

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

<b>ADT, LLC</b>	§	
	§	<b>Cases 16-CA-144548</b>
<b>Respondent,</b>	§	<b>16-CA-168863</b>
	§	<b>16-CA-172713</b>
<b>and</b>	§	<b>16-CA-179506</b>
	§	<b>16-CA-189805</b>
<b>COMMUNICATIONS WORKERS OF</b>	§	<b>16-CA-187497</b>
<b>AMERICA, AFL-CIO,</b>	§	<b>16-CA-191963</b>
	§	<b>16-CA-199947</b>
<b>Charging Party.</b>	§	<b>16-CA-200961</b>
	§	<b>16-CA-209070</b>
	§	<b>16-CA-209995</b>

**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S  
MOTION TO RECONSIDER**

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**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S  
MOTION TO RECONSIDER**

TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

COMES NOW Charging Party Communications Workers of America, AFL-CIO (“Charging Party” or “the Union” or “CWA”) and, pursuant to Section 102.48 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “the Board”), 29 C.F.R. § 102.48, files this motion to reconsider, and would respectfully show the National Labor relations Board the following:

**I. Introduction and Summary of Argument**

The NLRB issued *ADT, LLC*, 368 NLRB No. 118 (2019) on November 22, 2019 (“the decision”). The decision, in relevant part for purposes of this motion, overruled the determination by the Administrative Law Judge (“ALJ”) that Respondent ADT, LLC (“Respondent” or “the Company” or “ADT”) violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“NLRA” or “the Act”) by (1) refusing to place new hires into the

bargaining unit since September 2014; (2) withdrawing recognition of the Union in May 2017; (3) making several unilateral changes to the unit employees' terms and conditions of employment<sup>1</sup>, (4) refusing to provide CWA with requested relevant information.<sup>2</sup>

In overturning the ALJ's decision, the Board relied on the principle that the reorganization of a smaller represented unit with a larger unrepresented unit such that the employees are "fully integrated and have lost their distinct identity as a group, the employer is no longer obligated to recognize or bargain with the union as the representative of employee in the historic unit." *ADT*, slip op. at 2 (citing *Nott Co.*, 345 NLRB 396, 400 (2005); *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1338–40 (1988); *Abbott-Northwestern Hospital*, 274 NLRB 1063, 1064 (1985)). The Board also concluded that a community of interest existed between the unit and non-unit employees so as to support subsuming the unit employees within the non-unit employee cohort. *Id.*, slip op. at 3, n. 11.

In reaching its decision to overrule the ALJ and find no Section 8(a)(1) and 8(a)(5) violations as to the issues of the new hires and withdrawal of recognition based on the February 2014 reorganization, the Board committed material error because (1) it failed to treat the reorganization of February 2014 as a relocations and consolidation, which under applicable Board precedents would result in ADT having a continuing obligation from February 2014 to recognize CWA at most of the Dallas-Fort Worth ADT locations; and (2) in the alternative, it

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<sup>1</sup> Specifically, the ALJ found that ADT unlawfully (1) changed its policies regarding sick leave, lunchbreaks, paid leave banks, bereavement leave, sales quotas, and pay periods; (2) stopped processing grievances; and (3) discontinued dues checkoff. *ADT*, 368 NLRB slip op. at 2, n. 10, 15.

<sup>2</sup> Specifically, the ALJ held that ADT refused to provide the Union requested relevant information regarding new hires, grievances over out-of-classification work, overtime, and hours of work, grievances over the discipline of bargaining unit employees Chad Short, Art Whittington, and Brian Sauser, the Dominguez and Averitt appropriate material grievance, subcontracting, and information relevant to remedying an arbitration award. *ADT*, slip op. at 15-16.

failed to account for the fact that from February 2014 until May 2017, when ADT formally withdrew recognition, the historic unit employees maintained distinct characteristics apart from the non-unit employees based on the negotiated terms of the collective bargaining agreement (“CBA”) that ADT continued to apply to the historic unit employees. (Transcript (“Tr.”) 790, line (“ln.”) 24-Tr. 791, ln. 2).

a. *The bargaining unit survived the relocation and consolidation that occurred in the Dallas-Fort Worth ADT locations in 2014*

The Board committed material error in finding that ADT had no duty to bargain with CWA following the February 2014 reorganization because, in accordance with *Harte & Co., Inc.*, 278 NLRB 947 (1986), more than 40% of the total employees, or, in the alternative, more than 40% of the employee at two out of the four reorganized Dallas-Fort Worth locations as of February 2014 were unit employees and the reorganized facilities continued the operations that had been historically performed ADT at the unionized locations:

- ADT continued to provide residential and small business security installation and service following the reorganization. (Tr. 704, ln. 20-Tr. 705, ln. 13; Charging Party Exhibit (“CP”) 7, p. 1, ¶¶ 1-2, p. 2, ¶¶ 7-8); see also *ADT, LLC*, 365 NLRB No. 77, slip op. at 1 (2017).
- As of February 2014, of the total 128 technicians employed by ADT in the Dallas-Fort Worth area, 58 of the employees, or 45%, were unit employees and 70 employees, or 55%, were non-unit employees. (CP 7, p. 10); see also *ADT*, 365 NLRB at slip op. 1-2.
- At ADT’s Carrollton location, as of 2014, 25 of the employees, or 57%, were unit employees and 19 of the employees, or 43%, were non-unit employees. (CP 7, p. 10); see also *ADT*, 365 NLRB at slip op. 2, n. 4.

