

# 20-1522(L)

**20-1973(XAP)**

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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305 WEST END HOLDING, LLC, d/b/a 305 WEST END AVENUE OPERATING, LLC, ULTIMATE CARE MANAGEMENT ASSISTED LIVING MANAGEMENT, LLC, A DIVISION OF THE ENGEL BURMAN GROUP, d/b/a ULTIMATE CARE MANAGEMENT, LLC,

*Petitioners-Cross-Respondents,*

—against—

NATIONAL LABOR RELATIONS BOARD,

*Respondent-Cross-Petitioner.*

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ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

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**REVISED RESPONSE AND REPLY BRIEF FOR  
PETITIONERS-CROSS-RESPONDENTS**

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## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
A. Faraz Kayani’s Testimony Did Not Contradict Clement Walsh’s Testimony That the BSW Employees Would Not Have Been Hired but for the New York City Ordinance; In Any Event, the Date on Which the Substantial and Representative Complement is Reached Should Logically Occur After the Employee Retention Ordinance Has Expired .....	1
B. The Overwhelming Evidence Demonstrates That the Current Union, Like the Previous Union, Treated the Contract as “An Arrangement Under Which the Union Agreed to Check Off Dues and Health and Welfare Payments for Union Members Only” .....	8
C. The Nature of the Business Changed Significantly After 305 West End’s Takeover, Precluding a Finding of Successorship, Particularly When the Proper April 2017 Date is Used as the Date a Substantial and Representative Complement was Reached.....	13
D. The Board’s Approach Here Would Result in a Windfall to an Employee Who Retired and Moved Out of State Years Ago and Plainly Cannot be Instated Now.....	15
CONCLUSION.....	16

## TABLE OF AUTHORITIES

	PAGE(S)
<b>Cases</b>	
<i>Ace Doran Hauling &amp; Rigging Co.</i> , 171 NLRB 645 (1968) .....	8
<i>Awelewa v. New York City</i> , 2012 WL 601119 (S.D.N.Y. Feb. 23, 2012) .....	13
<i>Bassiouni v. F.B.I.</i> , 436 F.3d 712 (7th Cir. 2006) .....	12
<i>Carpio v. Holder</i> , 592 F.3d 1091 (10th Cir. 2010) .....	7
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	7
<i>CitiSteel USA, Inc. v. N.L.R.B.</i> , 53 F.3d 350 (D.C. Cir. 1995).....	13, 14
<i>Eng v. New York Hosp.</i> , 199 F.3d 1322 (2d Cir. 1999).....	12
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987) .....	1, 2, 4
<i>Kramer v. Time Warner Inc.</i> , 937 F.2d 767 (2d Cir. 1991) .....	13
<i>M &amp; M Parkside Towers LLC</i> , 2007 WL 313429 (Jan. 30, 2007) .....	6
<i>N.L.R.B. v. W. Sand &amp; Gravel Co.</i> , 612 F.2d 1326 (1st Cir. 1979) .....	9
<i>Parker v. Office of Pers. Mgmt.</i> , 974 F.2d 164 (Fed. Cir. 1992).....	7
<i>Sierra Club v. Trump</i> , 929 F.3d 670 (9th Cir. 2019) .....	7
<i>Wassenaar v. Office of Pers. Mgmt.</i> , 21 F.3d 1090 (Fed. Cir. 1994).....	7

PAGE(S)

**Statutes**

29 U.S.C. § 152(11)..... 10

**Rules**

Fed. R. Evid. 201..... 12

Rule 10(e)(2) ..... 12

## ARGUMENT

A. Faraz Kayani's Testimony Did Not Contradict Clement Walsh's Testimony That the BSW Employees Would Not Have Been Hired but for the New York City Ordinance; In Any Event, the Date on Which the Substantial and Representative Complement is Reached Should Logically Occur After the Employee Retention Ordinance Has Expired

