

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

<p>In The Matter of</p> <p>ARBAH HOTEL CORP. d/b/a MEADOWLANDS VIEW HOTEL,</p> <p>and</p> <p>THE NEW YORK HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO,</p>	<p>Case Nos. 22-CA-197658, et al.</p>
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**ARBAH HOTEL CORP.'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO DECISION OF ADMINISTRATIVE  
LAW JUDGE DATED DECEMBER 20, 2018**

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**I. STATEMENT OF THE CASE**

Respondent Arbah Hotel Corp. d/b/a Meadowlands View Hotel (“Respondent” or “Charged Party” or the “Hotel” or the “Employer”) is the owning entity of high-rise hotel located in North Bergen, NJ just minutes away from Midtown Manhattan. Approximately thirty (30) of the Respondents employees are members of the New York Hotel And Motel Trades Council, AFL-CIO (the “Union” or “Charging Party”).

On or about April 24, 2018, the General Counsel of Region 22 of the National Labor Relations Board (“NLRB”), Amended & Consolidated the Complaint, specific to charges 22- CA-197658, 22-CA-203130, 22-CA-205317, 22-CA-205422, 22-CA-209158 and 22-CA-212705 that were filed by the Union against the Respondent for various allegations claiming unfair labor charges in violation of Section 8(a)(1), (3), & (5) of the National Labor Relations Act (“NLRA”). On December 20, 2018, Administrative Law Judge Lauren Esposito issued a decision favorable to the Union. The Hotel now asserts exceptions on several grounds, which support the Hotel’s position that it acted within the law in terminating employee Marie Dufort, denying access to George Padilla and opting to implement a new and better plan for medical coverage.

## II. ISSUES PRESENTED AS EXCEPTIONS

The Hotel files exceptions with the National Labor Relations Board as to the following issue relating to the decision of the Administrative Law Judge:

A) Under Sec. 8(a)(1) & (3) of the Act, the Hotel's termination of the employment of Marie Dufort ("Dufort") was justified based upon Dufort's dishonesty in the form of the coverup she engaged in to mask her insubordination and repeated lies to multiple supervisors about fulfilling her job-related duties pursuant to the Collective Bargaining Agreement ("CBA") that expired in July 2015. Dufort's termination was unrelated to her engaging in Union activities.

B) Under Sec. 8(a)(5), the Hotel was justified in denying Union representative George Padilla access to the Hotel on August 23, 2017. The Hotel's actions were justified on several grounds, including the terms of the Settlement Agreement of January 2017 and the CBA. Padilla acted in a belligerent manner and was disruptive to the Hotel environment, failed to provide advance notice of his intention to come to the Hotel and the Settlement Agreement expressly stated that a meeting was to take place as a prerequisite prior to Padilla being able to return to the Hotel. The Hotel's actions were therefore warranted.

C) Under Sec. 8(a)(5), the Hotel did not refuse to bargain with the Union, and in fact undertook reasonable efforts to maintain health insurance for its employees. The Hotel offered alternative and better insurance for its employees at a time when the coverage was about to lapse. The contract had expired and the Hotel was obligated to fill the gap in coverage in order to prevent a lapse. The Administrative Law Judge's decision was predicated on the finding that the terms of the CBA govern the matter, but the decision ignores the fact that the Hotel had the right to obtain alternate coverage. Because federal law also requires that the Hotel provide coverage for its employees, the holding is inconsistent. Therefore, the Hotel acted within its rights in implementing a healthcare plan with superior coverage for its employees.

The Hotel has not committed violations and therefore files exceptions as to the above-referenced issues, which are supported by the evidence and legal arguments submitted at the hearing before the Administrative Law Judge. The Hotel relies on the within brief in support of its position.

### III. PERTINENT FACTS AND LEGAL ARGUMENTS

#### A. **The Respondent Did Not Violate The Act By Terminating Marie Dufort Because She Was Not Engaged In “Concerted Activity” And Her Misconduct Provided A Legitimate Non-Pretext Reason For The Hotel’s Actions.**

##### 1. **Protected and Concerted Activities.**

Section 8(a)(1) of the National Labor Relations Act (the “Act”) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Similarly, Section 8(a)(3) of the Act prohibits employer’s “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. §158(a)(3).

