

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

REMINGTON LODGING &
HOSPITALITY, LLC. D/B/A HYATT
REGENCY WIND-WATCH

and

Case Nos. 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION, INTERNATIONAL
UNION OF JOURNEYMEN AND ALLIED
TRADES

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION FOR SPECIAL PERMISSION TO APPEAL AN ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

Pursuant to the Board's Rules and Regulations Section 102.26, Counsel for the General Counsel ("CGC") hereby opposes Remington Lodging & Hospitality, LLC. d/b/a Hyatt Regency Wind-Watch's ("Respondent's") Motion for Special Permission to Appeal the Order of the Administrative Law Judge ("ALJ") striking Respondent's thirteenth (13th) Affirmative defense and precluding Respondent from questioning witnesses regarding their immigration status.¹ CGC received the Motion for Special Permission to Appeal ("Motion") on May 28, 2019, at 11:24 p.m. Pursuant to Section 102.26, CGC timely files this Opposition.

¹ The ALJ's Order granting General Counsel's Motion to Strike Respondent's Bill of Particulars and Portions of the Respondent's Answer, and to Preclude Respondent from Questioning Discriminatees Regarding their Immigration Status, is attached here to as Exhibit A, and will be cited as "ALJO pg.#." Respondent's Motion for Special Permission to Appeal, and supporting brief, are attached hereto as Exhibit B, without the voluminous attachments that have already been submitted to the Board. (For judicial economy purposes, CGC has not included the Westlaw People Search reports or transcript excerpts in any of its exhibits since these voluminous records were already provide to the Board as part of Respondent's Special Appeal.) Citations to Respondent's Brief in support of the Motion will appear as "Res. Brf. Pg#."

Respondent's Motion should be denied because Respondent has failed to present any valid basis for the Board to review the ALJ's well-reasoned Order which is firmly rooted firmly in current Board law. Respondent's Motion must be scrutinized carefully, for Respondent engages in sleight of hand – misrepresenting the ALJ's findings in his Order, plucking seeming favorable sentences from case law without providing the complete context and misrepresenting the holdings of cases that it relies upon. In its Motion, Respondent attempts to deflect the Board's attention away from the fact that Respondent has utterly failed to substantiate even the most basic facts regarding its affirmative defense that certain discriminatees lacked work authorization during the backpay period. Respondent would have the Board ignore the fact that the evidence it proffers in support of its immigration-related affirmative defense was woefully deficient. In that regard, Respondent provided confusing and conclusory "Westlaw People Search" reports generated by third-party private credit authorization companies which characterize their own content as "*Possible Adverse Information*." Such uncertainty renders the reports insufficient to support Respondent's thirteenth affirmative defense under current Board law. Respondent also presented excerpts from the underlying ULP hearing to support its affirmative defense. However, Respondent completely mischaracterizes the underlying unfair labor practice testimony and makes an unsupported claim that the testimony shows that certain discriminatees were not hired by Respondent's subcontractor HSS because of problems with their immigration status. The testimony does not support Respondent's claim.

In its Motion, Respondent attempts to camouflage the fact that it has no concrete and positive evidence supporting its bare assertion that some discriminatees are not entitled to backpay because of their work authorization status with unsupported due process and undue prejudice objections to the ALJ's Order. In so doing, Respondent completely mischaracterizes

the ALJ's Order and claims that the ALJ "creat[ed] new pleading limits" and a higher burden of proof for the pleading of affirmative defenses sounding in immigration. However, as will be shown below, the ALJ's Order is firmly based on current Board law and the current standard for pleading lack of work authorization as an affirmative defense. Moreover, rather than properly acknowledging controlling case precedent, specifically *Flaum Appetizing Corp.*, 357 NLRB 2006 (2011), Respondent improperly cites to the dissenting opinion in *Flaum* which criticizes the pleading requirements set forth by the majority and then disingenuously claims that the ALJ created a new, higher pleadings standard because the ALJ utilized the majority holding. Through these arguments, Respondent is attempting to improperly flout current Board law and deflect attention away from its inability to produce some concrete and reliable evidence that the discriminatees lacked work authorization status in order to intimidate the discriminatees and avoid having to pay them the backpay Respondent clearly owes them. Accordingly, Respondent's Motion should be denied.

I. BACKGROUND

On June 1, 2018, the Regional Director for Region 29, of the National Labor Relations Board issued a Compliance Specification and Notice of Hearing setting forth, in detail, the amounts owed to each discriminatee entitled to backpay pursuant to the Board's February 12, 2016, Decision and Order, which was enforced by the Fifth Circuit on January 27, 2017. On June 29, 2018, Respondent file an Answer to the Compliance Specification in which it asserted as an affirmative defense that certain unidentified discriminatees were not entitled to backpay due to their lack of authorization to work in the United States during the relevant period.

On August 16, 2018, Counsel for the General Counsel filed a Motion for a Bill of Particulars seeking an order to compel Respondent to provide the General Counsel a clear and

concise description of the evidence in support of its affirmative defense that no backpay is due to discriminatees who were not authorized to work in the United States during the relevant period. (Attached hereto as Exhibit C.) On September 14, 2018, Administrative Law Judge Benjamin Green issued an Order requiring that Respondent provide the General Counsel a Bill of Particulars containing the following evidence in support of its affirmative defense regarding the discriminatees' work authorization status:

- a. The identity of each discriminatee alleged to be unauthorized to work in the United States.
- b. The period of time in which each discriminatee lacked authorization to work in the United States.
- c. For each discriminatee, the date which Respondent learned the discriminatee lacked authorization to work.
- d. For each discriminatee, the factual details of the Respondent's assertion that the discriminatee lacked authorization to work. (Attached as Exhibit D.)

On September 21, 2018, Respondent filed its Response to the General Counsel's Motion for a Bill of Particulars, setting forth two grounds that it claims justify further investigation into the discriminatees' immigration status via the use of hearing subpoenas that seek testimony and documentary evidence: 1) that a self-performed "Westlaw People Search" revealed that certain named discriminatee's social security numbers matched "multiple individuals," and 2) that certain unnamed discriminatees did not apply to Respondent's one-time subcontractor "HSS" because they lacked work authorization status. Respondent asserted that it learned of the alleged multiple match social security number issue after the issuance of the Compliance Specification on June 1, 2018. With regard to some of the discriminatees' failure to apply for jobs at HSS, Respondent learned of this issue during the underlying unfair labor practice proceeding in 2013. (Respondent's Response to the CGC's Bill of Particulars is attached as Exhibit E.)

On October 3, 2018, General Counsel filed a Motion to Strike Respondent's Bill of Particulars and Portions of Respondent's Answer and to Preclude Respondent from Questioning Discriminatees Regarding their Immigration Status, based on Respondent's failure to provide any factual support for its immigration-related affirmative defense. (Attached as Exhibit F.) On October 15, 2018, Respondent filed a Response in Opposition to the General Counsel's Motion to Strike claiming that its Westlaw People Search reports and transcript testimony from the underlying unfair labor practice hearing provided sufficient grounds to satisfy its pleading requirement for its immigration related affirmative defense. (Attached as Exhibit G.) On October 22, 2018, CGC filed a Reply. (Attached as Exhibit H.)

II. THE ALJ'S ORDER

On May 20, 2019, the ALJ issued an Order striking Respondent's thirteenth affirmative defense and precluding Respondent from examining discriminatees regarding their immigration status or introducing evidence regarding discriminatees' immigration status. (Attached hereto as Exhibit A.) In his Order, the ALJ reasoned that "the Board has refused to allow respondents to plead an affirmative defense based upon *Hoffman Plastics* and thereby open an avenue for inquiring into the immigration status of discriminatees without articulating **some factual basis** for the underlying pleading." (ALJO at pgs. 2-3) The ALJ correctly cited to the controlling precedent in this case, *Flaum Appetizing Corp.*, 357 NLRB 2006 (2011), in which the Board held that an employer must demonstrate "some concrete and positive evidence, as opposed to a mere theoretical argument, that there is some substance to its (affirmative defense) and [it] is not a mere fishing expedition..." *Flaum Appetizing Corp.*, 357 NLRB 2006, at 2009.

The ALJ correctly concluded that Respondent had failed to make a sufficient factual showing to maintain its *Hoffman Plastics* based affirmative defense so as to permit Respondent to examine witnesses regarding their immigration status. The ALJ rejected both of Respondent's

arguments. In rejecting Respondent's claim that its self-performed "Westlaw People Search" showing multiple Social Security matches was a basis to allow Respondent to further investigate the discriminatees' immigration status, the ALJ relied on the fact that the Westlaw reports are confusing in their format and conclusory in their references to multiple people who used the same Social Security number. The Judge noted that the Westlaw reports do not provide an adequate explanation of what the reports mean or any information to address the many possible reasons for the multiple matches.

In rejecting Respondent's claim that testimony adduced during the underlying 2013 ULP hearing that certain discriminatees did not apply for work with Respondent's subcontractor, the ALJ ruled that this testimony was similarly deficient and not a sufficient basis to allow Respondent to further investigate discriminatees' immigration status because the transcript does not contain testimony from persons involved in the subcontractor's E-Verification process, nor did was there testimonial evidence to establish on what basis an employee was told that the documents presented to establish work authorization may have been deficient - and therefore there is no factual basis to conclude that the discriminatees' were not authorized to work.

Finally, it is important to note that in its special appeal, Respondent is conspicuously silent about the fact that it knew the discriminatees - Respondent employed them - and at no time prior to these proceedings did Respondent contend that the discriminatees were unauthorized to work. Respondent's failure to challenge the discriminatees' authority to work was not lost on the ALJ, who emphasized that similar to the respondent in *Flaum*, "Respondent made no determination during its employment of the discriminatees that they were unauthorized to work" and that rather, "it was the filing of the unfair labor practice charge, the discriminatees' participation in the case, and the Board's order of reinstatement and award of backpay to the

discriminatees that motivated the pleading at issue and the inquiry that will follow if the pleading is permitted.” (ALJO pg. 4) Based on his close analysis of Respondent’s proffered evidence, the ALJ then properly concluded that he “find[s] the limited factual basis the Respondent has presented...to be inadequate under the Board’s standards.” Id.

III. ARGUMENT

1. Respondent’s Claim that the ALJ Created a Higher Burden of Proof in Pleading Immigration-Related Affirmative Defenses is Erroneous. Instead, the ALJ Properly Adhered to the Current Standard of Pleading Set Forth in *Flaum*.

Respondent makes various unsupported arguments in its Motion to deflect attention away from the fact that it has not presented any evidence that the discriminatees in this case lack or lacked worked authorization status at any point during the backpay period. One such erroneous argument is that the ALJ created a “higher burden of proof” in his Order striking Respondent’s immigration related defense.

Respondent argues that the ALJ “created a burden of pleading that is not found in the Administrative Procedures Act or in the NLRB’s own regulations, and that flies in the face of federal pleading standards.”² (Respondent’s Brief in Support of Motion pg. 1) Respondent also claims that the ALJ “went beyond the *Domsey* court’s suggestion and required detailed proof supporting each discriminatee’s inability to work,” (Res. Brf. Pg. 6) and that “the ALJ is creating an unrealistically high burden of proof for Respondent at the pleading stage.” (Res. Brf. Pg. 7) None of these assertions is true. As discussed below, the ALJ did not create a new burden of proof and he adhered to current controlling case law which Respondent completely ignores.

² Respondent failed to specify what portion of the APA or what NLRB Rule or Federal Pleading Standard the ALJ ignored or altered. Accordingly, CGC cannot address this unsupported argument except to say that the Second Circuit made it clear in *Domsey Trading Corp.*, 636 F. 3d 33,39 (2nd Cir. 2011), that the Board has a legitimate interest in fashioning rules that preserve the integrity of its proceedings, and the Board in *Flaum Appetizing Corp.* 357 NLRB 2006.(2011), made it clear that applicable rules of pleading and policies underlying the Immigration and Reform Control Act of 1986 and the NLRA require that a *Hoffman* affirmative defense must be specifically pled.

In its Motion, Respondent improperly ignores the controlling precedent in this case, *Flaum Appetizing Corp.*, 357 NLRB 2006 (2011). Rather than recognize the majority decision in *Flaum*, Respondent relies on the dissenting opinion to disingenuously asserts that the ALJ created a new burden of proof with regard to affirmative defenses about work authorization status. However, the majority opinion in *Flaum* makes it clear that Respondent has not met its burden of providing a concrete basis to support its affirmative defense that certain discriminatees lacked work authorization status during the backpay period. Respondent has presented no alternative case precedent that challenges the majority opinion in *Flaum* and its argument that the ALJ created a higher burden of proof should be patently rejected.³

Observing that employers have launched probes into immigration status during compliance proceedings without a legitimate basis and to intimidate employees, the Board has been concerned that such probing would jeopardize labor law enforcement absent administrative limits. *Flaum Appetizing* 357 NLRB 2006, 2009. The Board has anticipated that, without procedural limitations, employers charged with unfair labor practices would be encouraged to “serve subpoenas, and elicit testimony [concerning employees’ immigration status] whenever a discriminatee has a Hispanic surname.” *Id.* Hence, failing to appropriately limit probing into immigration status “would inevitably lead to unwarranted delay, abuse of the Board’s processes, and a waste of administrative resources[.]” while, contrary to the policies of the NLRA,

³ Respondent’s reliance on *Domsey Trading Corp.*, 636 F. 3d 33 (2nd Cir. 2011), is both mis-cited and misplaced. The language quoted by Respondent does not appear on page 36 as cited by Respondent. With regard to the argument being misplaced, the Second Circuit in *Domsey* did not address a deficient *Hoffman Plastics* pleading. In that case, the affirmative defense was raised properly. Thus, the *Domsey* decision does not set forth a standard for the pleading of affirmative defenses regarding work authorization status as claimed by Respondent. In *Domsey*, “the question before the court was what limitations could be placed on a party’s efforts to adduce evidence relevant to what was concededly a properly pleaded affirmative defense.” *Flaum Appetizing*, 357 NLRB at 2009.

“plac[ing] hurdles in front of employees who come to the Board to vindicate their rights and those of the public.” *Id.*

While employers may cross-examine discriminatees about their immigration status in NLRB compliance proceedings, courts have recognized that it is for the Board “to fashion evidentiary rules consistent with *Hoffman*” that “preserve the integrity of tis proceedings.” *NLRB v Domsey Trading Corp.*, 636 F.3d 33, 39 (2d Cir. 2011). In the exercise of that responsibility, the Board requires employers to “articulate a basis for pleading an affirmative defense, thereby opening up an avenue through which to subpoena documents and examine witnesses in order to discover evidence to support its defense.” *Flaum Appetizing* 357 NLRB at 2007. In other words, the Board prevents employers from raising an immigration status-based defense “with the mere hope of discovering evidence to support it.” *Id.* Instead, the Board requires the employer to provide a bill of particulars identifying the individuals against whom an affirmative defense applies, and to briefly state the alleged facts establishing the defense. *Id.* The respondent in *Flaum* and Respondent in the instant case both failed to meet this standard set forth by the Board.

In *Flaum*, the Associate Chief Administrative Law Judge required that the respondent provide the following information with regard to its affirmative defense that employees lacked work authorization status: names of discriminatees who lacked status and which affirmative defenses applied to each one, and a brief statement of the facts constituting the offense each discriminatee allegedly committed and when. *Flaum Appetizing Corp.*, 357 NLRB at 2008. In response, the respondent generally asserted that none of the discriminatees was entitled to work in the United States under IRCA at the time of their employment, and that each discriminatee provided respondent with facially valid but fraudulent documentation and photo identification, thereby committing a willful violation of IRCA and demonstrating unclean hands. The

respondent provided no factual details regarding the discriminatees' lack of status or fraudulent conduct. *Id.* The *Flaum* Board ruled that respondent's vague, unsupported, general claims that the discriminatees lacked status and had provided respondent with fraudulent documentation and photo identification were insufficient to satisfy respondent's pleading requirement and the Board struck the respondent's immigration related affirmative defenses.

Similar to the respondent in *Flaum*, Respondent in this case has failed to provide any factual details to support its affirmative defense as required by the ALJ's order of September 14, 2018. (Attached as Exhibit...) In that Order, the ALJ required that Respondent provide the General Counsel with a Bill of Particulars containing the following evidence in support of its affirmative defense regarding the discriminatees' work authorization status, which mirrors the order of the Associate Chief Judge in *Flaum*:

- a. The identity of each discriminatee alleged to be unauthorized to work in the United States.
- b. The period of time in which each discriminatee lacked authorization to work in the United States.
- c. For each discriminatee, the date which Respondent learned the discriminatee lacked authorization to work.
- d. For each discriminatee, the factual details of the Respondent's assertion that the discriminatee lacked authorization to work.

The ALJ's Order plainly sought nothing more than basic information in connection with Respondent's assertion that certain discriminatees lacked work authorization status – a ruling that is solidly in line with the standard set forth in *Flaum*. Contrary to Respondent's claim that the ALJ created an “unrealistically high burden,” and essentially heightened the burden of proof, a plain reading of the ALJ's Order establishes that Respondent's claim is baseless. All Respondent had to provide to support its affirmative defense was basic information naming

which employees it believed lacked status, when they lacked it, when the Respondent found out about it, and what the factual details are that support the claim of lack of status. However, Respondent failed to provide even this basic information.

2. The ALJ Correctly Found Respondent's Showing to be Insufficient to Satisfy the Standard Set Forth in *Flaum*.

Having established that the ALJ utilized the correct pleading standard, the ALJ properly applied that standard to Respondent's proffer and found it insufficient.