The Board misconstrued the testimony at the hearing on which it most heavily relies in justifying its conclusions; notably, neither the ALJ nor the Board actually cited to the transcript in concluding that Faraz Kayani “determined that the Company preferred to hire and retain all workers rather than simply replacing them.” Appellee Brief, Doc. 140 at 17. There is no dispute that 305 West End was *open* to hiring people from the former Esplanade, because it obviously made sense to do so where the employees were otherwise qualified. But in determining which employees the new employer regarded as “qualified,” experience at the property was not nearly as important as other factors. The overwhelming evidence, including the testimony of Kayani, established that 305 West End intended to hire only those who demonstrated themselves qualified from the standpoint of personability and willingness to learn, first and foremost, regardless of whether they were or were not former Esplanade employees. A-406, A-411-413, A-415-416, A-420-421, A-445, A-468, A-517-519, A-573-575, A-598, A-643, A-646, A-649, A-1013-1015. That is different from saying it *intended* to “take advantage of the trained work force of its predecessor,” particularly in certain areas of the operation. *Cf. Fall River Dyeing & Finishing*

*Corp. v. NLRB*, 482 U.S. 27, 41 (1987). This was not a factory, where employees who can make a widget under one employer can presumably do so under another employer, but a service-based facility, and it was undisputed that most of the services that were being provided by the Esplanade were not up to 305 West End's standards.

This was manifestly the case in the areas of cleanliness and maintenance. 305 West End's willingness to hire former Esplanade employees most decidedly did *not* apply to employees who already had proved themselves unable or unwilling to do their jobs properly. This caveat applied not only to the cleaning staff, which obviously took so little pride in its work that the facility was noticeably and appallingly dirty, but to others, such as the Kitchen Manager, whose oversight of the kitchen resulted in disgusting conditions, as testified to unanimously by the Appellants' witnesses (and not contradicted). *See, e.g.* A-573 (Randy Tremble) ("If I have a manager that allows for those kind of conditions and practices, you know, I would – you know, probably not necessarily someone that I would want as part of my team."). Kayani observed the overall dirtiness of the building, just like the other managers who testified about it. A-407, A-410, A-433-434, A-451, A-1011.

Moreover, there was substantial evidence that 305 West End was not "taking advantage of the *trained* workforce of its predecessor," *cf. Fall River Dyeing*, but instead *retraining* Esplanade employees, as well as training new employees, in the new standards and expectations that would be imposed at 305 West End in light of

the fact that it was intended to be an assisted living facility, rather than a simple residence, and was to be a flagship, luxury property. A-101, A-120, A-145, A-220, A-229-235, A-260-261, A-263, A-266-267, A-423-425, A-435-440, A-442-443, A-451-454, A-460-461, A-463, A-657, A-715, A-757-758, A-804; A-2442-2449.

The testimony of Faraz Kayani did not contradict that of Clement Walsh, contrary to the Board's argument. It's true that the company ultimately complied with the statute and assessed the BSW workers' performances as if they were probationary employees – consistent with the intent of the BSW ordinance. As Kayani testified, they really had no choice: “[T]hey come with the building.” A-1013. As Kayani noted, he didn't have to wait 90 days to discharge any non-BSW employee he determined was not working out. A-987. The BSW employees had to be treated differently due to the ordinance. Under the circumstances, of course 305 West End was willing to give them a chance, but notably, only two of the housekeepers/porters kept their jobs after the 90-day period – Clement Walsh's assessment of them at the interview process was accurate.

These circumstances do not contradict the fact that Walsh, who was the primary interviewer of housekeeping staff, would not have hired them. Walsh testified that all of his recommendations regarding hiring were accepted, except that many of the employees he had recommended against hiring had to be hired due to the New York City ordinance. A-706-707. He recommended against hiring the

housekeepers that previously worked at the Esplanade. A-708. There is no evidence to suggest that Kayani or anyone else would have overruled his recommendations but for the operation of the ordinance. Walsh was the VP of Housekeeping with extensive experience in the area. A-702-703. Notably, Kayani was explicitly asked if he disagreed with any of Walsh's testimony, which Kayani heard live as the employer's representative, and other than Walsh's mistaken testimony that job descriptions were included with the new hire packet, he said he did not. A-999.