The rights guaranteed in Section 7 include the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009). Section 7 of the Act protects an employee's right to “engage in ... concerted activities for the purpose of mutual aid or protection.” 29 U.S.C. § 157. In order to fall within the protection of Section 7 of the Act, “the activities in question **must be ‘concerted’ before they can be ‘protected’**” (emphasis added). *Meyers Indus., Inc.*, 268 N.L.R.B. 493,494 (1984) (“Meyers I”). “In general, to find an employee’s activity to be ‘concerted’, it must be engaged in with or on the authority of other employees, and **not solely by an on behalf of the employee himself.**” *Meyers Indus. Inc.*, at 497. An employee who is acting only on his or her own behalf on a personal concern is generally not engaged in protected concerted activity. *Id.* at 493,

*MCPC Inc. v. National Labor Relations Board*, 813 F.3d 475, 486 (3d Cir. 2016) (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir.1964) holding that it was not concerted activity where the employee was engaged in “mere griping” or privately dispensing advice to employees “without involving fellow workers or union representation to protect or improve his own status or working position”). “The relevant precedent from the Third Circuit and the Board reflects that the benchmark for determining whether an employee's conduct falls within the broad scope of concerted activity is the intent to induce or effect group action in furtherance of group interests.” *MCPC Inc.*, 813 F.3d 475, 486 (3d Cir. 2016).

“There can...be **no violation** of § 8(a)(1) by the employer **if there is no underlying § 7 conduct by the employee**. Conduct must be both concerted and protected to fall within § 7 of the Act. *Smithfield Packing Co., Inc. v. N.L.R.B.*, 510 F.3d 507, 516 (4th Cir. 2007), citing *Yesterday’s Children, Inc. v. N.L.R.B.*, 115 F.3d 36, 44 (1st Cir. 1997).

**a. Dufort’s Conduct For Which She Was Terminated Was Not Concerted.**

Dufort was terminated for breaching the “dishonesty clause” set forth in the CBA. (GC Exs. 19, 20; R. Ex. 2). Pursuant to the Article XI of the CBA, the “Employer may summarily discharge any employee for dishonesty, insobriety, insubordination...and for any other just cause”. (R. Ex. 2, p. 6; GC Ex. 3). The Hotel determined that Dufort had engaged in such “dishonestly” in breach of Article XI when Respondent learned that she “entered room 426 on March 16, 2017 on more than one occasion...in order to manipulate findings of [her] improper cleaning duties during the previous day”. (GC Ex. 20 – April 4<sup>th</sup> Dismissal Notice). Specifically, and as discovered during its investigation, Respondent uncovered that Dufort, after cleaning room 426 on March 15, 2017 was “instructed by her supervisor [Jessica Tunia] to remove a dirty quilt and replace it with a clean quilt” after the aforesaid supervisor, “upon an inspection, found a dirty stain on the quilt in plain sight” subsequent to Dufort having “informed [the] supervisor that [she] had completed [her] duties in room

426” earlier that day. Further, and “upon a second inspection conducted on the afternoon of March 15<sup>th</sup> it was found that the quilt had not been changed [despite] [Dufort] clearly being instructed to do so by [her] supervisor prior to the end of [her] shift” on that day. (GC Ex. 19, pg. 3 – Discipline Notice with Date of Incident: 0/3/15/2017). However, **the basis for Dufort’s termination** was the **cover-up and lying that Dufort engaged in** on the following day to **conceal her insubordination** from the day before when she failed and/or refused to change the quilt as directed by her supervisor.