Respondent relies on "Westlaw People Search" reports to support its request to engage in an open-ended, intimidating, and coercive inquiry into twenty-one (21) discriminatees immigration status.⁴ However, these reports do not present a factual basis that would satisfy Respondent's affirmative defense under *Flaum*. Rather than provide basic information to support its claim that certain individual lacked status as required by the ALJ's Order, Respondent presented inconclusive credit agency reports which offer no specific evidence to support Respondent's affirmative defense that twenty-one employees are not entitled to backpay because they lacked work authorization status during the backpay period. In fact, the Westlaw People Search reports specifically warn that the information contained therein merely represents "Possible Adverse Information." The document does not explain what "Possible Adverse Information" means, nor does it offer any details on the nature of the possible adverse information.

⁴ Although Respondent claims that it "discovered" this evidence while engaging in "background research" to serve subpoenas, Respondent has not explained why it could not utilize these employees last known addresses on file with Respondent as it did when mailing the offers of reinstatement mailed to employees in 2013. The facts that Respondent did not engage in this background research until the Compliance Specification issued, is suspect and smacks of retaliation, as prohibited by *Flaum*.

The Westlaw People Search reports represent the epitome of “theoretical argument” that the *Flaum* Board warned against.⁵ The reports show nothing more than the *possibility* that certain discriminatees’ social security numbers match different iterations of the discriminatee’s name or possibly other individuals at some unidentified period of time. Thus, the reports themselves admit to their own uncertainty and unreliability. There could be myriad reasons why a private third-party credit bureau reports that certain social security numbers were associated with more than one individual. It could be due to misspellings in the subject’s name, misprint of the social security number on a credit card application, a glitch in the database or identity theft. The Westlaw reports do not provide any details on what the multiple SSN associations is based. Consequently, Respondent has not met its burden in articulating some concrete details for its assertion regarding the lack of status for the named discriminatees.

Moreover, the Westlaw reports do not establish the time period during which the multiple SSN associations occurred. Thus, it is utterly impossible to determine whether these alleged multiple associations even occurred during the relevant backpay period. Consequently, Respondent has not established any factual basis to believe that the named discriminatees lacked status during any point in the backpay period.

Respondent argues that the Westlaw reports are an “*indicator* of misuse and therefore sufficient evidence to warrant further investigation into the discriminatees’ immigration status.” (Res. Brf. Pg. 7) In support of that argument, Respondent cites to *Am. Fed’n of Labor v. Chertoff*, 552 F.Supp. 2d 999, 1010 (N.D. Cal. 2007). However, that case is inapposite. That case

⁵ In its discussion of an analogous backpay case, the *Flaum* Board noted that it is proper to require that the party interposing the affirmative defense should be required to “demonstrate that it has some concrete and positive evidence, as opposed to a mere theoretical argument, that there is some substance to its affirmative defense and it is not a mere fishing expedition.” *Flaum Appetizing Corp.*, 357 NLRB at 2010.

involved the propriety of a preliminary injunction against the Department of Homeland Security's ("DHS") implementation of a new safe harbor rule regarding employer's receipt of social security "No Match" letters from the Social Security Administration ("SSA"). First, it is important to note the difference between 'No Match' letters issued by the SSA and the non-governmental, private entity-generated Westlaw People Search reports. The SSA "No Match" letters are sent to employers whose employees' W-2 wage and earnings statements contain information that does not match records compiled by the government.⁶ Thus, the No Match letters are based on official, competent government and employee records.

In stark contrast, the Westlaw People Search reports are informal reports generated by private credit authorization companies such as Equifax. Respondent has provided no information regarding from precisely where the Westlaw People Search reports acquired their "multiple SSN associations" information. It is unclear whether such information came from credit card applications, credit score checks, or some other credit related effort. Consequently, these records do not have the same level of reliability as governmental records.⁷ Thus, the case cited by Respondent, *Am. Fed'n of Labor v. Chertoff*, 552 F.Supp. 2d 999 (N.D. Cal. 2007), does not address the same class of documents since that case dealt only with the issue of SSA No Match

⁶ According to the SSA website, "In March of 2019, we began mailing notifications to employers identified as having at least one name and Social Security Number (SSN) combination submitted on wage and tax statement (Form W-2) that do not match our records. The purpose of the letter is to advise employers that corrections are needed in order for us to properly post its employee's earnings to the correct record. There are a number of reasons why reported names and SSNs may not agree with our records, such as typographical errors, unreported name changes, and inaccurate or incomplete employer records. <https://www.ssa.gov/employer/notices.html>

⁷ The Board has repeatedly held that even "No Match" letters from the Social Security Administration do not constitute prima facie evidence that an employee is undocumented. *Aramark Facility Services, v. SEIU, Local 1877*, 530 F.3d 817 (9th Cir. 2008); *The Ruprecht Company*, 366 NLRB No. 179 (2018); *Concrete Wall Forms*, 346 NLRB 831, 834-835 (2006). If the Board finds SSA No Match letters which are based on official payroll and government records to be insufficient, it can only be concluded that the attenuated, privately-generated Westlaw People Search reports could not possibly provide a basis for an immigration related affirmative defense.

letters and whether they can indicate fraud or misuse. That case does not stand for the proposition that informal credit reports are indicators of fraud or SSN misuse.

Second, contrary to Respondent's assertion, the *Chertoff* case is not about the proper pleading of affirmative defenses. In the *Chertoff* case, the preliminary injunction against the DHS was granted and the proposed rule was blocked for various equitable reasons, including because "the government's proposal to disseminate no-match letters affecting more than eight million workers will, under the mandated time line, result in the termination of employment to lawfully employed workers." *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1005 (N.D. Cal. 2007) The district court discussed the no match letters as indicators of fraud or misuse only in dicta and only to point out that fraud or misuse is just one possibility, of many, behind the generation of a no match letter. The court did not make any finding regarding whether a no match letter would constitute sufficient evidence to support an immigration related affirmative defense. Consequently, Respondent's reliance on this case is misplaced and misguided.

3. Respondent's Westlaw People Search Reports Effectively Allege Fraud and Respondent has Also Failed to Meet the Pleading Requirements for Such Allegations

As noted above, Respondent argues that the Westlaw People Search reports are an indicator of misuse of social security numbers, effectively arguing that the named discriminatees engaged in the fraudulent use of social security numbers during the backpay period. However, Respondent fails to satisfy the standard for the proper pleading of fraud as an affirmative defense.

It is well established that a party alleging fraud – or sounding in fraud- must do so with particularity, regardless of whether the allegation is made in a complaint or affirmative defense.” *Flaum Appetizing*, 357 NLRB 2006, 2010 (citing Fed. R. Civ. P. 9(b)) Other courts have generally held that claims of fraud must specifically plead the time, place and content of the

alleged fraud. See *Videojet Systems International, Inc., v. Inkjet, Inc.*, 1997 WL 124259 (N.D. Ill. 1997) (citations omitted.) Courts generally have held that a complaint sounding in fraud may not rely on sweeping references to acts by all or some of the defendants because each named defendant is entitled to be apprised of the facts surrounding the alleged fraud. See *Miller v. City of New York*, 2007 WL 1062505 *4 (E.D.N.Y.), citing *Center Cadillac Inc. v. Bank of Leumi Trust Co.*, 808 F. Supp. 213, 230 (S.D.N.Y. 1992); see also *PharMerica Chicago, Inc. v. Meisels*, 772 F.Supp. 2d 938, 954-955 (N.D. Ill 2011) (in a multiple defendant action, the complaint should inform each defendant of the nature of his or her alleged participation in the fraud, citing *Vicom Inc., v. Harbridge Mech. Services, Inc.*, 20 F.3d 771, 778 (7th Cir. 1994); *Wendt v. Handler, Thayer and Duggan, LLC*, 613 F. Supp. 2d 1021, 1028 (N.D. Ill 2009).

Similarly, an affirmative defense which is based on allegations of fraud must likewise apprise each discriminatee of the nature of the fraudulent acts he or she allegedly committed.⁸

Here, it is clear that Respondent has fallen far short of the requirements of *Flaum* and of the generally accepted basic requirements of pleading fraud as an affirmative defense. Respondent has not provided any detail with regard to the conduct of any specific discriminatee. Respondent provides no documentary evidence or any factual details (date, time, place of fraud, to name a few) to support any claim of fraud. Rather, Respondent makes a vague, overly general statement that its alleged “Westlaw People Search” reports present evidence “indicative” of fraud. This vague statement and the equally vague, inconclusive Westlaw People Search reports do not apprise the discriminatees of the nature of the fraudulent acts he or she allegedly committed as would comply with *Flaum* and the decisions of other courts.

⁸ It is well- settled that affirmative defenses are pleadings and as such are subject to the same requirements applicable to complaints. See *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp 897, 904 (N.D. Ill 2006), citing *Heller Fin. Inc., v. Midway Powder Co., Inc.*, 883 F. 2d 1286, 1294 (7th Cir. 1989).

Thus, whether analyzed under the pleading standard set forth in the controlling Board decision *Flaum*, or under the pleading standards set forth under the Federal Rules of Procedure and general case law, Respondent has utterly failed to establish a factual basis sufficient to support its 13th affirmative defense that certain discriminatees lacked work authorization and that such discriminatees engaged in fraudulent conduct. Contrary to Respondent's attempt at sleight of hand, the ALJ did not set forth a higher burden of proof than that already provided by current Board and case law.

4. The Limited Transcript Testimony From the Underlying ULP Hearing Does Not Provide Factual Details Sufficient to Support Respondent's Burden Under *Flaum*

In addition to the Westlaw People Search reports, Respondent offered selected pages of transcript testimony from the underlying unfair labor practice proceeding to support its immigration related affirmative defense. However, just like the Westlaw People Search reports, these transcripts are woefully deficient since they fail to provide any factual basis to question the immigration status of any discriminatee.

Respondent falsely claims that during the underlying ULP proceeding "Respondent learned that numerous employees who had previously worked for Respondent had not been rehired by HSS due to issues with their immigration status." (Res. Brf. Pg 7-8.) Contrary to Respondent's assertion, the transcript testimony does not show that certain employees were not hired by HSS due to immigration status. To the contrary, in the very transcript pages provided by Respondent attached to their brief in support of the instant Motion, Respondent's General Manager Jeff Rostek testified that "I don't know...I don't know why they weren't hired." Thus, Respondent's own general manager had no idea why certain employees either did not continue to work for HSS. No specific employee is named, nor is any specific employee even discussed in

these transcript excerpts. Thus, Respondent's claim is totally disingenuous and completely mischaracterizes the transcript testimony. Respondent's argument is nothing but mere speculation, its desired conclusion among many possible reasons that the employees did not continue to work for HSS, from Respondent's counsel and from General Manager Rostek that about fifteen discriminatees did not end up working for HSS. No further details are provided.

It is entirely inappropriate to presume that an employee who was not hired by or did not apply for or obtain employment with HSS failed to seek or gain that job because he/she was unauthorized to work in the United States, and it is especially inappropriate to make such an assumption in this case. There are myriad reasons why employees who had just been unlawfully discharged by Respondent would not wish to continue working at the same place where their rights had been so egregiously violated. The transcript excerpts provided by Respondent offer no factual details sufficient to support Respondent's immigration related affirmative defense since they fail to identify any employee or provide factual details regarding such an employee's lack of work authorization status.

5. Respondent's Due Process Rights Have Not Been Violated and Respondent has not Been Subjected to Undue Prejudice Since Respondent was Given Every Opportunity to Present Evidence in Support of Its Thirteenth Affirmative Defense and Failed to Do So.

In its Motion, Respondent erroneously argues that its due process rights were violated by the ALJ's Order and that it was unduly prejudiced by the ALJ's Order striking Respondent's affirmative defense relating to work authorization status and precluding Respondent from questioning discriminatees about their immigration status. Aside from making this claim in its Motion, Respondent offered no argument to support the due process or undue prejudice arguments. To the extent that Respondent intended to argue that due process and undue prejudice results from the ALJ's creation of an allegedly higher burden of proof in pleading affirmative

defenses, the CGC reiterates the above case law and argument. Specifically, that the ALJ did not create a higher standard or burden of proof, and that rather, the ALJ followed well-settled Board law, the Rules of Civil Procedure, and general case law on the standard for pleading affirmative defenses.

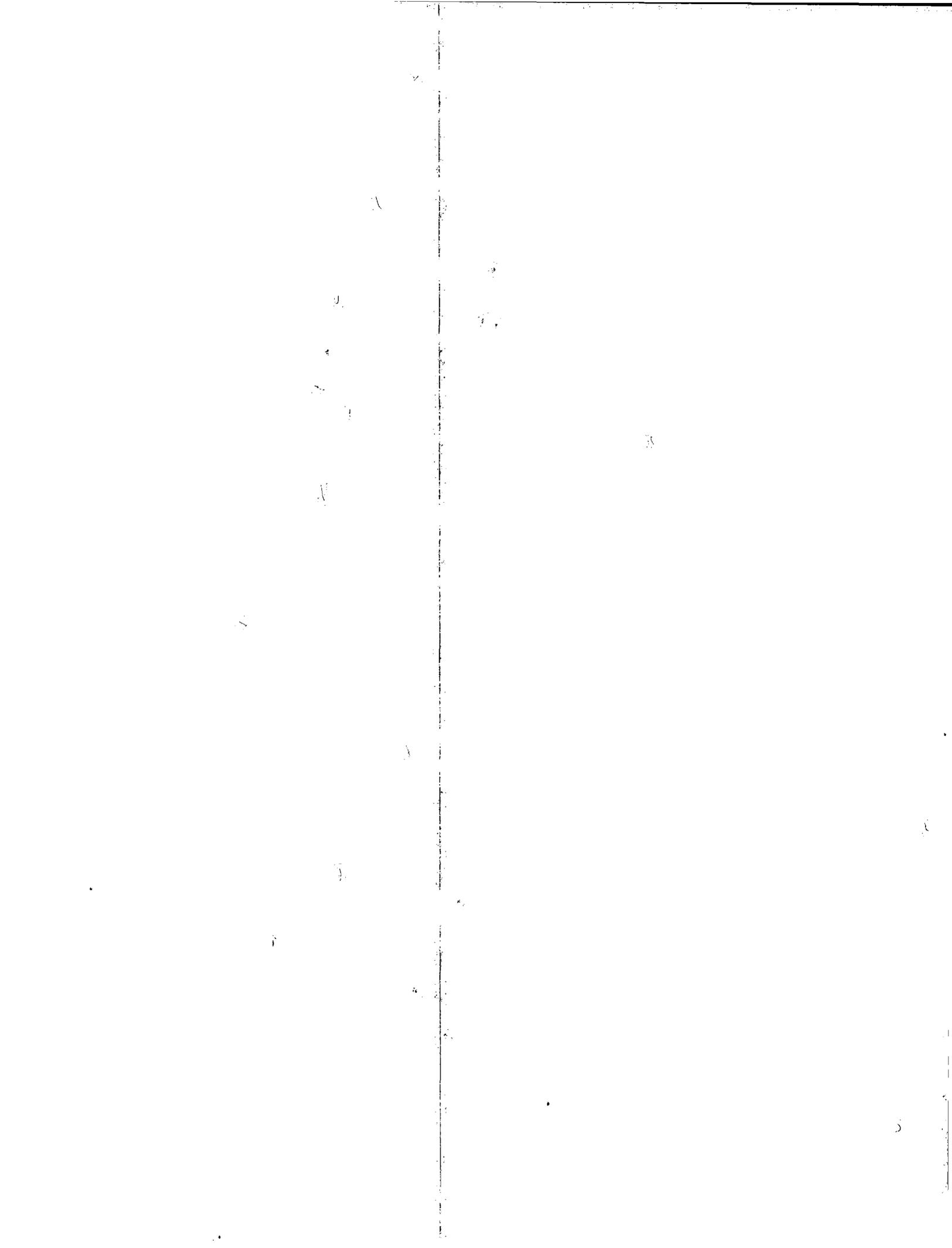
To the extent that Respondent intended to argue that due process concerns arise because it was precluded from further investigating the discriminatees' immigration status, the CGC submits that Respondent's due process rights were not violated; to the contrary, Respondent had the opportunity to present evidence in its possession regarding the twenty-one discriminatees' work authorization status and the evidence provided was insufficient. Just because its evidence was deemed insufficient does not mean that Respondent was denied due process. Respondent was given the opportunity to present evidence in support of its affirmative defense when it filed its Answer, in response to the General Counsel's Bill of Particulars, and in response to the ALJ's Order. Respondent failed to provide sufficient evidence to support its defense. Respondent's failure to present an adequate showing does not establish a due process violation. The same is true for its undue prejudice argument. Undue prejudice does not exist merely because Respondent received an unfavorable evidentiary ruling. Again, Respondent has various opportunities to present a factual basis to support its thirteenth affirmative defense and it could not do so. Respondent's failure to present this adequate factual showing resulted in the adverse evidentiary ruling by the ALJ. This does not amount to undue prejudice since Respondent had every opportunity to establish a factual foundation for its defense.

6. Respondent Must Not Be Permitted to Harass and Intimidate Discriminatees with Questions Regarding their Immigration Status Based on the Scant Information Provided by Respondent in Support of its Affirmative Defense.

As the Board in *Flaum* noted, “Numerous federal courts have recognized that such formal inquiry into immigration status is intimidating and chills the exercise of statutory rights...even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends...” *Flaum*, supra, 357 NLRB 2006, 2012. Respondent should be precluded from engaging in these intimidation tactics and employees’ statutory rights to participate in these proceedings should be protected since Respondent has utterly failed to present any evidence that warrants inquiry into employees’ immigration status.

Respondent had employed most of the discriminatees – in many cases for numerous years – without previously questioning their immigration status. But now, in direct response to the Compliance Specification, Respondent has suddenly engaged in “background research” to find evidence establishing that its former employees were undocumented. However, as discussed above, Respondent has failed to find any such evidence. Instead, Respondent offers confusing and conclusory Westlaw People Search reports, and mischaracterizes Board testimony in order to intimidate and harass the discriminatees to avoid their participation in these proceedings and to avoid paying the discriminatees the backpay it owes them.

