Arch Y. Stokes, Esq., *admitted pro hac vice*
Email: astokes@stokesroberts.com
Karl M. Terrell, Esq., *admitted pro hac vice*
Email: kterrell@stokesroberts.com
Peter G. Fischer, Esq., *admitted pro hac vice*
Email: pfischer@stokesroberts.com
Stokes Roberts & Wagner
3593 Hemphill St.
Atlanta, GA 30337
Telephone: 404-766-0076
Facsimile: 404-766-8823

Adolf V. Zeman, Esq., ABA 0411082
Email: azeman@dmgz.com
DeLisio Moran Geraghty & Zobel, P.C.
945 West Sixth Avenue
Anchorage, Alaska 99501
Telephone: 907-279-9574
Facsimile: 907-276-4231

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

REMINGTON LODGING & HOSPITALITY LLC Petitioner, v. RICHARD AHEARN, in his official capacity as REGIONAL DIRECTOR of NATIONAL LABOR RELATIONS BOARD, REGION 19, Respondent.	)	Case No. 3:10-cv-214

AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDAMUS

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Petitioner Remington Lodging & Hospitality LLC, employer of the employees at the Sheraton Anchorage Hotel ("Hotel," "Employer" or "Petitioner") hereby sets forth the following points and authorities in support of its Petition for Writ of Mandamus pursuant to 28 U.S.C. § 1361.

INTRODUCTION

This matter arises out of collective bargaining negotiations between the Hotel and UNITE HERE, Local 878 [hereinafter "the Union" or "Local 878"] a local union representing hotel, restaurant, and other hospitality workers in the Municipality of Anchorage and the expressed desire of Hotel employees to end their representation by the Union. The National Labor Relations Board has abdicated its role as the unbiased referee between the employer and unions in their on-going disputes.

When faced with near simultaneous unfair labor practice charges for bad faith bargaining from both the Union and the Employer, the Regional Director's staff issued a Complaint against the Hotel, and dismissed the charge against Union. When those same charges against the Union were proved to be true based upon admissions by the Union, and almost seven hundred (700) pages of the Employer's internal bargaining notes, charts, and communications, the Regional Director refused to re-open the ULP investigation against the Union, or reconsider his case against the Employer. To add insult to injury, the Regional Director's trial attorneys now cite to the number of *pending* unfair labor practice charges against the Hotel as evidence of a so-called "coercive environment" that they believe somehow justifies the Board's pursuit of injunctive relief, and serve as a basis to ignore an employee's independently filed petition to decertify the

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Union. This conduct, of course, only encourages the Union to file a plethora of baseless charges in order to support the Regional Director's tactics. The Regional Director's conduct ignores the priority the National Labor Relations Act gives to the wishes of the employees over those of the Employer, or the Union. The Hotel is now suffering irreversible damage to its procedural due process rights because the Regional Director refuses to conduct fair, unbiased, investigations of its ULP charges, refuses to suspend the on-going ULP hearing pending the outcome of the employee's decertification petition, and continues to pursue 10(j) injunctive action despite overwhelming evidence that such action is unwarranted. Thus, the Hotel asks this Court to (1) order the Regional Director to issue a Complaint on ULP 19-CB-9969, (2) suspend the now on-going ULP hearings before Administrative Law Judge Meyerson until the Board conducts a secret ballot election based upon Margarita Lucero's decertification petition ULP 19-RD-3877; and, (3) issue a judgment declaring injunctive relief pursuant to 29 USC 160(j) inappropriate in this case.

I. FACTS

A. The Petitioner

Remington Hospitality & Lodging, LLC is a Texas entity that employs hotel workers in multiple states in the United States. Of the forty nine (49) hotels with which Petitioner is affiliated, only the Sheraton in Anchorage, Alaska is engaged in litigation with a labor union before the NLRB.

