

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 3. Petition for Review of Order of a Federal Agency, Board,  
Commission, or Officer**

Name of Federal Agency, Board, Commission, or Officer:

National Labor Relations Board

Date of judgment or order you are challenging: 01/25/2021

Fee paid for petition?  Yes  No

**List all Petitioners** (List *each* party filing the petition. Do not use "et al." or other abbreviations.)

Kava Holdings, LLC., a Delaware limited liability company, d/b/a Hotel Bel-Air in the City of Los Angeles

For immigration cases:

Alien Number(s):

Is petitioner(s) detained?  Yes  No

Has petitioner(s) moved the BIA to reopen?  Yes  No

Has petitioner(s) applied to the district director for an adjustment of status?  Yes  No

Have you filed a previous petition for review from this agency?  Yes  No

If Yes, what is the prior 9th Circuit case number?

Your mailing address:

1201 W Peachtree Street NW, One Atlantic Center, Suite 2615

City: Atlanta State: GA Zip Code: 30309

Prisoner Inmate or A Number (if applicable):

Signature /s/ Arch Stokes Date Feb 3, 2021

*Complete and file with the attached representation statement and the order being challenged.  
See, e.g., Circuit Rule 15-4.*

Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)

### Representation Statement for Petition for Review

**Petitioner(s)** *(List each party filing the petition, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

Kava Holdings, LLC., a Delaware limited liability company, d/b/a Hotel Bel-Air  
in the City of Los Angeles

Name(s) of counsel (if any):

Arch Stokes  
Karl Terrell  
Diana Lerma

Address: 1201 W. Peachtree St. NW, One Atlantic Center, Suite 2615, Atlanta, GA

Telephone number(s): 404-766-0076

Email(s): astokes@stokeswagner.com, kterrell@stokeswagner.com, dlerma@stok

Is counsel registered for Electronic Filing in the 9th Circuit?  Yes  No

**Respondent(s)** *(List only the names of parties and counsel (if known) who will oppose you in the petition. List separately represented parties separately.)*

Name(s) of party/parties:

National Labor Relations Board

Name(s) of counsel (if any known):

NLRB: Simone Gancayco, Yaneth Palencia, Sarah Ingebritsen

Address: 11500 W. Olympic Blvd. #600, Los Angeles, CA 90064

Telephone number(s): 310-235-7352

Email(s): yaneth.Palencia@nlrb.gov, sarah.ingebritsen@nlrb.gov, simone.gancayc

*To list additional parties and/or counsel, attach additional pages as necessary.*

*Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)*

Additional parties and/or counsel:

Local 11: Charles Peng Du, Jeremy Blasi, Kirill Pentishen

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Los Angeles, CA 90017

cdu@unitehere11.org, jblasi@unitehere11.org, kpenteshin@unitehere11.org,

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**Kava Holdings, LLC, et al. d/b/a Hotel Bel-Air and  
UNITE HERE Local 11.** Case 31-CA-074675

January 25, 2021

DECISION, ORDER, AND ORDER REMANDING

BY MEMBERS KAPLAN, EMANUEL, AND RING

On December 19, 2019, Administrative Law Judge Lisa D. Ross issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions, to adopt the judge's recommended Order as modified and set forth in full below,<sup>3</sup> and to sever and remand one issue to the judge as explained below.

For the reasons stated by the judge, we affirm her findings that when the Hotel Bel-Air reopened on October 14, 2011, following a 2-year closure for renovations, the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to recognize and bargain with the Union and by unilaterally changing unit employees' terms and conditions of employment.

We also affirm, for the reasons she states, the judge's finding that the Respondent violated Section 8(a)(3) and

(1) of the Act by refusing to rehire unit employees who were laid off in September 2009 when the Hotel was closed for renovations and who reapplied for their positions beginning July 26, 2011.<sup>4</sup> The judge found that these unit employees numbered 152. However, she ordered reinstatement and make-whole remedies for 139 unit employees, who were identified by the General Counsel by the close of the hearing and whose names are listed in Appendix A of her decision. The General Counsel excepts, arguing that the 13 unit employees who were not identified by the close of the hearing are also entitled to remedial relief. The General Counsel argued likewise to the judge, but the judge did not explain why she excluded those 13 from the scope of her recommended Order. Accordingly, we shall sever this issue and remand it to the judge to address the General Counsel's argument. At her discretion, the judge may also reopen the record for further proceedings regarding the as-yet-unidentified 13 and/or permit the parties to file supplemental briefs.<sup>5</sup>

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondent to recognize and bargain in good faith with the Union as its unit employees' exclusive bargaining representative concerning their wages, hours, benefits, and other terms and conditions of employment, and, if an understanding is reached, to embody the understanding in a signed agreement.<sup>6</sup>

<sup>1</sup> Subsequent to these filings, the Respondent filed a Motion to Include in the Record the Findings and Decision of the Associate to the General Counsel (Division of Operations-Management in Case AD-85). This motion asks the Board to add to the record a letter from the General Counsel's Division of Operations Management stating that "no further action would be taken regarding the attorney misconduct allegation" that had been referred to the General Counsel by Judge Ross. The General Counsel filed a response to the motion, indicating that he did not take a position on whether or not the letter should be added to the record. On January 7, 2021, the Office of the Executive Secretary informed the parties that the Respondent's motion would be treated as a motion to take administrative notice of agency proceedings. In light of the foregoing, we grant the Respondent's motion and take administrative notice of this disposition of the judge's attorney misconduct allegation.

Even assuming, however, that the Respondent's motion could be interpreted as supplemental briefing regarding its assertion that the judge demonstrated bias in these proceedings, we do not consider the General Counsel's administrative decision not to take further action with regard to the attorney misconduct allegation to be evidence of judicial bias.

<sup>2</sup> The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362

(3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>3</sup> We shall modify the judge's recommended Order to conform to the violations found, the amended remedy, the Board's standard remedial language, and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

<sup>4</sup> In affirming the judge's finding that antiunion animus contributed to the decision not to rehire the laid-off applicants, we do not rely on the disparity between the number who applied and the number who were hired or on *Glenn's Trucking Co.*, 332 NLRB 880 (2000), enfd. 298 F.3d 502 (6th Cir. 2002), cited by the judge.

<sup>5</sup> That we are severing and remanding the issue of the 13 as-yet-unidentified unit employees has no effect on the Respondent's obligation to immediately comply with the remedies provided below for the 139 discriminatees whose names are listed in Appendix A of the judge's decision.

<sup>6</sup> The Respondent excepts to the judge's finding that it unlawfully refused to recognize and bargain with the Union in violation of Sec. 8(a)(5) and (1), but it does not argue that the judge's recommended

Further, having found that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes to the terms and conditions of employment of unit employees, we shall order the Respondent to rescind those changes at the Union's request and make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). This make-whole remedy also requires the Respondent to make any applicable contributions to Union benefit funds that have not been made since the date of the unlawful changes in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make the unit employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>7</sup>

Additionally, having found that the Respondent violated Section 8(a)(3) and (1) by unlawfully refusing to rehire unit employees, we shall order the Respondent to offer affected employees reinstatement and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.<sup>8</sup> Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. We shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 1 fn. 2 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, we shall require the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 31, within 21 days of the

date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014); *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

#### ORDER

The National Labor Relations Board orders that the Respondent, Kava Holdings, LLC, d/b/a Hotel Bel-Air, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Unite Here Local 11 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Changing terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) Refusing to rehire unit employees because of their union affiliation.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, bargain with the Union as the exclusive collective-bargaining representative of its unit employees as described in section 3.A of the August 16, 2006 to September 30, 2009 collective-bargaining agreement between the Union and the Respondent concerning the unit employees' terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request by the Union, rescind the changes in unit employees' terms and conditions of employment that were unilaterally implemented.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, in the manner set forth in the amended remedy section of this decision.

(d) Make all delinquent contributions to the applicable benefit funds on behalf of unit employees that have not been made as a result of the unlawful unilateral changes, including any additional amounts due the funds, in the manner set forth in the amended remedy section of this decision.

(e) Make unit employees whole for any expenses ensuing from the failure to make the required contributions to

affirmative bargaining order is improper if the Board affirms the judge's Sec. 8(a)(5) violation finding. Accordingly, we find it unnecessary to provide a specific justification for that remedy. See *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119, slip op. at 1 fn. 2 (2019) (collecting cases).

<sup>7</sup> To the extent that an employee has made personal contributions to a fund that were accepted by the fund in lieu of the Respondent's

delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

<sup>8</sup> The "affected employees" are the 139 employees listed in Appendix A of the judge's decision.

the applicable benefit funds, in the manner set forth in the amended remedy section of this decision.

