade.

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[28] Respondent West End is on even more dubious factual and legal grounds in asserting that five recreation employees should be counted toward the complement but not counted toward the Union's majority support. Throughout the trial, and in its brief, Respondent West End's counsel represented that recreation employees were not unit employees. It is, therefore, nonsensical to suggest that the five recreation employees should be counted toward the unit complement. Further, for the reasons described above, if recreation employees were included in the complement, as predecessor employees, they would be counted toward the Union's majority support. However, even if I we were to include the recreation employees in the unit complement and not count them as presumed Union supporters, the Union would still enjoy a majority of 27 to 22.

[29] Although Respondent West End relies heavily upon an ancillary proceeding in which a district court denied the Board's petition for 10(j) relief, *Paulsen ex rel. NLRB v. GVS Properties, LLC*, 904 F.Supp.2d 282, 292 (E.D.N.Y), the Board in *GVS Properties* expressly rejected the precedential value of that decision as it "is not binding on the Board." 362 NLRB NLBB No. 194, fn. 12. Further, although the Board's decision in *GVS Properties* was ultimately "vacated as moot" by order of the United States Court of Appeals for the District of Columbia, the circuit did not reach or address the merits of the case and, regardless, its decisions are no more controlling as precedent than those of the district court.

III. *Section 8(a)(5) and (1) – Refusal to Recognize/Bargain and Furnish Information*

1. Refusal to Recognize and Bargain with the Union

Respondent West End has denied an obligation to bargain with the Union on the grounds that (1) Respondent Ultimate was not a joint employer with Respondent West and (2) they are not, collectively, the successor of Respondents Esplanade. As discussed above, I have found that Respondent West End and Respondent Ultimate are joint employers and, collectively, a successor of Respondents Esplanade. Accordingly, I find that Respondents West End violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of unit employees.

2. Refusal to Furnish Information to the Union

The General Counsel contends that Respondents Esplanade violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information related to the sale of the facility. Respondents Esplanade did not appear at trial or file briefs in defense of this allegation. I agree that Respondents Esplanade violated the Act as alleged.

I have already determined, above, that Respondents Esplanade are joint employers and, as such, are both under an obligation to produce requested information that is relevant and necessary for the Union to perform its function as the bargaining representative of unit employees. *Branch International Services, Inc.*, 313 NLRB 1293, 1296 (1994).

The Union requested the identity of prospective purchasers of the business with contact information, a copy of any purchase documents, communication between Respondents Esplanade and purchasers as relate to the collective-bargaining agreement, and any other documents which refer or relate to the sale. This is not information that is presumptively relevant as it does not pertain to the terms and conditions of employment of unit employees. Rather, the burden of establishing relevance is on the requesting party. However, the Board has adopted a liberal discovery-type standard for information requests and the burden of showing relevance is not exceptionally heavy. *Columbia College Chicago*, 363 NLRB No. 154 (2016); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Shippers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994); *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982) enfd. 715 F.2d 473 (9th Cir. 1983).

As noted in the successor section, the sale of a business is a particularly vulnerable time for employees and their bargaining representative. Accordingly, the "Board has . . . held that where the union bargaining representative has received information that the employer may be subcontracting unit work or has or may be transferring its business to another, the union is entitled, on appropriate request, to information bearing on that issue, so that the union may properly represent the unit employees." *Washington Star Co.*, 273 NLRB 391, 396 (1984) citing *Westwood Import Co.*, 251 NLRB 1213 (1980) and *Air Express International Corp.*, 245 NLRB 478 (1979).

Here, the Union justified its information request as being necessary to monitor and enforce the contract, particularly Article 31 on successors and assigns. The information is arguably relevant to this end as it would allow the Union to identify prospective buyers, determine whether the sale agreement provides for assumption of the collective-bargaining agreement, and determine whether Respondents Esplanade notified the purchaser of the

collective-bargaining agreement (as required by Article 31). An employer might assert that the requested information is overly broad and contains confidential information. However, "(i)t is well established that an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Columbia College Chicago*, 363 NLRB No. 154 (2016) quoting *National Steel Corp.*, 335 NLRB 747, 748 (2001). Further, the party asserting a confidentiality claim has the burden of proving it and proposing an accommodation such as redactions. *Washington Gas Light Co.*, 273 NLRB 116 (1984); *United States Postal Service*, 364 NLRB No. 27 (2016). Respondents Esplanade did not contend that the Union's information request was overbroad or encompassed confidential information.