Specifically, on the following morning “[Dufort] entered room 426 at approximately 8:30a.m. with [said room] not included in [Dufort’s] daily room list for the [aforesaid date]...thereby making it an unauthorized entry.” (GC Ex. 19 – Discipline Notice – Date of Incident: 03/16/2017). To further advance her cover-up, Dufort then “flipped” the comforter around to conceal the stain so that it was no longer facing upwards at the bottom of the bed and, thereafter “entered room 426 with Shop Steward, Mercedes Suarez, at approximately 11:00a.m.” to demonstrate that she had complied with the supervisor’s request to change the comforter the day before. *Id.* (Hr’g Tr. vol 1, 161:15-162:3, 196:2-19, May 30, 2018). “Ms. Suarez [then] informed the supervisors on duty that the quilt in room 426 was in perfect condition” and not as the supervisor (Jessica Tunia) had reported to management the day before on March 15<sup>th</sup>. *Id.*

During further inquiry by management in the presence of the Shop Steward (Mercedes Suarez) “[Dufort], admitted that [she] manipulated the situation by turning over the quilt when [she] entered the room around 8:30a.m.” on March 16<sup>th</sup> to “hide the dirty stain which had been found from the previous day”. *Id.*

The conduct of Dufort cannot be considered “concerted” within the meaning of Sec. 7 of the Act because Dufort’s conduct and admissions to management with regards to engaging in the aforesaid cover-up of her insubordination on March 15<sup>th</sup> **was solely for her own benefit, not in furtherance of any such protected activity, and/or not on behalf of other union members.**

Further, the record is devoid of any testimony that was **provided by Dufort** or her **union shop steward, Mercedes**, that would indicate that her aforesaid dishonest conduct might be considered to be “concerted activity” where her conduct was intended to induce or effect group action in furtherance of group interests. *MCPC Inc. v. National Labor Relations Board*, at 486 (3d Cir. 2016). However, what the record is not devoid of is the **conflicting testimony** offered by Dufort and Mercedes with respect to the actual actions that Dufort engaged in, the details of which only serve to provide further evidence that Dufort will continue to lie as she had before to cover up her aforesaid insubordination.

Specifically Dufort testified that on March 15<sup>th</sup>:

“Jessica...asked me to change the bedspread, I call one of the male employee responsible to deliver the linen [a]nd after I changed the bedspread for a new one, Jessica asked me, did you change the bed spread or **did you flip it?**...[and] I said, yes I changed it. And [sic] on the 16<sup>th</sup> she came to the same question asking me **did you flip or did you change** it?...[and] **I said yes, I changed it.**” (Hr’g Tr. vol 3, 304:18-305:2, 305: 8-10, June 20, 2018).

Dufort adamantly and repeatedly, testified in furtherance of her defense that she complied with the supervisor’s direction on March 15<sup>th</sup> and that “**every other employee flip** [sic] bedspread. **I don’t flip** bedspread. **I always change** the bedspread”. (Hr’g Tr. vol 3, 306: 5-8, 307:6-8, June 20, 2018). Unfortunately for Dufort, Mercedes’s testimony the prior day that was offered in support of Dufort conveyed that Dufort did “flip” the bedspread to hide the stain, doing so on the morning after March 15<sup>th</sup>. Specifically, Mercedes’s testimony directly contradicts that of Dufort’s adamant position that “she [unlike everyone else] does not flip” the bedspreads where Mercedes testified that:

From the first moment that I entered the room and Marie took me and the stain was not there, Marie had turned over the sheets, the blanket. The first thing in the morning, the first thing she did was go to the room because maybe the night before she didn’t get a chance to do it...and she didn’t have to tell me that [she just turned over the stained bedspread to hid the stain] because that was the standard practice. (Hr’g Tr. vol 1, 197:14-1520, 203:5-6, May 30, 2018).

Further, Dufort’s former Union representative, Ms. Sayde Stern, subsequent to speaking with Dufort to prepare for a grievance meeting with the Respondent over Dufort’s termination confirmed that

Dufort did flip the bedspread:

We explained that we understood **that the practice of the Hotel** was that if there was a stained comforter, that comforter would be flipped over. And that, that was -- **Marie was acting in accordance with past practice** regarding that issue, but that she had been treated differently than other employees. None of which had ever been disciplined before for, for doing that. (Hr'g Tr. vol 1, 57:13-20, May 30, 2018).