(f) Within 14 days from the date of this Order, offer affected employees—as that term is defined in the amended remedy section of this decision—instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled.

(g) Make affected employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(h) Compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each unit employee.

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

(j) Post at its Los Angeles, California facility (the Hotel Bel-Air) copies of the attached notice marked “Appendix” in both English and Spanish.<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

<sup>9</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if

expense, copies of the notice in English and Spanish to all current employees and former employees employed by the Respondent at any time since July 26, 2011.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED THAT the issue of whether the 13 as-yet-unidentified unit employees who applied for positions but were not hired are entitled to remedial relief is severed and remanded to Administrative Law Judge Lisa D. Ross. On remand, Judge Ross is to address the General Counsel's contentions regarding the remanded issue. At her discretion, she may also reopen the record for further proceedings regarding the 13 as-yet-unidentified unit employees and/or permit the parties to file supplemental briefs.<sup>10</sup> The judge shall prepare a supplemental decision, copies of which shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. January 25, 2021

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

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

the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

<sup>10</sup> If Judge Ross chooses to reopen the record, and if the 13 are then identified, the issue of whether unidentified individuals are entitled to remedial relief will be mooted, and the judge need not address it.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Unite Here Local 11 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to rehire you because of your union affiliation.

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

WE WILL, on request by the Union, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described in section 3.A of the August 16, 2006 to September 30, 2009 collective-bargaining agreement between the Union and us concerning our unit employees' terms and conditions of employment and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

WE WILL, on request by the Union, rescind the changes in your terms and conditions of employment that we unilaterally implemented on October 14, 2011.

WE WILL make you whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes to wages and benefits.

WE WILL make all delinquent contributions to applicable benefit funds that have not been made since October 14, 2011, including any additional amounts due the funds as provided for in the Board's Order.

WE WILL reimburse you, with interest, for any out-of-pocket expenses you incurred because of our discontinuation of contributions to applicable benefit funds.

WE WILL, within 14 days from the date of the Board's Order, offer the employees listed in Attachment A reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled.

WE WILL make the employees listed in Attachment A whole for any loss of earnings and other benefits resulting from our unlawful refusal to rehire them, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

KAVA HOLDINGS, LLC, ET AL. D/B/A HOTEL BEL-AIR

The Board's decision can be found at [www.nlr.gov/case/31-CA-074675](http://www.nlr.gov/case/31-CA-074675) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



ATTACHMENT A

1. Adam Gardner
2. Alberto Duran
3. Alex Barrios
4. Allyson Tison/Tizon
5. Amanda Escobar
6. Ana Arrozola
7. Angel Loeches
8. Anthony Hop Pham
9. Antonio Diaz
10. Antonio Escobedo
11. Antonio Romero
12. Armando Alvarenga
13. Armida Huevo
14. Arturo Leon
15. Beatriz Lemis
16. Boris Shaetz
17. Borislav Kostadinov
18. Bradley Anderson
19. Carlos Burgos

20. Carlos Gutierrez
21. Carlos Perez
22. Carmen Casiano
23. Chad Biagini
24. Corina Ivanna Ganame
25. Cristian Vargas
26. Danielle Rodriguez
27. Davis Komarek
28. David Leger
29. Delmy Alas
30. Domingo Antonio
31. Edgar Cano
32. Edith Calderon
33. Elizabeth Bono
34. Emilio Molina
35. Eric Flores
36. Erick Orozco
37. Esteban Pacheco
38. Evaristo Vasconcelos
39. Feliciano Viscarra
40. Felipe Vasquez
41. Felix Gonzales
42. Fortino Luis Martinez
43. Francisco Alas
44. Gilberto A. Moran
45. Gilberto Diaz
46. Giovanni Rodriguez
47. Guadalupe Soto
48. Hector Jimenez
49. Hermina Urbana
50. Hignio Castellon
51. Howie Witz
52. Ignacio Escobedo
53. Inigo De La Hidalgo
54. Inna Zavala
55. Ismael Casanova
56. Ismael Witz
57. Ivan Stankov
58. Jacques Felix
59. Jaime Bravo
60. Jehane Delwar
61. Jennifer Contreras
62. Jennifer Jimenez
63. Jeremias Del Cid
64. Yixiong "Jimmy" Dong
65. Joaquin Fuentes
66. Jorge Duarte
67. Jose Bojorquez
68. Jose de Jesus Garcia
69. Jose Luis Gaeta
70. Jose Madrid
71. Jose Manzo
72. Jose Mojarro
73. Jose Polio
74. Jose Pavon
75. Jose Pinedo
76. Joseph Nava
77. Juan Carlos Pavon
78. Juan Contreras
79. Julio Cruz
80. Julio Pedro Perez
81. Justino Castellon
82. Karoly Zsiga
83. Kenny McCabe
84. Khenk Lee
85. Laura Fergusson
86. Leslie Miller
87. Manuel Giron
88. Maria Del Cid
89. Maria Gomez
90. Maria Lourdes Nolasco
91. Maria Antoinette Albano Gonzales
92. Mario Rodriguez
93. Martin Orozco

- |                                |                       |
|--------------------------------|-----------------------|
| 94. Matthew Biedel             | 131. Steve Rasmussen  |
| 95. Miriam Martirosyan         | 132. Tomas Alvarado   |
| 96. Mishele Tapia              | 133. Tomas Ramirez    |
| 97. Mohammed Masum             | 134. Ulises Trejo     |
| 98. Narciso Lopez              | 135. Victor Pacheco   |
| 99. Ngoc Mihn Hoang            | 136. Victor Venegas   |
| 100. Nora Melendez             | 137. Virginia Cruz    |
| 101. Oscar Flores              | 138. William Carranza |
| 102. Oscar Galdamez            | 139. Wilson Alvaro    |
| 103. Oscar Ingles              |                       |
| 104. Oscar Martinez            |                       |
| 105. Oscar Vasquez             |                       |
| 106. Pablo Del Real            |                       |
| 107. Patricia Miranda          |                       |
| 108. Pedro Hernandez           |                       |
| 109. Pedro Morales Sanchez     |                       |
| 110. Rafael Guevarra           |                       |
| 111. Rafael Martinez           |                       |
| 112. Raul Salazar              |                       |
| 113. Raymundo Avina            |                       |
| 114. Refugio Lopez             |                       |
| 115. Rejo Jastoreja            |                       |
| 116. Rigoberto Carrillo        |                       |
| 117. Rigoberto Contreras       |                       |
| 118. Robert "Charlie" Hargitay |                       |
| 119. Roberto Dominguez         |                       |
| 120. Roel Andres               |                       |
| 121. Roger Jackson             |                       |
| 122. Ronald Hartling           |                       |
| 123. Rosa Perez                |                       |
| 124. Rudy Castellanes          |                       |
| 125. Salvador Gonzales         |                       |
| 126. Salvador Maldonado        |                       |
| 127. Sapardjo Diporedjo        |                       |
| 128. Sergio Manzo              |                       |
| 129. Sonia Mancias             |                       |
| 130. Sonia Reyes               |                       |

*Yaneth Palencia, Simone Gancayco and Sarah Ingebritsen, Esqs.*, for the General Counsel.  
*Arch Stokes, Karl M. Terrell and Diana Dowell, Esqs. (Stokes Wagner ALC)*, for the Respondent.  
*Kirill Penteshin and Charles Du, Esqs. (UNITE HERE Local 11)*, of Los Angeles, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

LISA D. ROSS, Administrative Law Judge.<sup>1</sup> On February 15, 2012, UNITE HERE Local 11 (the Charging Party, Local 11 or the Union) filed an unfair labor practice (ULP) charge against Kava Holdings, LLC, et al. d/b/a Hotel Bel Air (Respondent). In January 2013, Region 31 held this matter in abeyance until July 29, 2016, pending the outcome of a related case *Hotel Bel Air v. NLRB*, 637 F.3d Appx. 4 (D.C. Cir. 2016). In that case, the U.S. Court of Appeals for the District of Columbia enforced the National Labor Relations Board's (NLRB or the Board) Order in *Hotel Bel Air*, 361 NLRB 898 (2014) which adopted a prior Board decision at 358 NLRB 1527 (2012). Region 31 issued the instant complaint on July 29, 2016, then amended it on December 26, 2016.

The amended complaint (complaint) alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA or the Act) when, after a temporary closure of the Hotel, Respondent refused to rehire or recall approximately 152 former bargaining unit employees in order to avoid recognizing and bargaining with the Union.