Respondent must not be allowed to use these Compliance proceedings as a means to coercively re-investigate the work authorization status of the discriminatees simply because their union activities have caused Respondent to be liable for unfair labor practices. As the Board in *Flaum* observed, “permitting such re-verification and intrusive inquiry without sufficient factual basis for doing so would invite a form of abuse expressly prohibited by [federal immigration law], and would contravene ordinary rules of procedure and undermine the policies of our Act.” 357 NLRB at 2012. In order to uphold the policies and principles of the Act, therefore, Respondent’s Motion should be denied and the ALJ’s Order striking respondent’s thirteenth



affirmative defense and precluding Respondent from questioning witnesses about their immigration status should be upheld.

IV. Conclusion

For the foregoing reasons, Counsel for the General Counsel respectfully urges the Board to Deny Respondent's Motion for Special Permission to Appeal the Administrative Law Judge's Order striking their immigration related defense and precluding Respondent from questioning witnesses about their immigration status.

Respectfully submitted this 4th day of June 2019.

/s/ Emily A. Cabrera
Emily A. Cabrera
Matthew A. Jackson
Counsel for the General Counsel
National Labor Relations Board, Region 29
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EXHIBIT A

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

**REMINGTON LODGING & HOSPITALITY, LLC
D/B/A HYATT REGENCY-WIND WATCH**

and

Cases

29-CA-093850

29-CA-095876

**LOCAL 947, UNITED SERVICE WORKERS
UNION, INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES**

**Order on the General Counsel's Motion to Strike the Respondent's Bill of Particulars
and Portions of the Respondent's Answer, and to Preclude the Respondent from
Questioning Discriminatees Regarding their Immigration Status**

In connection with the above-captioned compliance proceeding, the General Counsel filed a motion to strike the Respondent's bill of particulars and portions of the Respondent's answer to the compliance specification, and to preclude the Respondent from eliciting or introducing any evidence regarding the discriminatees' work authorization or immigration status. The Respondent has opposed this motion.

On February 12, 2016, the Board issued a Decision and Order (363 NLRB No. 112) directing the Respondent to comply with the recommended Order of the Administrative Law Judge as modified. The modified order requires the Respondent to reinstate and make the discriminatees whole for any losses they suffered as a result of their discharge (upon the unlawful contracting of housekeeping work to Hospitality Staffing Solutions (HSS)) and subsequent refusal to hire (upon the termination of the HSS housekeeping contract). On January 27, 2017, the United States Court of Appeals for the Fifth Circuit entered a judgment enforcing the Board's Decision and Order. On June 1, 2018, the Regional Director for Region 29 issued a Compliance Specification and Notice of Hearing.¹ On June 29, 2018, the Respondent filed an answer to the compliance specification. The Respondent's answer included, as its 13th affirmative defense, an assertion that "[n]o backpay is due to any discriminatee who was not legally authorized to work in the United States during the relevant period."

On September 14, 2018, I issued an order granting the General Counsel's motion for a bill of particulars. The order required the Respondent to provide a bill of particulars setting forth the following information:

¹ On April 30, 2019, the Regional Director issued an amendment which modified and updated the original compliance specification.

- 1) The identity of each discriminatee asserted to be unauthorized to work in the United States.
- 2) The period of time in which each discriminatee lacked authorization to work in the United States.
- 3) For each discriminatee, the date the Respondent learned the discriminatee lacked authorization to work.
- 4) For each discriminatee, the factual details of the Respondent's assertion that the discriminatee lacked authorization to work.

On September 18, 2018, the Respondent served upon the General Counsel a response to my order for a bill of particulars. Therein, the Respondent represented that, for 20 named discriminatees, a "Westlaw People Search" report indicated "SSN Match[ing] Multiple Individuals." Respondent further represented that, upon information and belief, certain unidentified former employees "failed to reapply for employment with HSS due to immigration status, or failed to successfully complete the E-Verify process with HSS."² The Respondent indicated that it has subpoenaed HSS records which reflect the same and requested leave to amend its answer and/or the bill of particulars to specifically identify such employees.

Upon receipt of the Respondent's bill of particulars, the General Counsel filed the instant motion and the Respondent filed an opposition. With its opposition, the Respondent attached the Westlaw reports (over 1300 pages) referenced above and certain sections from the transcript of the underlying unfair labor practice hearing. The Westlaw reports are not a model of clarity. The searches appear to have been run in August and September 2018 and are largely based upon information in Equifax credit headers. The search results indicate that the social security numbers of the 20 named discriminatees were used by more than one person. However, the reports do not clearly indicate who used those social security numbers, when, and/or for what purpose.

The transcripts the Respondent relies on consist largely of one discriminatee who understood her employment with HSS to have been terminated because she did not provide documents which satisfied E-Verify.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), "the Supreme Court ruled that the [Immigration Reform and Control Act of 1986 (IRCA)] barred the Board from awarding backpay to an employee who was not authorized to work in this country during what would otherwise have been the backpay period." *Flaum Appetizing Corp.*, 357 NLRB 2006, 2009 (2011). However, the Board has refused to allow respondents to plead an affirmative defense based upon *Hoffman Plastic* and thereby open an avenue for inquiring into the immigration status of discriminatees without articulating some factual basis

² E-Verify was described in the judge's decision in the underlying unfair labor practice case as a voluntary federal government system whereby employers may determine an applicant's work authorization by, for example, electronically verifying that the "new hire's social security number is a match to one on file with Social Security." 363 NLRB No. 112, Slip Op. p. 16, fn.6. In adopting the judge's order as modified, the Board left to compliance the question of any particular discriminatee's eligibility for reinstatement and backpay in light of evidence that an "undetermined number of these employees were not hired by HSS, apparently because they failed to pass drug screens, background checks or HSS' E-Verify requirements." 363 NLRB No. 112, Slip. Op. p. 3, fn.11.

1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)." 8 U.S.C. § 1324b(a),(6). Paragraph 1, 8 U.S.C. § 1324b(1), (A), and (B), makes it an unfair immigration-related practice for a person to discriminate in respect to hiring or discharging an individual because of such individual's national origin or citizenship. Requesting additional documents not required by IRCA on the basis of national origin makes it more difficult for individuals to gain employment (or, in this case, to be reinstated to employment) and thus violates these provisions of IRCA. Cf. *Robison Fruit Ranch, Inc. v. U.S.*, 147 F.3d 798, 802 (9th Cir. 1998).

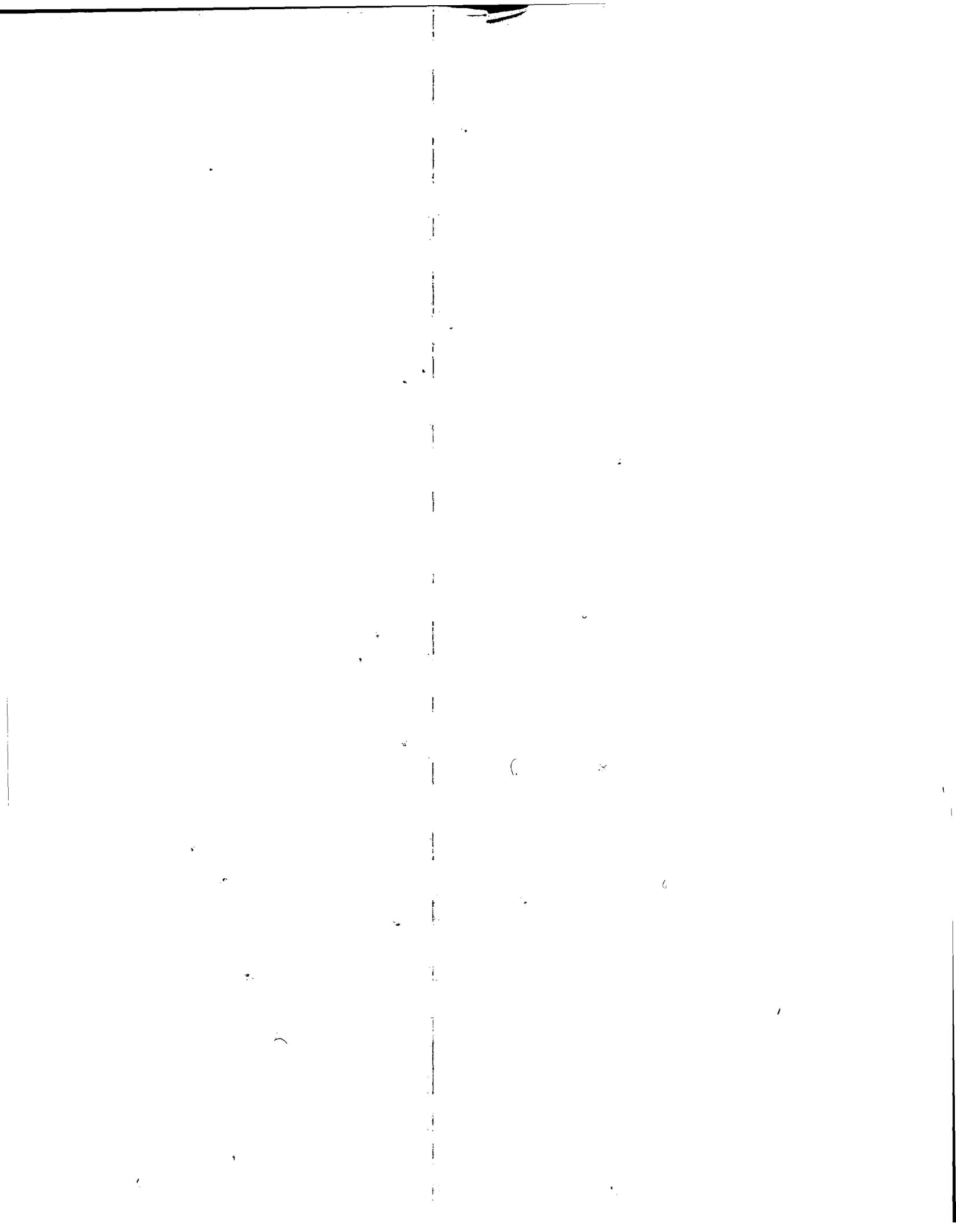
357 NLRB at 2011.

Although little Board precedent has followed *Flaum Appetizing* as to what constitutes a sufficient factual showing by a respondent to maintain a *Hoffman Plastic* affirmative defense and examine discriminatees regarding their immigration status, I do not believe the Respondent has made such a showing here. The Westlaw reports are confusing in their format and conclusory in their reference to multiple people who used the same social security number. We do not know, for example, whether social security numbers are associated with different but similar names (e.g., Samuel Rodriguez and Sam Rodrigues) for the same person, simple errors people make in stating their social security numbers, and/or identity theft (for reasons other than establishing work authorization). I am not familiar with Equifax credit headers and the Respondent has not offered an explanation of the source of the information contained in the Westlaw reports. Further, the transcript portions relied upon by the Respondent do not contain testimony from anyone who was involved in and had personal knowledge of HSS's E-Verify process and/or on what basis an employee was told that documents establishing her work authorization were insufficient.

It is important to note that here, as in *Flaum Appetizing*, the Respondent made no determination during its employment of the discriminatees' that they were unauthorized to work. Rather, "it was the filing of the unfair labor practice charge, the discriminatees' participation in this case, and the Board's order of reinstatement and award of backpay to the discriminatees that motivated the pleading at issue and the inquiry that will follow if the pleading is permitted." *Flaum Appetizing Corp.*, 357 NLRB at 2011. The Respondent would effectively convert a proceeding designed to protect employees from the type of coercion in which it was found to have engaged into a forum for examination that may be additionally intimidating. I find the limited factual basis the Respondent has presented for doing so to be inadequate under the Board's standard.

Accordingly, it is hereby ORDERED that the Respondent's 13th affirmative defense is struck from its answer to the compliance specification⁴ and it is further ORDERED that

⁴ I see no reason to strike the Respondent's bill of particulars as it provides a description of the limited responsive information the Respondent possessed.



the Respondent shall not examine discriminatees or introduce other evidence at the hearing of this matter regarding discriminatees' immigration status.⁵

Dated: May 20, 2019
New York, New York.

Sl Benjamin W. Green
Benjamin W. Green
Administrative Law Judge

⁵ In its brief on the instant motion, the General Counsel requests that I prohibit the Respondent from subpoenaing materials from discriminatees regarding their work authorization. In a prior petition to revoke subpoenas duces tecum issued by the Respondent to discriminatees, the General Counsel requested that I issue an order restricting the production of responsive documents which may reveal discriminatees' immigration status. However, as discussed in my order on the General Counsel's petition to revoke, *Flaum Appetizing* did not create a privilege prohibiting the request for documents that may happen to touch upon immigration status but are relevant for some other reason. In my opinion, legitimate requests for such documents do not involve or implicate the "open-ended inquiry" the Board sought to restrict in *Flaum Appetizing*. *Flaum Appetizing Corp.*, 357 NLRB at 2009. Accordingly, I will not, at this time, issue a broad order restricting the service of all subpoenas that may touch upon the immigration status of discriminatees.

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**REMINGTON LODGING & HOSPITALITY,LLC
D/B/A HYATT REGENCY-WIND WATCH**

and

Case 29-CA-093850
29-CA-095876

**LOCAL 947, UNITED SERVICE WORKERS
UNION, INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES**

**RESPONDENT'S MOTION FOR SPECIAL PERMISSION
TO APPEAL PURSUANT TO RULE 102.26**

Respondent Remington Lodging and Hospitality, LLC d/b/a Hyatt Regency-Wind Watch ("Respondent"), pursuant to Rule 102.26, timely seeks special permission to appeal the attached Administrative Law Judge order, dated May 20, 2019, striking Respondent's 13th affirmative defense and barring the Respondent from examining discriminatees or introducing other evidence at the hearing on this matter regarding discriminatees' immigration status.

The Administrative Law Judge's order materially prejudices Respondent's defense, impedes Respondent's ability to thoroughly examine discriminatees regarding their eligibility for backpay during the relevant time period, and is not supported by good law, as articulated quite well by Board Member Hayes in his dissenting opinion in *Flaum Appetizing Corp.*, 357 NLRB 2006, 2013 (2011). Respondent respectfully requests that the Board reverse the ALJ's decision to enable Respondent to present its affirmative defense and allow for the examination of the discriminatees and introduction of evidence at the hearing regarding discriminatees' immigration status.

Respondent seeks special permission to appeal on the following grounds:

- The ALJ's barring of Respondent from examining discriminatees or introducing other evidence at the hearing of this matter regarding discriminatees' immigration status violates Respondent's due process rights; and
- If Respondent is unable to seek evidence related to a discriminatee's legal authorization to work during the relevant period, and cannot question discriminatees regarding the same, it will unduly prejudice Respondent.

A motion for a special permission to appeal is timely if it is filed "promptly" and will not delay the proceeding. (NLRB Rule 102.26; and See *Lee Enterprises, Inc. d/b/a Arizona Daily Star & Brian Pedersen*, 2012-13 NLRB Dec. (CCH) ¶ 15684, 2011 WL 5869215, n.1 (Nov. 18, 2011)) The Compliance Specification hearing is scheduled to commence on June 11, 2019. Respondent makes this motion within one week of receiving the ALJ's order subject to this appeal. A copy of the appeal Respondent wishes to bring before the Board is attached below.

In the interest of justice and efficiency, it is critical that the Board accept this appeal to ensure Respondent is afforded a fair hearing before the ALJ.

CONCLUSION

Respondent respectfully requests that the Board grant Respondent special permission to appeal the ALJ's decision dated May 20, 2019.