In any event, the law of successorship in light of ordinances like the DBSWPA should not be based entirely on what an employer intended to do at the moment of takeover, which is at best debatable; the inescapable fact is that any employer in New York City (and other areas which have similar ordinances) has no choice but to retain the cleaning and maintenance staff of the property following takeover. It is therefore legally indefensible to consider the date of takeover as the date the substantial and representative complement is reached, because when an ordinance like DBSWPA is in force, no inference of a "conscious decision" can fairly be attached to that date. *Cf. Fall River Dyeing, supra.*<sup>1</sup>

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<sup>1</sup> The way the Board approached this case embodies its "damned if you do, damned if you don't" approach. If an employer states that it does not want to hire its predecessor's employees for any reason, the Board cites that statement as evidence of anti-union animus. If it expresses a willingness to hire its predecessor's employees, the Board will infer that it intends to become a successor for purposes of collective bargaining. Either way, the result is that the Board will order the new

As the Counsel for the General Counsel acknowledged in its Exceptions brief to the decision of the ALJ, the date that the substantial and representative complement is reached cannot occur until after the effects of an ordinance such as the DBSWPA have ended. 305 West End should not be considered a successor because it did not reach its substantial and representative complement until after it was allowed to discharge and replace the cleaning staff it was forced to hire because of the DBSWPA. *See* Supplemental Appendix at SA-13-SA14, in which the CGC asserted:

... the appropriate time for determining successorship status in the context of a worker retention statute is not until the expiration of the statute's mandatory retention period, when the putative successor has an opportunity to voluntarily compose its own work force. Furthermore, the Board should conclude that a successor employer is entitled to a reasonable amount of time following the expiration of the retention period to evaluate employees' performance during the mandatory retention period, conduct any needed interviews, and make final staffing decisions before measuring the new employer's workforce for purposes of determining successorship status.

Supp. App. at SA-13-SA-14. Counsel for the General Counsel accordingly concluded that 305 West End should not be considered a successor under the circumstances of this case:

Applying the standard above, the Board should conclude that the Respondents did not incur a successorship obligation and therefore did not violate Section 8(a)(5). Upon expiration of the 90- day period, the Respondents evaluated the DBSWPA-covered employees and decided

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employer to bargain with the predecessor's union, regardless of whether any of the actual hired employees want the union.

to keep some based on their performance, but also decided to terminate seven employees due to attendance issues and their difficulty with accepting directions. At that point, which was approximately eighteen days after the 90-day period expired, new employees outnumbered predecessor employees. Thus, within a reasonable time after the expiration of the retention period, the Respondents were able to evaluate their workforce and make a “conscious” and voluntary decision about whom to retain and whom to discharge. Because new employees outnumbered predecessor employees at that time, the Respondents were not successor employers with an obligation to recognize and bargain with the Union.

*Id.* at SA-14. *Cf. M & M Parkside Towers LLC*, 2007 WL 313429 (Jan. 30, 2007) (where successor employer hired BSW employees pursuant to the statute, and then elected to retain them, their official start date for purposes of the employer’s bargaining obligations did not occur until they were offered permanent employment, three weeks after their 90-day “probation” ended).

Appellants respectfully request that this Court hold it inappropriate for the Board to conclude that a substantial and representative complement is reached immediately upon takeover, when a large number of hired employees have been retained due to operation of law and not due to any voluntary decision of the employer. Its decision should not be accorded the customary deference, particularly where its own prosecutorial arm, the Counsel for the General Counsel, urges a different conclusion for valid reasons and the Board has not engaged in a lengthy consideration of the matter.