This conflicting supporting testimony offered by the witnesses in support of Dufort's position only supports the cover-up of Dufort's insubordination. Further, If Marie had "flipped" the comforter as Mercedes and Sayde testified that she had done so on March 15<sup>th</sup>, how could the very same stain be located in the very same area on the quilt, especially if it was a different one as Dufort so claims it to be? The answer is that it simply could not be.

The Charging Party, when offering testimony in support of Dufort's allegations cannot have it both ways. Either Dufort flipped the comforter around to hide the stain as it is so alleged by the Charging Party to have been the practice within the housekeeping department of the hotel or she changed the bedspread as she so testified each time Jessica, her supervisor, directed. Further, if Dufort had, as she so testified, changed the bedspread each time Jessica directed her to do so, her testimony is devoid of any explanation as to how the exact same stain was in the same location on the bedspread, other than that "they are all stained" and confirmed by Mercedes to have been present on March 16<sup>th</sup> after the Hotel conducted its investigation and, after re-flipping the bed spread, found the stain in the exact same area as it was the day before. (Hr'g. vol 3, 336:1-337:17 June 20, 2018).)

Dufort's conduct (dishonesty and insubordination) cannot be that which is "concerted activity" because her actions "were [NOT] to induce group action in the interest of [other] employees" like that of the employee in *MCPC Inc.*, where Dufort's complaints were not about working conditions, but rather as a lie to her shop steward (Mercedes) to cover up the fact that she had not changed the bedspread as directed to do so the day before by her supervisor. (GC Ex. 19 – Discipline Notice – Date of Incident: 03/16/2017) (Hr'g Tr. vol 1, 161:15-162:3, 196:2-19, May 30, 2018).

Unlike the employee in *MCPC Inc.*, Dufort's actions only could be reasonably believed by her to benefit herself because the cover-up and lying she engaged in was for the sole purpose of concealing her aforesaid insubordination. *Meyers Indus. Inc.*, at 497; *MCPC Inc.* at 486 (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir.1964) holding *that it was not concerted activity where the employee was engaged in "mere griping" and privately dispensing advice to employees "without involving fellow workers or union representation to protect or improve his own status or working position")*).

Frankly, to suggest that such conduct (dishonesty and orchestrating a cover-up) would be beneficial to Dufort's coworkers or advance some bargained for right is absurd because doing so would clearly undermine Respondent's business operations where it is essential for employees to perform their job related duties in a hotel (i.e. change bedding, especially when directed by a supervisor) and not lie to management that they have done so when they have not. Because Dufort's aforesaid conduct for which she was terminated was not "concerted activity", her termination is not a violation.

**b. Dufort Was Not Discharged for Engaging in Protected Concerted Activity.**

The evidence does not establish that Dufort was discharged for engaging in protected concerted activities. Further, the General Counsel only loosely asserted to the effect during the hearing that it was Respondent's animus toward Dufort for previously filing grievances that was the motivation for her termination when the record clearly establishes that the termination was based solely on Dufort's aforesaid dishonesty made during the aforementioned non-"concerted activity". (GC Exs. 1- The Complaint (Amended) ¶¶ 16-17; Ex. 4; Ex. 19, Ex. 20).

Where motive is at issue, Courts have employed the Board's *Wright Line* "mixed motive" test set forth by the Board in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980). *enforced*

on other grounds, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-404, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), abrogated by *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), in order to determine whether an employee was discharged for engaging in protected concerted activities. Under this test, if the General Counsel makes a *prima facie* showing that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the 'same action would have taken place even in the absence of the protected conduct.'" *NLRB v. Alan Motor Lines Inc.*, 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line*, 251 N.L.R.B. at 1089); accord *D & D Distrib. Co. v. NLRB*, 801 F.2d 636, 642 (3d Cir. 1986) (citing *Transp. Mgmt. Corp.*, 462 U.S. at 401-02). *Wright Line* is designed to preserve what has long been recognized as the employer's general freedom to discharge an employee "for a good reason, a poor reason, or no reason at all, so long as the terms of the [Act] are not violated." See *Meyers Indus.* ("Meyers I"), 268 N.L.R.B. 493, 497 n.23 (1984) (quoting *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942)).