- At ADT's Tyler location, as of 2014, all six of the employees, 100%, were unit employees. (CP 7, p. 10); see also *ADT*, 365 NLRB at slip op. 2, n. 4.
- At ADT's Trinity location<sup>3</sup>, as of 2014, 14 of the employees, or 38%, were unit employees and 23 of the employees, or 62%, were non-unit employees. (CP 7, p. 10); see also *ADT*, 365 NLRB at slip op. 2, n. 4.
- At ADT's Haltom City location, as of 2014, 13 of the employees, or 31%, were unit employees and 28 of the employees, or 69%, were non-unit employees. (CP 7, p. 10); see also *ADT*, 365 NLRB at slip op. 2, n. 4.

*b. The Board committed material error in the decision by failing to find a distinct stand-alone bargaining unit of legacy ADT employees*

In the alternative, the historic unit employees and non-unit employees had the following different terms and conditions of employment:

- The unit employees were subject to discipline under the just cause standard from February 2014 until withdrawal of recognition in May 2017, but the non-unit employees were not protected by the just cause standard. (Tr. 791, lns. 6-11).
- The unit employees continued to have a grievance process and, until expiration of the CBA, arbitration and the non-unit employees did not have such recourse. (Tr. 791, lns. 14-18).
- The unit employees were provided five days of bereavement leave that the non-unit employees were not afforded. (Tr. 792, lns. 5-11).

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<sup>3</sup> The Trinity location refers to an office on Trinity Road in Fort Worth. (CP 7, p. 10).

- The unit employees began overtime after working eight hours a day whereas non-unit employees only began to accrue overtime after working forty hours in a week. (Tr. 792, lns. 2-4; Tr. 792, ln. 22-Tr. 793, ln. 125).
- The unit employees holding the title of high-volume commissioned installer job title continued to be paid under the terms specified in the CBA, but unit employees were not paid those commission rates. (Tr. 793, lns. 2-8).
- The unit employees were paid under the terms of the CBA, received pay raises based on their respective years of service under the wage progression outlined in the CBA, which is not based on merit; non-unit employees were paid on a different pay scale and received only a merit-based wage increase. (Tr. 763, ln. 20 – Tr. 765, ln. 25; Tr. 793, ln. 11-Tr. 794, ln. 8).

As such, unit employees continued to enjoy the benefits of the CBA after the integration with the non-unit employees inherited by ADT through the acquisition. In turn, these distinct terms and conditions of employment provided the historical unit with its own community of interests such that it can be maintained as a stand-alone unit following the February 2014 reorganization under the applicable precedents of the Board. *See Dodge of Naperville, Inc.*, 357 NLRB 2252 (2012); *ADT Security Services*, 355 NLRB 1388 (2010). The Board failed to take these facts into account in its decision that these facts provide the basis for a stand-alone historic unit to continue to exist following May 2017 just as it had from February 2014. The unit and non-unit employees need not be accreted; CWA can maintain its representation of the historic unit employees. The Board's failure to hold that the distinct, historical unit continued to exist based on the facts recounted above was material error that warrants the Board granting this

motion and amending its previous order in this case to find that the historical unit continued to exist and ADT violated Sections 8(a)(1) and 8(a)(5) of the Act by withdrawing recognition as to the stand-alone, historical unit, failing to include new hires within the stand-alone, historical unit, unilaterally changing working conditions as to the stand-alone, historical unit, and refusing to provide information relevant to CWA's representation of the stand-alone, historical unit.

## **II. Arguments and Authorities**

### *a. The bargaining unit survived the 2014 reorganization*

The bargaining unit survived the 2014 reorganization based on the Board's holding in *Harte & Co.*, 278 NLRB 947 (1986). In *Harte & Co.*, the Board held that in cases where employees are relocated, the employer must recognize and apply the collective bargaining agreement at the site where the represented employees were transferred if (1) the operations at the new facility are substantially the same as those at the old facility; and (2) the transfers from the represented facilities constitute a substantial percentage, usually 40 percent or greater, of the new plant employees. *Harte & Co.*, 278 NLRB at 948-949.

In this case, prior to the February 2014 reorganization, ADT had two presented, unit facilities and two non-unit facilities in the Dallas-Fort Worth area. (CP 7, p. 10). Following the reorganization, the only unit facility that remained open was the Haltom City office. (Id.). New facilities were opened in Carrollton and in Fort Worth on Trinity Road, as well as a satellite office in Tyler. (Id.). No change to the nature of ADT's business resulted from the February 2014 reorganization. (Tr. 704, ln. 20-Tr. 705, ln. 13, Tr. 707, lns. 17-25; CP 7, p. 1, ¶¶ 1-2, p. 2, ¶¶ 7-8); see also *ADT*, 365 NLRB slip op. at 1. The bargaining unit, as defined by the CBA, is the entirety of the Dallas-Fort Worth metropolitan area. (General Counsel Exhibit ("GC") 4, p.

2, Art. 1, Sec. 1). The CBA was effective between the parties as of the February 2014 reorganization. (Id., p. 18, Art. 27); see also *ADT*, 368 NLRB slip op. at 5. Given that the CBA defined the unit in terms of working within the geographic area wherein the technicians were located and worked, it is appropriate to apply to CBA to all the units because CWA represented 58 of the 128 total employees (CP 7, p. 10), or 45%. Thus, under *Harte & Co.*, the CBA should have been applied to all Dallas-Fort Worth area ADT locations following the February 2014 reorganization and the relocation of bargaining unit employees within the geographic area of the bargaining unit. Alternatively, of the 58 unit employees in the Dallas-Fort Worth area, 45, or 78% (45 out of 58) of the bargaining unit employees were relocated to completely new facilities as a result of the February 2014 reorganization and of the total employees at the new locations, 45 or 52% of the employees relocated to the new facilities were unit employees and only 48% were non-unit employees. Thus, under *Harte & Co.*, ADT had a duty to recognize CWA as to the three new locations, Carrollton, Fort Worth on Trinity Road, and the Tyler satellite office.