Based on the foregoing, I find that Respondents Esplanade violated Section 8(a)(5) and (1) of the Act by refusing to furnish information requested by the Union on October 27.

IV. ***Section 8(a)(3) and (1) – Refusal to Hire***

The General Counsel contends that Respondents West End refused to hire 15 of the predecessor's employees in violation of 8(a)(3) of the Act. I find, herein, that Respondents West End unlawfully refused to hire steward Trinidad, but will dismiss the remainder of the refusal-to-hire allegations.

In successor situations, the Board does not apply the *FES*, 331 NLRB 9 (2000) refusal-to-hire analyses to the extent it requires proof that the employer was actually hiring at the time of the alleged unlawful conduct and the applicant had relevant experience or training for the position. *Planned Building Services,* 347 NLRB 670 (2006). Rather, it is presumed that the successor is hiring positions previously filled by predecessor employees and that the predecessor employees are qualified to continue in those positions. Id. Accordingly, consistent with *Wright Line*, 251 NLRB 1083 (1980), to establish "a violation of Section 8(a)(3) and (1) in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus." Id. The Board has held that such proof includes the following:

> [S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

Id. at 673 citing *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), enfd en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden shifts to the employer to prove it would not have hired the predecessor's employees even in the absence of its unlawful motive. Id. at 674.

The parties have presented specific arguments with regarding to employees Hardy and Duncanson, and I will address them before moving on to an analysis of the alleged discriminatees as a group.

Trinidad Hardy

Respondents West End was admittedly aware that Hardy was the shop steward. Further, through Scharf, Singer, and Levitt, who were retained by Respondents West End following the sale, Respondents West End would have known that Hardy was one of the negotiators who represented the Union in negotiations for the most recent collective-bargaining agreement.

Evidence of Union animus consists largely of a discrepancy between the favorable applicant evaluation Hardy received from Youngberg and Youngberg's inexplicable testimony to the contrary. Youngberg testified that Hardy "came in with a look of anger and disgust that we were even going through this process. Just a body language, angry face." However, Youngberg graded Hardy "excellent" in categories of "guest service & hospitality personality" and "enthusiasm." Youngblood admitted that such ratings would not normally be given to an employee who looked angry and disgusted. I do not find Youngberg credible. Rather, I find his explanation for the refusal to hire Hardy blatantly pretextual.

The decision not to hire Hardy is particularly surprising since Respondents West End admitted a preference for hiring applicants who presented well in attitude, personality, and enthusiasm. Although perhaps somewhat a comparison of apples and oranges, it is noteworthy that Respondents West End hired several servers even though they had consistently "average" ratings in multiple categories, including the categories of personality and enthusiasm. Tremble testified that an applicant's personality was particularly important for front of the house servers because they have significant interaction with residents. One would expect it to be equally important for a front desk concierge employee, such as Hardy, to display an engaging personality as she too had significant interaction with residents. Accordingly, it is telling of Respondents West End's discriminatory intent that waitstaff were hired with "average" ratings for personality and enthusiasm while Hardy was not hired with ratings of "excellent."

In my opinion, the flagrant pretext of the stated reason for Respondents West End's refusal to hire Hardy and a degree of disparate treatment is sufficient to establish a prima facie case.[30] See *Grane Healthcare Co.*, 357 NLRB 1412 (2011). There is pretext and then there is *pretext*. This is not a case in which something was odd or a little difficult to understand about an employer's explanation for alleged unlawful conduct. Rather, Youngberg's rational directly and irreconcilably conflicts with his own applicant evaluation. Youngberg, on the stand, was presented with the discrepancy and could not begin to articulate an explanation.

Since the stated reason for Respondents West End's refusal to hire Hardy is pure pretext, I need not do a mixed-motive analysis to determine whether Hardy would have been hired regardless of her union position and activity. *Parkview Lounge, LLC*, 366 NLRB No. 71

[30] I do not rely, in considering alleged antiunion animus on the part of Respondents West End, on the statement of an unnamed individual to Baldoquin, on October 27, that, "to his knowledge, this wasn't going to be a union shop and that [employees] had to reapply." Baldoquin did not attempt to determine the individual's name and was not asked to describe his appearance at trial. Accordingly, I am not inclined to find the anonymous individual an agent of Respondents West End. Further, I do not find the statement overly indicative of animus. Technically, the new employer was not a union shop until and unless the predecessor employees applied and were hired in sufficient number to find successorship. Lastly, Respondent Ultimate managers were not familiar with "union shops" and the individual's comment that employees "had to reapply" suggests, perhaps, a misunderstanding as to what a union shop signifies.