For the General Counsel to make a *prima facie* showing that the conduct was a motivating factor in the employer's decision it must be established by a preponderance of evidence that: (1) the employee engaged in protected union activity; (2) the Employer knew about this activity; (3) the Employer took an adverse employment action against the employee; and (4) there was a motivational nexus between the employee's protected activity and the adverse employment action. See *The Hays Corp.*, 334 NLRB 48, 49 (2001).

From the very generic allegations set forth in the Complaint in conjunction with the completely non-credible testimony of Dufort, it is unclear what exact protected activity the Charging Party has claimed that the Respondent, in retaliation for Dufort's participation therein, terminated her for. Even if the Union had established the aforementioned elements necessary for a *prima facie* case,

the central issue is whether the Respondent would have terminated Dufort even in the absence of the protected conduct, in this case the aforesaid February 2017 grievance and/or her complaints to Stern subsequent to having acknowledged that she received the aforementioned March 15<sup>th</sup> and March 16<sup>th</sup> write-ups, the latter of which specifically stated in bold letters therein that “**Please be advised that this notice could change into a dismissal notice based on further investigation of your insubordination and dishonesty**”, according to Article XI in the **Agreement between the Union and Hotel**”. (GC Ex. 19) *NLRB v. Alan Motor Lines Inc.*, 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line*, 251 N.L.R.B. at 1089).

Respondent’s Assistant General Manager, Vanessa Rubio (“Vanessa”), testified credibly that based upon her twelve (12) years of employment, part of which encompassed being a supervisor within the housekeeping department, that she knew of only one other employee in the hotel who engaged in dishonesty rising to the level for which Dufort was terminated.

That employee, Beatrice Gonzales (“Gonzales”), was terminated when she failed to report a lost garment of a guest that she found in laundry where she worked and decided to keep it for herself, lying about if she had come across that garment in the laundry room when management conducted a similar investigation as they had concerning Dufort. (Hr’g. Tr. vol. 4, 548:5-549:19 June 21, 2018). Similarly, Dufort was terminated for dishonesty on March 16<sup>th</sup> that was akin to that of Gonzales’s when she tried to cover up her own prior bad conduct, when, and in direct violation of her supervisor’s direction “flipped” the bedspread instead of changing it the day before as instructed. Dufort, even after almost a year and half to get her story straight, deviated from what she proffered to Sayde in March of 2017 in preparation of her defense offered to the Respondent at the April of 2017 grievance (that she flipped the bedspread in accordance with the housekeeping practice of the entire department), lying yet once again when she testified at the hearing on June 20, 2018 that she changed the bedspread both times Jessica directed her to do so, offering nonsensical answers that “all the

comforters are stained” when it was inquired of her how the same stain was apparent on the comforter (in the exact same location) on the afternoon of March 15<sup>th</sup> after she was instructed to change the bedspread and was later found on the bed (in the exact same location) on March 16<sup>th</sup> after the supervisors re-flipped the bedspread when investigating how the stain on the morning thereof was no longer present after it was the day before subsequent to Dufort punching out. (Hr’g. Tr. vol 3. 336:1-337:17 June 20, 2018).

The absence of evidence, specifically that no other housekeeping attendant had been terminated before for same infraction as Dufort (lying to a supervisor), is not evidence itself that Dufort was treated any differently. Gonzales was terminated for dishonesty, specifically lying to management during an investigation for the missing blouse, which she had seen at the time of inquiry, but denied so she could keep it for herself. Respondent, even in the absence of the protected conduct that is claimed by Dufort to be the motivation for her termination, clearly would have terminated her just as it had with Gonzales prior to Dufort’s termination taking place. *NLRB v. Alan Motor Lines Inc.*, 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line*, 251 N.L.R.B. at 1089); *accord D & D Distrib. Co. v. NLRB*, 801 F.2d 636, 642 (3d Cir. 1986) (citing *Transp. Mgmt. Corp.*, 462 U.S. at 401-02); *Cellco Partnership v. NLRB*, No. 17-1158, p. 12, 14-15 (D.C. Cir. 2018) (holding that a union supervisor lies to management during an investigation and termination thereof “was a legitimate business judgment – a not unusual one – [because] an employee lying during an investigation is a serious threat to management of the enterprise.” Further finding that the charged party applied the policy to terminate dishonest employees consistently and would have done so regardless of the protected activity that the employee alleged was the motivation for her termination).