In the alternative, should the Board determine that *Harte & Co.* requires an examination of each of the four locations individually, under such analysis the CBA applied to the Carrollton and Tyler locations as of the February 2014 reorganization, and thus ADT had a duty to recognize CWA as to those locations, because in Carrollton 25 of the employees, or 57%, were unit employees and 19 of the employees, or 43%, were non-unit employees and in Tyler all six of the employees, 100%, were unit employees. (CP 7, p. 10); see also *ADT*, 365 NLRB at slip op. 2, n. 4.

The application of *Harte & Co.*'s analysis to this case underscores why *Nott Co.*, 345 NLRB 396 (2005) is not applicable to these facts. In *Nott*, the employer purchased another

company, immediately closed the purchased company's facilities, and immediately brought the purchased company's employees into the employer's extant facility. *Nott*, 345 NLRB at 396-97. The Board held that the relocation doctrine of *Harte & Co.* did not apply because the bargaining unit employees were not relocated. *Nott* at 401, n. 14, n. 17. Unlike *Nott*, in this case ADT closed its legacy unit locations except Haltom City and it relocated employees within the geographic scope of the unit to two new locations, Carrollton and the Trinity Road facility in Fort Worth, a satellite office, and Haltom City. (CP 7, p. 10). In *Nott*, the Board in distinguishing the facts before it from a relocation emphasized that "the instant case involves the entrepreneurial decision to buy a company, retain the employees, and consolidate them at the prior location." *Nott* at 401. In contrast, ADT's February 2014 reorganization was not proximately related to its purchase of Broadview. Broadview was acquired in 2010. (Tr. 704, lns. 2-6). The reorganization did not transpire until several years later in February 2014. (Tr. 704, lns. 7-13; CP 7, p. 10). During the reorganization, the non-unit employees were only consolidated into pre-existing, unit location in Haltom City. Otherwise, employees were relocated to the new offices in Carrollton and the Fort Worth Trinity Road office and the Tyler satellite office. (CP 7, p. 10).

In *Central Soya Company*, 281 NLRB 1308 (1986), a case relied by the Board in *Nott*, the facts were also different. The employer purchased a competitor and placed both the former competitor's employees and the bargaining unit employees into the former competitor's facility. As in *Nott*, the transactions were part and parcel of the entrepreneurial acquisition of the other company – not years later as in this case. And in this case, unlike *Central Soya*, ADT placed no bargaining unit employees into non-unit locations. All the former Broadview facilities were

closed and the only pre-existing facility remaining open, Haltom City, was not a former Broadview facility. (CP 7, p. 10).

Further, the analysis of this case under the relocation framework of *Harte & Co.*, based on either the totality of relocated employees to new facilities or each discrete location, demonstrates that the holding of *Abbott-Northwestern Hospital*, 274 NLRB 1063 (1985), is not applicable to this case or its applicability is limited to one location, Haltom City. *Abbott-Northwestern* involved the transfer of 63 non-unit employees to an existing unit facility of only nine employees. *Abbott-Northwestern*, 274 NLRB at 1063. ADT's February 2014 reorganization involved the transfer of employees to three new facilities while maintaining one historical unit facility. Thus, *Abbott-Northwestern* was not a relocation case because unit employees were not moved, rather, in *Abbott-Northwestern*, non-unit employees were incorporated into one existing location. Conversely, ADT simultaneously relocated unit and non-unit employees to three new locations, Carrollton, the Trinity Road location in Fort Worth, and the Tyler satellite office, and only moved non-unit employees to one former unit location, Haltom City. (CP 7, p. 10). To the extent *Abbott-Northwestern* applies to this case, its application should be limited to Haltom City.

Likewise, the *Harte & Co.* framework also illustrates why *Geo V. Hamilton*, 289 NLRB 1335 (1988), is not applicable to this case. In *Geo V. Hamilton*, the unionized employer purchased a non-union facility of an equal number of employees with no change in the locations where the respective employees worked. *Geo V. Hamilton*, 289 NLRB at 1335-37. The Board concluded that the union's lack of a majority status as to the integrated operations did not obligate the employer to recognize the union. *Geo V. Hamilton* at 1338. In this case however,

ADT did not keep its combined employees in their respective original locations following the February 2014 reorganization; both unit and non-unit employees were relocated during the reorganization to three new facilities and unit employees only remained at one of the original facilities, Haltom City, where the employer relocated non-unit employees in sufficient number that non-unit employees were a majority at Haltom City as of the February 2014 reorganization. The relocation of employees in this case distinguishes it from *Geo V. Hamilton* and therefore that case's analysis should not apply. Rather, *Harte & Co.*'s relocation analysis should apply and under that framework ADT continued to have an obligation to recognize CWA following the 2014 reorganization.

Accordingly, under the frameworks argued above, ADT continued to have an obligation to recognize CWA following the February 2014 reorganization, and the Board should reconsider the decision of November 22<sup>nd</sup> to the extent the decision concluded otherwise and hold, as found by the ALJ, that ADT violated Sections 8(a)(1) and 8(a)(5) of the Act by unlawfully withdrawing recognition, making the unilateral changes at issue in this case and failing to provide information, as argued below, or in the alternative, remand the matter to the ALJ for further proceedings on this matter.

*b. A distinct cohort of unit employees remained after the 2014 reorganization*

In the alternative to the argument above, the Board should reconsider its November 22<sup>nd</sup> decision because a distinct cohort of unit employees remained following the February 2014 reorganization. In the decision, the Board found that the February 2014 reorganization of unit employees with non-unit employees resulted in a homogenous work group that shared a community of interest such that a distinct group of unit employees no longer existed apart from

the non-unit employees. This conclusion should be reconsidered because the record in this case demonstrates that a distinct group of unit employees remained and were identifiable after the 2014 reorganization. Consistent with Board precedents, a discernable unit of bargaining unit employees remained after February 2014.