(Apr. 26, 2018); *Master Mining*, 274 NLRB 1213, 1214 (1985). Accordingly, I find that Respondents West End violated Section 8(a)(3) and (1) of the Act by refusing to hire Hardy because of her union position and/or activity.

Although Hardy signed an agreement releasing Respondents Esplanade from certain damages resulting from a charge filed with a federal agency, Respondents West End was not a party to that agreement. If Respondents West End want to assert a release of damages on the grounds that it is a successor or assign of Respondents Esplanade, it may do so in a compliance proceeding.

Deannie Duncanson

The General Counsel contends that Respondents West End refused to hire Duncanson, along with the other alleged discriminatees, in an attempt to avoid successorship. Respondents West End defended against the allegation as it pertains to Duncanson on the grounds that she was a supervisor within the meaning of Section 2(11) and not covered by the Act. The General Counsel contends that Duncanson was a unit employee who acted largely as a cook and server. However, Duncanson's alleged supervisory status with Respondents Esplanade is not germane to the issue whether Respondents West End violated the Act by refusing to hire her. Respondents West End could refuse to hire an applicant into a 2(11) position on the basis of that person's union activity. The issue is not whether Duncanson held a unit position with Respondents Esplanade, but whether Respondent West End unlawfully refused to hire her into a unit position. I find that it did not.

Duncanson admittedly stated in her resume that she was the director of food service at the Esplanade Hotel and applied for the same position with Respondents West End. Respondents West End was entitled to reject her application for that nonunit position even if it did so on the basis of her union activity.

I do not find that Respondents West End should have known to consider Duncanson for hire as a unit employee (e.g., server or cook). Whether she actually held the position of lead, supervisor, manager, or director of food service, there is little question that Duncanson was either the person or one of the people in charge of the kitchen. She told Tremble during the interview she could do things other than manage, but did not say she would take a lesser position than the one she claimed to hold previously and the one she was applying to retain. Duncanson's resume did not indicate she had performed unit work (i.e., serving food) since 1998. Under these circumstances, I do not find the evidence sufficient to show that Respondents West End acted unreasonably or unlawfully in its refusal to consider her for a unit position. See *Diamond Detective Agency, Inc.*, 339 NLRB 443 (2003) (employer acted lawfully in refusing to hire employee into former position he was applying for and not considering him for employment in other positions that were available).

The General Counsel contends that Respondents West End's unlawful intent to bar Duncanson from a unit position can be gleaned from Tremble's testimony that he did not hire Duncanson because she oversaw an operation in poor condition and received a favorable applicant evaluation. According to the General Counsel, Tremble's testimony was pretextual because Respondents West End hired Levitt even though she was the executive director of a poorly run facility. However, Respondent West End presented uncontested evidence that the kitchen and dining area were in particularly egregious condition and the two other "kitchen leads" (as identified by Duncanson) were not hired either. Further, although Duncanson

received above-average ratings on her applicant evaluation, the employment decision was based on the condition of her department as opposed to her interview. Accordingly, I do not find Tremble's rational for refusing to hire Duncanson, on its merits, to be pretextual or indicative of a discriminatory intent.

Based upon the foregoing, I do not find that the General Counsel established a prima facie case that Respondents West End unlawfully refused to hire Duncanson.

3. Alleged Discriminatees other than Hardy

The General Counsel contends that Respondents West End refused to hire alleged discriminatees other than Hardy in a doomed attempt to avoid successorship. I disagree and will dismiss these refusal-to-hire allegations.

As noted above, Respondents West End hired a super majority of the predecessor's employees on December 5. The General Counsel asserts in a conclusory manner that Respondents West End attempted to avoid hiring a majority of the predecessor employees, but miscalculated the total number of employees in the bargaining unit. The General Counsel has offered no explanation or theory as to whom Respondents West End mistakenly believed was in/out of the unit and how it would have affected the count. The General Counsel has not, for example, claimed that Respondents West End mistakenly believed that 10 predecessor employees in unit classifications would not be counted toward the Union's majority support because they were not dues paying members of the Union (a position Respondent West End actually took in connection with the successor analysis). Considering such a possibility, for the sake of argument, and including those employees in the complement but not counting them as union supporters, the Union would still have majority support by a count of 26 to 18. If Respondents West End also believed the predecessor's five nonunit recreation employees would be included in the count (perhaps upon the belief that recreational employees must be included in any appropriate unit) and excluded as employees who were not dues paying members of the Union, predecessor employees would still outnumber new employees by a count of 26 to 23. Accordingly, it does not follow that Respondent mistakenly believed it would avoid successorship by hiring "nonunion" employees instead of the alleged discriminatees.[31]