Thus, Respondent’s termination was not in violation of Sec. 8(a)(3) of the Act because Respondent applied the policy for terminating employees for dishonesty evenly, doing so regardless of Dufort’s engagement in the alleged protected activity as so previously set forth herein and, like the

employer in *Cellco Partnership v. NLRB*, the Respondent had a legitimate business interest and judgment in terminating an employee who lied during an investigation.

Dufort acted in a manner that was insubordinate and dishonest and her testimony concerning these issues was inconsistent. The conduct at issue had no relation to any of Dufort's union activities. Indeed, Dufort's activities could reasonably be viewed as an attempt to draw a reprimand from the Hotel in an effort to promote a potential case against the Hotel. Therefore, the decision of the Judge was inconsistent with the facts on the record.

**B. The Respondent Did Not Violate Sec. 8(a)(5) of the Act When George Padilla Was Removed From The Hotel.**

Pursuant to Section 8(a)(5) of the Act it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." "Each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent." *NLRB v. ILGWU, et. al* 374 F.2d 376 (3d Cir. 1960). However, this rule is not absolute or immutable. *Id* at 379, citing *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810, 813 (6th Cir. 1950) (holding "that it was not an unfair labor practice for an employer to refuse to negotiate with a union representative who had evidenced hostility to it by his past activities [where] [w]ith Braswell acting as one of the negotiators for the Union, any meeting with the negotiators would not have fulfilled the requirements of collective bargaining [because] [h]is expressed hostility to the respondent and his purpose to destroy the respondent financially made any attempt at good faith collective bargaining a futility"). Thus, an exception to the general rule arises when the situation is so infected with ill will, usually personal, or conflict of interest as to make good-faith bargaining impractical. *NLRB v. ILGWU*, 274 F.2d at 379.

"Collective bargaining agreements...are to be interpreted according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) citing *Textile Workers v. Lincoln Mills of*

*Ala.*, 353 U.S. 448, 456–457 (1957). The “rule that ‘contractual provisions ordinarily should be enforced as written is especially appropriate...’ *M & G Polymers USA, LLC.* at 933 (2015), citing *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 611–612 (2013).

On January 27, 2017 the Union and the Respondent entered into a duly executed settlement agreement (the “January Settlement Agreement”) that resolved a number of charges. (GC. Ex. 12). One of those charges alleged by the Union was that the Respondent violated Sec. 8(a)(5) of the Act when the Respondent, by way of a letter dated August 3, 2016, notified the President of the Union, Peter Ward, that George Padilla (presently a Vice-President, but at the time of the aforesaid notice an Organizer of the Union) would no longer be permitted in the Hotel in light of the fight that occurred between Padilla and an employee during a meeting between Padilla, union employees, and management, which took place at the Hotel. (Hr’g. Tr. vol. 5 576:1-583:19) June 22, 2018). This altercation disrupted the business of the Respondent, requiring that Padilla be escorted out of the Hotel. *Id.* Respondent’s Assistant Operations Manager, Desiree Ruiz (“Ruiz”), described the altercation as “what you would see, like, at a bar [with two men about to fight]” and, believing that it was getting out of hand, “suggested to [Wysocki] to call the cops because...she felt her work environment was unsafe at that point.” *Id.* at 581:18-24; 583:21-584:5. Wysocki, who had been present during the altercation, determined that Padilla posed an unnecessary risk to the safety and welfare of not only the management personnel who were present at the time, but more importantly, the employees who he represented and had the altercation with. *Id.* at 671:18-671:1.