“We have never applied the [*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) deference principle] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice’.” *Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992), quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988). “[P]ost-hoc rationalizations will not create a statutory interpretation deserving of deference.” *See also, e.g., Wassenaar v. Office of Pers. Mgmt.*, 21 F.3d 1090, 1092 (Fed. Cir. 1994) (citation, some punctuation omitted) (an agency’s interpretation should not stand if it “contravenes clearly discernible legislative intent” or is otherwise unreasonable. “All statutes must be construed in light of their purpose. A reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and legislative purpose.”); *Carpio v. Holder*, 592 F.3d 1091, 1097 (10th Cir. 2010) (rejecting the reasoning of an administrative law judge and the agency itself where it reached an unreasonable interpretation of the applicable statute); *Sierra Club v. Trump*, 929 F.3d 670, 693 (9th Cir. 2019) (where there was no indication that the department’s decision was the product of “careful consideration ... over a long period of time” or any other procedural rigor that would more closely approximate a formal rulemaking, deference to its interpretation was not required).

Instead, the Court should hold that the substantial and representative complement is reached, as stated by the CGC in its Exceptions brief, upon the expiration of the statute's mandatory retention period, when the putative successor has gained the opportunity voluntarily to compose its own work force.

B. The Overwhelming Evidence Demonstrates That the Current Union, Like the Previous Union, Treated the Contract as “An Arrangement Under Which the Union Agreed to Check Off Dues and Health and Welfare Payments for Union Members Only.”

The Board states in its brief that “[a] members-only contract is one that the parties do not intend to be effective, “but instead merely regard[] as [an] arrangement under which [a union] agree[s] to check off dues, health and welfare, and pension payments for union members only.” Dkt. 140 at 43-44, citing *Ace Doran Hauling & Rigging Co.*, 171 NLRB 645 (1968). The evidence shows that this is exactly what the Union did here. Despite the wall-to-wall unit definition in the collective bargaining agreement, it charged dues only to those employees who sought to be covered by the Union's health insurance plan (there was no pension plan at issue). No other employee paid dues, and most importantly, the Union ***did not invoice dues for any other employee***, thus acknowledging that it did not intend to represent the other employees. A-2498-2544. *Cf. Ace Doran* (“The acquiescence of the Unions in Respondent's failure both to enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees (as ostensibly provided by the ‘contracts’), makes it clear that the parties did not believe

that they were in true collective-bargaining relationships.”). The Board’s statement that it was “puzzling” that the Union elected not to represent the recreation employees ignores the fact that the recreation employees were hardly the only ones who failed to pay dues or consider themselves members of the Union. And Eugene Hickey’s testimony that a recreation employee asked him if the Union could help her even more strongly underlines the fact that the employees themselves were unclear about who the Union was supposed to represent. A-317-318.

As in *Ace Doran* and other cases, such as *N.L.R.B. v. W. Sand & Gravel Co.*, 612 F.2d 1326, 1333 (1st Cir. 1979) (refusing to enforce bargaining order), the unit definition at Esplanade is not clear, because it was plainly not enforced as written. The record is replete with testimony that various employees in different departments, not just recreation, did not consider themselves members of the Union and did not pay dues, and moreover that the shop steward, Trinidad Hardy, attempted to recruit them to join the Union. *See* A-624-625 (“[S]he had asked me did I want to join the union, and I told her I had no interest in being in the union ... Q: At any time, Ms. Grant, did Ms. Hardy or anyone else from the union tell you you couldn’t work there unless you paid dues to the union? A No. She never said that.”), A-745, A-799, A-805-806, A-873, A-877.

The Board also ignored the undisputed evidence that Deannie Duncanson, the Food Services Director who managed a staff of 30 in the kitchen, paid Union dues