Circumstances such as this one are not unprecedented in the jurisprudence of the NLRB and resolution of this case turns on “whether the existing unit remains appropriate in light of changed circumstances.” *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012). While the Board looks to the community of interests in many such cases, it “gives significant weight to the parties' history of bargaining. Specifically, our case law holds that 'compelling circumstances' are required to overcome the significance of bargaining history.” *Dodge of Naperville*, 357 NLRB at 2253 (quoting *ADT Security Services*, 355 NLRB 1388, 1388 (2010), quoting *Radio Station KOMO-AM*, 324 NLRB 256, 262-263 (1997) (citing *Armco, Inc. v. NLRB*, 832 F.2d 357, 363 (6th Cir. 1987); see also *NLRB v. ADT Security Services, Inc.*, 689 F. 3d 628, 634 (6th Cir. 2012) (holding "ADT is required to establish that compelling circumstances overcome the almost twenty-nine year bargaining history between the parties.")). The bargaining history in this case dates from November 20, 1978, the date of certification (General Counsel Exhibit (“GC”) 4, p. 2, Art. 1, Mutual Recognition of Rights, Sec. 1; GC 5), to May 31, 2017 when ADT withdrew recognition.<sup>4</sup>

As the Board noted in the decision, bargaining history alone does not support retaining a unit of represented employees, other distinctive characteristics must be present to support finding that a unit of represented employees remain. *ADT*, 368 NRB slip op. at 3, n. 11 (citing *Geo V.*

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<sup>4</sup> ADT stipulated at the hearing to this approximate 37 ½ year bargaining history between the parties. (Tr. 785, Ins. 4-9).

*Hamilton*, 289 NLRB at 1340); see also *Dodge of Naperville* at 2253. The loss of a bargaining unit's distinct identity presents circumstances that overcome "the significant weight" accorded bargaining history by the NLRB. *Dodge of Naperville* at 2253 (citing *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995)).

In *Dodge of Naperville*, the Board held that the changed circumstances were insufficient to overcome the history of bargaining between the parties, especially in light of the fact that the bargaining unit only lost its distinct qualities because of the unlawful unilateral changes committed by the employer. In this case, the unique characteristics of the unit that resulted from the terms of the CBA remained in place until the withdrawal of recognition on May 31, 2017. The unit employees never lost their distinct identity as an identifiable cohort of employees distinct from the non-unit employees. These qualities remained unaffected by the combining of the unit and non-unit groups in February 2014 to the same reporting locations; therefore the unit remained an appropriate unit for the purpose of collective bargaining.

ADT Director of Labor Relations James Nixdorf admitted at the hearing that the CBA applied to unit employees until ADT withdrew recognition in May 2017. (Tr. 790, ln. 24-Tr. 791, ln. 2). As such, unit employees continued to enjoy the benefits of the CBA after the integration with the non-unit employees. The unit and non-unit employees coexisted in stable, parallel worlds working side by side from February 2014 until the May 2017 withdrawal of recognition.

During the three-year period from the February 2014 reorganization to the May 2017 withdrawal of recognition, unit employees were subject to discipline only for just cause per the terms of the CBA and non-unit employees were not protected by the just cause standard. (Tr.

791, lns. 6-11). The non-unit employees did not have a grievance process that culminated in arbitration, whereas the unit employees did. (Id., lns. 14-18). The CBA provided distinct terms for bereavement leave of five days for unit employees that the non-unit employees did not have. (Tr. 792, lns. 5-11). Unit employees began overtime after working eight hours a day whereas non-unit employees only began to accrue overtime after working forty hours in a week. (Tr. 792, lns. 2-4; Tr. 792, ln. 22-Tr. 793, ln. 125). Non-unit employees are not paid under the terms of the high volume commission plan included in the CBA. (Tr. 793, lns. 2-8). Unit employees receive pay raises based on their respective years of service under the progression outlined in the CBA that is not based on merit, but non-unit employees only receive an annual wage increase based on merit. (Tr. 793, ln. 11-Tr. 794, ln. 8).

These conditions of employment under the CBA were terms unique to unit employees that rendered them identifiable as a distinct group despite the integration with the non-unit employees. The circumstances of the 2014 integration in the Dallas-Fort Worth area bear a striking resemblance to the reorganization undertaken by ADT in Kalamazoo, Michigan that culminated in an earlier ADT decision before in the Board. In *ADT Sec. Servs.*, 355 NLRB 1388 (2010), the Board confronted a situation the employer closed its Kalamazoo, Michigan facility and were relocated to a Wyoming, Michigan facility, and the employer subsequently withdrew recognition claiming the old unit no longer existed. Despite being comingled with the Wyoming employees, the Kalamazoo group retained its distinct character:

Even after the closure of the Kalamazoo facility, the employees in the unit continued to perform the same work in the same distinct geographical area under largely unchanged terms and conditions of employment. Contrary to the Respondent's contentions, the record does not establish that the Kalamazoo servicemen were "absorbed" or "integrated" into a unit including all the servicemen who work out of the Wyoming facility. To the contrary, some of the

most fundamental terms of employment that distinguished the Kalamazoo servicemen from the Wyoming servicemen --including the location of their work, their rate of pay, and their separate, dual "on call" list--not only remained intact following the closure of the Kalamazoo facility, but continued to separate them from the Wyoming servicemen. ADT, 355 NLRB at 1388 (emphasis added).