The Hotel’s management team routinely had issues with Padilla’s overall attitude and demeanor, being far from professional and outright inappropriate, such as when Ruiz met Padilla for the first time. Ruiz, in summary, described her initial interaction with Padilla during a safety inspection to “make her uncomfortable” when he refused to stop taking pictures of her when she requested and, in response thereto, conveyed to her that “he had a right to take pictures of anything

with regards to employee safety [and] that being that [Desiree] represents the Hotel [she] could be included in them”. (Hr’g. Tr. vol. 5 571:4-25 June 22, 2018). Ruiz was so disturbed by her first interaction with Padilla that, upon the advice of the management team leader at that time, Anthony Lapago, wrote an email documenting the interaction to the President of the Hotel. (R. Ex. 4).

To resolve the charge and issues with Padilla being barred from being on the Hotel property as set forth in Wysocki’s August 2, 2016 letter to Peter Ward, the Respondent and the Union agreed that, pursuant to the January Settlement Agreement, “The Employer will not bar any Union representatives from the Hotel nor interfere with their access pursuant to the expired CB.” However, as a condition precedent to Padilla being permitted back on Hotel property the Parties agreed that “Prior to Mr. Padilla returning to the Hotel, the parties shall meet, provided such meeting must take place before February 15, 2017.” (GC Ex. 12). The Union abided by the terms of the January Settlement Agreement, specifically where Padilla, since August of 2016 (the date when he was barred for engaging in the altercation with an employee) refrained from being on Hotel property, yet never scheduled the meeting with Wysocki to take place as required by February 15, 2017. In violation of the Agreement, Padilla barged into Wysocki’s workroom without warning. Wysocki demanded that he leave as he was in violation of the January Settlement Agreement as neither he nor Wysocki had met prior to February 15, 2017 to “clear the air” as required by the Settlement Agreement as a condition precedent for Padilla to be permitted back on Hotel Property. (Hr’g. Tr. vol. 5 700:3-702:2 June 22, 2018).

The Hotel did not commit an unfair labor practice when directing to Padilla to leave the Hotel property after he showed up unannounced on August 23, 2017 because Padilla had continuously evidenced hostility. Padilla’s conduct was the impetus that led to the “situation with [the Respondent] to become so infected with ill will [and] personal by nature that made good-faith bargaining [with him] impractical”. *NLRB v. ILGWU*, 274 F.2d 376 (3d Cir. 1960), citing *Kentucky Utilities Co.*, 182

F.2d 810, 813 (6th Cir. 1950). Wysocki, when demanding that Padilla vacate the Hotel's premises on August 23, 2017 and reaffirming the ban on Padilla being in the Hotel for the reasons set forth in his August 24, 2017 letter, was acting under the authority of the duly negotiated and bargained for terms that permitted him to do so as set forth in the January Settlement Agreement. The January Settlement Agreement's terms should be enforced as written because the Parties bargained for the benefit thereof in accordance with Sec. 8(a)(5) of the Act.

Padilla was denied access to the Hotel and asked to leave due to issues of safety and preserving peace in the workplace. The Agreement contained a specific reference to Padilla and requirement of a meeting, which served as a prerequisite to Padilla gaining access to the Hotel. It is also undisputed by the parties that Padilla did not contact management and notify them of his intention to come to the Hotel on August 23, 2017, which was in violation of a requirement under the contract. Union representatives are permitted to visit the Hotel upon providing advance notice to management. (GC Ex. 3). Therefore, the Hotel acted appropriately and within the law.

**C. The Hotel Did Not Refuse to Bargain And It Acted Appropriately To Implement Alternate Health Coverage.**

Under the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Subjects that fall within the statutory category of "wages, hours, and other terms and conditions of employment" are commonly referred to as "mandatory bargaining subjects." *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971); *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161, 1164 (5th Cir. 1976).

The parties entered into an agreement on February 12, 2012. An addendum to the agreement sets forth that "Should the Hotel find a more affordable health care alternative, the parties agree that the hotel may change providers, provided such alternative maintains the same if not better level of

current benefits, eligibility threshold, and coverage without employee contributions.” *Id.* In accordance with the aforesaid bargained for right as set forth previously herein, the Respondent attempted not once, but twice to exercise its unilateral right to implement “equal to or better than coverage” when it first sought to implement a more affordable, but equal coverage, to its employees administered by Health Republic (in 2015/2016) and then again attempting to do so using Qual Care in August of 2017. The Union obstructed the Hotel’s implementation of the Health Republic insurance when it refused to provide the Union specific pedigree information needed of the employees that was necessary for the enrollment (i.e. employee spouse names, social security numbers, etc.).