Admittedly, Respondent West End has taken the position in this proceeding that it did not hire a full complement of unit employees until after certain BSEs were replaced (by April 20, 2017) or at least separated (March 23 or 24, 2017). Thus, it is conceivable that Respondents West End set out to orchestrate a discriminatory plan whereby it sought to avoid succession by refusing to hire the alleged discriminatees, waiting over 90 days for the DBSWPA retention period to expire, and terminating enough BSEs to eliminate the Union's majority support (and thereby defeat a finding of successorship). Since Respondent West End actually raised this hail-mary defense against successorship, I am inclined to address the possibility that its hiring process was strategically designed in support of it. However, in my opinion, the General Counsel has a greater evidentiary hill to climb than in the more typical case where an employer actually refuses to hire a majority of the predecessor's employees and can reasonably expect to avoid succession on that basis.

[31] As noted in the fact section, the General Counsel has not argued that Respondents West End discriminated against employees (other than Hardy) on the basis of an understanding that some were union members and others were not. Rather, the General Counsel has contended that Respondents West End violated Section 8(a)(3) and (1) of the Act by attempting (unsuccessfully) to avoid hiring enough predecessor employees to be found a successor.

It is also noteworthy that Respondents West End did not immediately terminate any of the BSEs as soon as it was legally entitled to do so on March 5, 2017 (90 days after the sale). BSEs were retained through March 22, 2017. One would expect an employer intent on defeating successorship by firing BSEs to do so as quickly as possible. Further, the General Counsel has not alleged or attempted to prove that any of the BSEs were unlawfully terminated. The fact that Respondents West End did not rush to terminate BSEs, perhaps unlawfully, suggests it was not seeking to avoid successorship by extralegal means (and makes the evidentiary hill in favor of a violation even steeper).

As discussed above, I have found that Respondents West End refused to hire Hardy because she was known to be the Union steward and participated in contract negotiations. Respondents West End's treatment of Hardy does suggest that it preferred to avoid hiring proactive union supporters and would prefer to avoid dealing with the Union as a bargaining representative of unit employees. The remainder of the General Counsel's arguments in favor of a violation are far less compelling.

The General Counsel contends that the failure of interviewers to complete an applicant review form for each applicant warrants an inference of discrimination. I do not find it particularly suspicious that interviewers used the form as convenient during a day when they were interviewing and hiring a great many applicants. The interviewers were not required by upper management or human resources to use the form for each employee. Rather, the form was used in a discretionary manner for guidance. Further, the evidence does not indicate that the forms went strategically missing for certain employees, such as the alleged discriminatees. The record does not contain applicant evaluations for some of the alleged discriminatees, but does contain applicant evaluations for other alleged discriminatees, including Hardy. If Respondents West End were inclined to artificially lower the rankings or "misplace" the evaluations of alleged discriminatees, we probably would not be in possession of a stellar applicant evaluation for, of all applicants, the known steward. Although the General Counsel is correct that interviewers were not entirely consistent in rigorously using the applicant evaluation form for every applicant, Respondents West End's failure to do so was not the type of inconsistency which necessarily suggested a discriminatory intent.

Likewise, I do not find it overly suspicious that (1) the interviews only lasted 5 to 15 minutes, (2) interviewers did not have access to employee personnel files, and/or (3) employee references were not rigorously checked. It is perhaps somewhat surprising that interviewers did not spend more time with each applicant given that Respondents West End considered attitude and personality the most important qualification for certain positions (as opposed to, for example, years of service with the company). However, some applicants were interviewed more than once and applicants were interviewed in large numbers. Respondents West End was also aware that in-house applicants were sufficiently qualified to maintain employment with the predecessor. I do not think it self-evident that longer interviews were necessarily warranted or practical under the circumstances. With regard to personnel files, interviewers testified that Respondents Esplanade did not give them access to those documents. Tremble noted that interviewers do not normally have access to personnel files when hiring employees and employees were being interviewed "without prejudice." Senken did not consider the absence of personnel files to be a particularly significant disadvantage as such documents tend to be subjective. I am not shocked that Respondents West End failed to make a greater effort to obtain and pour through personnel files of employees who were currently working at the Esplanade Hotel and had not been discharged. I am equally unimpressed, as evidence of

animus, by Anderson's testimony that he was unaware whether the interviewers checked the references of newly hired employees who never worked at the Esplanade Hotel. Managers who conducted the interviews were called by Respondent West End to testify and were not asked whether they contacted references. Anderson explained that ideally in a typical hiring situation where time allows, it is good practice to check references even though such references are rarely reliable. However, Anderson also testified that this was not a typical situation.