B. UNITE HERE International Labor Union

UNITE HERE is an international hotel workers union formed from an ill-fated merger of two long-established American labor unions, UNITE, a textile workers' union, and HERE International Union ("HEREIU"), a union that historically represented hotel and restaurant employees. The UNITE wing brought a great deal of financial support, including ownership of the Amalgamated Bank, the only labor-owned bank in the United States. HEREIU, on the other hand, was short of money, but brought a network of labor organization and manpower that some believed could benefit from the textile union's resources.

The July 2004 merger was strained to the breaking point by a February 2009 lawsuit filed in the federal district court for the Southern District of New York by leaders of the textile workers unions against the leaders of the hospitality unions, seeking the dissolution of the unions' merger.[1]

In October 2008, the United States' economy entered a prolonged downturn, and the hospitality industry faced declining profits and revenue. Meanwhile, UNITE HERE, in the midst of its internal split, began a coordinated nationwide campaign called "Hotel Workers Rising" that encouraged local unions to refuse to renew their labor contracts if such agreements did not continue to increase wages and benefits, even if such increases were not warranted by current business conditions. The strategy was called "contract to organize," in which the unions would refuse to sign contracts unless the Hotel owners acceded to the unions' pricey proposals in the midst of the nation's financial fallout.

[1] That lawsuit, Gillis,et al v. Wilhelm et al, 09 CIV 01116, includes an account of the merger and intra-union dispute.

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Today, many U.S. hotel companies are experiencing nationwide strikes in major cities with UNITE HERE local unions participating in the Hotel Workers Rising Campaign. The result for Hotel owners and operators has been frustrating; not only are they unsure which side of the UNITE HERE union to deal with, but they are also unable to negotiate labor contracts that reflect the reality of the economy.

The schism between the UNITE and HERE branches of UNITE HERE persisted until a settlement was announced in July 2010, that involved several hundreds of millions of dollars in Manhattan real estate, the ownership of the Amalgamated Bank, undisclosed cash settlements, and control over various local union relationships throughout the United States.[2]

UNITE HERE Local 878 is the local union representing some of the hotel, restaurant, and other hospitality workers in the Municipality of Anchorage.[3] According to filings with the Department of Labor from 2009, Local 878 has approximately 1,112 members and assets of approximately $650,000. See Unite Here Local 11 LM-2 form, a true and correct copy of which is attached hereto as Exhibit "6." Local 878 is currently boycotting both the Sheraton Anchorage *and* the Hilton Anchorage after prolonged negotiations over renewed collective bargaining agreements reached impasse over what appear to be substantially similar issues.

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[2] Service Unions Agree on Labor-Owned Bank, The New York Times, July 27, 2010; http://dealbook.blogs.nytimes.com/2010/07/27/service-unions-agree-on-labor-owned-bank/

[3] See http://www.union878.com/here/

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C. Collective Bargaining at the Hilton Anchorage

In 2008, just one year before the start of this dispute, the entity that does business as the Hilton Anchorage [hereinafter "the Hilton"] began negotiations with Local 878 [hereinafter "Union"] for a new collective bargaining agreement. See Declaration of Denis Artiles is Exhibit 1, ¶ 3. The Hilton and the Union quickly reached impasse over three main issues: the terms of the Hilton's health care plan for its employees, the size of the wage increase, and the conditions of work. Exhibit 1, ¶ 7 Media releases from the Hilton indicate that the Hotel anticipated the need to pay its unionized workers more conservatively over the coming three years while in the midst of a severe economic downturn. As a result, the Union filed ULPs against the Hilton for violating 29 U.S.C. § 158(a)(5), alleging a "failure to bargain in good faith." See ULP No. 19-CA-32148, attached to Second Declaration of Denis Artiles, Exhibit "2" (hereinafter referred to as "Exhibit 2") as Attachment "I." The Union instituted a boycott of the Hilton and the Hilton implemented its last, best, and final bargaining offer. Exhibit 1, ¶ 12. After an investigation, the Regional Director found no basis for the charges against the Hilton.