The complaint further avers that Respondent violated Sections 8(a)(5) and (1) when, after the Hotel reopened, Respondent refused to recognize and bargain with the Union and made unilateral changes to terms and conditions of employment of bargaining unit employees without giving prior notice to and bargaining to impasse with the Union.<sup>2</sup>

Respondent filed its answer and amended answer, denying all material allegations and setting forth multiple affirmative defenses to the complaint.

This case was tried in Los Angeles, California, over 21 dates between March 13, 2017 and June 28, 2018. Counsel for the General Counsel, Charging Party and Respondent presented witness testimony along with a mountain of documentary evidence.<sup>3</sup>

After the trial, counsel timely filed extensive post-hearing briefs, which I have read and carefully considered. Based upon the entire record, including the testimony of the witnesses, my observation of their demeanor, and the parties' briefs, I conclude that Respondent violated the Act as alleged.<sup>4</sup>

### FINDINGS OF FACT

#### I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent operates a 5-star luxury hotel, the Hotel Bel Air, in Los Angeles, California. It is undisputed that, at all material times, Respondent's gross revenue exceeded \$500,000 annually,

<sup>1</sup> At the time of the trial, my name was Lisa D. Thompson. However, since the hearing I got married and have legally changed my name to Lisa D. Ross.

<sup>2</sup> The General Counsel withdrew the allegation in par. 9(b) of the amended complaint based on a refusal to consider for hire.

<sup>3</sup> The delay in issuing this decision was due, in part, to my being on extended leave under the Family and Medical Leave Act (FMLA).

<sup>4</sup> Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh. #" for the General Counsel's exhibits, "CP Exh. #" for Charging Party's exhibits, "R. Exh. #" for Respondent's exhibits, "ALJ Exh. #" for the Administrative Law Judge's exhibits, "GC Br." for the General Counsel's brief, "CP Br." for Charging Party's brief, and "R. Br." for Respondent's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive.

and it annually purchased and received goods valued in excess of \$5000 from points outside the State of California. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>5</sup>

It is also undisputed, and I find that, at all material times, UNITE HERE Local 11 has been a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background Facts

Respondent operates the Hotel Bel Air (the Hotel) in Los Angeles. The Hotel has been a luxury hotel for decades. It is currently owned by the Dorchester Collection, which also owns the Beverly Hills Hotel in Los Angeles and other luxury hotels. Prior to September 30, 2009, the Hotel was a five-star luxury hotel.

Also prior to September 30, 2009, UNITE HERE Local 11 was the exclusive collective-bargaining representative for many of Hotel's employees, including, but not limited to, kitchen workers, dining and room service employees, housekeepers, garage and front desk employees, restaurant employees, guest and banquet services employees, gardeners, painters, maintenance employees, stewarding, and purchasing and receiving employees. (GC Exh. 3.) Respondent and the Union were party to a series of collective bargaining agreements (CBA), the most recent of which was in effect from August 16, 2006 to September 30, 2009, the date the hotel closed for renovation.

On September 30, 2009, the Hotel temporarily closed for extensive renovation and remodeling. It laid off all bargaining unit employees. Respondent and the Union engaged in effects bargaining. Key issues for negotiations included the right of bargaining unit employees to return to their positions upon the Hotel's reopening and the terms of any severance package offered to employees. The parties bargained throughout the end of 2009 and into the middle of 2010.

By June 7, 2010, however, Respondent unilaterally, and without notice to the Union, implemented its "last, best and final offer" from April 2010, and sent severance packages and waiver and release forms to the unit employees. Approximately 179 employees signed the waiver and release forms, thus forfeiting their recall rights.

The Union filed an ULP charge regarding Respondent's actions in this regard. The Board held that Respondent violated Section 8(a)(5) and (1), finding that a valid impasse did not exist, and that Respondent had therefore illegally dealt directly with unit employees, *Hotel Bel Air*, 358 NLRB 1527 (2012), adopted 361 NLRB 898 (2014), *enfd.* 637 Fed.Appx. 4 (D.C. Cir. 2016) (finding that a valid impasse did not exist when Respondent unilaterally implemented its last, best and final offer, and that Respondent illegally dealt directly with unit employees

for Charging Party's exhibits, "R. Exh. #" for Respondent's exhibits, "ALJ Exh. #" for the Administrative Law Judge's exhibits, "GC Br." for the General Counsel's brief, "CP Br." for Charging Party's brief, and "R. Br." for Respondent's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive.

<sup>5</sup> See *Hotel Bel-Air*, 358 NLRB 1527, 1529–1530 (where Respondent admitted it was an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) the Act).

regarding severance).<sup>6</sup> The Board ordered that Respondent rescind the waiver and release agreements signed by 179 unit members if the Union requested and for Respondent to bargain with the Union over the effects of the temporary shutdown.

#### B. Respondent's Reopening and Job Fair

Turning back to this case, Respondent prepared the Hotel for its reopening. (Tr. 1825, 2388.) Despite Respondent's arguments that the Hotel was entirely different from the pre-closure Hotel, the Hotel remained essentially the same five-star luxury hotel it was prior to the renovation. More importantly, the record reveals that the Hotel's job descriptions and duties for most bargaining unit positions before and after its temporary closure remained essentially the same. (Tr. 1717–1726, GC Exh. 9–10).

Prior to its reopening, Respondent conducted a job fair, planned by Beverly Hills Hotel's Director of Human Resources Eva White (White). Respondent hired Sandra Arbizu (Arbizu) as Respondent's human resources manager to prepare for the reopening. (Tr. 1860.)

Maria "Milet" Lukey (Lukey) served as Area Director of Human Resources for both the Beverly Hills Hotel and the Hotel Bel-Air. Lukey was the top staff member in charge of organizing the job fair. Arbizu, under the direction of White, Lukey and Respondent's General Manager Tim Lee (Lee) determined how the job fair would run. (Tr. 1862–1863.)

Interestingly, when Union counsel asked Arbizu whether any preparations were made to deal with the Union upon reopening, Arbizu testified:

I guess when you —when you say "preparation", is —what I mean by that is that we do training on being good managers, following good practices. We do training on getting people engaged. We want to have meeting—department meetings. We want to make sure that we provide a clean and healthy break room, cafeteria. That we work at making sure they have uniforms, all of this, for is preventative kind of work that we do to educate our managers so that your employees do not need a third party to speak for them, that they can come and talk to you. We have an open-door policy. So, things like that.

Q. So in other words, taking, as you put it preventative measures to make sure a union doesn't need to come, or that they don't need to be represented by a Union, because those things are being taken care of?

A. Well, yeah. To be good managers, to be good people to their staff.

(Tr. 1906–1907.)

It is undisputed that Respondent held its job fair on July 26, 27 and 28, 2011. In advertising the job fair, Respondent sought candidates with "exceptional talent," who had "a passion for excellence, a warm, friendly and positive attitude, and strong verbal communication skills." (Tr. Vol. 4 at 16–17, GC Exhs. 6 and 7.) "Previous luxury hospitality experience and the ability to thrive in a fast-pace (sic) environment" was "desirable." (GC

Exh. 6–7).

The first day of the job fair was reserved for former Hotel employee applicants. Respondent accepted applications from and/or interviewed the general public on July 27 and 28. Interview forms indicated the day and time—AM or PM—applicants were interviewed, making it clear which applicants were former employees. (GC Exh. 2.) It is undisputed that approximately 306 hourly positions were available at the time of the Hotel's job fair. (Tr. 536.)

#### 1. Initial interviews

The interviewing process had three rounds: the initial interview, the departmental interview, and the final interview. The initial interview lasted from a few seconds to a few minutes, and the interviewers asked the same three questions:

What position are you applying for?  
Are you available to work weekends/holidays?  
Why do you want to work at Hotel Bel Air?

The initial interviewers were instructed to rate the applicants on Appearance, Self Confidence and their Communication Skills. Initial interviewers were responsible for completely filling out the initial interview section of the candidate's interview form then determining whether the applicant advanced to the next level.