and recruited for the Union, and another kitchen manager was also a member of the Union. *See* A-147-160, A-164, A-170, A-239-244, A-252-253, A-255-256, A-258-260, A-263-264, A-569-570, A-572-573, A-597, A-625-628, A-682-684, A-749-751, A-787-788, A-795-798, A-802, A-808, A-814, A-827-828, A-1222-1224; A-2621-2622. The Board's assertion on appeal that the argument about Duncanson's status as a management employee was made only in the context of whether she could bring a claim for refusal-to-hire is false and in any event, it does not matter why the evidence was entered into the record; the evidence establishes that she continued to be a member of the Union, and the Union invoiced and accepted dues from her, even though she was manifestly a statutory supervisor. The evidence was overwhelming and un rebutted that she engaged in many of the activities described by 29 U.S.C. § 152(11)<sup>2</sup>, including hiring, directing, and using independent judgment, and that another employee who was also paying Union dues, Terrell Brannon, was likewise a statutory supervisor. *See, e.g.*, A-148 (Duncanson's immediate supervisor was the general manager of the property); A-156 (Duncanson supervised people); A-157 (Duncanson managed a staff of 30); A-149-150, 796 (Duncanson managed the

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<sup>2</sup> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

kitchen inventory and oversaw the staff); A-164 (Duncanson earned \$22 per hour, double what most kitchen staff earned); A-239-241 (Duncanson was the department head and was empowered to impose discipline, as were supervisors Mike White and Terrell Brannon); A-241-242 (Duncanson attended department head meetings at least once a month); A-233-234 (Duncanson, White or Brannon did the scheduling); A-255-256 (Duncanson had the power as department head to grant employees days off and change their shifts); A-258-259, 749-751, 787-788 (Duncanson told employees what to do and together with White and Brannon supervised the kitchen employees); A-262-264, 802, 808, 814 (Duncanson interviewed and hired kitchen employees); A-625-626, 827-828 (Duncanson was the kitchen manager who was “in charge of the kitchen”, did the ordering, and gave employees instructions); A-628 (Brannon would give instructions if Duncanson and the other manager were busy); A-682-683 and 2621-2622 (kitchen employee identified Duncanson as her supervisor in her application); A-795-796 (kitchen employee was supervised by Duncanson and White, Brannon was another supervisor).

*Evidence Regarding the Union’s Predecessor.* It is interesting that the Board is so determined to prevent this Court from considering the evidence regarding the previous union’s practices, while simultaneously insisting that the evidence does not support the Appellants’ arguments. In particular, the Board insists that this Court cannot consider information that was not before the Board, but Appellants proffered

the evidence to the ALJ, only to have it rejected. A-493-494. Appellants in their Exceptions Brief also invited the Board to take administrative notice of the documents, an invitation it ignored. A-2961. The Appellants cannot be punished for the absence from the record of evidence it sought to include. *See, e.g., Bassiouni v. F.B.I.*, 436 F.3d 712, 722 n.7 (7th Cir. 2006) (appellate court accepted party's offer to review information despite the fact that it was refused by the district court: "Although the Classified Declaration was not made a part of the record below, both the district court and Mr. Bassiouni were made aware of its existence, and its availability as evidence, during briefing on the Bureau's motion for summary judgment."); *cf. Eng v. New York Hosp.*, 199 F.3d 1322 (2d Cir. 1999) (failure of the moving party to present the proffered evidence to the district court precluded supplementation of the record under Rule 10(e)(2)).

Notably, the ALJ acknowledged that administrative notice could be taken of the documents, though he declined to do so, and the Board likewise ignored them. Because this Court declined to allow them to be included in the Supplemental Appendix, Appellants respectfully request that the Court instead take judicial notice of them, because they are important for the purpose of context.

Pursuant to Federal Rule of Evidence 201 the Court can take judicial notice of the documents identified in Exhibit 1 of Dkt. 74:

The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Judicial notice may be taken of public records, including “arrest reports, criminal complaints, indictments, and criminal disposition data.” *Awelewa v. New York City*, 2012 WL 601119, at \*2 (S.D.N.Y. Feb. 23, 2012); *see also Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (taking judicial notice of SEC filings relevant to the litigation; “the documents are required by law to be filed with the SEC, and no serious question as to their authenticity can exist.”).

C. The Nature of the Business Changed Significantly After 305 West End's Takeover, Precluding a Finding of Successorship, Particularly When the Proper April 2017 Date is Used as the Date a Substantial and Representative Complement was Reached.