D. Collective Bargaining at the Sheraton Anchorage

The collective bargaining agreement between UNITE HERE, Local 878 and the former manager of the Sheraton Anchorage was to expire by its terms at the end of February 2009. Exhibit 1, ¶ 2. In order to leave a reasonable amount of time to accomplish the negotiation of a successor agreement, representatives of the Hotel, Arch Stokes, counsel and chief negotiator for Sheraton Anchorage, and Mary Villarreal, a human resources consultant for the Petitioner,

arranged to meet with representatives of the Union, president Marvin Jones and business agent Daniel Esparza, for two days in October 2008. See January 22, 2010 Affidavit of Arch Stokes, attached to Exhibit 1 as Attachment "F"; October 23, 2008 letter from Arch Stokes to Daniel Esparza, attached to Exhibit 2 as Attachment "A".

During those meetings, the Petitioner's representatives indicated that they hoped to reach a new collective bargaining agreement before the expiration of the collective bargaining agreement on February 28, 2009. See December 11, 2008 letter to Messrs. Jones and Esparaza from Arch Stokes, attached to Exhibit 2 as Attachment "B." They explained to Messrs. Jones and Esparza that the economic climate had changed considerably since the current CBA was negotiated and the negotiation process was anticipated to take some time. Exhibit 1, Attachment F, p. 5.

During those October 2008 meetings, the parties discussed the specifics of banquet schedules, passive union membership, banquet work conditions, and Union Health & Welfare Fund premiums. Id. The parties began to go through the current collective bargaining agreement one page at a time, but were sidetracked on some of the above issues, and did not complete that process. Id. At no time did Mr. Jones or Mr. Esparza indicate that they would not be the negotiators for the Union, nor did they suggest that the October meetings were anything other than negotiating sessions. Id. During those meetings, the Hotel requested several documents, including a list of existing Health and Welfare programs, and copies of the existing Pension Fund and Legal Fund programs. Id.at pg. 8; see also November 4, 2008 letter to UNITE-Here, Local 878 President Marvin Jones from Arch Stokes, attached to Exhibit 2 as Attachment "C." After that meeting, the Hotel made repeated attempts to set dates for

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negotiations. See December 11, 2008 letter to Messrs. Jones and Esparza from Arch Stokes; December 29 e-mail to Messrs. Jones and Esparza from Arch Stokes; January 8, 2009 letter to Messrs. Jones and Esparaza from Arch Stokes, attached to Exhibit 2 as Attachment "D."

However, the Union would not cooperate with the Hotel's efforts to set up new dates for negotiation, telephonic or otherwise. Id. The Union also failed to respond to any of the Hotel's requests for information. Id.

Finally, on January 21, 2009, the Union informed the Petitioner – without reason or explanation for the prolonged lag in communication – that Rick Sawyer, UNITE-HERE International Vice-President from Seattle, Washington, would take over the negotiations from the representatives of Local 878. See Exhibit 1, Attachment F; January 21, 2009 e-mail from Mr. Jones to Arch Stokes, attached to Exhibit 2 as Attachment "E." This communication from the Union was provided after six (6) separate communications from the Hotel urging the Union to return to the bargaining table and provide information requested in October, which it did not do. See Exhibit 1, Attachment F, p. 9. By this time, the existing CBA was just one month away from expiration. Id. On March 2, 2009, the two sides agreed to extend the collective bargaining agreement until March 30, 2009. See March 2, 2010 letter to Rick Sawyer from Arch Stokes, attached to Exhibit 2 as Attachment "F."

In subsequent communications, the Union (via Rick Sawyer) asked simply for extensions of the current CBA, and was unprepared to discuss any substantive issues. The Union submitted its only substantive proposal – in summarized unexecutable form – on April 1, 2009, and then tried to schedule more bargaining dates for April 8-10, an unrealistic timetable that would not have allowed the Petitioner time to effectively review and cost out the Union's proposal.

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Affidavit of Donald Denzin, attached to Exhibit 1 as Attachment E ¶ 16. Moreover, despite requests from the Petitioner, the Union refused to provide proof that Local 878 remained the recognized representative of the bargaining unit, proof the Petitioner had reasonably requested in light of the well-publicized UNITE-HERE schism. Indeed, the Union's letter reaffirming that it was the proper representative was not received by the Petitioner until April 13, 2009, after the proposed bargaining sessions would have taken place. See April 1, 2009 letter from R. Sawyer to A. Stokes, received April 13, 2010, attached to Exhibit 2 as Attachment "G."