The General Counsel did not specifically assert how these discrepancies in the hiring process actually work into its theory of the case. It could be argued that the corners Respondents West End cut in hiring employees suggest it would have retained all Respondents Esplanade's employees if it were not for a strategy of union avoidance. However, it is at least equally plausible that Respondents West End were pressed to implement a new operation, hire a large number of employees, and already knew that most employees successfully maintained employment at the Esplanade Hotel without being fired. I can understand an employer wanting to conduct a fairly brief interview of employees to ensure they were not hiring someone who presented particularly poorly, without scouring personnel records or having in depth discussions about each employee with their former managers and supervisors. It is somewhat suspicious that Respondents West End hired new employees without conducting extensive interviewers of those applicants or (perhaps) checking their references, but this evidence was not aggressively pursued and, even if true, would be far from a smoking gun under the circumstances.

The General Counsel asserts that alleged discriminatees who received average ratings on their applicant evaluations should have been hired over new applicants, and Respondent's West End's failure to offer more specific reasons for its decision not to hire the alleged discriminatees to do so infers animus. Tremble testified that it was typical for Respondents West End to hire applicants with ratings of "average" and (excluding Hardy and Duncanson) alleged discriminatees received certain category rankings of "average" or, in limited circumstances, "good." Further, Kayani testified that Respondents West End preferred to keep predecessor employees if possible because it was less time consuming and costly than replacing them. Thus, to the extent employees were equivalent and received ratings of "average," we would expect incumbent employees to be hired over new employees.

The problem with the General Counsel's argument in this regard is that it relies on comparisons between employees who were both employed by the predecessor and/or employees who were not equivalent. The General Counsel notes that predecessor employee Nichols was hired with "average" ratings while alleged discriminatee Terrier was not hired with a rating of "good" in the category of "guest service & hospitality personality."[32] However, Nichols and Terrier were both former employees of the predecessor and selecting one over the other would not adversely impact Respondents West End with regard to successorship. Further, Nichols was a server while Terrier was a cook, and their applicant evaluations appear to have been completed by two different people (with different handwriting). Thus, applicants Nichols and Terrier were not in direct competition with each other and two different interviewers could have had two different concepts of the ratings.

The General Counsel noted in its brief that new employee Jose Cabrera, a cook (like Terrier), was hired even though he received ratings of "average" in certain categories. However, Cabrera, like Terrier, received a rating of "good" in the category of "guest service &

[32] Terrier's applicant evaluation was only partially complete. He received a rating of "good" for "guest service & hospitality personality," but no ratings for other categories.

hospitality personality." More importantly, Cabrera received a rating of "good" in seven other categories in which Terrier was not rated. Thus, Cabrera received what appears to be a better applicant evaluation than Terrier.

Of the new employees, other than Cabrera, the General Counsel identified server Williams and utility/dishwasher Batista as applicants who should not have been hired over predecessor employees. I do not agree. Williams received rankings of good in the important categories of "guest service & hospitality personality" and "enthusiasm," as well seven other categories. As such, her applicant evaluation was significantly better than each of the alleged discriminatees who held the position of server. Batista was a utility aide/dishwasher, and the evidence does not indicate she was hired over any alleged discriminatee who held the same position. In this case, the General Counsel's arguments regarding disparate treatment fail because they are based on false equivalencies.

It is true that Respondent West End did not have managers testify to the specific reasons why each alleged discriminatee was not hired and the record does not contain applicant evaluations for each one. I would have liked to hear such testimony and we are, therefore, left with something of a vacuum that might be filled with an inference of animus. However, unlike the General Counsel, as discussed above, I find the applicant evaluations to be largely consistent with a legal hiring process, and these interviews were conducted in mass over a year before the trial. Meanwhile, the General Counsel did not call any of the alleged discriminatees to contest or otherwise cast doubt upon the ratings contained in their applicant evaluations. I do not find Respondents West End's failure, among other evidence presented by the General Counsel, sufficient to support a prima facie case.