Dated: March 28, 2019

Respectfully Submitted,

STOKES WAGNER

/s/ Jacqueline A. Godoy

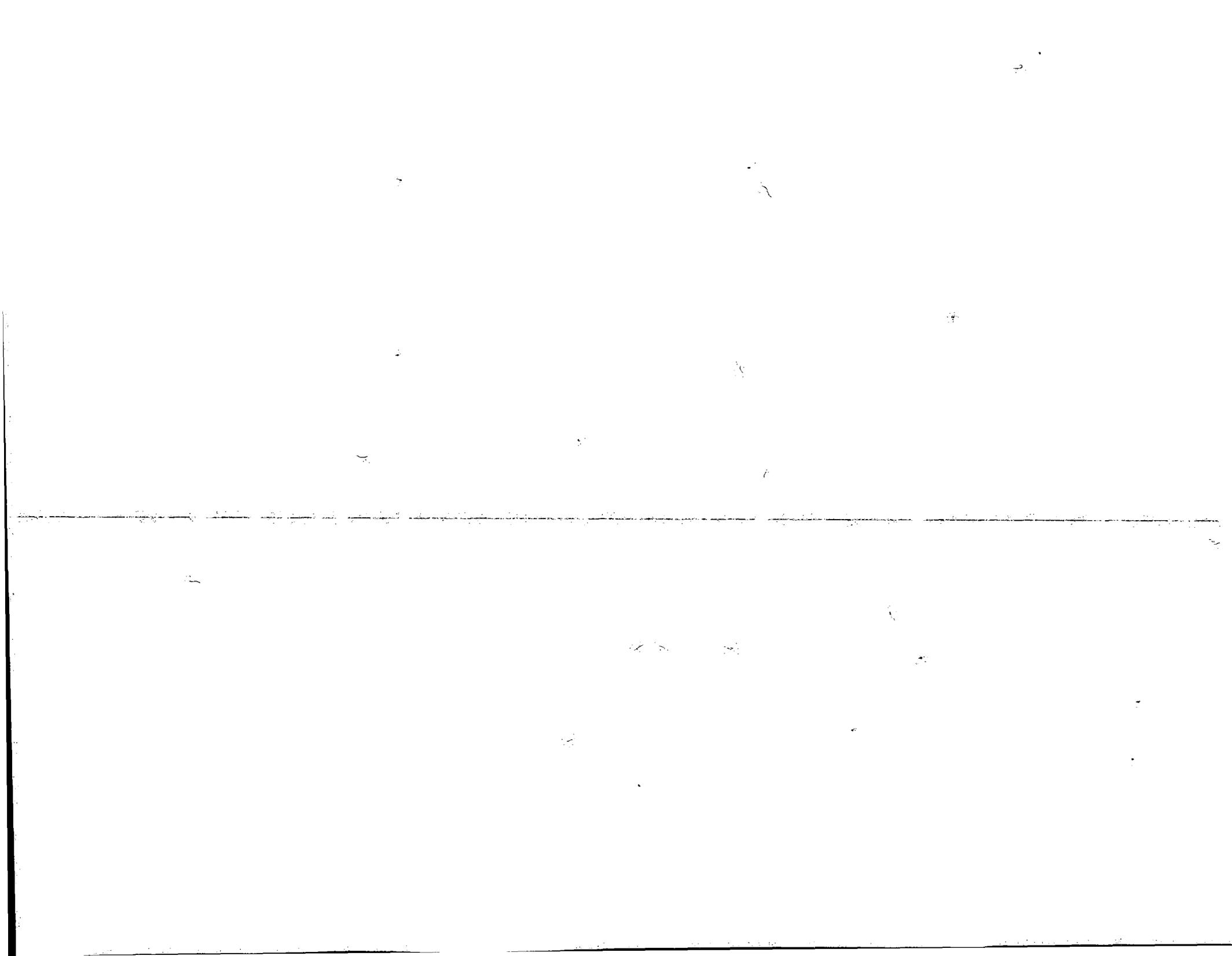
Jacqueline A. Godoy

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ATTORNEYS FOR REMINGTON



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
REGION 29**

**REMINGTON LODGING & HOSPITALITY, LLC
D/B/A HYATT REGENCY-WIND WATCH**

and

Case 29-CA-093850
29-CA-095876

**LOCAL 947, UNITED SERVICE WORKERS
UNION, INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES**

**RESPONDENT'S APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S ORDER
STRIKING RESPONDENT'S 13TH AFFIRMATIVE DEFENSE AND BARRING
RESPONDENT FROM QUESTIONING DISCRIMINATEES REGARDING THEIR
IMMIGRATION STATUS**

Respondent hereby appeals the Administrative Law Judge's ("ALJ") order striking Respondent's 13th affirmative defense and barring Respondent from examining discriminatees or introducing other evidence at the hearing regarding discriminatees' immigration status. (See Exhibit C, a true and correct copy of the Administrative Law Judge's May 20, 2019 order.) The ALJ, in striking the defense, has created a burden of pleading that is not found in the Administrative Procedure Act ("APA") or in the NLRB's own regulations, and that flies in the face of federal pleading standards. The ALJ's order materially prejudices Respondent's defense, impedes Respondent's ability to thoroughly examine discriminatees regarding their eligibility for backpay during the relevant time period, and is not supported by good law. Respondent respectfully requests that the Board reverse the ALJ's decision to enable Respondent to present its

affirmative defense and allow for the examination of the discriminatees and introduction of evidence at the hearing regarding discriminatees' immigration status.

BACKGROUND

Remington Lodging & Hospitality, LLC ("Remington") is a Dallas, Texas based hotel management company. At the time of the events in this case, Remington managed approximately 70 hotels for a number of independent owners, and for a number of different brands – including Hilton, Marriott, Westin and Sheraton (the owners and brand-licensors, in most cases, are separate businesses). The hotel involved in this case, the Hyatt Regency Long Island – near the town of Hauppauge, N.Y. – entered Remington's management portfolio in December of 2011.

When Remington first assumed the management of the hotel, in December 2011, the housekeeping department was operated by Hospitality Staffing Services ("HSS"), an outplacement contractor whose primary role was to provide staffing for this department. Shortly following takeover, Remington assumed full control of the housekeeping department, and became the sole employer.

On August 20, Remington informed the housekeeping staff that HSS would be taking over the department. All employees (with one exception) were invited to apply. HSS was present in the hotel to begin the process of taking applications. HSS required the employees to submit to E-Verify, along with a drug test and a background check. As a consequence of these conditions, a certain significant number of the applicants – possibly as many as 15 – were not hired by HSS on August 21, 2012. (See Exhibit A, Hearing Transcripts)

Shortly after taking over the housekeeping department, HSS gave a 30-day notice to Remington that it was terminating its contract. True to its notice, HSS departed on October 19, 2012. On October 19, 2012, a new staff of housekeepers replaced the HSS staff and were employed

by Remington. Within a week or two following October 19, Remington began making a series of unconditional offers to hire back all of the displaced employees.

Following that, individual unconditional offers were made to all of the displaced employees as openings occurred, and as found by the United States District Court in *Paulsen ex rel. NLRB v. Remington Lodging*, 2013 WL 4119006, aff'd in material part, 773 F3d 462 (2d Cir. 2014) (denying the Board's request, for a 10(j) injunction, to require Remington make an immediate, en masse offer of reinstatement, instead of continuing its series of offers as openings became available). By September 2013, less than a year later, 14 of the 37 displaced employees had accepted an offer and returned.

On February 12, 2016, the National Labor Relations Board issued a Decision and Order on the underlying case and ordered that Remington (1) offer the housekeeping employees employed at the property as of August 20, 2012 full reinstatement to their former position; (2) offer the housekeeping employees employed at the property as of October 19, 2012 full reinstatement to their former position; (3) offer Margaret Loiacono reinstatement to her former position; (4) make the employees whole for any loss of earnings and other benefits as a result of Remington's actions, less any net interim earnings and interest; and (5) compensate the employees for any adverse tax consequences due to the lump sum payment of the backpay award.

After the Fifth Circuit Court of Appeals enforced the Board's decision in full on March 21, 2017, Counsel for the General Counsel ("CGC") brought the present Compliance Specification and Notice of Hearing on June 1, 2018. On June 29, 2018, the Respondent filed an answer to the compliance specification. The Respondent's answer included, as its 13th affirmative defense, an assertion that "[n]o backpay is due to any discriminatee who was not legally authorized to work in the United States during the relevant period."

Respondent raised this defense due to testimony at the underlying hearing that certain individuals were not rehired by HSS due to immigration status. Later, in conducting background research for serving subpoenas to discriminatees to appear at the hearing, Respondent identified numerous discriminatees whose social security numbers were linked to multiple persons, an indicator that the social security number may have improperly used in the past. Specifically, on or about August 2018 and September 2018, Respondent ran “Westlaw People Search” reports for all of the named discriminatees using dates of birth, social security numbers and/or last known City and State. Approximately, 21 of the named discriminatees came back with report identifying “SSN Match[ing] Multiple Individuals.” (See Exhibit B, Westlaw Reports.) According to, Westlaw, the information in the report is gathered from credit bureaus and is reconciled on a monthly basis. The reports were ran solely for the purpose of issuing subpoenas to the individuals and at no point was Respondent engaging in a “fishing expedition.” Given this indicator calling into question the discriminatee’s immigration status, Respondent continued to pursue its 13th affirmative defense as to these 21 individuals.

On August 16, 2018, the CGC filed a motion for a bill of particulars seeking information related to Respondent’s 13th affirmative defense. On September 14, 2018, the ALJ issued an order granting the General Counsel’s motion for a bill of particulars. The order required the Respondent to provide a bill of particulars setting forth the following information: (1) The identity of each discriminatee asserted to be unauthorized to work in the United States; (2) The period of time in which each discriminatee lacked authorization to work in the United States; (3) For each discriminatee, the date the Respondent learned the discriminatee lacked authorization to work; (4) For each discriminatee, the factual details of the Respondent’s assertion that the discriminatee lacked authorization to work. On September 20, 2018, Respondent detailed this information in its Bill of Particulars as requested by the CGC and upon order of the Administrative Law Judge.

Thereafter, on October 3, 2018, the CGC filed its Motion to Strike Respondent's Bill of Particulars, Portions of Respondent's Answer, and to Preclude Respondent from Questioning Discriminatees Regarding their Immigration Status. Despite meeting the pleading requirements under federal law, and despite providing the additional factual information needed to satisfy Board precedent, the ALJ struck Respondent's 13th affirmative defense and ruled that Respondent may not question discriminatees regarding their immigration status during the compliance specification proceeding.

LEGAL ARGUMENT

The ALJ abused his discretion in striking Respondent's 13th affirmative defense. The Supreme Court, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, (2002) ("*Hoffman Plastic*"), found that the award of backpay to an undocumented alien who was never legally authorized to work in the United States was foreclosed by federal immigration policy. *Hoffman Plastic* made it clear that as a jurisdictional matter, the NLRB could not award backpay to a discriminatee who was not authorized to work in the United States. What follows from *Hoffman Plastic* is that employers in a compliance proceeding under the NLRA may raise the affirmative defense regarding the immigration status of the discriminatee and seek evidence to support the discriminatee's authorization for legal employment, a prerequisite for the award of backpay. While the affirmative defense may not be used as a "fishing expedition," the pleading burden instituted here by the ALJ frustrates this right while also effectively allowing the Board to bury its head in the sand regarding a discriminatee's immigration status in direct contravention of *Hoffman Plastic*.

This right to raise the affirmative defense, and thereafter question discriminatees regarding immigration status was recognized by Courts following *Hoffman Plastic*. In *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 36 (2d Cir. 2011), the Second Circuit acknowledged that, "employers may question discriminatees about their immigration status. . ." While *Domsey* pointed out that

the right to question discriminatees was not absolute, the evidentiary limits that an ALJ may institute should not impede the questioning altogether. The Second Circuit court went on to give an example: “Such a limit may, for instance, require an employer, before embarking on a cross-examination of a substantial number of claimants, to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable, or in error.” *Id.* Respondent has proffered this articulable reason for the inquiry into immigration status. Nonetheless, the ALJ went beyond the *Domsey* court’s suggestion and required detailed proof supporting each discriminatee’s inability to work. Such information is simply not available in this type of proceeding where there is no discovery and where discriminatees are in sole possession of the evidence related to their own authorization to legally work throughout the entire backpay period.

The CGC in its motion to strike the affirmative defense, and the ALJ in reaching his decision, rely on the Board’s decision in *Flaum Appetizing Corp.*, 357 NLRB 2006, 2013 (2011). But, in doing so, they substantiate the same error made by the Board in that decision and overstep their jurisdictional authority. As aptly pointed out by Member Hayes in the dissenting opinion, the Board lacks the authority to create these insurmountable hurdles:

My colleagues’ contrary view, which subjects any Hoffman defense to extraordinary requirements of proof in support of pleading, is an obvious attempt to minimize the impact of what they clearly view as an erroneous decision by the Supreme Court. That is an exercise for Congress to undertake, not this administrative agency.

In sum, Hayes concluded that the ALJ cannot use “the guise of procedural and evidentiary limits” to overturn the Supreme Court’s decision in *Hoffman Plastic* and avoid its own obligation to ensure that alleged discriminatees do not receive backpay for periods where they were not in the job market.

Moreover, Respondent has an articulable reason to question the immigration status of at least twenty-one discriminatees named by the CGC and certainly sufficient evidence to move past the pleading stage and to satisfy the limits contemplated by the court in *Domsey*. Specifically, in researching background information related to the discriminatees through the use of “Westlaw People Search,” Respondent became aware that these discriminatees had a social security number that matched multiple individuals. The ALJ points out that the Westlaw report submitted by Respondent is “confusing” and that he is unable to determine whether the multiple matches was due to other reasons, such as a name change, misspelling, or other reasons unrelated to work authorization. However, the ALJ is creating an unrealistically high burden of proof for Respondent at the pleading stage. Contrary to the CGC’s argument, Respondent is not asserting that a mismatched social security number is conclusive proof of immigration status and agrees that there may be other causes for the mismatch. However, Respondent *is* contending that the Westlaw report is an indicator of misuse and therefore sufficient evidence to warrant further investigation into the discriminatee’s immigration status. *See Am. Fed’n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1010 (N.D. Cal. 2007) (“To be sure, plaintiffs are correct that there are numerous reasons unrelated to illegality that a mismatch might exist, including name change or typographical error . . . A discrepancy in the SSA database is not a tell-tale sign of ineligibility, but because ineligibility is one reason why discrepancies occur, it is rational for DHS to use no-match letters as an “indicator[] of a potential problem.”). As such, Respondent is entitled to subpoena documents from the discriminatees to support their legal authorization to work during the backpay period, and to cross-examine these discriminatees regarding their immigration status. The ALJ’s order precludes Respondent from doing both.

In addition, Respondent, during the underlying complaint hearing, learned that numerous employees who had previously worked for Respondent had not been rehired by HSS due to issues

with their immigration status. Respondent has provided testimony from the underlying proceeding to support its assertion. (See Exhibit A, Hearing Transcripts and Exhibit B, Westlaw Reports.) For that reason, Respondent is also entitled to cross-examine these discriminatees regarding their immigration status.

Respondent has sufficiently pled its affirmative defense. By requiring a heightened burden of pleading, essentially requiring that Respondent prove (without the benefit of discovery) that certain discriminatees were illegally working for Respondent, the ALJ precludes the NLRB from abiding by federal immigration policy. While the CGC argues that the federal rules of evidence are irrelevant to pleading requirements in Board proceedings, the CGC can only point to *Flaum* for proof of the more specific pleading requirements it seeks to enforce. Indeed, the Board does not require that other affirmative defenses be plead with specificity. By creating a unique pleading burden, not articulated in the APA or the Board's regulations, and contradicted by federal evidence rules and Supreme court precedent, the ALJ has overstepped his authority as an administrative agent and deprived Respondent of its due process right to litigate the immigration status of discriminatees. This policy decision should be made by Congress and not by the ALJ or the Board.

The controlling precedent provides that an undocumented worker who is ineligible to work during the backpay period is precluded from receiving a backpay award under the National Labor Relations Act. *Hoffman Plastics v. NLRB*, 535 U.S. 137 (2002). The Second Circuit Court decision in *Domsey* precludes an ALJ from doing exactly what he did – creating new pleading limits simply because immigration status is involved. Respondent has met its burden in this case and should be entitled to fully litigate its 13th affirmative defense.

CONCLUSION

As set forth above, Respondent has pled a sufficient factual basis to support its affirmative defense and the questioning of certain discriminatees regarding their immigration status at the

compliance hearing. Furthermore, case law supports Respondent's right to question discriminatees at the hearing about such issues. Based on the foregoing, Respondent respectfully requests that the Board reverse the ALJ's rulings as set forth in his May 20, 2019 "Order on The General Counsel's Motion to Strike the Respondent's Bill of Particulars and Portion of the Respondent's Answer, and to Preclude the Respondent from Questioning Discriminatees Regarding their Immigration Status."

Dated: May 28, 2019

Respectfully Submitted,

STOKES WAGNER

/s/ Jacqueline A. Godoy
Jacqueline A. Godoy
Karl M. Terrell
600 W. Broadway, #910
San Diego, California 92101

ATTORNEYS FOR REMINGTON

EXHIBIT C

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

REMINGTON LODGING &
HOSPITALITY, LLC. D/B/A HYATT
REGENCY WIND-WATCH, A SINGLE
EMPLOYER WITH HHC TRS FP
PORTFOLIO, LLC, A SUBSIDIARY OF
ASHFORD HOSPITALITY TRUST, INC.

and

Case Nos. 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION, INTERNATIONAL
UNION OF JOURNEYMEN AND ALLIED
TRADES

MOTION FOR A BILL OF PARTICULARS

Respondent's Answer to the General Counsel's Compliance Specification fails to comply with the Board's Rules and Regulations Section 102.56 because it fails to "set forth in detail" the factual basis for its affirmative defense that, "No backpay is due to any discriminatee who was not legally authorized to work in the United States during the relevant time period." Respondent failed to plead any facts to support this affirmative defense, including which discriminatees it believes were not legally authorized to work during the relevant time period. In *Flaum Appetizing, Corp.*, 357 NLRB 2006 (2011), the Board emphasized that it will not permit an affirmative defense based on immigration status to proceed where a respondent fails to plead articulable facts in support of the defense. Consequently, without any factual basis, Respondent's bare assertion regarding the discriminatee's work authorization status is

insufficient under the Board's Rules and Regulations and requires that Respondent provide the General Counsel with further detail regarding this affirmative defense.

For this reason, the General Counsel seeks an order requiring that Respondent serve on the General Counsel a bill of particulars containing a clear and concise description of the evidence in support its affirmative defense that no backpay is due to discriminatees who were not authorized to work in the United States during the relevant time period.

I. Background

On February 12, 2016, the Board issued its Decision and Order in Case Nos. 29-CA-093850 and 29-CA-095876,¹ finding that Respondent unlawfully subcontracted out the housekeeping work and discharged the housekeeping employees on August 12, 2012, and unlawfully failed to hire the incumbent housekeeping employees on October 19, 2012, in violation of Sections 8(a)(1) and (3) of the Act. The Board also found that Respondent unlawfully discharged employee Margaret Loicano on January 2, 2013, in violation of Section 8(a)(1) of the Act. Thereafter, Respondent petitioned for partial review of the Board's Decision and Order in the Fifth Circuit. The Board cross-petitioned for enforcement of the Board's Decision and Order.

On January 27, 2017, the Fifth Circuit denied Respondent's petition for partial review and granted the Board's petition for enforcement of the Board's entire Decision and Order. The Fifth Circuit issued its Mandate on March 21, 2017. (Exhibits 1 and 2, respectively.)