The Petitioner submitted its first proposal to the Union – a complete, executable proposal – on April 9, 2009. See Exhibit 1, Attachment E, ¶ 18. Soon thereafter, the Petitioner attempted to schedule negotiations in May, 2009, but due to the Union's refusal to coordinate negotiations with pending grievance arbitrations, this became impossible and negotiations were ultimately scheduled for June 9-12, 2009. Id., ¶ 20. On May 22, 2009, the Petitioner requested any revisions to the Union's position in advance of negotiations. Id., ¶ 21. The Union did not respond to this request. Id.

The parties negotiated for four (4) full days in Anchorage as scheduled in June and agreed to extend the expiring CBA to the end of July, 2009. Exhibit 1, Attachment E, ¶ 20. During these June negotiations, the Hotel's management authorized a discounted room rate to Mr. Sawyer, the Union's negotiator. Exhibit 2, ¶ 17 These discounts were a thing of value, violations of criminal statute 29 USC § 186, and only one example of the close, non-arms-length relationship previous Hotel management allowed to arise with the Union. Mr. Artiles was hired as a new Hotel General Manager, beginning on July 1, 2010. Id. Mr. Artiles began a system of

strict compliance with the rules, regulations, and laws, particularly those related to the Union. Id.

Leading up to those June negotiations, the Petitioner requested an updated proposal from the Union. Exhibit 1, ¶ 21. The Union failed to respond to this request. Id. The Union then offered July 28 and 29 as dates for further negotiations, only to attempt to renege on the July 29 date after it had been accepted. Id. at ¶ 23-24. Ultimately, after Arch Stokes met with Rick Sawyer in Denver on July 20, the Union agreed to those dates, dates which the Union itself had proposed in the first place. Id. at ¶ 24.

The closest the Union came to presenting a revised negotiating position was in a July 9, 2009, letter in which it suggested the addition of two (2) non-substantive procedural provisions. Exhibit 1, Attachment E, ¶ 22. The Petitioner accepted the changes and asked for a substantive counter-proposal. Id. at ¶ 23. This request was again ignored. Id.¶ 24, 26. On July 17, 2009, the Hotel presented the Union with a revised, complete proposal that incorporated those minor changes made by the Union on July 9, 2009. Id. at ¶ 23.

At the conclusion of the July 28 and 29 negotiations, the parties agreed to extend the expiring CBA until the end of August 2009. Id. at ¶ 25. At that point, the parties were in agreement on approximately 87% of the provisions of a new collective bargaining agreement (164 out of 190 provisions). See Exhibit 1, Attachment F, p. 13. The Petitioner once again asked the Union for an update on its positions, to no avail. Exhibit 1, Attachment E, ¶ 26. In August, the Petitioner made multiple requests for updated or revised positions from the Union. Id. None of these requests received a reply. Id. On August 21, 2009, the Petitioner presented the Union with its third and final offer. Id. at ¶ 27; Exhibit 1, ¶ 6. The fact that this was the

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Petitioner's final offer was unambiguously communicated to the Union in the cover letter accompanying the proposal.

One week after presenting the offer, the parties spoke over the phone and after another request from the Petitioner, the Union represented that it would soon present the Petitioner with its updated and revised positions. See Exhibit 1, Attachment E, ¶ 27. No updates were forthcoming, however, and the collective bargaining agreement expired on August 31, 2009, without further extensions or a successor agreement in place. Id. at ¶ 28. By this point, it was clear that the Union had no interest in reaching a new collective bargaining agreement.

In September, 2009, the Petitioner repeatedly asked for the updated and revised offer the Union promised. Id. ¶ 29, 30. None was received. Id. Finally, on October 2, 2009, the parties discussed the Petitioner's final proposal over the phone. Exhibit 1, Attachment F, p. 15. The Union again failed to provide its revised position. Id.