After obtaining the requisite pedigree information the Hotel restarted the lengthy process of locating a provider who could provide coverage as set forth in the agreement. In August of 2017 the Hotel confirmed with Qual Care that its plan and services afforded thereunder were not just equal to the coverage provided by UHH, but actually better than where there was a savings to the employee of more than \$1,000 per year in deductibles and co-pays that were more favorable under the Qual Care plan when compared to that of the then current UHH plan. The Union once again elected to use this as an opportunity to extract wage increases. *Id.* at 644:25-645:18; 651:9-654:21. Despite the Hotel’s efforts to provide the Union with as much information as possible, short of the exact figure of the monetary savings it expected to receive pursuant to the Qual Care quote, and the informational meetings the Qual Care provider representatives attempted to have with the employees, the Union refused to recommend that the employees sign up for the Qual Care insurance plan solely to extract or perhaps more appropriately, extort wage increases that were above what were previously offered by the Union six months earlier and bend its will to force the Respondent to adopt the GRIWA universal collective bargaining agreement as a successor to the CBA that had been expired at the time for close to three years. *Id.* at 656:12-658:6. As a result of the Union’s conduct the Hotel was

prevented from implementing the Qual Care plan for September 2017 coverage to begin and was only able to do so in June of 2018 after obtaining updated household information from the employees which, once completed, enabled the Hotel to sign the members up directly. *Id.* at 668:2-663:5.

Similar to the waiver in *Mississippi Power Company* executed by the union, the Union waived its right to bargain over the insurance coverage pursuant to Sec. 3 of the Side Agreement in consideration that the Hotel pay 100% of the premiums on behalf of the employees. (R. Ex. 2) *Mississippi Power Company v. National Labor Relations Board No. 00-60794* (5th Cir. 2002). It was the conduct of the Union, in violation of Sec. 3 of the Side Agreement, that usurped the unilateral right of the Hotel to implement coverage where the Union first refused to permit the Hotel to directly seek requisite pedigree information from the employees when desiring to implement the Health Republic plan. Aside from the CBA, the Hotel had the obligation and right to obtain alternate coverage for its employees as dictated by federal law.

There was no refusal to bargain on the part of the Hotel. Rather, the Hotel was obligated to ensure that there was adequate healthcare coverage for the workers. The Hotel was able to obtain comparable or better insurance for the workers. The Hotel acted under its obligation to fill the gap in coverage as the contract had expired, giving rise to the danger of a lapse in coverage. The decision of the Administrative Law Judge states that the contract controls but that the Hotel could not act according to the provision that allows it to obtain alternate coverage. In addition, the Hotel had a statutory obligation to ensure that the employees were covered. Therefore, the Hotel has not committed any violation.

#### IV. CONCLUSION

The evidence on the record does not support the findings made by the Administrative Law Judge based upon allegations set forth in the Amended Complaint with respect to the exceptions raised by the Hotel. Furthermore, and in conjunction with the applicable law, the conflicting testimony of Dufort and Mercedes, along with credible and consistent testimony made by the Hotel's representatives rebuts the evidence proffered by the Union, does not support the claim that the Hotel violated Sections 8(a)(1), (3), & (5) of the Act as alleged in the Complaint. Accordingly, the Hotel submits these exceptions pursuant to 29 C.F.R. § 102.46 and respectfully requests that the National Labor Relations Board find for the Hotel and dismiss all charges.



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Dated: Rockaway, New Jersey

March 22, 2019

## CERTIFICATION

This is to certify that copies of the Respondent's Exceptions and Brief in Support of Exceptions to the National Labor Relations Board have been duly served via electronic filing on the National Labor Relations Board and Judge Esposito on March 22, 2019 and on Respondent's Counsel and the Charging Party via email on the same date as follows:

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