Respondent's first round interviewers had discretion to recommend advancing the applicant to the next round of interviews. The interviewers were instructed to put the applications for those advancing to the second round in a blue "yes" box and to put those not advancing in a pink "no" box. (Tr. 1776–1777, 1867, 2054–2055, 2097, 2107.)<sup>7</sup>

Record evidence demonstrates that, out of 176 former employee applicants 67 of them did not advance after their initial interview, thus assuring Respondent that a majority of the bargaining unit would not consist of former unit employees (176 applicants minus 67=109, less than 50% of the unit upon reopening).<sup>8</sup>

Moreover, any applicant whose application went into a blue "yes" box should have received a second interview with a departmental head or the equivalent. However, the record is replete with examples of former unit employee applicants who, based on the documentary evidence, should have received a departmental interview but did not. For example:

Irma Zavala (Zavala) worked for the Hotel for 20 years as a room attendant (aka housekeeper), then as a uniform attendant. On the morning of July 26, Khoi Evans (now Khoi Luevano), the Assistant Director at the Beverly Hills Hotel, interviewed Zavala in the first round. Evans gave Zavala a positive review, yet Zavala did not receive a second interview. (Tr. 385–387, 2078–2079, see also GC Exh. 2 at 481.) Zavala's interview form gives absolutely no reason why she did not have a departmental interview. Respondent has not offered any explanation why Zavala was not hired.

Carmen Casino (Casino) worked for the Hotel as a room

<sup>6</sup> The initial decision was rendered by a Board that was not legally constituted. In 2014, a legally constituted Board affirmed the judge's rulings, finding and conclusions, and adopted the recommended order to the extent set forth in the 2012 decision.

<sup>7</sup> There is no evidence who took the applications put in the blue box to the departmental reviewers.

<sup>8</sup> This fact is actually irrelevant since there is a rebuttable presumption that the Union enjoyed majority support after the expiration of its

collective bargaining agreement with Respondent, *Golden State Warriors*, 334 NLRB 651, 653–54 (2001). However, this statistical information is included herein as evidence of antiunion animus which is discussed later in this decision. See *Greenbrier Rail Services*, 364 NLRB No. 30, at 40–41, citing *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981).

attendant for 22 years—from 1987 until September 30, 2009. Evans/Luevano interviewed Casino and gave her a positive rating. Yet, there are no markings on the interview form that Casino was advanced to a departmental interview, and Respondent did not hire her. (GC Exh. 2 at 254–257, Tr. 2072–2076.)

Ana Arrazola (Arrazola) worked as a room attendant for the Hotel for 13 years – from 1996 until September 30, 2009. She reapplied for her position. Evans/Luevano interviewed Arrazola and gave her a positive rating. However, Arrazola did not get a departmental interview and was not hired. (Tr. 2079–81, GC Exh. 2 at 489–492.) Respondent has not offered a reason why Arrazola was excluded from the hiring process.

Carlos Burgos (Burgos) worked for the Hotel as a night cleaner for 16 years—from 1993 to September 30, 2009. (GC Exh. 2 at 109–112.) He reapplied for his former position. Evans/Luevano gave Burgos a positive rating, but he did not receive a departmental interview and was not hired. (Tr. 2081–2084). Respondent again offered no explanation as to why Burgos was not rehired.

Pablo Del Real (“Del Real”) worked for Respondent for approximately 21 years. (Tr. 1126.) Del Real initially worked as a housekeeper then as a painter in the engineering department. In fact, for approximately 15 years, Del Real intermittently worked as a substitute supervisor whenever his supervisor was absent. Del Real reapplied for his job as a painter but was excluded from consideration after his initial interview because he did not “possess minimum experience/skills requirement.” (GC Exh. 2 at 14). Yet, Respondent offered a painter/engineer position to non-former employee applicant Fernando Diaz (Diaz), who had no experience working in a hotel and had previously been working as a cable installer for the past two years. (GC Exh. 2 at 1077–1081). Incredibly, Respondent noted on Diaz’s interview notes that he had “good experience.” (Id. at 1077.)

## 2. Departmental interviews

It is undisputed that, if an applicant advanced to the second round, the candidate next interviewed with a department manager. These second interviews often occurred behind a barrier from where the initial interviews took place. During the departmental interviews, the department head asked pre-prepared but more detailed questions and recorded the applicant’s answers further down on the candidate’s interview form.

Like the initial interviewers, the departmental managers had discretion to choose which applicants, out of those passed on to them, they would interview. (Tr. 1912, 2304, 2398–2399.)

However, even at the second stage of the interview process, unusual anomalies occurred. Specifically, in many cases in which Respondent’s documents indicate that the applicant may have received a departmental interview, I conclude the applicant did not, because the manner in which these forms were completed (or not completed) indicates that there was no interview. For example, I turn to the interview forms completed (or not completed) by Andrey Godzhik (Godzhik).

I infer from the record that the initials AG on many of the interview forms are those of Andrey Godzhik, a manager for Wolfgang Puck’s restaurant at the Hotel. (Tr. 555.) While all departmental managers were instructed to complete the section of the interview form under departmental interview (Tr. 533), the

record demonstrates that Godzhik did not do so with regard to many of the applicants he *excluded* from the hiring process.<sup>9</sup>

Specifically, the record reveals that when Godzhik interviewed applicants, he filled out the departmental form in full. (See e.g., GC Exh. 2 at 359–360). However, when he did not fill out the form, but merely initialed it, I infer he did not interview the applicant, but summarily excluded the applicant from the hiring process. I draw this inference from several factors.

First, Respondent did not call Godzhik as a witness and has not indicated that he was unavailable to testify. Second, Respondent’s brief at p. 31 states that the departmental interviews were largely conducted by departmental managers. However, Godzhik was not a departmental manager. Thus, it is unlikely that he interviewed the many applicants on whose forms his initials appear.

Finally, I find that the reasons given for excluding these former employee applicants are, in many cases, preposterous. Specifically, below are examples of former employee applicants who I infer did not have a departmental interview despite the presence of Godzhik’s initials on their interview forms:

Salvador Maldonado (Maldonado) worked as a server in the Hotel’s restaurant for approximately 25 years—from 1984 to September 30, 2009. (GC Exh. 2 at 298–301). He reapplied for his former position. Evans/Luevano gave him a positive rating in the initial interview. (Tr. 2084–2087). However, the interview form indicates that Godzhik excluded Maldonado from consideration because he did not “possess the minimum experience/skills for the server position for which he was applying.”

Lukey, the job fair coordinator, interviewed Thomas Alvarado (Alvarado) on July 26. Alvarado worked at the Hotel for approximately 25 years—from 1984 through 2009. Although Alvarado supposedly advanced to the departmental interview, Godzhik excluded Alvarado from the hiring process due to his “unacceptable job stability.” (GC Exh. 2 at 145–148.)

Oscar Martinez (Martinez) worked for the Hotel for approximately 10 years—from 1999 through 2009. (GC Exh. 2 at 113–116). He was previously a busboy and reapplied for his former position. He received a positive initial evaluation from Jonathan Mattis (Mattis), then the Hotel’s Director of Marketing. Yet Godzhik summarily excluded Martinez from further consideration as a busboy due to his “unacceptable job stability.”

Elizabeth Bono (Bono) worked as a bartender at the Hotel for approximately 12 years—from 1997 to 2009. She reapplied for her former position. Lukey gave Bono a positive rating. However, Godzhik again summarily excluded Bono from further consideration due to “unacceptable job stability.” (GC Exh. 2 at 373–376.)

Antonio Diaz (Diaz) worked for Respondent for approximately 23 years – from 1986 until September 30, 2009—as a mini-bar attendant. He reapplied for his former position. Mattis gave Diaz a positive rating on his initial interview. (GC Exh. 2 at 453–456, Tr. 2111–2112.) Nevertheless, Godzhik summarily excluded him from consideration on the grounds that he did not “possess the minimum experience/skills to be a bartender.” However, Respondent offered non-former employee applicant Divania Minc a position as a mini bar attendant where she had only three years of hotel experience. Respondent rated her as

<sup>9</sup> The Union in its brief states that Godzhik rejected 31 former employee applicants. CP Br. at 10.

having “[s]trong experience for this position.” (GC Exh. 2 at 1465–1468.)

Oscar Galdemez (Galdemez) was a houseman at the Hotel for 10 years prior to 2009. He reapplied for his former position. Evans/Luevano gave Galdemez a favorable assessment at his initial interview. (GC Exh. 2 at 19–20.) Despite this, Galdemez did not get a departmental interview and there is no explanation why he was not advanced in the record.

Similarly, there was no explanation why Jeremias Del Cid (Del Cid), who was a housekeeping supervisor at the Hotel from 1986 to 2000 (GC Exh. 2 at 50–53), and Minh Ngoc Hoang (Hoang), a seamstress/uniform attendant, who worked for the Hotel from 1990–2009, both of whom reapplied for their former positions and received a favorable initial assessment, did not receive a departmental interview. (GC Exh. 2 at 125–128.)