On October 6, 2009, the Petitioner declared an impasse in the negotiations and filed an unfair labor practice charge against the Union for refusing to bargain in good faith. See Unfair Labor Practice Charge 19-CB-9969, attached to Exhibit 2 as Attachment "H.". The following day the Union filed its unfair labor practice charge in retaliation. See Unfair Labor Practice Charge 19-CA-32148, attached to Exhibit 2 as Attachment "I." The Regional Director ultimately issued a complaint on the Union's charge, but dismissed the Petitioner's charge on obviously spurious grounds, as discussed further below. Exhibit 1, ¶ 8.

On October 17, 2009 after notice to the Union, the Petitioner implemented portions of the final proposal issued on August 21. See Exhibit 1, Attachment F, p. 15. The impasse resulted in part because the parties' positions on a few items, particularly the number of rooms to be cleaned

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by the housekeepers, the 30-minute meal breaks, and the health and welfare benefits to be provided remained obstacles to agreement. See Exhibit 1, ¶ 7. Based on an order by the ALJ presiding over the current unfair labor practices hearing, the Employer has provided 679 pages of internal negotiating material, quantifications, comparison charts and other documents demonstrating the great lengths the Employer went to in an effort to negotiate in good faith. See Exhibit 5.

The Regional Director dismissed the Hotel's ULP against the Union on April 30, 2010, a decision ratified on June 10, 2010. See Exhibit 1, ¶ 8. The Regional Director's dismissal was based on obvious misconstruction of the Hotel's position and nonsensical assertions, including the claim that the Hotel failed to provide evidence in support of its claims, when it in fact provided hundreds of pages of documentation and correspondence. By contrast, the Regional Director issued a complaint on nearly every one of the thirteen (13) ULPs filed by the Union, no matter how frivolous, including its copycat assertion that the Hotel had failed to bargain in good faith.[4] See Exhibit 1, ¶¶ 8-9.

On August 17 and 24, 2010, evidence came to light during the hearing in Anchorage that clearly supported the Hotel's ULP against the Union for bad faith bargaining when Daniel Esparza acknowledged delays in the bargaining process, the Union's repeated refusal to submit requested documents to the Hotel, and other assertions made by the Hotel in support of its

[4] The "investigation" of the Hotel's and Union's charges was done by David Schaff, who is identified as a Facebook "friend" of several Union members, including Marvin Jones, and is now assisting the General Counsel to prosecute these same charges that he so inadequately investigated. *See* Declaration of Denis Artiles ¶ 9. A motion to disqualify Mr. Schaff from the investigation was submitted to the Administrative Law Judge on September 22, 2010.

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allegation of bad faith bargaining. See August 17, 2010 hearing transcript, Exhibit 4, pp. 189-191, pp. 200-201. Mr. Esparza testified:

> Q: Now looking back at K, General Counsel 6, K, do you recall that we reiterated in this January 8, 2009 letter that we had made information request of the Union on October 27th and October 28th, November the 4th and December the 11th? Do you recall that?
>
> A: I'm looking at December 11th. Yes. Now I do, yes.
>
> Q: Okay. And the Union didn't respond by saying no or yes or maybe or anything to any of those information requests.
>
> A: We did not respond to you – no, I did not.

See Exhibit 4, p. 200.

Mr. Jones also admitted at that the Union refused to answer any of the Hotel's requests for copies of the collective bargaining agreements and information concerning the employee health, welfare or pension trust funds. Exhibit 1, pp. 158-159. Mr. Jones also admitted that though he turned to Mr. Sawyer for advice regarding the Hotel's document requests, he never informed the Hotel that Mr. Sawyer was involved in the negotiations between October and December of 2008. Id. at pp. 177-180.

The evidence described above – corroborated at the ULP hearing currently being conducted in Anchorage – shows that it was the Union, not the Petitioner, that failed to bargain in good faith. See Exhibit 1, Attachment E, ¶ 31. The Hotel requested that the dismissed ULP be reopened on account of this new evidence. Exhibit 1, ¶ 10. The Regional Director, however, has not even bothered to respond to this request. Id.