The General Counsel relies heavily on *Lemay Caring Ctr.*, 280 NLRB 60 (1986), but that case is distinguishable. First and foremost, the employer in *Lemay Caring* actually hired a minority of the predecessor's employees. Second, the employer in *Lemay Caring* made certain unlawful 8(a)(1) statements that were far more telling of its goal to avoid successorship than any evidence presented here by the General Counsel. Third, the record in *Lemay Caring* contained evidence that employees were actually told they were not hired because of a manager's "gut feelings" and other criteria that were particularly nebulous.

Ultimately, although a refusal-to-hire violation was established with regard to Hardy, this and other marginal evidence of animus does not go far enough to extend that violation to the other allege discriminatees. I will not call it entirely far-fetched to believe that Respondents West End expected to avoid successorship by refusing to hire the alleged discriminatees and then discharging enough BSEs to undermine the Union's majority (since Respondents West End made this argument with regard to succession). However, the General Counsel did not actually articulate this theory and inferring such a motive is more difficult to accept than an inference of the unlawful motive at issue in more typical refusal-to-hire cases, such as *Lemay Caring*. In my opinion, this case involves a heightened evidentiary burden, which the General Counsel has failed to satisfy.

Accordingly, based upon the foregoing, I do not find that Respondents West End violated Section 8(a)(3) and (1) of the Act by failing to hire alleged discriminatees other than Hardy. I will, therefore, dismiss those allegations.

REMEDY

Having found that Respondents Esplanade and Respondents West End have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The remedies of instatement and backpay are appropriate for discriminatory refusals-to-hire, and I will order Respondents West End to provide those remedies with regard to Hardy. *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000).

Backpay for the unlawful refusal-to-hire Hardy shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987), compounded daily as required in *Kentucky River Medical Center,* 356 NLRB 6 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), the Respondents West End shall compensate Hardy, who was unlawfully denied employment, for search-for-work and interim employment expenses regardless of whether those expenses exceed their her earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), backpay computations shall compensate Hardy for any adverse tax consequences of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondents West End shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondents West End will be ordered to recognize and bargain with the Union as the bargaining representative of unit employees.

Respondents Esplanade will be ordered to promptly provide the information requested by the Union on October 27.

Respondents West End will be ordered to post the notice attached hereto as “Appendix A” and Respondents Esplanade will be ordered to post the notice attached hereto as “Appendix B.”

CONCLUSIONS OF LAW

1. Respondents West End and Respondents Esplanade are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

2. United Food & Commercial Workers Union, Local 2013, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents West End violated Section 8(a)(3) and (1) of the Act by refusing to hire Union shop steward Trinidad Hardy because of her union position and/or activity.

4. The following unit is appropriate for purposes of collective bargaining:

> [A]ll of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

5. Respondents West End Violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of unit employees.

6. Respondents Esplanade violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on October 27, 2016.

7. The violations found are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not otherwise violated the Act.

ORDER[33]

1. The Respondents shall CEASE AND DESIST from engaging in the following conduct:

A. Respondents West End, a joint employer, consisting of 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC, New York and Ultimate Care Management Assisted Living Management, LLC, a Division of the Engel Burman Group d/b/a Ultimate Care Management, LLC, of Bohemia, New York, their offers, agents, successors, and assigns, shall cease and desist from

(1) Refusing to hire employees because of their union position and/or activity.

(2) Failing and refusing to recognize and bargain in good-faith with the United Food & Commercial Workers Union, Local 2013 (Union), as the exclusive bargaining representative of employees in the following bargaining unit:

> (A)ll of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(3) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

B. Respondents Esplanade, a joint employer, consisting of County Agency, Inc. of Brooklyn, New York and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel of New York, New York, their offers, agents, successors, and assigns, shall cease and desist from

1) Failing or refusing to provide information to the Union that is relevant and necessary to perform its duties as the exclusive collective-bargaining representative of Unit employees employed at the New York, New York facility involved in these proceedings.

2) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. The Respondents shall take the following AFFIRMATIVE ACTION necessary to effectuate the policies of the Act.

A. Respondents West End shall

(1) Recognize and bargain in good-faith with the Union as the exclusive collective-bargaining representative of Unit employees.

(2) Within 14 days from the date of this Order, offer Trinidad Hardy instatement to the position for which she applied, or, if such a position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(3) Make Hardy whole for any loss of wages or benefits suffered as a result of the unlawful refusal to hire her in the manner set forth in the remedy section of this decision.

(4) Compensate Hardy for search-for-work and interim employment expenses following Respondents West End's refusal to hire her regardless of whether those expenses exceed her interim earnings.