The analytical approach of the Kalamazoo ADT case dispels much of the obfuscation as to the reality of the workplace in Dallas and Fort Worth from 2014 to 2017. Unit employees were not integrated with the non-unit employees in a manner such that the unit employees disappeared into an amorphous mass. Both groups did the same work, but the unit employees retained their distinct terms of employment as required by the CBA, including wages, overtime, and bereavement leave. The two groups reported to the same offices, but the unit employees were still the unit employees based on how they were paid and terms and conditions of work such as bereavement leave, grievance, arbitration, and just cause for discipline.

These distinct terms and conditions of work that applied to unit employees and not the non-unit employees buttress the 37 ½ years of bargaining history between the parties such that the weight accorded bargaining history cannot be overcome. The Board should reconsider and reverse its November 22<sup>nd</sup> decision in this case and hold that a distinct bargaining unit survived the 2014 reorganization based on the unique terms and conditions of work enjoyed by the unit employees following the 2014 reorganization and that ADT therefore violated Sections 8(a)(1) and 8(a)(5) of the Act by unlawfully withdrawing recognition, making the unilateral changes at issue in this case and failing to provide information, as argued below, or in the alternative, remand the matter to the ALJ for further proceedings on this matter.

c. The unlawful exclusion of new hires from the bargaining unit

The Board also committed material error in the decision by failing to find that ADT had unlawfully excluded new hires from the bargaining unit that remained a distinct entity following the February 2014 reorganization. Under either of arguments urged above in reconsideration of the decision as to ADT's obligation to bargain with CWA, ADT had a duty to Article I, Mutual Recognition of Rights, Section 1 of the CBA describes the bargaining unit as follows

The Employer hereby recognizes the Union as the exclusive bargaining representative with respect to rates of pay, wages, hours and other conditions of employment for the employees in the bargaining unit for whom the Union was certified by the National Labor Relations Board on November 20, 1978 in Case Number 16~RC-7820, including all servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards as defined in the Act. (GC 4, p. 2, Art. 1, Sec. 1).

This provision of the CBA establishes the scope of the unit. In 2011, the parties agreed that the inherited Broadview employees were not part of the unit (Charging Party Exhibit ("CP") 3), but at no time did CWA agree to remove new hires from the unit. New hires are presumed to support the Union in a ratio comparative to that of existing bargaining unit employees. *Levitz Furniture Company*, 353 NLRB 717, 728, n. 60 (2001). ADT's removal of those employees from the unit was an unlawful unilateral act that violated the scope of the agreement.

ADT's unilateral removal new hires reduced the scope of the bargaining unit and violated the recognition clause of the CBA (GC 4, p.2, Art. 1, Sec. 1) between the parties, which recognized the Union as representing all technicians in Dallas and Fort Worth. The scope of a unit cannot be unilaterally changed. *Antelope Valley Press*, 311 NLRB 459, 461 (1993) ("A proposal to change the actual unit description clause would raise questions regarding the union's

right to represent those employees. The employer consequently may not insist on such a proposal.”); *Boise Cascade Corp.*, 283 NLRB 462, 467 (1987) (citing *Bozzuto's, Inc.*, 277 NLRB No. 100 (1985); *Douds v. Longshoremen*, 241 F.2d 278 (2nd Cir. 1957); *Young & Hay Transp. Co.*, 214 NLRB 252 (1974), *enfd* 522 F.2d 562 (8th Cir. 1975)). ADT, however, did so when it excluded new hires from the unit beginning in 2014.

ADT was in no way privileged to do so under the election agreement it reached with CWA concerning the integration of non-unit employees through a self-determination election because that agreement did not concede that new hires would be outside the unit following any reorganization. (CP 3). The presumption of *Levitz Furniture* that new hires support the bargaining unit in proportion to the unit’s current level of a support applies in this case and ADT unlawfully changed the scope of the unit when it removed new hires from the bargaining unit. The Board’s contrary finding in the decision was material error and this motion should be granted on this point and the Board should hold ADT violated Sections 8(a)(1) and 8(a)(5) of the Act when it unilaterally altered the scope of the unit by excluding new hires.

*d.     The unlawful withdrawal of recognition*

The decision also erred by reversing the ALJ’s finding that ADT violated Sections 8(a)(1) and 8(a)(5) by unlawfully withdrawing recognition of CWA on or about May 31, 2017. ADT’s withdrawal of recognition is unlawful because it cannot meet the standard articulated by the Board in *Levitz Furniture* and it is tainted by the commission of unfair labor practices, specifically the exclusion of the new hires from the unit and statements blaming the Union for employees not receiving wage increases.

1. ADT cannot lawfully withdraw recognition under *Levitz Furniture*

The NLRB has held “that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees.” *Levitz Furniture*, 353 NLRB at 717. In *Levitz Furniture*, the Board adopted “a more stringent standard for withdrawals of recognition,” while adopting a “more lenient standard for obtaining RM elections.” *Levitz*, 353 NLRB at 723. The Board stated in *Levitz Furniture* that an employer must “prove by a preponderance of the evidence that the union had, in fact, *lost majority support at the time the employer withdrew recognition.*” *Levitz Furniture* at 725 (emphasis added). In reversing the ALJ’s decision, the Board looked back to 2014 and not at the facts as they existed in 2017. In 2017, as the ALJ found, CWA represented the majority of the workforce based on its legacy employees with the addition of the new hires, which under *Levitz Furniture* are presumed to support the Union proportionate to its existing support. *ADT*, 368 NLRB slip op. at 12-15.

Under the *Levitz Furniture* formula and presumptions, as of 2017, ADT was obligated to bargain with CWA, including the new hires per the *Levitz Furniture* presumption. ADT had no grounds to withdraw recognition of this unit, and the decision’s contrary ruling should be reversed and ADT held to have violated Sections 8(a)(1) and 8(a)(5) by unlawfully withdrawing recognition of CWA.