Juan Contreras Torres (Torres) was a busboy for the Hotel for approximately five years – from 2004 to 2009. He reapplied for his former position. Torres received a favorable rating on the initial interview but did not get a departmental interview. (GC Exh. 2 at 653–56.) An unknown person opined that Torres lacked “hospitality/communication skills” and “did not possess the minimum experience/skill requirements for the position”. There is no showing in this record as to how hospitality/communication skills are relevant to the job of a busboy.

In contrast, Respondent offered Kevin Gilly a busser position where he listed no busser experience on his application (GC Exh. 2 at 1176–1179.) Respondent also hired Hong Moon (Moon) as a busser, despite rating Moon as having “basic experience, training needed” (Id. at 1488–1492). Lastly, Respondent offered a busser position to Paris Ramirez who had no luxury or hotel experience and had not worked in a restaurant in the past four years (Id. at 636–640).

### 3. Final interviews

It is further undisputed that, if the applicant was advanced passed the departmental interview, the last stage was the final interview, which were mostly conducted by Hotel Manager Christoph Moje (Moje), a different position from Respondent’s General Manager. These interviews were mostly conducted in a set of trailers across the street from the Hotel. (Tr. 2563.) Moje asked each applicant the questions listed in, and then completed, the final interview section of the interview form. (GC Exh. 2; Tr. 533.) He interviewed every applicant that was presented to him, and he made his decisions to hire or reject the applicant immediately after the interview. (Tr. 2564–2565.)

It is undisputed that, for approximately 306 job openings available, and out of the approximately 176 former Hotel employee applicants who applied for the 306 jobs available, only 24–25 former unit employees were hired during the job fair. (Tr. 536–538.)<sup>10</sup> This means that Respondent rejected 152 out of 176 former unit employees who applied/reapplied for their former positions. (GC Exh. 52, see also Appendix A attached to this decision, see GC Br. at Exh. 1.) The former unit employee applicants who were rejected were qualified for the open positions, and many had several prior years of positive evaluations while they worked for Respondent. (GC Exh. 29.) These included, but

are not limited to, former employees Irma Zavala, Juan Pablo Contreras Torres, Amanda Escobar, and Pablo del Real, all of whom had positive work histories while employed by Respondent.

In addition, the record demonstrates that some of the rejected former employee applicants worked for Respondent for 20 years or longer. (See, e.g., GC Exh. 2 at 141–148, 254–257, 441–444, 481–484.) Out of the 176 former employee applicants, at least 64 (36%) were not given a departmental interview. (GC Exh. 2.) Out of the 64 former employee applicants dismissed at this stage, around 42 (65%) had worked at the Hotel for five years or more, and around 29 (45%) had at least 10 years tenure with Respondent.

### C. Refusal to Recognize/Bargain with the Union

As stated above, on or about September 30, 2009, when the CBA expired, Respondent temporarily closed for renovations. All bargaining unit employees were laid off. Record evidence reveals that Respondent clearly intended to reopen the Hotel as it continued to employ managers, directors, accounting employees, engineering employees and security. It also planned, coordinated and conducted its job fair, announced the job fair to the public as well as the Union and intended to hire employees and re-staff itself in advance of its reopening in October 2011.

On or about October 14, 2011, Respondent reopened the Hotel. That same day, the Union and unit employees picketed across the street from the Hotel. (Tr. 629.)

Since the Hotel reopened in October 2011, it is undisputed that Respondent has not recognized the Union as the exclusive bargaining representative for unit employees. (Tr. 621, see also GC Exh. 1(r) at 6.) It is further undisputed that Respondent did not provide the Union with notice that it was withdrawing recognition of the Union (Tr. 621, 626). To date, Respondent has yet to recognize the Union since its reopening. To date, Respondent has yet to bargain with the Union over any terms and conditions of employment for the bargaining unit prior to and after the Hotel’s September 30, 2009 shutdown, the events leading up to, during or after the job fair, or any terms and conditions of employment for the bargaining unit after the Hotel reopened.

### D. Unilateral Changes to the Terms/Conditions of Employment of Bargaining Unit Employees

Since the Hotel reopened in October 2011, Respondent unilaterally made the following changes to the terms and conditions of employment for various bargaining unit positions:

Wage rates for certain job classifications were determined by the wage rates at other luxury hotels in the Los Angeles area rather than by the terms of the expired CBA. (Tr. 625, 1575–1578, see also GC Exh. 3 at 9, 21–25.)

Respondent stopped making payments to the Union’s retirement, legal, or health and welfare funds, as required by the CBA (Tr. 625, GC Exh. 3 at 9, 21–25).

The expired CBA prohibited “work customarily performed by employees covered by [the] Agreement” from being “subcontracted, transferred or assigned by any means to any persons, firm, or entity.” (GC Exh. 3 at 5–6.) However, Respondent outsourced the positions of gardener, painter, maintenance, and

<sup>10</sup> Several former Hotel employees were hired late in the process. Lucinda Landers, a former Hotel waitress, received a very unfavorable assessment from Godzhik at the departmental interview. (GC Exh. 2 at 359–360, Tr. 2224–2229, 2234.) Yet, she was hired in August 2011. The

General Counsel identified 139 former employees who were subsequently rehired after the job fair concluded. Their names appear in GC Exh. 51 (Tr. 1603–1609). However, Lucinda Landers does not appear on this list. (Id.)

“touch-up” to a third party. (GC Exh. 3 at 47, Tr. 1893, 1931–1932.)

Respondent also changed the terms and conditions of employee’s meals and breaks, vacations, sick days, paid time off, retirement, health and life insurance, seniority and how employees are compensated during attendance at mandatory meetings. (See GC Br. at 66–69.)

It is undisputed that Respondent did not give, and has not given, notice to or bargained with the Union about these changes before implementing them.

#### DISCUSSION AND ANALYSIS

After reviewing all of the evidence, I conclude that:

#### I. RESPONDENT VIOLATED SECTION 8(A)(3) AND (1) OF THE ACT BY REFUSING/FAILING TO REHIRE JOB APPLICANTS WHO WERE MEMBERS OF THE BARGAINING UNIT PRIOR TO THE HOTEL’S OCTOBER 14, 2011 REOPENING

##### A. Legal Standard

It is an unfair labor practice “for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under Section 8(a)(3) of the NLRA.” *Mason City Dressed Beef, Inc.*, 231 NLRB 735, 745 (1977), citing *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272, 280–281 (1972) (new owner cannot refuse to hire his predecessor’s employees solely because they were union members or in order to avoid having to recognize the Union).

The appropriate test to determine whether Respondent discriminatorily refused to hire/rehire its former union member employees is set forth in *FES*, 331 NLRB 9 (2000). Relying also on the burden shifting analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F. 2d 889 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in order to establish a prima facie case of discriminatory refusal to rehire, the General Counsel must show that: (1) Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) applicants had the experience/training relevant to the requirements of the positions for hire, or Respondent did not adhere uniformly to such requirements, or the requirements were pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants.

Recently, the Board clarified element three of the General Counsel’s prima facie case, holding that, in order to prove antiunion animus sufficient to carry the General Counsel’s initial burden, the General Counsel must establish a causal connection “between the employee(s)’ protected activity and the employer’s adverse action against the employee(s).” See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 at 1 (2019). This means, that, in order to demonstrate that Respondent’s failure to rehire was motivated by their former employees’ union membership, the General Counsel must establish a link or nexus between the employees’ protected activity and Respondent’s failure to hire/rehire its former employees. (*Id.*).

If the General Counsel satisfies her *prima facie* case, the burden of persuasion shifts to Respondent to show that it would not have hired its former unit employee applicants even in the absence of their union activity/affiliation. *FES*, supra at 12, see also *Greenbrier Rail Services*, 364 NLRB No. 30, at 49–50 (2016) (Board applied the *FES* test in cases where an employer refuses

to rehire its former employees). To satisfy this burden, Respondent “. . . cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If Respondent’s proffered defenses are found to be a pretext, i.e., the reasons given for the employer’s actions are either false or not relied on, it fails by definition to show that it would have taken the same action for those reasons. On the other hand, further analysis is required if the defense is one of “dual motivation.” that is, Respondent defends that, even if an invalid reason might have played some part in its motivation, Respondent would have taken the same action against its employees for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

##### B. Analysis

As shown below, the General Counsel has met her initial burden to establish a discriminatory motive in Respondent failing to rehire its former unit member employees. Specifically, the record reveals and I find that: (1) Respondent held a job fair to hire various employees upon its reopening and (2) practically all of Respondent’s former unit member employees who participated in the job fair previously worked for Respondent, were given positive job evaluations prior to their layoff, were applying for their former positions, and had the experience/training relevant to the positions for which they applied. Third, Respondent failed to rehire 152 out of 176 former bargaining unit employees when it reopened in October 2011.