(5) Compensate Hardy for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(6) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to hire Hardy, and within 3 days thereafter, notify Hardy in writing that this has been done and that the refusal to hire her will not be used against her in any way.

(7) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(8) Within 14 days after service by the Region, post at its facility in New York, New York, the facility involved in these proceedings, copies of the attached notice marked "Appendix A."[34] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondents West End's authorized representative, shall be posted by Respondents West End and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents West End customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondents West End to ensure that the notices are not altered, defaced, or covered by any other material. If Respondents West End has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondents West End at any time since December 5, 2016.

(9) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondents Esplanade shall

(a) Promptly provide to the Union with information it requested on October 27, 2016.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, the facility involved in these proceedings, copies of the attached notice marked "Appendix B."[35] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondents Esplanade's authorized representative, shall be posted Respondents Esplanade and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents Esplanade customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondents Esplanade to ensure that the notices are not altered, defaced, or covered by any other material. If Respondents Esplanade has gone out of business, closed or sold the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents Esplanade at any time since October 27, 2016.

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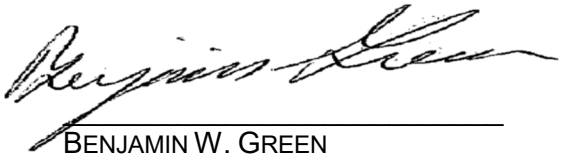
[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

It is further ORDERED that the complaint is dismissed insofar as it alleges that the Respondent unlawfully refused-to-hire employees other than Hardy, or other allegations not specifically found herein.

Dated at Washington, DC. February 7, 2019



BENJAMIN W. GREEN
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire you or otherwise discriminate against you because you hold a union position or engage in union activities.

WE WILL NOT fail and refuse to recognize and bargain with the United Food & Commercial Workers Union, Local 2013 (Union) as the representative for purposes of collective-bargaining of employees in the following bargaining unit:

> All of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain in good-faith with the Union as the exclusive bargaining representative of employees in the bargaining unit.

WE WILL, within 14 days from the date of this Order, offer instatement to Trinidad Hardy for the job she applied for, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Hardy whole for any loss of earnings and other benefits resulting from our refusal to hire her, less any net interim earnings, plus interest, and **WE WILL** also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Hardy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Hardy, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that the refusal-to-hire will not be used against her in any way.

305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC and Ultimate Care Management Assisted Living Management, LLC, a Division of the Engel Burman Group d/b/a Ultimate Care Management, LLC
(Employer)

Dated:_____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza
Suite 3614
5th Floor
New York, NY 10278
Phone: 212-264-0300

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/2–CA–188405 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0300.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide information to the United Food and Commercial Workers Union, Local 342, AFL-CIO (Union), that is relevant and necessary to perform its duties as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL promptly provide to the Union with information it requested on October 27, 2016.

County Agency, Inc. and Esplanade Partners Ltd. d/b/a
Esplanade Venture Partnership d/b/a The Esplanade Hotel
(Employer)

Dated:_____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza
Suite 3614
5th Floor
New York, NY 10278
Phone: 212-264-0300

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LIST OF PERSONNEL

Predecessor Employees	P
New Employees	N
Predecessor Supervisor	SP
New Supervisor	SN
Predecessor Recreation Employee	RP

Initial Complement	**Status**	**BSE**	**Hired**	**Seperated**
Aguino, Manuel	P		12/5/2016	
Alexander, Francisca	SN		12/5/2016	
Anselmo, Fernando	P	BSE	1/5/2016	
Baez, Melanie	SN		4/6/2017	
Batista Rodriguez, Agustin B	N		12/5/2016	
Battick, James W	P	BSE	12/5/2016	
Bellamy, Michelle	P		12/5/2016	
Bicic, Dzevat	SN		12/5/2016	
Blocker, Otto	P		12/5/2016	12/12/2016
Bradford, Ida	P		12/5/2016	
Breaker, Michael	P		12/5/2016	
Brennan, Annis	RP		12/5/2016	
Brown, Leslie E	SP		12/5/2016	
Burnham, Lorraine A	P		12/5/2016	
Cabrera, Jose	N		12/6/2016	12/7/2016
Caplan, Shelley	SP		12/20/2016	
Cappelli, Dawn	P		12/5/2016	
Campbell, Norman	P		12/5/2016	
Celisca, Berne	SP		11/30/2016	
Conway, Kelsey A	N		12/5/2016	12/11/2016
De La Cruz, Milda	P	BSE	12/5/2016	3/1/2017
DelVillar, Elsie	N		12/8/2016	
Embry, Nicole	RP		12/5/2016	4/11/2017
Esposito, Felicetta Pia	P	BSE	12/5/2016	3/24/2017
Etienne, Albert	SP		12/5/2016	
Fajar, Miguelina	P	BSE	12/5/2016	3/23/2017
Fantalina, Rimma	P	BSE	12/5/2016	3/23/2017
Fernandez, Carlos	P	BSE	12/5/2016	
Fernandez, Clara	RP		12/5/2016	
Figueroa, Don Frank	P	BSE	12/5/2016	3/24/2017
Franklin, Jess	RP		12/5/2016	
Garcia, Danitza	P		12/5/2016	
Gomez, Danilda A	P	BSE	12/5/2016	3/23/2017
Grant, Charlene Benymon	P		12/5/2016	
Harpal, Sudeshkumar	P	BSE	12/5/2016	