2. ADT’s unilateral exclusion of new hires from the unit tainted the withdrawal under *Denton County Cooperative*.

An employer cannot withdraw recognition when it has committed unfair labor practices that tend to undermine employee support for a union. *Denton County Cooperative*, 366 NLRB No. 103, slip op. at 10 (2018) (citing *Levitz* at 717; *Olson Bodies*, 206 NLRB 779, 780 (1973)).

ADT created the division between legacy ADT employees and new hires by failing to apply the terms of the CBA to new hires. The removal of new hires from the unit tainted the withdrawal of recognition. *Denton County*, 366 NLRB slip op. at 10.

ADT barred new hires from benefits of the labor agreement and drove a wedge between legacy and new hire. The Board in *Levitz Furniture* reaffirmed the proposition that new hires are presumed to support the incumbent union in a ratio comparative to that of existing bargaining unit employees. *Levitz Furniture*, 333 NLRB at 728, n. 60. The Board then proceeded to discuss employer misconduct being the principle agency behind the creation of facts an employer would point at to justify removing a union. The Board, in the context of discussing its decision in *Henry Bierce*, 328 NLRB 646 (1999) that “some of the factors relied on by the employer were the direct result of its own unlawful failure to apply the union contract to new employees or to inform the union about new hires.” *Levitz* at 729, n. 63 (citing *Henry Bierce*, 328 NLRB at 647). Thus, the Board has recognized that employers may not rely on the very malfeasance used by ADT in this case, the ostracizing of new hires from the unit, in order to justify ADT’s withdrawal of recognition.

The Board’s analysis of employer conduct in *Levitz Furniture* and *Henry Bierce* supports concluding that ostracizing new hires from the unit by ADT tainted the withdrawal. The new hires are deprived of the benefits of representation, principally in the form of benefits provided under the CBA. ADT then seizes upon the fruit of its own malfeasance and asserts the new hires, outside of the unit by operation of ADT’s own conduct, count towards finding loss of support. The new hires are as much strangers to the unit as the inherited Broadview employees because they have been excluded from the unit based on ADT’s unilateral actions. The outsider

status of new hires is a result of ADT's own misconduct and in accordance with *Levitz Furniture* and *Henry Bierce* their mistreatment at the hands of ADT taints the withdrawal.

ADT additionally blamed the Union for a lack of pay raises. (Tr. 206, Ins. 16-24; Tr. 207, Ins. 21-24). This allegation was upheld by the Board in the November 22<sup>nd</sup> decision. *ADT*, 368 NLRB slip op. at 3. Such conduct as blaming a lack of raises on Union support violates Section 8(a) (1) and is sufficiently detrimental to employee interests so as to taint withdrawal. *Denton County*, 366 NLRB slip op. at 2, 11 (citing *Atlantic Forest Products*, 282 NLRB 855 (1987); *Truss-Span Co.*, 236 NLRB 50 (1978)).

The unfair labor practice charge concerning the new hires was filed on or about January 15, 2015 (Complaint, ¶ 1(a)) and is part of this case (*Id.*, ¶ 17(a)) and has therefore not been remedied. The statements by ADT blaming the Union for a lack of raises are also a component of this case. (*Id.*, ¶ 9). These un-remedied unfair labor practices taint the withdrawal of recognition and render the withdrawal unlawful under Sections 8(a)(1) and 8(a)(5) of the Act.

*e.     The unlawful unilateral changes*

The reversal of the decision as to the unlawful unilateral changes found by the ALJ must also be reconsidered because their dismissal flows from the finding in the decision, reconsideration of which was requested above, that ADT's obligation to recognize CWA expired as a result of the 2014 reorganization.

An employer cannot unilaterally implement changes concerning mandatory subjects of bargaining without providing notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). Under *Katz*, "an employer's unilateral change in conditions of employment under

negotiation is similarly a violation of § 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a)(5) much as does a flat refusal.” *Katz*, 369 U.S. at 743.

Many of the unilateral changes at issue were made to terms of the CBA, which though expired, continued in effect until a successor agreement was reached. “The *Katz* doctrine has been extended to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)); see also *Air Convey Indus.*, 292 NLRB 25, 25-26 (1988) (holding “It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.”).

In this case, ADT made several unilateral changes to conditions of work, as outlined below, before and after it withdrew recognition that violate Sections 8(a)(1) and 8(a)(5). Unit employees, including new hires, should be made whole for any losses they suffered as a result of these changes, ADT ordered to cease and desist from making such changes and enforcing the changed terms of employment, and ADT ordered to restore the prior terms and conditions of employment.

1. Unilateral change to sick leave policy by requiring a doctor’s note

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about May 2016 by unilaterally changing its sick leave policy to require employees to bring a note from their doctor for a one-day absence. ADT technician and bargaining unit employee Paul Linder testified as to the promulgation of this change (Tr. 117, lns. 10-24), as did Will Skelton, (Tr. 201, ln. 25-Tr.

202, ln. 10; Tr. 202, lns. 20-22). Changes such as this to sick leave policies violate Sections 8(a)(1) and 8(a)(5).

2. Unilateral change to start of lunch period

ADT also violated Sections 8(a)(1) and 8(a)(5) of the Act since about May 2016 by unilaterally changing start time for employee lunches to as soon as the employee leaves a customer's premise. Changes impacting employee lunch periods are mandatory subjects of bargaining. *Nat'l Grinding Wheel Co.*, 75 NLRB 905, 906 (1948). Bargaining unit employee Shawn Bieker testified as to this unilateral change. (Tr. 144, lns. 12-18) as did Skelton (Tr. 239, lns. 1-14; Tr. 240, ln. 20; Tr. 240, ln. 25-Tr. 241, ln. 15). This change violated Sections 8(a)(1) and 8(a)(5).