On June 1, 2018, the Regional Director for Region 29 of the National Labor Relations Board issued Compliance Specification and Notice of Hearing, to which Respondent filed an Answer on June 29, 2018. (Exhibits 3 and 4, respectively.)

In its Answer, Respondent asserted the following affirmative defense:

¹ 363 NRLB No. 112

“13. No backpay is due to any discriminatee who was not legally authorized to work in the United States during the relevant time period.”

Respondent failed to provide any facts to support this defense, including the identity of those discriminatees it believes were not authorized to work in the United States during the relevant time period.

II. Respondent Has Failed to Plead Articulate Facts to Support Its Affirmative Defense Based on Immigration Status.

In *Flaum Appetizing Corp.*, the Board recognized that “to permit the pleading of an affirmative defense based on immigration status in the complete absence of any articulable reason...would contravene the policies underlying *both* IRCA and the NLRA.” 357 NLRB 2006, 2011 (emphasis in original). In that case, the respondent claimed that eleven employees were disqualified from receiving backpay because they were undocumented aliens “who willfully violated the Immigration Reform and Control Act of 1986...[“IRCA”] by perpetrating a fraud upon the Respondent...” *Id.* at 2007. Counsel for the Acting General Counsel then filed a motion with the administrative law judge for a bill of particulars requesting that the respondent plead specific facts in support of its affirmative defense. The administrative law judge granted the motion and ordered the respondent to proffer a factual summary, including a statement of the facts constituting the offenses that the discriminatees engaged in and when. In reply, the respondent asserted that all eleven discriminatees were ineligible to receive backpay under *Hoffman Plastic Compounds, Inc. v NLRB*, 535 U.S. 137 (2002), because each employee had provided it with fraudulent documentation and photo identification. The respondent asserted that it learned of this alleged fraud when four of the eleven employees testified at the underlying unfair labor practice hearing that they had presented false documents when initially hired. At the same time, the respondent sought to subpoena from each of the eleven employees documents relating to their immigration status in an effort to uncover evidence to support its assertions. The

Acting General Counsel then moved to strike the respondent's affirmative defense because the bill of particulars failed to identify specific facts sufficient to support its claim. *Id.* at 2008.

The Board granted the Acting General Counsel's motion with respect to the seven employees who did not testify about their work status documents at the unfair labor practice hearing. The Board concluded that it was "readily apparent" that the respondent failed to satisfy the ALJ's order for a specific bill of particulars. Thus, the respondent "failed to provide dates on which the discriminatees allegedly committed the wrongdoings attributed to them and failed to describe the nature of the documentation and photo identification submitted by each of the discriminatees or explain why it was fraudulent." *Id.* at 2008, n.4. The Board noted that "it was the filing of the unfair labor practice charge, the discriminatees' participation in this case, and the Board's order of reinstatement and backpay to the discriminatees that motivated the pleading at issue..." *Id.* at 2011. Under these circumstances, allowing the respondent to attempt to use a Board compliance hearing to re-verify an employee's work status would violate IRCA's anti-discrimination provisions. *Ibid*, citing 8 USC sec. 1324b and 8 CFR sec. 8274a.2(b), (1), (vii), (A), (5). The Board warned that if respondents were allowed to plead immigration status as an affirmative defense without any articulable basis, employers would do so as a matter of course. The result would be that,

In every case in which the Board has found that employees' rights have been violated, in order to obtain any remedy for the injuries suffered, the employees would potentially be subject to what is often an embarrassing and frightening inquiry into their immigration status.

In our view, subjecting every employee whose rights have been violated to such an intrusive inquiry, even when the party that has already been adjudged to have violated the law can articulate no justification for the inquiry, contravenes the purposes of the NLRA.

Id. at slip op. 7.

As to the four remaining employees who testified that they had provided false documentation, the Board held that respondent's bill of particulars was also inadequate because the respondent failed to justify its assertion of immigration-related affirmative defenses as to those four employees. Accordingly, the Board ordered that respondent file an amended bill describing specific facts, without which the ALJ would strike the affirmative defense upon a renewed motion by the Acting General Counsel. *Id.* at 2012-13.

Here, Respondent's affirmative defense that backpay is not due to "any" discriminatee not authorized to work in the United States during the relevant time period fails to meet the basic pleading requirements of Section 102.56 of the Board's Rules and Regulations and the principles articulated in *Flaum Appetizing*. This defense is not supported by any articulable facts. Respondent does not even name the discriminatees whom it believes were not authorized to work in the U.S. during the relevant time period. Respondent offers no explanation for why it believes that certain discriminatees, whom it employed and whose immigration status was presumably verified at the time of such employment, were not eligible to work in the United States during the relevant time period. In accordance with *Flaum Appetizing*, if Respondent intends to litigate the work authorization of any of the discriminatees, its current Answer is plainly deficient and must be supplemented with specific facts set forth in a bill of particulars.

III. Conclusion

Accordingly, Counsel for the General Counsel requests an order requiring Respondent to serve on the General Counsel, within 14 days of the date of the order, a bill of particulars which will include (a) the identity of each discriminatee asserted to be unauthorized to work in the U.S. during the relevant time period and (b) for any such discriminatee, a particularized and specific

description of the evidence, both documentary and testimonial, that establishes the individual's ineligibility.

Respectfully submitted this 16th day of August 2018.



Matthew A. Jackson
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EXHIBIT D

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

**REMINGTON LODGING & HOSPITALITY,
LLC d/b/a HYATT REGENCY WIND-WATCH,
A SINGLE EMPLOYER WITH HHC TRS FP
PORTFOLIO, LLC, A SUBSIDIARY OF
ASHFORD HOSPITALITY TRUST, INC.**

and

**Cases 29-CA-093850
29-CA-095876**

**LOCAL 947, UNITED SERVICE WORKERS
UNION, INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES**

Order on the General Counsel's Motion for a Bill of Particulars

On February 12, 2016, the Board issued a Decision and Order (363 NLRB No. 112) directing the Respondent to comply with the recommended Order of the Administrative Law Judge as modified. The modified Order requires the Respondent to reinstate and make the discriminatees whole for any losses they suffered as a result of their discharge (upon the unlawful contracting out of housekeeping work) and subsequent refusal for hire. On January 27, 2017, the United States Court of Appeals for the Fifth Circuit entered a judgment enforcing the Board's Decision and Order. On June 1, 2018, the Regional Director for Region 29 issued a Compliance Specification and Notice of Hearing in the above-captioned cases. On June 29, 2018, the Respondent filed an answer to the specification. The Respondent's answer includes, as its 13th affirmative defense, an assertion that "[n]o backpay is due to any discriminatee who was not legally authorized to work in the United States during the relevant period."

On August 16, 2018, the General Counsel filed a motion for a bill of particulars from the Respondent with a more clear and concise description of its affirmative defense regarding the work status of the discriminatees. Specifically, the General Counsel requests an order requiring the Respondent to serve on the General Counsel a bill of particulars which (a) identifies each discriminate asserted to be unauthorized to work in the United States during the relevant time period and (b) for any such discriminate, a particularized and specific description of the evidence, both documentary and testimonial, that establishes the individuals ineligibility.

Under Section 102.56(b) of the Board's Rules and Regulations, to dispute a portion of the specification, "the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures." The Respondent is not permitted to assert affirmative defenses as "a fishing expedition" without being able to articulate a factual basis for pleading the affirmative defense. *Flaum Appetizing Corp.*, 357 NLRB 2006 (2011). This being so, and having considered the matter, it is hereby

ORDERED that the Respondent, within 7 days of this order, provide the General Counsel with a Bill of Particulars setting forth the following:

- (1) The identity of each discriminatee asserted to be unauthorized to work in the United States.
- (2) The period of time in which each discriminatee lacked authorization to work in the United States.
- (3) For each discriminatee, the date the Respondent learned the discriminatee lacked authorization to work.
- (4) For each discriminatee, the factual details of the Respondent's assertion that the discriminatee lacked authorization to work.

Dated this 14th day of September, 2018
at New York, New York.

S/ Benjamin W. Green
Benjamin W. Green
Administrative Law Judge

EXHIBIT E

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

REMINGTON LODGING &
HOSPITALITY, LLC D/B/A HYATT
REGENCY-WIND WATCH, A
SINGLE EMPLOYER WITH HHC
TRS FP PORTFOLIO, LLC, A
SUBSIDIARY OF ASHFORD
HOSPITALITY TRUST, INC.

and

Case 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION,
INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED
TRADES

RESPONSE TO ORDER FOR BILL OF PARTICULARS

Respondent respectfully responds to the Order on the General Counsel's Motion for a Bill for Particulars dated September 14, 2018 relating to Respondent's affirmative defense relating to the immigration status of the discriminatees.

The Order provides that Respondent articulate: (1) The identity of each discriminatee asserted to be unauthorized to work in the United States; (2) The period of time in which each discriminatee lacked authorization to work in the United States; (3) For each discriminatee, the date the Respondent learned the discriminatee lacked authorization to work; (4) For each discriminatee, the factual details of the Respondent's assertion that the discriminatee lacked authorization to work.

LEGAL ARGUMENT

The law is clear that employers, in a compliance proceeding under the NLRA, may raise the affirmative defense regarding the immigration status of the discriminatee. The Supreme Court, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, (2002) ("*Hoffman Plastic*"), found that the award of backpay to an undocumented alien who was never been legally authorized to work in the United States was foreclosed by federal immigration policy. Subsequent courts have upheld the *Hoffman Plastic* ruling, finding that in a case where the employer pleads lack of

work authorization as an affirmative defense, “employers may question discriminatees about their immigration status. . . .” *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 36 (2d Cir. 2011). While leaving it to the Board to provide rules to preserve the integrity of its proceedings, the only limits the NLRB may place on immigration-related questioning in compliance proceedings are the usual limits a judge may place on cross-examination, which may include requiring the employer to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable (*Id.* at 39). In sum, an employer that proffers an articulable reason as to why it is questioning a discriminatee’s immigration status and a reasonable belief that evidentiary support can be obtained through a trial subpoena, is entitled to raise the affirmative defense.

Here, Respondent has an articulable reason to question the immigration status of at least twenty-one discriminatees named by Counsel for the General Counsel. Specifically, in researching background information related to the discriminatees through the use of “Westlaw People Search,” Respondent became aware that these discriminatees had a social security number that matched multiple individuals. Respondent intends to introduce testimony at the compliance hearing to support its assertion that this finding is indicative of the use of false identification and/or fraud or misuse of immigration-related documents in contravention to federal immigration policy. As such, Respondent is entitled to subpoena documents from the discriminatees to support their legal authorization to work during the backpay period, and to cross-examine these discriminatees regarding their immigration status.

In addition, Respondent, during the underlying complaint hearing, learned that numerous employees who had previously worked for Respondent had not been rehired by HSS due to issues with their immigration status. For that reason, Respondent is also entitled to cross-examine these discriminatees regarding their immigration status.

SUPPORTING EVIDENCE

a. Social Security Number Matches Multiple Individuals

Respondent identifies the following discriminatees with questionable immigration status during the period their entitlement to backpay began through the present:¹

¹ Respondent reserves the right to amend its answer and/or this bill of particulars upon the discovery of information placing the immigration status of other discriminatees into question.

Name of Discriminatee	Description of Evidence
1. Samuel Rodriguez	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
2. Kevin Turcios	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
3. Norville Fowler	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
4. Nairobi Garcia	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
5. Cesia Hernandez	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
6. Vilma Rodriguez	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
7. Monique Webb	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
8. Maria Da Silva	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
9. Francisco de los Santos	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
10. Veronica Flores	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
11. Kathryn Frederick	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
12. Maria Garcia	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
13. Effer Monge	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
14. Ninfa Palacios	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
15. Ana Peralta	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"
16. Roxana Pereira	"Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals"

17. Ana Salgado	“Westlaw People Search” report indicating “SSN Match[ing] Multiple Individuals”
18. Suzanne Sanchez	“Westlaw People Search” report indicating “SSN Match[ing] Multiple Individuals”
19. Jose Garcia Duran	“Westlaw People Search” report indicating “SSN Match[ing] Multiple Individuals”
20. Martin Perla	“Westlaw People Search” report indicating “SSN Match[ing] Multiple Individuals”
21. Monique Webb	“Westlaw People Search” report indicating “SSN Match[ing] Multiple Individuals”

For each discriminatee listed above, the social security number provided to Respondent for employment matches multiple individuals. Respondent became aware of this information after the discriminatees were identified by Counsel for the General Counsel in the Compliance Specification and Notice of Hearing issued on June 1, 2018.

b. Discriminatees Who Were Not Hired by HSS

On or around the time of the hearing on the underlying claim March 5, 2013 through March 19, 2012, Respondent learned that multiple employees who had previously worked for Remington, failed to reapply for employment with HSS due to immigration status, or failed to successfully complete the E-Verify process with HSS. On information and belief, Respondent asserts a reasonable basis to question these individuals regarding their immigration status during the period of application for reemployment with HSS through the present. (See Hearing Transcript, Vol. 1, (21:17 - 22:2; Vol. 2, 148:16 - 151:25; Vol.5, 514:22-24, Vol.6, 674:1-13). Respondent has subpoenaed the records of HSS, and the records produced by HSS will indicate which employees may fall into this category. Respondent requests leave to amend its answer and/or this bill of particulars to specifically identify the employees who may fall into this category due to their failure to seek or obtain employment with HSS.

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CONCLUSION

Wherefore, having demonstrated that the above named discriminatees are subject to cross-examination due to their immigration status, Respondent formally requests to be allowed cross-examination of all discriminatees to establish eligibility of employment during the relevant time period and reserve our right to seek the information at the compliance hearing.

Respectfully submitted, this 21st day of September 2018.



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Attorneys for Respondent

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

REMINGTON LODGING &
HOSPITALITY, LLC D/B/A HYATT
REGENCY-WIND WATCH, A
SINGLE EMPLOYER WITH HHC
TRS FP PORTFOLIO, LLC, A
SUBSIDIARY OF ASHFORD
HOSPITALITY TRUST, INC.

and

Case 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION,
INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED
TRADES

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 5600 West Broadway, Suite 910, San Diego, CA 92101.

On September 21st, 2018, I caused the following document(s) to be served: **RESPONSE TO ORDER FOR BILL OF PARTICULARS** on the interested party below in this action by filing the enclosed

- BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.

- BY THE NLRB'S ELECTRONIC FILING SYSTEM on its website:
<http://www.nlr.gov>, Division of Judges, and Region, New York.
- BY ELECTRONIC MAIL to: Kathy.king@nlrb.gov;
John.Craner@css-pc.com; Matthew.Jackson@nlrb.gov; Emily.Cabrera@nlrb.gov;
Benjamin.Green@nlrb.gov
- BY EXPRESS MAIL: I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight delivery pursuant to Code of Civil Procedure Section 1013(c).

Executed on September 21, 2018, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Perla D. Cuevas
STOKES WAGNER
600 West Broadway, Suite 910
San Diego, CA 92101

EXHIBIT F

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

REMINGTON LODGING &
HOSPITALITY, LLC D/B/A HYATT
REGENCY WIND-WATCH, A SINGLE
EMPLOYER WITH HHC TRS FP
PORTFOLIO, LLC, A SUBSIDIARY OF
ASHFORD HOSPITALITY TRUST, INC.

and

Case Nos. 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION, INTERNATIONAL
UNION OF JOURNEYMEN AND ALLIED
TRADES

**MOTION TO STRIKE RESPONDENT'S BILL OF PARTICULARS, PORTIONS OF
RESPONDENT'S ANSWER, AND TO PRECLUDE RESPONDENT FROM
QUESTIONING DISCRIMINATEES REGARDING THEIR IMMIGRATION STATUS**

The General Counsel of the National Labor Relations Board (Board) hereby moves for the Administrative Law Judge to strike Respondent's Bill of Particulars and Respondent's thirteenth affirmative defense asserted in its Answer to Compliance Specification and further moves to preclude Respondent from eliciting or introducing at this compliance proceeding any evidence regarding the discriminatees' work authorization or immigration status. This Motion is based upon Respondent's failure to comply with the requirements of Board Rules and Regulations Section 102.56, and the Board's holding in *Flaum Appetizing, Corp.*, 357 NLRB 2006 (2011), which require that Respondent set forth in detail a factual basis for its affirmative defense that the discriminatees lacked work authorization during the relevant backpay periods. Rather than setting forth such a detailed factual basis in compliance with Board law,

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Respondent's Bill of Particulars rests entirely on rank speculation and demonstrates that Respondent has no evidence that any discriminatee lacked work authorization status during any portion of the applicable backpay period. Consequently, it is apparent that Respondent is engaged in nothing more than a fishing expedition and is abusing the Board's compliance proceedings in a chilling effort to intimidate the discriminatees and deny them the backpay award that Respondent owes them. Under these circumstances, Board law requires that Respondent be precluded from seeking or introducing evidence relating to the discriminatees' work authorization or immigration status.

I. PROCEDURAL HISTORY

On June 1, 2018, the Regional Director for Region 29 issued a Compliance Specification and Notice of Hearing setting forth, in detail, the amounts owed to each discriminatee entitled to backpay pursuant to the Board's February 12, 2016, Decision and Order, which was enforced by the U.S. Court of Appeals for the Fifth Circuit on January 27, 2017. A true and correct copy of the Compliance Specification, excluding appendices, along with the Board's Decision and Order and the Fifth Circuit Decision in this case are attached hereto as Exhibit A.

On June 29, 2018, Respondent filed an Answer to the Compliance Specification in which it asserted in its thirteenth affirmative defense that certain unidentified discriminatees were not entitled to backpay because they were not legally authorized to work in the United States during the relevant time period.¹ A true and correct copy of Respondent Answer to Compliance Specification and Notice of Hearing is attached hereto as Exhibit B.