Meanwhile, the Regional Director has pursued even the most frivolous claims against the Hotel. For example, he insisted on including in the Consolidated Complaint a charge that the

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Hotel violated the NLRA by failing to notify the Alaska Labor Relations Agency of the negotiations with the Union – when the ALRA has jurisdiction over only **public** employees. This charge was dropped on the first day of the hearing before the ALJ. Exhibit 4, pp. 14-16. Similarly, the Regional Director included in the Consolidated Complaint a charge that the outsourcing of the Hotel van service without consultation with the Union was a violation of the Act, when the collective bargaining agreement – which was still in effect at that time – clearly permitted outsourcing without prior notice to the Union where it did not result in the loss of shifts or hours for bargaining unit employees. At the hearing, the witnesses called by the Regional Director admitted that they had not lost any shifts or hours as a result of outsourcing the van service.

In short, the Regional Director has failed to discharge his statutory responsibility of impartially investigating and attempting to resolve the unfair labor practices that were filed by both the Hotel and the Union. Instead, the Regional Director has shown a clear bias in favor of the Union and against the Hotel, despite significant evidence that the Union failed to bargain in good faith, as alleged by the Hotel.

E. <u>The Union's Loss of Support is Due to Its Own Harsh Tactics and Failures</u>

On or around October 2009, representatives of the Union began to appear in the employee cafeteria on a regular basis. Exhibit 1, ¶11. Employees, mostly Union members, began to complain of obnoxious harassment from the Union's representatives. <u>Id</u>: <u>see</u> Exhibit 3. Union representatives even began photographing union members and managers while they were eating. Exhibit 1, ¶ 11. Daniel Esparza, a Union representative, was particularly harsh in his

treatment of employees, going so far as to call one employee who disagreed with him "trash." Id.

Up until this point, the Hotel possessed only occasional evidence of the employees' dissatisfaction with the Union while the parties were negotiating and even after they failed to reach agreement and the final offer was implemented. Exhibit 1, ¶ 11.[5] The Union began to take this new tack of harassing and intimidating employees in apparent response to the impasse in negotiations. Id.

On November 17, 2009, the Union announced that it had initiated a boycott of the Hotel. Exhibit 1, ¶ 12. The Union used this boycott as an excuse to harass, threaten, and defame the Hotel to prospective Hotel guests and clients.[6] The boycott has turned away more than $700,000 in business from the Petitioner, which has historically been a Union hotel, often sending that business, ironically, to the Marriott, a historically non-union hotel. Id. Inexorably, the schedules and thus the incomes of the employees were reduced due to the loss of business. Exhibit 1, ¶ 12. Complaints and grumbling became rampant among the employees who saw themselves losing money due to the boycott; the Union responded by telling them that some losses have to be endured in a "war." Id.

On or about March 31, 2010, Union members received notice that the UNITE HERE International Pension Fund was considered to be in "critical status." Exhibit 1, ¶ 13. This notice

[5] At the outset, it is important to note that reports of the Employee's displeasure with the Union's representation are not distilled from second-hand reports from the Hotel's management. This information comes from seventy three (73) handwritten Declarations from Hotel employees, in both English and Spanish, voluntarily submitted to their management in hopes of freeing themselves of the Union's pestering.

[6] An affiliate of the Hotel filed a lawsuit against the Union contemporaneous with this petition in the United States District Court for the District of Alaska to recover damages suffered as a result of these tactics.

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was sent less than two years after the employees' fully solvent Alaska Hotel Workers Pension Fund was transferred to the now-critical UNITE HERE International Pension Fund. Id. The immediate result has been a decrease in overall benefits per employee, while monthly employer payments have been increased. Id. The employees began expressing significant dissatisfaction about this as well. Id. Seventy-three employees submitted handwritten declarations expressing their dissatisfaction with the Union. See Exhibit 3.