Regarding Respondent’s antiunion animus (element 3), I rely on HR Manager Arbizu’s testimony (quoted herein at p. 4), regarding Respondent’s intent not to have a unionized workforce when the Hotel reopened, in addition to the number of former Hotel employees excluded at the initial interview stage, as well as record evidence regarding the unexplained failure of many former unit members to get a departmental interview after having a positive initial interview, the unexplained and/or obviously insufficiently explained reasons many of these employees were excluded at the departmental interview stage and the suspiciously small number of former unit employees hired. See *Greenbrier Rail Services*, supra at 140–141 (citations omitted) (“discriminatory motive or animus may be established by . . . statements and actions showing the employer’s general and specific animus, the disparate treatment of the discriminatees, and . . . evidence that an employer’s proffered explanation for the adverse action is a pretext.”).

Respondent argues that the General Counsel has shown only “generalized” union animus, not “particularized” union animus. (R. Br. at 57–58). Although a “particularized” showing of union animus was irrelevant at the time this case was tried, even under the standards articulated in *Tschiggfrie Properties, Ltd.*, supra, I find the General Counsel has satisfied her burden to show animus.

Specifically, the record shows countless examples of former employees, almost all of whom are union members, being excluded after the initial interview either without sufficient explanation or because of a bogus explanation. Furthermore, the General Counsel produced evidence showing the small number of former employees re/hired as compared with the number of former unit member applicants and the available jobs.

Moreover, it is settled law that a discriminatory motive otherwise established is not disproved by the failure to “weed out all union adherents,” *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *McKee Electric Co.*, 349 NLRB 463, 465 fn. 9 (2007); *Lucky Cab Co.*, 360 NLRB 271, 275 (2014). Based on the clearly preposterous reasons given for their exclusion (i.e., former employee applicants lacked minimum skill level for position when they had successfully performed the job for which they were reapplying for between 5–25 years; or former employee applicants demonstrated unacceptable job stability when they successfully worked for Respondent in the job for which they were reapplying for between 10–20 years), I find that Respondent intended to weed out a sufficient number of bargaining unit members to prevent a majority of former employees from being rehired when the Hotel reopened. Once the majority of former bargaining unit members were excluded, Respondent would not have to recognize or bargain with the Union. Not only did Respondent take the unlawful actions indicated above, its brief failed to rebut the overwhelming evidence of discrimination by failing to give credible non-discriminatory reasons for rejecting its former employees. Respondent’s own pretextual reasons simply confirm its discriminatory motive.

Even using the *Greenbrier* standard to demonstrate animus, I find Respondent’s animus toward rehiring its former bargaining unit employees is clearly evidenced by: 1) its prior unlawful efforts to obtain waivers of reinstatement rights from former employees when the Hotel shutdown in September 2009 in violation of §8(a)(5) of the Act, see *Hotel Bel Air*, 358 NLRB 1527, 1530 (2012)<sup>11</sup>; 2) the hiring/interview process as set forth in the Findings of Facts section (above); 3) the disparity between the large number of qualified former employees who applied for their prior jobs, and the small number of those employees hired by Respondent; and 4) the clearly pretextual nature of the job fair conducted by Respondent, which was riddled with inconsistencies and bias against former employee applicants. See *Greenbrier Rail Services*, supra at 140–141 (citations omitted)(discriminatory motive can be shown by...the presence of other unfair labor practice, the disparate treatment of the discriminatees, and evidence that the employer’s proffered explanation for the adverse action is a pretext).

The record demonstrates blatant discriminatory treatment of Respondent’s former unit members, particularly in the interview process. The Board will infer an unlawful motive or animus “where the employer’s action is ‘baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.’” *Greenbrier* at 141, citing *J. S. Troup Electric*, 344 NLRB 1009 (2005) and *Montgomery Ward*, 316 NLRB 1248, 1253 (1995); see also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). In this case, for example, the evidence demonstrates that 67 former Hotel employees were eliminated after the initial interview on the basis that their interview answers were unsatisfactory, when, upon closer inspection, the record reveals that Respondent eliminated those applicants for reasons that were largely irrelevant (e.g. needing to have great enthusiasm and “effervescence” as a housekeeper and/or busboy).

Furthermore, Respondent’s interviews were structured so as to give no weight to the fact that many of the former unit employees had, for years, successfully performed the jobs for which

they were reapplying. Additionally, Respondent clearly hired less qualified, non-former employee applicants, blatantly bypassing more qualified former employee applicants. This, as well as Respondent’s inconsistent application of its ostensibly objective guidelines, indicates discriminatory motive. *CNN America, Inc.*, supra at 458–459. Normally, an employer would prefer an employee who had previously worked for it for many years unless their performance was substandard. The testimony of Respondent’s witness Maria Rangel (Rangel) confirms this (Tr. 2175–2177), as does the Board’s observation in *Smoke House Restaurant*, 347 NLRB 192, 196 fn. 13 (2006)(it is human nature to want to hire “known quantities.”). However, Respondent devalued its former employees’ skills and qualifications and had no legitimate, non-discriminatory reason for doing so.

Most importantly, the fact that Respondent proffered bogus reasons for why many former employee applicants failed to advance passed the first round (i.e., lacked minimum qualifications/skills when former employee applicant had previously & successfully performed the job for which they were reapplying for more than 10 years) while non-former employee applicants were advanced and hired who demonstrated minimum if any qualifications demonstrates Respondent’s discriminatory motives. In addition, not only were many former employee applicants not given a departmental interview (even when Respondent’s own initial interviewers advanced them to the second round), but former employee applicants were given preposterous reasons why they were not moved to the second stage also establishes Respondent’s discriminatory motives. Respondent has offered no credible explanation for why these employees were excluded from the hiring process after the initial interview.

Next, the disparity between the number of former Hotel employees who applied and those who were subsequently rehired is astonishing. The fact that only 24 or 25 former Hotel employees were rehired out of 176 employees who applied (or stated another way, 152 out of 176 former employee applicants excluded) suggests a discriminatory motive. See, e.g., *Glenn’s Trucking*, 332 NLRB 880 (2000), enfd. 298 F. 3d 502 (6th Cir. 2002).

Lastly, the clearly pretextual nature of the job fair conducted by Respondent, which was riddled with inconsistencies and bias against former employee applicants, demonstrates Respondent’s discriminatory motives. Arbizu made it clear that Respondent had no intention of dealing with the Union upon reopening. As such, I find that Respondent designed the July job fair with an objective of identifying and excluding former employee applicants and avoiding recognizing and bargaining with the Union. To effectuate Respondent’s purpose, I conclude that former unit member employees were invited to interview on the first morning of the job fair precisely so that Respondent could distinguish them from other applicants.

Again, the record strongly supports the inference that Respondent’s former unit employee applicants were excluded from being rehired so that Respondent could avoid hiring a majority of former Hotel unit members in violation of Section 8(a)(3) and (1) of the Act. Accordingly, I conclude that the General Counsel has more than established her prima facie case of Respondent’s discriminatory failure to rehire.

At this point, the burden of persuasion shifts to Respondent to show that it would not have rehired its former employees despite

<sup>11</sup> Respondent’s animus toward the Union is shown in part by its unlawful direct dealing in 2010 by bypassing the Union and offering severance packages to employees in exchange for waivers of their recall

rights. The Board so found in *Hotel Bel-Air*, 358 NLRB 1527, 1530 (2012), adopted by *Hotel Bel-Air*, 361 NLRB 898 (2014), enfd. *Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016).

their union membership/affiliation. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd.* 127 F.3d 34 (5th Cir. 1997) (per curiam). However, Respondent’s failed to satisfy its burden.

All of Respondent’s affirmative defenses and attempts to explain why it failed to rehire an overwhelming number of former Hotel employees are wholly without merit. For example, Respondent spent an inordinate amount of time at the hearing trying to emphasize the changes which the Hotel underwent as a result of its remodeling. Largely through photographs of the renovated Hotel’s interior, Respondent sought to demonstrate that its improvements to the Hotel rendered former employees’ years and decades of work experience irrelevant to their qualifications to work at the renovated property. (R Exh. 17.) However, Respondent’s own argument is refuted by its own witnesses and documentary evidence.

In fact, Respondent’s former Assistant Manager Steven Boggs (Boggs) conceded that the Hotel had been rated a five-star hotel prior to the renovation and did not achieve the same rating immediately upon reopening. Moreover, after comparing Respondent’s job descriptions for numerous bargaining unit classifications in departments throughout the Hotel from before and after the renovation, Boggs conceded that the descriptions were substantively identical, and the written job requirements did not change significantly as a result of the renovation. (Tr. 1717–1726; see also GC Exhs. 9, 10.)