On August 16, 2018, Counsel for the General Counsel filed a Motion for a Bill of Particulars seeking an order compelling Respondent to provide the General Counsel with a clear

¹ Counsel for the General Counsel has also filed a Motion for Partial Summary Judgment regarding other portions of Respondent's Answer which fail to comply with the requirements of Board Rules and Regulations Section 102.56. That Motion is currently pending before the Board.

and concise description of the evidence in support of its thirteenth affirmative defense asserting that no backpay is due to discriminatees who were not authorized to work in the United States during the relevant period. A true and correct copy of the General Counsel's Motion for a Bill of Particulars is attached hereto as Exhibit C.

On September 14, 2018, Administrative Law Judge Benjamin Green ("ALJ") issued an Order on the General Counsel's Motion for a Bill of Particulars ("Order") requiring that Respondent provide the General Counsel with a Bill of Particulars specifically setting forth:

- a. The identity of each discriminatee alleged to be unauthorized to work in the United States.
- b. The period of time in which each discriminatee lacked authorization to work in the United States.
- c. For each discriminatee, the date which Respondent learned the discriminatee lacked authorization to work.
- d. For each discriminatee, the factual details of the Respondent's assertion that the discriminatee lacked authorization to work.

A true and correct copy of the ALJ's Order is attached hereto as Exhibit D.

On September 21, 2018, Respondent filed its Response to the Order for Bill of Particulars (Respondent's "Bill of Particulars"). A true and correct copy of Respondent's Bill of Particulars is attached hereto as Exhibit E. Respondent's Bill of Particulars sets forth two grounds that it claims justify inquiry into the discriminatees' immigration status during these Compliance proceedings: 1) that a self-performed "Westlaw People Search" revealed that the social security numbers of certain named discriminatees matched "multiple individuals"; and 2) that certain unnamed discriminatees did not apply for employment with Respondent's one-time subcontractor "HSS."

With regard to its first stated basis for questioning the work authorization status of the discriminatees, Respondent contends that it will present testimony at trial showing that the results of its alleged “Westlaw People Search” are “indicative” of the use of false identification and/or fraud. Respondent provides a list of twenty names in chart form,² and opposite each name Respondent repetitively asserts, “Westlaw People Search report indicating SSN match[ing] multiple individuals.” Respondent’s Bill of Particulars otherwise provides no facts or specifics to support its assertion that the named discriminatees are undocumented.

With regard to Respondent’s second stated basis for questioning the immigration status of the discriminatees, Respondent speculates, without any foundation, that the failure of certain unnamed discriminatees to apply for or obtain employment with HSS, somehow demonstrates that they lack or lacked work authorization. Respondent contends that it learned of this issue during the underlying unfair labor practice proceedings in 2013.

As explained below, Respondent’s unfounded conjecture concerning the work authorization status of the discriminatees named in the Bill of Particulars and those that remain unnamed is insufficient to allow invasive inquiries into the discriminatees’ immigration history under extant law.

II. ARGUMENT

Respondent’s Bill of Particulars is woefully deficient and utterly fails to comply with the provisions of the ALJ’s Order, the Board’s Rules and Regulations, and the Federal Rules of Civil Procedure. The lack of substance in Respondent’s Bill of Particulars shows that Respondent is engaged in nothing more than a classic fishing expedition in the hopes of uncovering at trial

² Respondent inaccurately states in its Bill of Particulars that 21 discriminatees have social security numbers that reveal “multiple matches” via Respondent’s purported “Westlaw People Search.” A review of the list of discriminatees allegedly in this category provided by Respondent reveals that Respondent listed discriminatee Monique Webb twice, such that there are actually only 20 named discriminatees in this category identified by Respondent.

evidence regarding the discriminatees' work authorization status, which Respondent presently has no legitimate basis to doubt. Respondent's true intent here is apparent: to harass and intimidate the discriminatees in order to either chill their participation in these proceedings or find something Respondent can use to argue that a discriminatee is not entitled to backpay.

As set forth in the General Counsel's Motion for a Bill of Particulars, the Board in *Flaum Appetizing Corp.*, recognized that "to permit the pleading of an affirmative defense based on immigration status in the complete absence of any articulable reason...would contravene the policies underlying both IRCA and the NLRA." 357 NLRB 2006, 2010 (emphasis in original). In *Flaum*, the respondent sought to justify its immigration-related affirmative defense by asserting in a bill of particulars that specific work authorization documents furnished to the respondent by certain discriminatees were fraudulent. The Board found that the evidence the respondent set forth in its bill of particulars was inadequate and struck the respondent's immigration-related affirmative defense regarding certain discriminatees, since the defense "failed to provide dates on which the discriminatees allegedly committed the wrongdoings attributed to them and failed to describe the nature of the documentation and photo identification submitted by each of the discriminatees or explain why it was fraudulent." *Id.* at 2008 n.4. The Board noted with disapproval that "it was the filing of the unfair labor practice charge, the discriminatees' participation in this case, and the Board's order of reinstatement and backpay to the discriminatees that motivated the pleading at issue..." *Id.* at 2009.

Similar to the respondent in *Flaum*, Respondent here has failed to provide any facts or evidence to support its unfounded claim that the twenty named discriminatees engaged in the misuse of identification and/or fraud and were therefore unauthorized to work in the United States during the relevant time periods. Moreover, Respondent failed to even provide the names

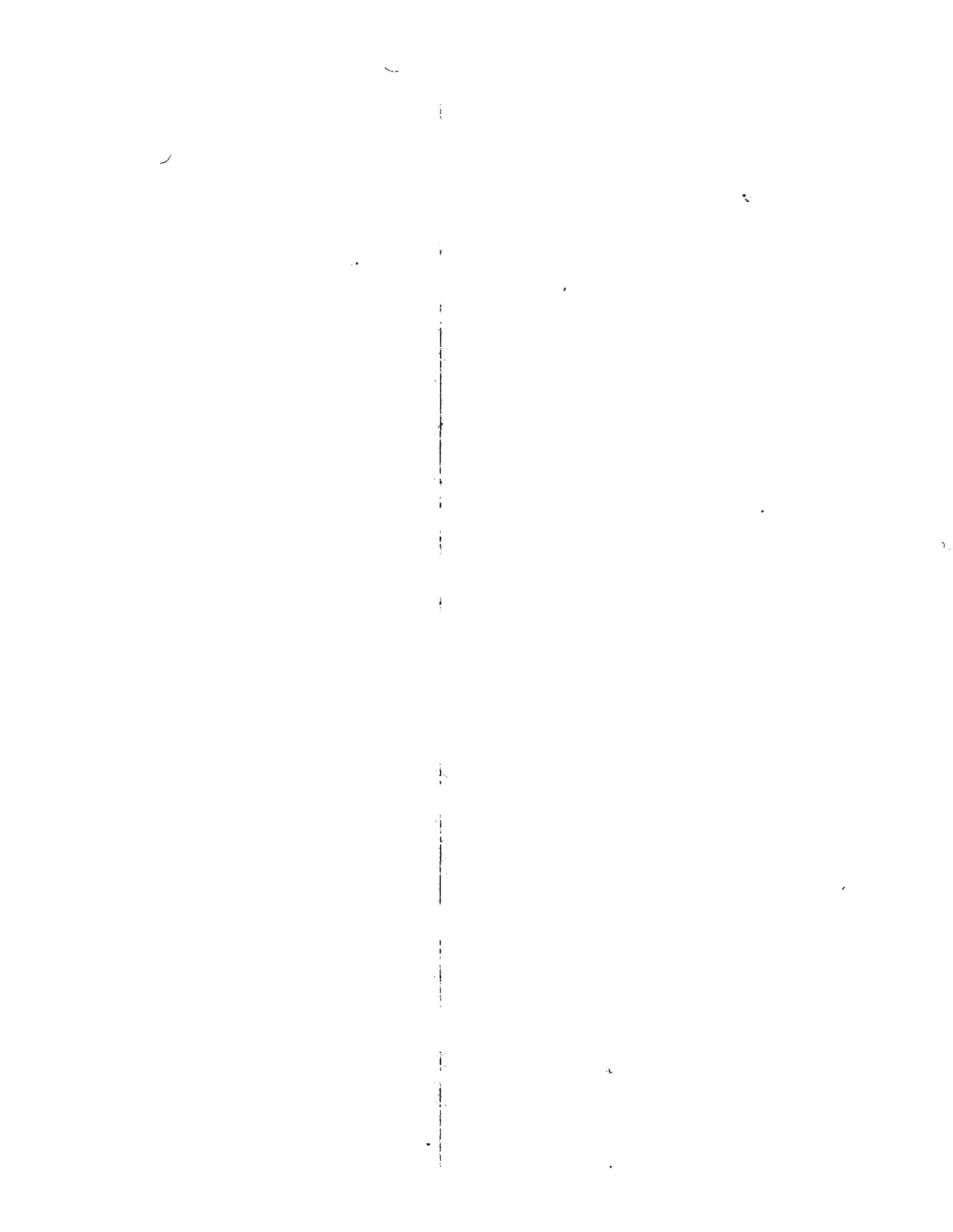
of the discriminatees that it alleges failed to apply for work at HSS because of their lack of work authorization. As discussed in greater detail below, the vague, unsupported claims in Respondent's Bill of Particulars do not provide adequate factual support for its thirteenth affirmative defense regarding the discriminatees' work authorization status, as required under Board law, and both the Bill of Particulars and the affirmative defense should be stricken accordingly. Moreover, since Respondent's Bill of Particulars makes it clear that Respondent intends to subpoena the discriminatees and "cross-examine" them on their immigration status, the General Counsel further seeks an Order precluding Respondent from eliciting or introducing at trial evidence concerning the discriminatees' work authorization status.

A. Respondent's Bill of Particulars Fails to Comply with the ALJ's Order

In his Order on the General Counsel's Motion for a Bill of Particulars, the ALJ clearly set forth the facts and evidence that Respondent had to provide in response to the General Counsel's Motion for a Bill of Particulars. Specifically, the Order required that Respondent provide: 1) the identity of the discriminatees alleged to not have work authorization, 2) the dates on which the discriminatees lacked work authorization, 3) the dates on which Respondent discovered the lack of work authorization, and 4) factual details regarding Respondent's assertion that the individual discriminatee lacked authorization. Other than providing the approximate dates on which Respondent learned of the alleged work authorization issues, Respondent's Bill of Particulars fails to comply with any of the ALJ's directives.

1. Respondent Does Not Identify All of the Discriminatees It Contends Lack Work Authorization

Contrary to the ALJ's simple and clear directive, Respondent failed to provide the identities of all the discriminatees it believes lack work authorization status. While Respondent did identify the discriminatees it believes to have engaged in the misuse of identification and/or



fraud, Respondent did not name the discriminatees whom it claims failed to apply for or obtain employment with HSS because of they lacked work authorization status. Rather, Respondent vaguely claims that “multiple employees” who had worked for Remington failed to apply for work with HSS, supposedly for immigration-related reasons. Although Respondent admits that it learned of these multiple individuals at the time of the underlying ULP hearing in 2013, it fails to name them. Respondent instead contends that it has subpoenaed records from HSS and once HSS complies with said subpoena, those records “will indicate” which employees “may” fall into this category. Respondent thus admits that it currently does not know who these discriminatees are, that it has no current evidence that any specific individual failed to apply for employment with HSS because they lacked work authorization status, and that Respondent intends to utilize the Board’s compliance proceedings to undertake a wide-ranging search for evidence that might somehow exclude discriminatees from receiving backpay.

This is precisely what the Board in *Flaum* sought to prevent. The Board prohibits employers from raising an immigration status-based defense, “with the mere hope of discovering evidence to support it.” *Flaum Appetizing*, 357 NLRB at 2009. Yet as Respondent’s Bill of Particulars makes clear, Respondent cannot even name the discriminatees that it claims lack status on account of their mere failure to obtain employment with HSS, and it seeks to use Board subpoenas “with the mere hope of discovering evidence” that would support Respondent’s preconceived, unsubstantiated belief that these discriminatees lack work authorization. Respondent’s failure to name all of the discriminatees whom Respondent asserts lack work authorization plainly fails to comply with the ALJ’s Order, and the Bill of Particulars should be stricken on that basis.

2. *Respondent Failed to Provide the Dates on Which the Discriminatees Are Alleged to Have Lacked Work Authorization*

In addition to failing to identify all of the discriminatees whose immigration status Respondent intends to probe at trial, Respondent's Bill of Particulars also does not comply with the ALJ's Order requiring Respondent to provide the dates during which the discriminatees allegedly lacked work authorization status. As noted above, Respondent provided the names of twenty discriminatees in chart form, and the only information provided other than the names is the vague, general statement: "Westlaw People Search" report indicating "SSN Match[ing] Multiple Individuals." In direct contravention of the ALJ's Order, Respondent provides absolutely no information regarding when these discriminatees supposedly lacked work authorization. Likewise, in regard to the unnamed discriminatees who purportedly lacked work authorization status because they did not obtain employment with HSS, Respondent does not provide the dates during which these unnamed individuals were allegedly unauthorized. Thus, here again, Respondent has failed to comply with the ALJ's Order, and the Bill of Particulars should be stricken.

3. Respondent Provided No Factual Support for Its Assertion that the Discriminatees Lacked Work Authorization Status

Respondent asserts in its Bill of Particulars that twenty named discriminatees may have provided false social security numbers in connection with obtaining employment with Respondent. Respondent has thus essentially accused these individuals of having engaged in fraud. Respondent casually levels these serious allegations without providing any details substantiating the alleged fraud. Providing even less supporting information than that which the Board found inadequate in *Flaum*, Respondent here simply asserts that its alleged "Westlaw People Search" – conducted after the Compliance Specification in this case issued on June 1, 2018 – revealed information suggesting that the social security numbers that the twenty named

discriminatees used to gain employment with Respondent were false. As explained fully below, the results of Respondent's alleged "Westlaw People Search" do not establish an adequate basis to question the discriminatees' immigration status.³

Similarly, Respondent provides no factual support for its speculation that other unnamed discriminatees lacked work authorization status simply because they did not seek or obtain employment with HSS. Respondent presumes that the mere fact that certain discriminatees did not apply for a job with, or were not hired by HSS, means that these individuals must have been unauthorized to work in the United States. However, again contrary to the ALJ's Order, Respondent provides no factual basis to establish its speculative conclusion regarding the reason why certain discriminatees did not apply for, or were not hired to work with HSS. There are countless reasons that might explain why certain individuals did not apply for or get a job with HSS, but Respondent, without any explanation or factual support, assumes that these unnamed discriminatees did not apply for or obtain employment with HSS because of their immigration status. Such pure speculation is plainly inadequate and does not comply with the ALJ's Order requiring Respondent to set forth in its Bill of Particulars factual details supporting Respondent's assertion that certain discriminatees lacked authorization. Once more, Respondent has failed to comply with the ALJ's Order, and its Bill of Particulars should be stricken accordingly.

B. Respondent's "Westlaw People Search" Does Not Provide an Adequate Factual Basis to Support its Immigration-Related Affirmative Defense

Respondent's Bill of Particulars relies extensively on a "Westlaw People Search," the results of which Respondent contends cast doubt on the work authorization status of twenty

³ Moreover, it should be noted that Respondent employed the vast majority of the twenty employees named in its Bill of Particulars, some for as long as fourteen years, and presumably, Respondent complied with the requirements of federal immigration law when it hired these individuals and kept them employed for years. Thus, the fact that Respondent claims to have checked the validity of these workers' social security numbers only in preparation for this Compliance proceeding, after the discriminatees won reinstatement and a backpay award, smacks of retaliation. See *Flaum, supra*, 357 NLRB at 2009-11.

named discriminatees. Respondent, however, offers no details establishing what exact searches it performed, what the precise results of the search were in each instance, or any reason to believe that these results constitute reliable evidence putting the discriminatees' work authorization status in question. Respondent does not provide the website that was searched nor any printouts of the results obtained from the search. In the time since Respondent filed its Bill of Particulars, Counsel for the General Counsel has investigated the services offered by Westlaw and found that Westlaw offers no service called "Westlaw People Search."⁴ Thus, it is entirely unclear what service Respondent actually used to conduct its alleged check of the discriminatees' social security numbers.

Even if it were clear that Respondent utilized a valid Westlaw service that revealed that the social security number presented by certain individuals matched multiple people, which it is not, such evidence says virtually nothing about the work authorization status of the named discriminatees. The Board has repeatedly held that "No Match" letters from the Social Security Administration do not constitute prima facie evidence that an employee is undocumented. See e.g., *Aramark Facility Services, v. SEIU, Local 1877*, 530 F.3d 817 (9th Cir. 2008); *The Ruprecht Company*, 366 NLRB No. 179 (Aug. 27, 2018); *Concrete Wall Forms*, 346 NLRB 831, 834-835 (2006). The Board noted in those cases that there are myriad reasons, having nothing to do with work authorization status, why a social security number may not match a name submitted by an employer. *Id.*

Since the Board holds that an official "No Match" letter from the Social Security Administration does not constitute proof of undocumented status, Respondent's self-performed search using an unspecified and non-existent "Westlaw People Search" website in the present

⁴ Westlaw offers a service called "PeopleMap" that may be used to investigate individuals based on their social security numbers. However, the "Westlaw People Search" service cited in Respondent's Bill of Particulars does not exist.

case necessarily fails to constitute adequate proof that any discriminatees lacked work authorization. The purported results of Respondent's "Westlaw People Search," therefore cannot serve as the "factual basis" that Respondent is required to set forth in support of its immigration status-related affirmative defense under Board law. Thus, Respondent's Bill of Particulars utterly fails to articulate a factual basis to substantiate its thirteenth affirmative defense, and the Bill of Particulars and the affirmative defense should be stricken accordingly.