The Board's finding that 305 West End continued the same business as Esplanade is simply wrong. The inquiry into this matter requires examination of “the totality of the circumstances” *see, e.g., CitiSteel USA, Inc. v. N.L.R.B.*, 53 F.3d 350, 351 (D.C. Cir. 1995), most of which the Board ignored. It is undisputed that the property at 305 West End was to be changed from a simple residence to a luxury assisted-living facility licensed by the New York State Department of Health. As explained in the Appellants' initial brief, Dkt. 109 at pp. 9, 54-57, doing so entailed a complete physical overhaul of the property, substantial training of employees to ensure that they understood their obligations pursuant to Department of Health

regulations, and ultimately the obtainment of a license from the New York State Department of Health. *Compare CitiSteel USA, supra*, 53 F.3d at 354 (the jobs, working conditions, and supervision of the workers were different, precluding a finding of successorship, particularly because the CitiSteel jobs provided more responsibilities and were more complex, as shown by the additional training conducted by CitiSteel).

These things take time. The Board ignored this evidence because it cited the date of takeover as the date of successorship, and since the change was not instantaneous, determined that the business was not substantially different after takeover. But the process for changing the business had already begun by the time the substantial and representative complement was actually reached, in April of 2017. Thus, for example, the unrebutted evidence, including testimony from witnesses for the CGC, established that employees were being trained in their obligations under Department of Health regulations and that the physical overhauling of the property had begun. *See* A-120, A-405-418. Moreover, a portion of the property was expected to be licensed by the Department of Health by the end of the April 2018, and by the time of the hearing in the spring of 2018, the employer had already hired a nurse to be director of resident services once that license was obtained. A-460-461. The Board has ignored all of this evidence in concluding that

the property is a continuation of the previous business. For this reason as well, the Board's finding of successorship is in error.

D. The Board's Approach Here Would Result in a Windfall to an Employee Who Retired and Moved Out of State Years Ago and Plainly Cannot be Instated Now.

The alleged discriminatee,<sup>3</sup> Trinidad Hardy, moved out of New York more than three years ago – at most, a year or so after 305 West End took over the property. This is a matter of record, as the CGC filed a motion (which the ALJ denied) to take her testimony by videoconference because by March 12, 2018, Hardy was living in Las Vegas. A-2853. By signing the release of claims, she obtained \$14,130 in severance pay in February of 2017, more than a third of her gross annual salary at Esplanade, and then moved out of town. A-2589.

The “public” need for the Board to award back pay is vitiated in this case by the fact that Hardy received substantial severance pay in exchange for giving up her right to seek backpay or other damages in a Board proceeding. This is not a case in which backpay must be awarded to make a discrimination victim whole. On the contrary, the result of awarding backpay on top of severance pay will be a windfall

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<sup>3</sup> Contrary to the Board's assertion, the Appellants do not concede that Hardy was actually the victim of discrimination. However, in the absence of record evidence to challenge the ALJ's conclusions, there is no benefit to doing so. As the Court is undoubtedly aware, the ALJ's credibility determinations are unassailable in any proceeding thereafter in the absence of overwhelming contradictory evidence.

for an employee who hasn't even lived in the New York Area for at least two years. The Board's order requiring reinstatement and the payment of back pay to Trinidad Hardy should not be enforced.

### CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in Appellants' initial brief, Appellants 305 West End and Ultimate Care Hospitality respectfully request that the Court refuse to enforce the Board's bargaining order and its order that Trinidad Hardy must be reinstated and/or offered back pay. For the same reasons, Appellants request that Board's Cross-Application for Enforcement be denied.

Respectfully submitted this 21<sup>st</sup> of September, 2020.

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petitioners'/Cross-Respondents' Reply Brief complies with Fed. Rule of App. Proc. 32(a)(7)(b), containing 3,945 words [fewer than 14,000], excluding the cover page, disclosure statement, table of contents, table or citations, statement regarding oral argument, certificates of counsel, signature block and proof of service.

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