Similarly, Respondent witness Mina Thuy Luc (Luc), who was employed as a Housekeeping dispatcher for the Hotel prior to its renovation and has been employed as a Housekeeping supervisor for Respondent from 2011 to the present, confirmed that the job duties and requirements for Hotel housekeepers remain largely unchanged. (Tr. 2016–19). While Boggs testified to changes in the Hotel’s food and beverage operations as a result of the post-remodeling collaboration between the Hotel and the Wolfgang Puck, he admitted that these changes necessitated specialized training, rather than a distinct set of *a priori* qualifications. (Tr. 1671–1672).

Similarly, while there were invariably some differences in how the Food and Beverage Department ran prior to and after the renovation, Tracey Spillane (Spillane), a manager for the Wolfgang Puck restaurant group, who participated in Respondent’s hiring process, acknowledged that “everyone needed training” in the Food and Beverage Department upon the Hotel’s reopening, irrespective of their work experience and background. (Tr. 1979.) Moreover, despite that additional technological devices and interfaces were added to the Hotel after its renovation, Boggs admitted that employees could be trained with respect to such “technical aspects” of their job, and that the Hotel Bel-Air had provided such training to its employees in the past. (Tr. 1676–1678, 1727–1728.) In sum, Respondent’s own witnesses fail to support its rationale that its former unit employee’s prior qualifications were irrelevant to the new job descriptions for which it sought applicants.

Most importantly, the record is replete with evidence that Respondent proffered no legitimate explanation for why many former Hotel unit employees, who were given initial interviews, were not advanced to the second round. In addition, Respondent failed to explain the anomalies as to why several other former Unit employees were excluded from consideration after the departmental interview. Even where there was some explanation as to why several former Hotel unit employees were excluded after

the departmental interview, Respondent’s reasons were preposterous and beyond belief. Lastly, Respondent also failed to sufficiently explain how non-former employee applicants, with less experience, little to no skills, knowledge and/or qualifications for the jobs for which they applied were hired over former employee applicants who had a lengthy tenure with Respondent and had previously, successfully performed the job for which they reapplied.

Again, based on the overwhelming evidence in the record, I conclude that Respondent failed to establish that it would not have rehired its former Unit employees despite their membership in the Union and participation in prior protected concerted activity. Rather, I find that Respondent excluded a majority of former bargaining unit employees for no other reason except to avoid recognizing and bargaining with the Union in violation of Section 8(a)(3) and (1) of the Act.

## II. RESPONDENT VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION UPON REOPENING

### A. Legal Standard

In establishing whether an employer’s bargaining obligation survives a hiatus in operations, the Board distinguishes between “temporary” and “indefinite” closures and examines whether employees retained a “reasonable expectancy” of rehire. *Golden State Warriors*, 334 NLRB 651, 653–654 (2001); *El Torito-La Fiesta Restaurants*, 295 NLRB 493, 494–495 (1989), *enfd.* 929 F.2d 490 (9th Cir. 1991) (temporary closure of restaurant for remodeling did not negate union’s representative status or employer’s bargaining obligation); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136 (1990), *enfd.* 942 F.2d 169 (3d Cir. 1991) (lengthy suspension of operations did not relieve employer of bargaining obligation where laid off employees had “some expectancy of recall.”).

If a closure is determined to be temporary and employees are found to have a reasonable expectancy of rehire, the union’s status as § 9(a) collective bargaining representative and the employer’s bargaining obligation are deemed to survive the closure and continue upon reopening. The employer must respect the pre-closure status quo and may not implement new terms and conditions of employment without first bargaining with the union.

### B. Analysis

Record evidence is clear that Respondent should have recognized and bargained with the Union after it reopened in October 2011. Specifically, the record reveals that Respondent and the Union were parties to a series of CBAs, the most recent of which was in effect from August 16, 2006 to September 30, 2009, the date the Hotel closed for renovations. The evidence clearly supports the fact that the shutdown of the Hotel was planned as temporary renovation. Moreover, in 2016, the U.S. Court of Appeals for the District of Columbia enforced the Board’s order requiring Respondent to bargain with Union over the effects of the temporary shutdown.

Lastly, and most importantly, there is a rebuttable presumption that the Union enjoyed majority support after the expiration of its CBA with Respondent. Thus, Respondent’s collective bargaining relationship with the Union survived the hiatus, see

*Golden State Warriors*, 334 NLRB 651, 653–654 (2001),<sup>12</sup> and accordingly, it was obligated to recognize and bargain with the Union over the effects of the shutdown and the rehiring process pursuant to the pre-closure CBA. See *Golden State Warriors*, *supra*. Respondent violated Section 8(a)(5) and (1) by refusing to do so.<sup>13</sup>

III. RESPONDENT VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT  
BY MAKING UNILATERAL CHANGES TO THE TERMS AND  
CONDITIONS OF EMPLOYMENT OF BARGAINING UNIT MEMBERS  
UPON ITS REOPENING

A. *Legal Standard*

An employer which has a bargaining relationship with the Section 9(a) bargaining representative of its employees, such as the Union in this case, cannot make changes in the terms and conditions of employees represented by that union without bargaining to impasse with the Union about the proposed changes, *Golden State Warriors*, *supra*, at 652.

B. *Analysis*

Because Respondent was required, but failed, to recognize and bargain with the Union upon its reopening (See sec. II, above), Respondent also violated Sections 8(a)(5) and (1) of the Act when it made unilateral changes to the terms and conditions of its unit employees' employment contrary to the terms set forth in the expired CBA. Specifically, Respondent failed to bargain with the Union to impasse before it unilaterally contracted out certain gardening, maintenance and painter work, changed employees' rates of pay, vacation, sick leave and paid time off, altered the terms/conditions of employee's meals and breaks, failed to contribute to the Union's retirement, legal, health and welfare funds, changed how it calculated seniority status, and how employees are compensated during attendance at mandatory meetings.

Thus, in setting terms and conditions of employment different than those set forth in the expired CBA without first bargaining to impasse with the Union, Respondent violated Sections 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Kava Holdings, LLC, d/b/a Hotel Bel Air, Los Angeles, California, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Sections 8(a)(3) and (1) of the Act when it discriminatorily failed/refused to rehire job applicants who were members of the bargaining unit upon the Hotel's October 14, 2011 reopening.

<sup>12</sup> *Golden State* involved a temporary shutdown of their home venue for over a year. During this time, the Golden State Warriors played their home games in San Jose, rather than at their normal venue in Oakland. However, the bargaining relationship between the NBA and the Warriors survived despite this temporary change in venue.

<sup>13</sup> Moreover, as shown above, but for Respondent's discriminatory hiring practices, former Hotel unit member employees would have constituted a majority of the bargaining unit upon reopening of the hotel in 2011.

<sup>14</sup> Counsel for Respondent Arch Stokes, Karl Terrell and Diana Dowell demonstrated intolerable behavior throughout the hearing toward General Counsel, Charging Party counsel and I. Respondent counsel were notified several times about and ordered to cease/desist their contumacious conduct via multiple Orders that have been made a part of the record. See ALJ Exhs. 11–13, 22–24, 29–30, 35, 40, 42, 44, 46, 52, 55–56, Order Denying Respondent's Request for More Time to Obtain Co-

3. Respondent violated Sections 8(a)(5) and (1) of the Act when it failed/refused to recognize and bargain with UNITE HERE Local 11 upon its reopening.

4. Respondent violated Section 8(a)(5) and (1) of the Act when it made unilateral changes to the terms and conditions of employment of bargaining unit members upon its reopening.<sup>14</sup>

REMEDY

Respondent, having discriminatorily refused to hire its former unit member employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall compensate these employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above. See *King Soopers*, 364 NLRB No. 93 (2016).

Respondent shall file a report with the Regional Director for Region 31 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one (1) year. See *AdvoServ of New Jersey*, 363 NLRB 1324 (2016).

Respondent is also ordered to recognize UNITE HERE Local 11 forthwith, and, on request, bargain with UNITE HERE Local 11 as the exclusive representative of the employees in the appropriate unit concerning all terms and conditions of employment.