Harrison, Stephen	P		12/5/2016	
Johnson, James	P	BSE	12/5/2016	3/23/207
Keller, Almedia	RP		12/5/2016	
Knight, Gregory	P		12/5/2016	
Korzep, Stanislaw	P	BSE	12/5/2016	
Leon-Heras, Claudio	P		12/5/2016	
Levin, Michael	N		12/5/2016	12/15/2016
Lind, Jonathan E	N		12/5/2016	12/28/2016
Loach, Carlis R	P		12/5/2016	
Londea, William E	P		12/5/2016	
Martinez, Flor	P		12/5/2016	
Nartowicz, Helena	P		12/5/2016	12/15/2018
Nicholls, Barbara	P		12/5/2016	
Oconnell, Ruth	SP		12/5/2016	
Peters, Hayden R	P		12/5/2016	
Rivera, Carmelo	P		12/5/2016	
Rodriguez, Cynthia	P		12/5/2016	
Rybicka, Sylwia	P	BSE	12/5/2016	1/24/2017
Salwen, Marcy	SP		12/5/2016	
Singer, Edwin	SP		12/5/2016	
Supliguicha, Maria	P	BSE	12/5/2016	3/23/2017
Vadi, Taylor	N		12/8/2016	
Valle, Lazaro	P	BSE	12/5/2016	1/16/2017
Williams, Deandra	N		12/7/2016	4/4/2016

New Hires Retained After March 24, 2017

Adolphe Desrosiers, Marie	N		1/18/2017	
Bogen, Tyler	N			
Blackwood, Kevin	N		1/5/2017	
Clarke, Viviene C	N		3/16/20167	
Currey, Salaambia N	N		12/28/20116	
Dessources, Lenz	N		1/4/2017	
Durand, Fritz	N		3/1/2017	
Francillon, Kettia	N		2/24/2017	4/6/2017
Joachim Desrosiers, Sabrinia	N		3/1/2017	
Joseph, Jean R	N		1/4/2017	
Leveque Philogene, Claudicie	N		3/1/2017	
Loggins, Robert E	N		2/24/2017	
Maxwell, Clarence A	N		2/24/2017	
Merced, Raymond L	N		3/22/2017	
Nooks, Georgia S	N		2/12/2017	
Pagan, Mercedes	N		12/19/2016	
Ramos, Omar	N		3/1/2017	
Rivera, Ismael	N		1/16/2017	

Rosario, Natash	N	12/15/2017
Simmons, Gregory S	N	1/5/2017
Thomas, Stephanie N	N	1/12/2016
Walters, Tasha	N	12/28/2016

New Hires not Retained until March 24, 2017

Frost, Norman C	N	12/28/2016	2/3/2017
Gonzalez, Julio R	N	12/12/2016	12/25/2016
Marie, Javier	N	2/15/2017	2/17/2017
Perry, Shatasia	N	12/21/2016	1/26/2017
Serrano, Sean M	N	12/15/2016	2/5/2017
Tavira Martinez, Marco A	N	12/12/2016	12/14/2017
Viruet, Carmenlydia M	N	12/12/2016	2/3/2017

December 5, 2016	**P**	**N**
Initial Complement	36	8
March 6, 2017		
New Hires Severed		4
New Hires		20
Predecessor Employees Severed	5	
Total	31	24
March 25, 2017		
New Hires Severed		
New Hires		2
Predecessor Employees Severed	7	
Total	24	26