3. Unilateral change to paid time off

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about May 2017 by unilaterally changing the manner in which employees accrue and use paid time off from work. Bieker testified about this change. (Tr. 149, ln. 18-Tr. 150, ln. 20). ADT admitted to this change. (Tr. 687-88). This change violated Sections 8(a)(1) and 8(a)(5) because ADT was not privileged to make unilateral changes based on its unlawful withdrawal of recognition as argued above.

4. Unilateral change to bereavement leave

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about May 2017 by unilaterally changing the annual allotment of bereavement time from five to three days. The CBA provided bereavement leave of five days for unit employees. (GC 4, p. 8; Tr. 792, lns. 5-11). Skelton testified that ADT changed that leave to three days. (Tr. 228, lns. 13-23). ADT

admitted to this change. (Tr. 688-89). This change violated Sections 8(a)(1) and 8(a)(5) because ADT was not privileged to make unilateral changes based on its unlawful withdrawal of recognition as argued above.

5. Unilateral change by disciplining employees for failing to meet sales quotas

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about May 2017 by unilaterally requiring employees to meet a sales quota or face discipline for not meeting the unilaterally imposed sales quotas. This change was testified to by Bieker. (Tr. 148, lns. 6-12). Skelton also testified as to this change. (Tr. 230, ln. 17-Tr. 231, ln. 15). Roberts confirmed that this change has been made. (Tr. 98, lns. 19-23). ADT admitted this change was made. (Tr. 689). This change violated Sections 8(a)(1) and 8(a)(5) because ADT was not privileged to make unilateral changes based on its unlawful withdrawal of recognition as argued above.

6. Unilateral change by rescinding the grievance process

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about May 2017 by unilaterally rescinding the grievance process. The CBA contains a grievance procedure. (GC 4, p. 4). ADT admitted to this change. (Tr. 689). This change violated Sections 8(a)(1) and 8(a)(5) because ADT was not privileged to make unilateral changes based on its unlawful withdrawal of recognition as argued above.

7. Unilateral change by cancelling dues deduction and remittance

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about August 1, 2017 by unilaterally ceasing to deduct and remit Union dues. ADT admitted to this change. (Tr. 690). This change violated Sections 8(a)(1) and 8(a)(5) because ADT was not privileged to make unilateral changes based on its unlawful withdrawal of recognition as argued above. While the

Board has recently held in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019) that dues may be terminated following the expiration of a labor agreement, to the extent applicable to this case, the *Valley Hospital* decision should be reconsidered as well because its treatment of dues as a condition of work conflicts with the decision of the holding of *Katz* that unilateral changes as to mandatory subjects of bargaining, such as dues deduction, are unlawful. Further, the Board's effort in *Valley Hospital* to distinguish dues as a category of working condition that can only be established by a labor agreement, and therefore changed upon expiration, fails because Section 8(a)(5) makes no such distinction and such a distinction is inconsistent with the holding of *Katz* and its progeny.

8. Unilateral change to pay periods

ADT violated Sections 8(a)(1) and 8(a)(5) of the Act since about November 2017 by unilaterally changing employee pay periods from weekly to biweekly. ADT admitted to this change. (Tr. 690). This change violated Sections 8(a)(1) and 8(a)(5) because ADT was not privileged to make unilateral changes based on its unlawful withdrawal of recognition as argued above.

*f.* The unlawful refusals to respond to requests for information

The reversal of the decision as to the unlawful refusals to provide information found by the ALJ must also be reconsidered because their dismissal flows from the finding in the decision, reconsideration of which was requested above, that ADT's obligation to recognize CWA expired as a result of the 2014 reorganization.

An employer has a duty under Sections 8(a)(5) and 8(d) to provide a union with relevant information that it needs to perform its function as the representative of unit employees. The

relevancy of information is determined using a liberal standard analogous to that found in civil discovery. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967). The Board has consistently upheld the right of a union to obtain information that it needs to bargain intelligently and “to service and police the contract.” *Viewlex, Inc.*, 204 NLRB 1080, 1080 (1973). Additionally, “A union's right wage information “cannot be seriously challenged” *Woodworkers Locals 6-7 & 6-22 (Pine Indus. Relations Comm.) v. NLRB*, 263 F.2d 483, 484 (D.C. Cir. 1959); *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938 (1956) (ordering production of wage information). This right to information on wages, based on the requirement of Section 8(d) that collective bargaining take place with respect to “wages, hours, and other terms and conditions of employment,” extends to wages paid to particular employees and groups of employees and to methods of computing compensation. *Puerto Rico Tel. Co. v. NLRB*, 359 F.2d 983 (1st Cir. 1966); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 613 (3d Cir. 1965).

A union is also entitled to a roster of unit employees. *Southern Nev. Home Builders Ass'n*, 274 NLRB 350 (1985). Information concerning bargaining unit employees is presumptively relevant. *Kentile Floors, Inc.*, 242 NLRB 755 (1979) (wage information); *Polymers, Inc.*, 319 NLRB 26 (1995) (names, mailing address, job classification, and earnings); *A. S. Abell Co.*, 230 NLRB 1112 (1977) (training); *Minnesota Mining and Mfg. Co.*, 261 NLRB 27 (1982) (safety and health); *Cowles Communications, Inc.*, 172 NLRB 1909 (1968) (dates of birth, dates of hire, and experience rating). Requests for information do not have to be in writing. *Hospitality Care Center*, 307 NLRB 1131 (1992).