C. Respondent Alleges Fraud Against the Discriminatees but Does Not Plead Any Details Relating to the Alleged Fraud, In Defiance of Board Law and the Federal Rules of Civil Procedure

"It is well established that a party alleging fraud – or claims sounding in fraud – must do so with particularity, regardless of whether the allegation is made in a complaint or affirmative defense." *Flaum Appetizing*, 357 NLRB 2006, 2010 (citing Fed. R. Civ. P. 9(b)) Federal courts have thus generally interpreted the Federal Rules of Civil Procedure as requiring that claims of fraud specifically plead the time, place and content of the alleged fraud. See *Videojet Systems International, Inc., v. Inkjet, Inc.*, 1997 WL 124259 (N.D. Ill 1997) (citations omitted). Likewise, courts hold that a complaint sounding in fraud may not rely on sweeping references to acts by all or some of the defendants because each named defendant is entitled to be apprised of the facts surrounding the alleged fraud. See *Miller v. City of New York*, 2007 WL 1062505 *4 (E.D.N.Y.), citing *Center Cadillac Inc. v. Bank of Leumi Trust Co.*, 808 F. Supp. 213, 230 (S.D.N.Y. 1992); see also *PharMerica Chicago, Inc. v. Meisels*, 772 F.Supp. 2d 938, 954-955 (N.D. Ill 2011) (in a multiple defendant action, the complaint should inform each defendant of the nature of his or her alleged participation in the fraud, citing *Vicom Inc., v. Harbridge Mech. Services, Inc.*, 20 F.3d 771, 778 (7th Cir. 1994)); *Wendt v. Handler, Thayer and Duggan, LLC*, 613 F. Supp. 2d 1021,

1028 (N.D. Ill 2009). An affirmative defense based on allegations of fraud must similarly apprise each discriminatee of the nature of the fraudulent acts he or she allegedly committed.⁵

Here again, it is clear that Respondent has fallen short of the requirements of *Flaum* and of the generally accepted basic requirements of pleading fraud as an affirmative defense. Respondent has not pled the time, place and content of the discriminatees' alleged fraud involving their social security numbers. Indeed, Respondent provides no detail whatsoever with respect to the alleged fraudulent conduct of any specific individual. Rather, Respondent asserts only a vague, overly general statement that its alleged "Westlaw People Search" uncovered evidence "indicative" of fraud. Such an ambiguous and unsupported statement does not apprise the discriminatees of the nature of the fraudulent acts he or she allegedly committed, as *Flaum* and the Federal Rules of Civil Procedure require.

D. Respondent Has No Basis to Question the Work Authorization Status of Any Discriminatee and Should be Barred from Doing So at Trial

As set forth above, Respondent's Bill of Particulars presents no plain statement of fact that any of the discriminatees presently lacks or lacked work authorization status during the relevant backpay period. It is thus clear that Respondent has no legitimate basis to elicit evidence from or question the discriminatees about their immigration status. Rather, it appears that Respondent's true intent in asserting its work authorization status-related defense is to abuse the Board's processes and turn these Compliance proceedings into an extended and invasive inquiry into the immigration histories of still untold numbers of discriminatees. This must not be allowed, as the chilling effect that such an unfounded inquiry would have on the discriminatees' exercise of their rights under the Act would be profound.

⁵ It is well- settled that affirmative defenses are pleadings and as such are subject to the same requirements applicable to complaints. See *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp 897, 904 (N.D. Ill 2006), citing *Heller Fin. Inc., v. Midway Powder Co., Inc.*, 883 F. 2d 1286, 1294 (7th Cir. 1989).

As the Board noted in *Flaum*, “Numerous federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights.” *Flaum*, supra, 357 NLRB at 2012. This is true even of workers who do possess valid work authorization, because:

“Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding” *Id.* (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004)).

Because of the inherent chilling effect of an open-ended inquiry into employees’ immigration status, the Board holds that, in a Compliance proceeding such as the present case, “subjecting every employee whose rights have been violated to such an intrusive inquiry, even when the party that has already been adjudged to have violated the law can articulate no justification for the inquiry, contravenes the purposes of the NLRA.” That is why the Board requires a considerable showing by a respondent before it will allow the respondent to assert a defense or put on evidence regarding the discriminatees’ immigration status, and Respondent here has simply not made the requisite showing called for under *Flaum*. Respondent’s Bill of Particulars shows that it has basis to question the work authorization status of any discriminatee, and in order to prevent the unnecessary chill of employees’ Section 7 rights, Respondent must be barred from questioning the discriminatees and subpoenaing evidence from them regarding their immigration status.

III. CONCLUSION

For all of the foregoing reasons, Respondent’s Bill of Particulars should be stricken because it does not comply with the ALJ’s Order, the Board’s holding in *Flaum*, the Board’s Rules and Regulations, or the Federal Rules of Civil Procedure. Moreover, Respondent’s

thirteenth affirmative defense pled in its Answer to the Compliance Specification in this case should also be stricken, as there is no factual basis to support Respondent's contention that the discriminatees lacked authorization to work in the United States. The General Counsel respectfully moves the Administrative Law Judge to strike these portions of Respondent's pleadings and issue an order prohibiting Respondent from subpoenaing evidence or questioning witnesses about the work authorization status of any discriminatee during the upcoming Compliance proceeding.

Respectfully submitted this 3rd day of October 2018.

/s/ Emily A. Cabrera

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EXHIBIT G

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

REMINGTON LODGING &
HOSPITALITY, LLC D/B/A HYATT
REGENCY-WIND WATCH, A
SINGLE EMPLOYER WITH HHC
TRS FP PORTFOLIO, LLC, A
SUBSIDIARY OF ASHFORD
HOSPITALITY TRUST, INC.

and

Case 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION,
INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED
TRADES

**RESPONSE IN OPPOSITION TO THE GENERAL COUNSEL'S MOTION TO STRIKE
RESPONDENT'S BILL OF PARTICULARS, PORTIONS OF RESPONDENT'S ANSWER,
AND TO PRECLUDE RESPONDENT FROM QUESTIONING DISCRIMINATEES
REGARDING THEIR IMMIGRATION STATUS**

Respondent respectfully responds to the General Counsel's Motion to Strike Respondent's Bill of Particulars, Portions of Respondent's Answer, and to Preclude Respondent from Questioning Discriminatees Regarding their Immigration Status, dated October 3, 2018.

I. INTRODUCTION

Counsel for the General Counsel ("CGC") seeks to wrongfully preclude Respondent from exercising its due process rights rooted in Board precedent and federal law. Respondent has effectively provided a factual basis for its affirmative defense relating to the immigration status of discriminatees, thus overcoming the necessary hurdles for asserting the defense and questioning certain discriminatees about their immigration status at the hearing. The CGC's motion ignores controlling precedent and seeks to impose a burden on Respondent that is not founded in the law.

II. BACKGROUND

Remington Lodging & Hospitality, LLC ("Remington") is a hotel management company based in Dallas, Texas. At the time of the events at issue in this case, Remington managed

approximately seventy hotels for a number of independent owners and different brands – including Hilton, Marriot, Westin, and Sheraton. The Hyatt Regency Long Island – the hotel involved in this case – came under Remington’s management in December of 2011. At that time, in December 2011, the Hyatt’s housekeeping department was operated by Hospitality Staffing Services (“HSS”). HSS is an outplacement contractor who provided staffing for the department. Shortly after taking over management of the Hyatt, Remington assumed full control of the housekeeping department, becoming the sole employer.

On August 20, 2012, Remington informed the housekeeping staff that HSS would be taking over the department. All employees (with one exception¹) were asked to apply. HSS, present in the hotel during the application process, required employees to submit to E-Verify as well as a drug test and a background check. Remington, however, did not previously use E-Verify in its application process.² As a result of the stricter hiring process, a certain significant number of the applicants – as many as fifteen – were not hired by HSS on August 21, 2012. See Attached Exh. B. Hearing Tr. Vol 1, 21-22.

Shortly thereafter, HSS gave a thirty-day notice to Remington, and terminated its contract on October 19, 2012. On that day, a new staff of housekeepers employed by Remington replaced the HSS staff. Within the next week or two, Remington began making unconditional offers to hire back all of the displaced employees.

Following that, individual unconditional offers were made to *all* of the displaced employees as openings occurred, and as found by the United States District Court in *Paulsen ex rel. NLRB v. Remington Lodging*, 2013 WL 4119006, *aff’d in material part*, 7773 F.3d 462 (2d Cir. 2014) (denying the Board’s request, for a 10(j) injunction, to require Remington make an immediate, *en masse* offer of reinstatement, instead of continuing its series of offers as openings became available). By September 2013, less than a year later, 14 of the 37 displaced employees had accepted an offer and returned.³

¹ There is no allegation in this case, or any evidence, that the exclusion of this one employee was discriminatorily unlawful.

² See Attached Exhibit B including transcripts of testimony from the hearing on Mar. 5, 2013. In its application process, Remington visually verified the applicants’ legal documentation, and, depending on the state requirements, would conduct a background check. Hearing Tr. Vol 6, 163.

³ The district court found, at *slip op.* *1, that “37 employees were eligible for reinstatement. At the time of the issuance of its decision, “only 8 employees are waiting for a position to open and it is extremely likely that these remaining 8 employees will receive positions over the next 60 days.” Subsequently, on October 3, 2013, Remington reported to the Court that all of the offers had been made (doc. no. 35).

On February 12, 2016, the National Labor Relations Board issued a Decision and Order on the underlying case and ordered that Remington (1) offer the housekeeping employees employed at the property as of August 20, 2012 full reinstatement to their former position; (2) offer the housekeeping employees employed at the property as of October 19, 2012 full reinstatement to their former position; (3) offer Margaret Loiacono reinstatement to her former position; (4) make the employees whole for any loss of earnings and other benefits as a result of Remington's actions, less any net interim earnings and interest; and (5) compensate the employees for any adverse tax consequences due to the lump sum payment of the backpay award. After the Fifth Circuit Court of Appeals enforced the Board's decision in full on March 21, 2017, Counsel for the General Counsel ("CGC") brought the present Compliance Specification and Notice of Hearing on June 1, 2018. Respondent answered the Compliance Specification on June 29, 2018 in accordance with the Federal Rules of Civil Procedure and the NLRB's regulations.

As part of its answer, Respondent raised the following affirmative defense: "No backpay is due to any discriminatee who was not legally authorized to work in the United States during the relevant period." Respondent raised this defense due to testimony at the underlying hearing that certain individuals were not rehired by HSS due to immigration status. Later, in conducting background research for serving subpoenas to discriminatees to appear at the hearing, Respondent identified numerous discriminatees whose social security numbers were linked to multiple persons, an indicator that the social security number may have been fraudulently used in the past. On September 20, 2018, Respondent detailed this information in its Bill of Particulars as requested by the CGC and upon order of the Administrative Law Judge. Despite meeting the pleading requirements under federal law, and despite providing the additional factual information needed to satisfy Board precedent, the CGC continues to attempt to deprive Respondent of its due process right to cross examine certain discriminatees regarding their employment status.

III. ARGUMENT

a. Respondent Effectively Met Pleading Requirements for Its Affirmative Defense.

The CGC seeks to impose an unsubstantiated standard to preclude Respondent from asserting its affirmative defense. Contrary to the CGC's assertion, Respondent has properly pled its affirmative defense with a sufficient factual basis. The sufficient pleading of an affirmative defense gives the plaintiff fair notice of the defense. *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir.

1979). However, in pleading an affirmative defense, defendant need do no more than give plaintiff fair notice of nature of the defense. *Edmonds v. U.S.*, E.D.Wis.1957, 148 F.Supp. 185. Fair notice generally requires that the defendant state the nature and grounds for the affirmative defense. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957). It does not, however, require a detailed statement of facts or supporting evidence. *Id.* at 47–48. In accordance with such precedent, Respondent pled as an affirmative defense that no backpay shall be awarded to any discriminatee not legally authorized to work in the United States. Discriminatees have been given fair notice that Respondent’s defense includes questioning of their work authorization status.

Furthermore, the CGC mistakenly asserts that Respondent’s affirmative defense lacks a factual basis. However, case law supports that an affirmative defense is insufficiently pled only if it clearly lacks merit “under any set of facts the defendant might allege.” *McArdle v. AT & T Mobility, LLC*, 657 F.Supp.2d 1140, 1149–50 (N.D.Cal.2009). Federal Rule of Civil Procedure 8(c)(1), which provides for affirmative defenses, states only that “a party must affirmatively state any avoidance or affirmative defense,” Fed.R.Civ.P. 8(c)(1). There is no requirement under Rule 8(c) that a defendant “show” any facts at all.” *Charleswell v. Chase Manhattan Bank, N.A.*, No. CIV.A. 01-119, 2009 WL 4981730, at *4 (D.V.I. Dec. 8, 2009). Thus, although Respondent as provided a factual basis for its assertion in its affirmative defense, Respondent need not have demonstrated any facts at all to still maintain a valid defense.

Moreover, Respondent is not required, as the CGC alleges, to provide the evidence that it cites to in its Bill of Particulars. The CGC argues that Respondent should have provided the documents obtained during its search on Westlaw and that its failure to do so undermines Respondent’s defense. The CGC’s argument attempts to apply a burden that flies in the face of federal pleading requirements and would amount to pre-hearing discovery where none is provided for under the Board’s own regulations. Notwithstanding, Respondent has attached a copy of the information supporting its affirmative defense to this opposition as Exhibit A.

Lastly, the CGC’s wrongful categorization of Respondent’s answer as a “fishing expedition” and a way “to harass and intimidate the discriminatees” is simply meritless. Respondent has met its burden during the pleading stage and is entitled to move forward with the questioning of individuals regarding immigration status to the extent that it has placed the individual’s immigration status into question. The CGC is essentially asking the ALJ to summarily rule that all the discriminatees were legally authorized to work in the United States for the entire back pay period, while providing no

evidence regarding the same. Respondent has provided the necessary information to place immigration status into question, at the least to the level necessary to defeat the CGC's present motion, and must be afforded the opportunity to cross-examine witnesses with the same limits applicable under federal law.

A. Respondent Pled Sufficient Factual Basis to Support its Affirmative Defense and Immigration-Related Questioning.

The CGC seeks to preclude Respondent from exercising its due process right in defending its position with immigration-related questioning at the compliance hearing. Because case law and Board precedent supports Respondent's position, the CGC's assertions against Respondent's pleadings are unfounded and unsubstantiated.

The controlling precedent here, and a case that the CGC noticeably failed to address in her motion to strike, unambiguously provides that an undocumented worker who is ineligible to work is precluded from receiving a backpay award under the National Labor Relations Act. *Hoffman Plastics v. NLRB*, 535 U.S. 137 (2002). Due to this determination, post-*Hoffman*, courts have found that the immigration status of discriminatees is relevant to the determination of a backpay award. *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 38 (2d Cir. 2011). In *Domsey*, the Second Circuit specifically found that employers may question discriminatees about their immigration status. *Id.* at 38-39. Notably, the Second Circuit Court decision in *Domsey* precludes an ALJ from doing exactly what the CGC is seeking in its Motion to Strike – creating new limits on cross-examination simply because immigration status is involved. The *Domsey* court specifically found that “the only limits the Board may place on cross-examination are the usual limits the presider may place on cross-examination.” The Second Circuit court went on to give an example: “Such a limit may, for instance, require an employer, before embarking on a cross-examination of a substantial number of claimants, to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable, or in error.” *Id.* Respondent has met this burden in this case.

Here, Respondent has proffered a legitimate reason as to why the immigration status of the discriminatees now seems questionable. Respondent conducted a search on Westlaw resulting in “multiple matches” found for certain discriminatees' social security number. During the time of the events at issue in the underlying case, Respondent did not use E-Verify during its hiring process and was precluded from performing its own investigation into the authenticity of an employee's

documents so long as the documents appeared on their fact to be genuine. 8 U.S.C. § 1324b(a)(6). Thus, the information more recently obtained supports the affirmative defense and satisfies Respondent's pleading burden.

The first instance of discriminatees' potential lack of authorization to work in the United States surfaced during the underlying hearing with testimony regarding HSS's failure to rehire certain individuals who were unable to pass HSS's screening process.⁴ See Attached Ex. B, Hearing Tr. Vol. 2, 148-141. HSS had used E-Verify; however, HSS has now since filed for bankruptcy and lacks any records pertaining to this case. Thus, Respondent lacked the ability to confirm a discriminatee's work authorization status until now. Therefore, when the "multiple matches" result appeared, the immigration status of certain discriminatees then seemed questionable or in error, and Respondent seeks to question the discriminatees to ensure compliance with IRCA and the NLRA according to precedent established in *Domsey*.⁵

The CGC's motion to strike is an attempt to bypass Supreme Court precedent precluding discriminatees from receiving backpay for periods when they were not employed. Respondent has met its burden of placing the immigration status of certain discriminatees into question and must be allowed to move forward to seek additional information at hearing that is only within the possession of the discriminatees – documents and testimony confirming that the discriminatee was authorized to work in the United States during the backpay period. Given the CGC's disregard of federal law, her motion must be denied in its entirety.

⁴ In order to be hired by HSS, an applicant was required to pass E-Verify. Exh. B. Hearing Tr. Vol 5, 514:22-24.

⁵ Notably, on remand, the Board cites to evidence of an employee having a valid social security number (one that has not been used by multiple persons) as evidence of work authorization. Certainly, the contrary should also be true – while not conclusive, when a social security number is called into question, an inference is raised that the person was not legally authorized to work in the United States. *Domsey Trading Corp., Domsey Fiber Corp. & Domsey Int'l Sales Corp., A Single Employer & Arthur Salm, Individually & Int'l Ladies Garment Workers Union, Afl-Cio Local 99, Int'l Ladies Garment Workers Union, Afl-Cio*, BROOKLYN, NY, 2013 WL 2286074 (May 22, 2013) (“Although such evidence is not conclusive as to the question of lawful immigration status, it was some evidence that those individuals were authorized to work in this country. Absent contrary evidence, one may infer that the individual holding a valid social security number was authorized to work during the backpay period.”)