Respondent is further ordered to cease and desist from making any unilateral changes to bargaining unit employees' terms and conditions of employment without bargaining to impasse with UNITE HERE Local 11.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

ORDER

Respondent, Kava Holdings, LLC, d/b/a Hotel Bel Air, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees who were members of the Union's bargaining unit prior to the temporary shutdown of the hotel in September 2009 in an attempt to avoid the obligation to recognize and bargain with UNITE HERE Local 11 as the exclusive collective bargaining representative of the hotel's unit

Counsel and/or Seek Permission to file a Special Appeal to the National Labor Relations Board, dated May 11, 2018 and Order Denying Respondent's Second Request to Admit Respondent's Proposed Exhibits 110 and 112 into Evidence dated July 10, 2018. Respondent counsel also were notified several times during the hearing that I would refer their conduct to the Board's Associate General Counsel, Division of Operations-Management for further review. As such, I am again serving notice to counsel for Respondent that, contemporaneous with the issuance of this decision, their conduct will now be referred to the Board's Associate General Counsel, Division of Operations-Management or his/her designee.

<sup>15</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employees.

(b) Failing to recognize and bargain with UNITE HERE Local 11 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(c) Unilaterally making changes to the terms and conditions of employment of bargaining unit members without bargaining to impasse with UNITE HERE Local 11.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer the employees named in the attached Appendix A of the amended complaint,<sup>16</sup> full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed.

(b) Make the employees named in the attached Appendix A of the amended complaint whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. Compensate the discriminatees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(d) Upon request of UNITE HERE Local 11, rescind any unilateral change made to the terms and conditions of employment of bargaining unit employees since September 30, 2009.

(e) File a report with the Regional Director for Region 31 allocating backpay to the appropriate calendar quarters.

(f) On request, bargain with UNITE HERE Local 11 as the exclusive representative of the employees in the appropriate bargaining unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

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

(h) Within 14 days after service by the Region, post at its Los Angeles (Bel-Air), California hotel copies of the attached notice marked "Appendix"<sup>17</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent

customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 26, 2011.

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

Dated, Washington, D.C. December 19, 2019

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

National Labor Relations Board  
An Agency of the United States Government

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to hire you in an attempt to avoid the obligation to recognize and bargain with UNITE HERE Local 11 as the exclusive collective bargaining representative of our bargaining unit employees.

WE WILL NOT fail and refuse to recognize and bargain with UNITE HERE Local 11 as the exclusive collective bargaining representative of our employees in the bargaining unit.

WE WILL NOT make unilateral changes to the terms and conditions of your employment without bargaining to impasse with UNITE HERE Local 11.

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

WE WILL, on request, bargain with the Union, UNITE HERE Local 11 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, on request, rescind any unilateral changes we have made to the terms and conditions of your employment since September 30, 2009.

WE WILL within 14 days from the date of the Board's Order, offer the employees named in the attached Appendix A of the amended complaint full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or

Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>16</sup> See GC Exh. 51.

<sup>17</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National

privileges previously enjoyed. WE WILL make the employees named in the attached Appendix A of the amended complaint whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate the employees named in the attached Appendix A of the amended complaint for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL compensate the employees named in the attached Appendix A of the amended complaint for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

KAVA HOLDINGS, LLC, ET AL., D/B/A HOTEL BEL-AIR

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/31-CA-074675](http://www.nlr.gov/case/31-CA-074675) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



## APPENDIX A

- |                        |                        |                       |
|------------------------|------------------------|-----------------------|
| 1. Adam Gardner        | 37. Esteban Pacheco    | 71. Jose Manzo        |
| 2. Alberto Duran       | 38. Evaristo           | 72. Jose Mojarro      |
| 3. Alex Barrios        | Vasconcelos            | 73. Jose Polio        |
| 4. Allyson             | 39. Feliciano Viscarra | 74. Jose Pavon        |
| Tison/Tizon            | 40. Felipe Vasquez     | 75. Jose Pinedo       |
| 5. Amanda Escobar      | 41. Felix Gonzales     | 76. Joseph Nava       |
| 6. Ana Arrozola        | 42. Fortino Luis       | 77. Juan Carlos Pavon |
| 7. Angel Loeches       | Martinez               | 78. Juan Contreras    |
| 8. Anthony Hop Pham    | 43. Francisco Alas     | 79. Julio Cruz        |
| 9. Antonio Diaz        | 44. Gilberto A. Moran  | 80. Julio Pedro Perez |
| 10. Antonio Escobedo   | 45. Gilberto Diaz      | 81. Justino Castellon |
| 11. Antonio Romero     | 46. Giovanni           | 82. Karoly Zsiga      |
| 12. Armando            | Rodriguez              | 83. Kenny McCabe      |
| Alvarenga              | 47. Guadalupe Soto     | 84. Khenk Lee         |
| 13. Armida Huezo       | 48. Hector Jimenez     | 85. Laura Fergusson   |
| 14. Arturo Leon        | 49. Hermina Urbana     | 86. Leslie Miller     |
| 15. Beatriz Lemis      | 50. Hignio Castellon   | 87. Manuel Giron      |
| 16. Boris Shaetz       | 51. Howie Witz         | 88. Maria Del Cid     |
| 17. Borislav           | 52. Ignacio Escobedo   | 89. Maria Gomez       |
| Kostadinov             | 53. Inigo De La        | 90. Maria Lourdes     |
| 18. Bradley Anderson   | Hidalga                | Nolasco               |
| 19. Carlos Burgos      | 54. Irma Zavala        | 91. Maria Antoinette  |
| 20. Carlos Gutierrez   | 55. Ismael Casanova    | Albano Gonzales       |
| 21. Carlos Perez       | 56. Ismael Witz        | 92. Mario Rodriguez   |
| 22. Carmen Casiano     | 57. Ivan Stankov       | 93. Martin Orozco     |
| 23. Chad Biagini       | 58. Jacques Felix      | 94. Matthew Biedel    |
| 24. Corina Ivanna      | 59. Jaime Bravo        | 95. Miriam            |
| Ganame                 | 60. Jehane Delwar      | Martirosyan           |
| 25. Cristian Vargas    | 61. Jennifer Contreras | 96. Mishele Tapia     |
| 26. Danielle Rodriguez | 62. Jennifer Jimenez   | 97. Mohammed          |
| 27. Davis Komarek      | 63. Jeremias Del Cid   | Masum                 |
| 28. David Leger        | 64. Yixiong "Jimmy"    | 98. Narciso Lopez     |
| 29. Delmy Alas         | Dong                   | 99. Ngoc Mihn Hoang   |
| 30. Domingo Antonio    | 65. Joaquin Fuentes    | 100. Nora Melendez    |
| 31. Edgar Cano         | 66. Jorge Duarte       | 101. Oscar Flores     |
| 32. Edith Calderon     | 67. Jose Bojorquez     | 102. Oscar Galdamez   |
| 33. Elizabeth Bono     | 68. Jose de Jesus      | 103. Oscar Ingles     |
| 34. Emilio Molina      | Garcia                 | 104. Oscar Martinez   |
| 35. Eric Flores        | 69. Jose Luis Gaeta    | 105. Oscar Vasquez    |
| 36. Erick Orozco       | 70. Jose Madrid        | 106. Pablo Del Real   |

## APPENDIX A

107. Patricia Miranda
108. Pedro Hernandez
109. Pedro Morales  
Sanchez
110. Rafael Guevarra
111. Rafael Martinez
112. Raul Salazar
113. Raymundo Avina
114. Refugio Lopez
115. Rejo Jastoreja
116. Rigoberto  
Carrillo
117. Rigoberto  
Contreras
118. Robert "Charlie"  
Hargitay
119. Roberto  
Dominguez
120. Roel Andres
121. Roger Jackson
122. Ronald Hartling
123. Rosa Perez
124. Rudy Castellanes
125. Salvador  
Gonzales
126. Salvador  
Maldonado
127. Sapardjo  
Diporedjo
128. Sergio Manzo
129. Sonia Mancias
130. Sonia Reyes
131. Steve Rasmussen
132. Tomas Alvarado
133. Tomas Ramirez
134. Ulises Trejo
135. Victor Pacheco
136. Victor Venegas
137. Virginia Cruz
138. William Carranza
139. Wilson Alvaro

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

KAVA HOLDINGS, LLC,  
a Delaware Limited Liability Company  
d/b/a HOTEL BEL-AIR in the  
City of Los Angeles, California

Petitioner,

v.

No. \_\_\_\_\_

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**CERTIFICATE OF SERVICE**

I hereby certify that the forgoing Petition for Review was served by U.S. First Class Mail on February 3, 2021, to the parties listed below, and that the Clerk of this Court has been provided additional copies of this Petition to enable service by the Clerk of stamped copies reflecting the date and time of filing, as required by F.R.A.P. Rule 15(c)(3):

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*/s/ Arch Stokes*

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Arch Stokes, Esq.