1. The requests for information on new hires

ADT violated Sections 8(a)(5) and 8(a)(1) of the Act when it refused to respond to CWA's request for information as follows: (a) on or about December 16, 2014 when the Union, through CWA Staff Representative Kevin Kimber, orally requested a list of new hires, including their service date (GC 8, p. 1); and (b) on or about December 19, 2014 when the Union, through Kimber, requested in writing a list of new hires, including their service date. (Tr. 28, lns. 16-19; GC 7). Kimber requested this information because he needed to know who was in the unit and stated as much to ADT in response to a question concerning why he needed the information. (GC 8, p.1; CP 1). Kimber never received a response to his oral request (GC 8, p. 1) or his written request. (Tr. 32, lns. 21-23). ADT's failure to respond to this request violated Sections 8(a)(1) and 8(a)(5).

2. Information requests concerning pending grievances

ADT violated Sections 8(a)(5) and 8(a)(1) of the Act when it refused to respond to CWA's requests for information concerning pending grievances. On October 29, 2015, CWA Staff Representative Jerrell Miller sent Respondent ten requests for information pertaining to ten different grievances. (GC 9-GC 18; tr. 393, lns. 6-10). These requests are each respectively an allegation in this case. (Tr. 388, ln. 7-Tr. 390, ln. 23).

The requests concerned Whittington's work outside of job class grievance (GC 9), Skelton's work outside of job class grievance (GC 10), Local 6215's work outside of job class grievance (GC 11), Bieker's work outside of job class grievance (GC 12), a second work outside of job class grievance for Skelton which has a different grievance number (GC 13), Local 6215's overtime grievance (GC 14), a second work outside of job class grievance for Local 6215 which

has a different grievance number (GC 15), a second work outside of job class grievance for Bieker which has a different grievance number (GC 16), a second overtime grievance for Local 6215 which has a different grievance number (GC 17), and Paul Johnson's work hours grievance. (GC 18). Miller received no response to these requests. (Tr. 393, lns. 11-14). ADT's failure to respond to these requests that pertain to CWA's enforcement of the labor contract through the grievance process violates Sections 8(a)(1) and 8(a)(5).

Miller submitted on October 30, 2015 an information request concerning the suspension and termination grievances of bargaining unit employee Brian Sauser. (GC 19). Miller never received a response to this request. (Tr. 393, ln. 22-Tr. 394, ln. 6). Miller submitted on November 19, 2015 a request concerning a grievance on appropriate materials. (GC 20). This request was also not responded to by ADT. (Tr. 395, lns. 6-14). ADT's failure to respond to these requests, which likewise pertained to CWA's enforcement of the labor contract through the grievance process, violates Sections 8(a)(1) and 8(a)(5).

3. The Chad Short and Art Whittington information requests

ADT violated Sections 8(a)(5) and 8(a)(1) of the Act when it refused to respond to CWA's requests for information concerning Chad Short and Whittington. CWA Chief Steward Ken Stephens submitted on January 8, 2016 a request for information on bargaining unit employee Chad Short concerning Short's personnel files and medical records. (GC 22). ADT did not respond to this request. (Tr. 347, lns. 7-9). This request sought relevant information concerning the Company's records on a bargaining unit employee and ADT's failure to respond to this request violated Sections 8(a)(1) and 8(a)(5).

On July 15, 2016, Miller submitted a request to ADT concerning Whittington's termination. (GC 23, pp. 1-2). Miller received a partial response by email to the request on July 22<sup>nd</sup>. (R 14, p. 1). Miller responded by email on July 27<sup>th</sup> that the information from ADT satisfied some of the requests, but items 8, 9, 10, and 12-16 remained outstanding and Miller expected a response to these items. (Id., pp. 3-4). ADT never provided a response to the outstanding requests. (Tr. 381). Miller also emailed on July 27<sup>th</sup> a request concerning the Company's global positioning system (GPS) as that related to Whittington's discharge. (GC 24). ADT never responded to this request. (Tr. 383, lns. 13-15). These requests concern grievances seeking to enforce the just cause provision of the CBA and CWA's efforts to police the agreement as to Whittington's termination. ADT's failure to respond to these requests violated Sections 8(a)(1) and 8(a)(5).

4. The requests for information about subcontracting and compliance with the new hire arbitration award

ADT violated Sections 8(a)(5) and 8(a)(1) of the Act when it refused to respond to CWA's requests for information concerning subcontracting and compliance with the arbitration award issued by Arbitrator Ruben Armendariz concerning new hires. On March 23, 2017, prior to the Company withdrawing recognition, Miller submitted a request for information on contractors. (GC 24). This request was made while the parties were still negotiating a successor agreement. (Tr. 699, lns. 12-19). Miller never received a response to this request. (Tr. 395, ln. 20-Tr. 396, ln. 9). This request relates not only to policing the agreement but also to negotiations over a successor contract and ADT's failure to respond to it violated Sections 8(a)(1) and 8(a)(5).

Lastly, Miller submitted a request for information on March 24, 2017 seeking information relevant to complying with an arbitration award concerning new hires issued by

Arbitrator Ruben Armendariz on March 12, 2017. (GC 26; GC 31). ADT did not respond to this request. (Tr. 397, Ins. 5-8). This request, like many of the requests in this case, concerned policing the labor agreement and ADT's failure to respond to it violated Sections 8(a)(1) and 8(a)(5).

### **III. Conclusion & Prayer**

For all the reasons argued above, Charging Party Communications Workers of America, AFL-CIO prays the National Labor Relations Board reconsider and reverse its decision of November 22, 2019 in *ADT, LLC*, 368 NLRB No. 118 (2019) and provide Charging Party with all further relief it is entitled to at law or in equity, including the affirmative bargaining order ordered by the ALJ in his decision.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

This section is to certify service of the above and foregoing instrument has been served electronically to the parties below on December 20, 2019 as follows:

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