IV. CONCLUSION

As set forth above, Respondent has pled a sufficient factual basis to support its affirmative defense and questioning of the discriminatees of their immigration status at the compliance hearing by effectively demonstrating when and how the immigration status became questionable. Furthermore, case law supports Respondent's right to question discriminatees at the hearing about such issues. Thus, the CGC's motion is groundless against superseding case law, and should be denied accordingly.

Respectfully submitted, this 15th day of October 2018.

/s/ Karl Terrell

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EXHIBIT H

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

REMINGTON LODGING &
HOSPITALITY, LLC. D/B/A HYATT
REGENCY WIND-WATCH, A SINGLE
EMPLOYER WITH HHC TRS FP
PORTFOLIO, LLC, A SUBSIDIARY OF
ASHFORD HOSPITALITY TRUST, INC.

and

Case Nos. 29-CA-093850
29-CA-095876

LOCAL 947, UNITED SERVICE
WORKERS UNION, INTERNATIONAL
UNION OF JOURNEYMEN AND ALLIED
TRADES

**GENERAL COUNSEL'S REPLY IN SUPPORT OF MOTION TO STRIKE
RESPONDENT'S BILL OF PARTICULARS, PORTIONS OF RESPONDENT'S
ANSWER, AND TO PRECLUDE RESPONDENT FROM QUESTIONING
DISCRIMINATEES REGARDING THEIR IMIGRATION STATUS**

Pursuant to Section 102.24(c) of the National Labor Relations Board ("Board") Rules and Regulations, Counsel for the General Counsel hereby files this Reply in support of the General Counsel's Motion to Strike Respondent's Bill of Particulars and Portions of Respondent's Answer, which was filed with the Administrative Law Judge on October 3, 2018. On October 15, 2018, Respondent filed a Response in Opposition to the General Counsel's Motion to Strike ("Opposition").

Respondent's Opposition presents no basis on which to deny the General Counsel's Motion to Strike, but rather confirms that Respondent presently has no legitimate grounds to believe that any of the discriminatees named in the Compliance Specification in this case lacked authorization to work in the United States during the relevant backpay periods and seeks to abuse

these Compliance proceedings before the Board to engage in a baseless and intimidating investigation into the discriminatees' personal immigration histories. Board law simply does not permit such unmoored inquiry into employees' immigration status, but instead requires Respondent to plead far more specific and reliable facts raising doubts about the discriminatees' work authorization than what Respondent has pled here. Accordingly, the Administration Law Judge should find that Respondent has not met the pleading requirements established by the Board in *Flaum Appetizing, Corp.*, 357 NLRB 2006 (2011) and should issue an order striking Respondent's Bill of Particulars and its immigration status-related affirmative defense, and precluding Respondent from questioning the discriminatees about their immigration status.

I. Board Law, Not the Federal Rules of Civil Procedure, Controls the Pleading Requirements in This Case

In its Opposition, Respondent primarily argues that it has properly pled its immigration status-related affirmative defenses by citing to various federal court precedents interpreting pleading standards under the Federal Rules of Civil Procedure ("FRCP"). However, in proceedings before the Board, it is the Board's Rules and Regulations and Board decisions that determine what litigants are required to plead, and Respondent's reliance on the less stringent pleading requirements of the FRCP is badly misplaced.

The Board has long held that "the Federal Rules of Civil Procedure are applicable to Board proceedings only with respect to the introduction of evidence and not with respect to pleadings before the Board." *Armstrong Cork Co.*, 112 NLRB 1420 (1955); see also *Component Bar Products*, 364 NLRB No. 140, slip op. at 10 (2016) ("Board proceedings are governed by the Administrative Procedures Act and the Board's Rules and Regulations, not the FRCP"). Moreover, "Where the Board has its own procedures, that are established by the Act, by Board rule or Board decision, the FRCP does not apply to vary the Board practice." *The Boeing Co.*, 2011 WL 2597601 (NLRB Div. of Judges) (citing *Control Services*, 303 NLRB 481

(1991) (holding that FRCP does not govern service requirements in Board proceedings where the Board provides its own procedures)).

Despite these longstanding principles, Respondent asks the Administrative Law Judge to apply a “fair notice” standard established under the FCRP – instead of what is required by Board law – to evaluate Respondent’s bare-bones pleadings in this case. As the aforementioned precedents make clear, however, the FRCP are simply irrelevant here, as they do not control the pleading requirements applicable to Compliance proceedings before the Board.¹

Rather than the FRCP, it is the Board’s decision in *Flaum* that determines what Respondent must plead in support of the thirteenth affirmative defense asserted in its Answer alleging that the discriminatees were not authorized to work in the United States during the relevant backpay period. *Flaum* holds that a respondent in a compliance case must plead specific facts that raise particular doubts as to a discriminatee’s work authorization during the applicable backpay period. 357 NLRB at 2012. *Flaum* thus affirmatively and decisively rejects Respondent’s argument that it is not required to allege any facts in support of its immigration status-related affirmative defense. Despite the Board’s clear holding in *Flaum*, Respondent’s Opposition inexplicably neglects to address *Flaum* in any manner. The omission is telling, as it is clear that *Flaum* requires Respondent to plead far more to support its thirteenth affirmative defense than what it has done in this case.

Instead of addressing the Board’s controlling holding in *Flaum*, Respondent deflects by reference to the Second Circuit’s decision in *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011). However, in *Domsey*, the Court of Appeals addressed the question of whether an

¹ Respondent’s reliance on the Supreme Court’s decision in *Conley v. Gibson*, 355 US 41 (1957) is also misplaced and irrelevant, as that case addressed the question of what a *plaintiff* in a civil lawsuit must plead to defeat a motion to dismiss under FRCP 12(b)(6). The General Counsel’s Motion to Strike, however, concerns what Respondent must plead in support of its affirmative defense. Regardless, the Supreme Court has abrogated its decision in *Conley v. Gibson* and has determined that a plaintiff must plead more than mere “labels and conclusions.” *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007). *Conley v. Gibson* is thus completely inapplicable.

administrative law judge or the Board could properly prevent a respondent from eliciting evidence relating to its properly-pled affirmative defense concerning discriminatees' work authorization status. The court determined that the Board could not prohibit the respondent from questioning the immigration status of discriminatees where the respondent had properly pled an immigration status-based affirmative defense. *Id.* at 35, 38-39. Nevertheless, the *Domsey* court clarified that the Board may limit such questioning by "fashioning rules that preserve the integrity of its proceedings." *Id.* at 39. The Board in *Flaum* – which issued after *Domsey* – did just that by establishing the specific factual pleading requirements, which Respondent here seeks to avoid. Board law is thus clear that Respondent must support its affirmative defense with particular factual allegations raising legitimate and specific doubts about the work authorization status of specified discriminatees. As explained below, Respondent has utterly failed to do this throughout its various pleadings and Opposition.

II. Respondent Still Has Not Asserted Facts to Justify the Invasive and Intimidating Immigration-Status Inquiries that Respondent Seeks

Respondent's Opposition ignores *Flaum* because in this case, Respondent has failed to plead sufficient facts that, if true, would establish that any of the discriminatees lacked work authorization. In *Flaum*, the Board struck the respondent's immigration status-related affirmative defenses as they pertained to 11 discriminatees because Respondent provided absolutely no factual allegations that raised legitimate doubts about those discriminatees' work authorization. *Flaum*, 357 NLRB at 2012. With respect to four other discriminatees, however, the Board declined to strike the respondent's affirmative defenses because these four individuals had admitted in testimony during the underlying unfair labor practice hearing that they had presented false work authorization documents to the respondent when they originally applied for employment. *Id.* Still, even these damning admissions by the four discriminatees were not enough for the Board to find that the respondent had made sufficient pleadings to justify

showing that the social security numbers associated with the employees did not match the names the Respondent entered into the database. The Board rejected the employer's argument, finding that the database search results did not prove that the employees were undocumented because the search did not affirmatively establish that the employees had used social security number that did not belong to them in order to gain employment. *Id.* at 334-35. The Board astutely noted, in relation to the unreliability of the search results, that the differing names associated with the social security numbers in the database could have resulted from slight variations in the names employees have used. The Board thus dismissed the search results as indeterminate because there was no evidence "indicating how sensitive the database [was] to small differences between the inputted names and the names located in its database." *Id.* Similarly, in *Aramark Facility Services v. SEIU, Local 1877*, 530 F.3d 817 (9th Cir. 2008), the Ninth Circuit affirmed that even an official "no-match" letter from the Social Security Administration ("SSA") confirming that the social security number provided by an employee did not match the SSA's records for that individual constituted insufficient grounds to conclude that the person was undocumented. *Id.* at 826. The court reasoned that the mismatches could have resulted from a variety of factors having nothing to do with the person's work authorization status, "including typographical errors, name changes, compound last names prevalent in immigrant communities, and inaccurate or incomplete employer records." *Id.*

A close review of the "Westlaw" search results Respondent provides in Exhibit A to its Opposition similarly reveals that extraneous factors having nothing to do with work authorization might explain some of the search discrepancies Respondent relies upon here to speculatively presume that certain discriminatees are undocumented. For example, Respondent's search regarding discriminatee Samuel Rodriguez was premised on social security number "132-50-XXX." The search found, based on an "Experian Credit Header," that another social security

number – “116-82-XXX” – was somehow associated with Mr. Rodriguez, and that *other* social security number – not the one Rodriguez provided to gain employment with Respondent – matched someone named “Christina M Martine.” Thus, the search provides no basis to find that the social security number Mr. Rodriguez used to verify his work authorization to get a job with Respondent did not belong to him.² The same is true in the cases of discriminatees Francisco De Los Santos and Kathryn Frederick: Respondent’s database search reveals that the social security numbers that match multiple individuals were not the ones that Respondent has on file for Mr. De Los Santos and Ms. Frederick, thereby refuting Respondent’s false assumption that these employees used fraudulent documents to initially secure employment.³ These examples prove that the “Westlaw” searches Respondent relies upon do not provide factual support for Respondent’s wishful presumption that the discriminatees used fake social security numbers to gain employment because they were undocumented.

Additionally, several of the discriminatees whom Respondent claims lack work authorization merely on the basis of the “Westlaw” search did not even have multiple social security number matches according to Respondent’s own search results. The search results Respondent provides relating to Norville Fowler, Cesia Hernandez, Vilma Rodriguez and Maria Da Silva all show that the “Westlaw” search found no evidence that any of these four individuals has multiple social security numbers or that other people were associated with the discriminatee’s social security number.⁴ Further demonstrating the utter unreliability of the facts Respondent relies upon to support its immigration status-related affirmative defense, Respondent names discriminatee Maria Garcia among the list of individuals who lack work authorization

² A select excerpt from the search Respondent provides in relation to Mr. Rodriguez is attached hereto as Exhibit A.

³ Select excerpts from the searches Respondent provides in relation to Mr. De Los Santos and Ms. Frederick, respectively, are attached hereto as Exhibit B.

⁴ Select, highlighted excerpts from the searches Respondent provides in relation to Mr. Fowler, Ms. Hernandez, Ms. Rodriguez and Ms. Da Silva, respectively, are attached hereto as Exhibit C.

based on the “Westlaw” search, but Respondent provides absolutely no search results regarding Ms. Garcia *whatsoever*.⁵ Thus, even the baseless alleged factual support for Respondent’s immigration status-related affirmative defense does not apply to Ms. Garcia.

In sum, Respondent’s “Westlaw” search says virtually nothing about the work authorization status of the discriminatees and is riddled with errors. In many cases, the search results do not even support Respondent’s assertion that the database found multiple matches with the discriminatees’ social security numbers. The Board and the courts do not rely on this type of purely speculative evidence because it is an inherently unreliable method of establishing that an employee lacks work authorization. See *Concrete Form Walls*, 346 NLRB at 334-35; *Aramark Facility Services*, 530 F.3d at 826. In reality, Respondent has no sound basis to doubt the work authorization status of any of the discriminatees and instead inappropriately relies on sheer conjecture founded on highly dubious “evidence.” See *Flaum*, 357 NLRB at 2010 (respondent must demonstrate that it has “some concrete and positive evidence, as opposed to a mere theoretical argument, that there is some substance to its affirmative defense . . .”) (quoting *Piccone v. U.S.*, 407 F.2d 866, 876 (1969)). The Administrative Law Judge should accordingly reject Respondent’s contention that its “Westlaw” searches establish sufficient grounds to support Respondent’s immigration status-based affirmative defense, and the affirmative defense should be stricken in accordance with *Flaum*.

B. Respondent’s Assertion that Certain Unnamed Discriminatees Did Not Obtain Employment with HSS Establishes Nothing to Show Their Undocumented Status

Respondent’s second purported basis for questioning the work authorization status of the discriminatees is likewise inadequate to raise a litigable issue under *Flaum*. In its Bill of Particulars, Respondent avers that an untold number of still as yet unnamed discriminatees

⁵ Respondent provided search results relating to a “Maria S Santos.” The complete search results Respondent offers for Maria S Santos are attached hereto as Exhibit D. No one named “Maria S Santos” – or anything similar – is named in the Compliance Specification.

lacked work authorization status simply because, after they were unlawfully discharged by Respondent, they “failed to reapply for employment with HSS” or otherwise did not secure employment with Respondent’s subcontractor. Respondent here is essentially asking the Administrative Law Judge to assume that just because HSS used E-Verify in its hiring process, any former employee of Respondent who did not apply or obtain employment with HSS must have failed to secure employment because he/she was undocumented. Respondent, however, supplies absolutely no evidence to support such a sweeping assumption and instead relies, once again, on rank speculation.

It is entirely inappropriate to presume that an employee who did not apply for or obtain employment with an employer who utilized E-Verify failed to seek or gain that job because he/she was unauthorized to work in the United States, and it is especially inappropriate to make such an assumption in this case. There are myriad reasons why employees who had just been unlawfully discharged by Respondent in retaliation for exercising their right to engage in union activity would not wish to continue working at the same place where their rights had been so egregiously violated. To presume –without a scintilla of factual foundation – that employees who did not continue working at Respondent’s hotel after they were unlawfully discharged failed to do so because they lacked work authorization is uncalled for and frankly offensive. The Administrative Law Judge should readily reject Respondent’s baseless speculation in this regard.

Moreover, Respondent fails to identify any of the discriminatees whom it claims lack work authorization status on account of their failure to gain employment with HSS or when during the relevant backpay periods these unnamed individuals were supposedly unauthorized. Such nebulous pleading plainly fails to comply with the Administrative Law Judge’s September 14, 2018 Order on General Counsel’s Motion for a Bill of Particulars and further fails to meet the pleading standards established by the Board in *Flaum*. Accordingly, Respondent has failed to

plead its immigration status-based affirmative defense with sufficient specificity to raise a litigable issue in this Compliance case, and the affirmative defense should be stricken.

III. Baseless Inquiry into the Discriminatees' Immigration Status Undermines the Policies and Purposes of the Act and Should Not Be Permitted

The Board recognizes that “formal inquiry into [employees’] immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights.” *Flaum*, 357 NLRB at 2012. Furthermore, the Board has long noted the severe coercive effect on the exercise of Section 7 rights that results from an employer raising the immigration status of its employees in response to their protected concerted activities. See e.g., *Labriola Baking Co.*, 361 NLRB 412 (2014). Respondent here is attempting to perpetrate this same form of prohibited coercion against the discriminatees by questioning their immigration status simply to avoid its obligation to remedy the unfair labor practices Respondent has committed against them.

Respondent had employed most of the discriminatees – in many cases for numerous years – without questioning their immigration status. But now, in direct response to the Compliance Specification, Respondent has suddenly embarked on an endeavor to find evidence establishing that its former employees were undocumented. Respondent’s conduct here is akin to the situation in which an employer seeks to re-verify its employees’ work authorization status because the employees engaged in union activity. The Board has repeatedly found that such re-verification unlawfully impedes employees’ Section 7 rights and must not be permitted under the Act. See *North Hills Office Services*, 344 NLRB 1083 (2005); *Victor's Café 52, Inc.*, 321 NLRB 504, 514-514 (1996); *Del Rey Tortilleria, Inc.*, 272 NLRB 1106 (1984). Similarly here, Respondent must not be allowed to use these Compliance proceedings as a means to coercively re-verify the work authorization status of the discriminatees simply because their union activities have caused Respondent to be liable for unfair labor practices. As the Board in *Flaum* observed, “permitting such re-verification and intrusive inquiry without sufficient factual basis for doing so

would invite a form of abuse expressly prohibited by [federal immigration law], and would contravene ordinary rules of procedure and undermine the policies of our Act.” 357 NLRB at 2012. In the present case, Respondent has demonstrated no factual basis to question the immigration status of any discriminatee, as explained above, and permitting it do so would invite the very form of abuse the Board has repeatedly forbade. In order to uphold the policies and principles of the Act, therefore, Respondent’s immigration status-related affirmative defense and its Bill of Particulars must be stricken, and Respondent should be precluded from eliciting evidence regarding the immigration status of any discriminatee in this case.

IV. Conclusion

For the foregoing reasons, Counsel for the General Counsel respectfully urges the Administrative Law Judge to grant the General Counsel’s Motion to Strike Respondent’s Bill of Particulars and Respondent’s thirteenth affirmative defense, and to preclude Respondent from questioning the discriminatees about their immigration status.

Respectfully submitted this 22nd day of October 2018.

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