Many of the employees expressed that the Union did not represent their interests. Id. They were growing weary of the boycott and of being approached by Union representatives on their lunch breaks in the cafeteria. Id. In addition, they had grave concerns about the underfunded pension plan and about the tactics used by the Union. Id. As employee Supaporn Kennedy wrote in a statement on August 25, 2010, "I also feel like many of the Union representatives abuse their position and use coercive, 'strong arm' tactics to get other workers to go along with the programs they are supporting." Id. Employee Jannice Emmsley stated that she was "constantly harassed during her 30-minute lunch breaks and they would take pictures of those who would sit and eat lunch with managers." Id.

Meanwhile, Mr. Artiles and another manager, Eduardo Canas, began receiving death threats via telephone from what they reasonably believed to be Union representatives. Exhibit 1, ¶ 14. Mr. Artiles reported the threats against him to the Anchorage Police Department, and he and Mr. Canas filed an Unfair Labor Practice charge relating to this conduct on June 6, 2010. Id. No action has yet been taken by the Board to issue a complaint on this ULP. Id.

In February 2010, four employees were discharged for insubordination and violations of various company policies after repeated infractions and progressive discipline. Exhibit 1, ¶ 15.

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The Union filed a ULP claiming that the four employees were discharged due to protected concerted activities. Id. The Respondent threatened to seek injunctive relief under 29 U.S.C. § 160(j) on account of the termination of these employees, even though the Hotel had strong evidence to show the history of their defiance of legitimate company policies and rules. Id. In settlement of these claims, and in exchange for the Respondent's agreement not to pursue 10(j) injunctive relief, the Hotel agreed to reinstate the employees with back pay ordered by the Board. Exhibit 1, ¶ 15. Despite the Hotel's fulfillment of its promise to reinstate the employees with back pay, and despite its repeated requests that the Respondent dismiss these charges, the Region has refused to do so and it continues to pursue those charges in the ongoing ULP hearing. Id.

At some point during these events, hotel employees, Union members all, began to circulate a petition to remove the Union from the Hotel. Exhibit 1, ¶ 16.

The first time the Hotel management had evidence that the petition existed was when it was presented to Mary Villarreal, a human resources consultant. Id. When the Hotel management received one hundred and ten (110) signatures on the decertification petition, the Hotel sent a letter to the Union informing it of the formal withdrawal of recognition of the Union's exclusive collective bargaining status at the Hotel. Id.

On the same day that the Hotel withdrew recognition of the Union, Marvin Jones, the President of the Union, entered the employee cafeteria. Exhibit 1, ¶ 17. According to the many witnesses among both employees and management, he appeared to be very upset, and began shouting and waving his finger, informing the employees that those who had sided with management should "be careful" because the Hotel would "always be a Union house." Exhibit 1, ¶ 17.

The Hotel filed a ULP against the Union due to the Union's unlawful harassment and threats against the employees. Exhibit 1, ¶ 18. This ULP was filed on July 7, 2010. Id. No action has yet been taken by the Board to issue a complaint on this ULP, despite the statements of more than half a dozen employees corroborating their observation of Mr. Jones's behavior. Exhibit 1, ¶ 18.

The Union filed ULPs against the Hotel on July 6, 2010, and July 12, 2010, alleging unlawful withdrawal of recognition of the Union by the Hotel. Exhibit 1, ¶ 19. The Hotel requested that the pending hearing on the other ULPs be delayed so that the Board and the Hotel could devote resources to the proper investigation of these new ULPs. Id. The Board refused to delay the hearing, but instead accelerated the investigation, demanding that the Hotel defend the charges at the same time that it was preparing to defend itself in the ULP hearing. Id. Because the Hotel could not effectively do both, it declined to participate in the investigation, and the Respondent immediately issued a Consolidated Complaint with barely one month of "investigation." Id. The Hotel was thus denied due process because it was forced to choose between defending itself on two fronts at once, while the Respondent refused to delay one attack so that the other could be addressed first.

During the month of September, an attorney in the Respondent's office began calling Hotel employees at their homes and on their cell phones, apparently identifying himself as an "attorney from Seattle," rather than as an attorney with the National Labor Relations Board, and asking questions about how the employees came to sign the decertification petition. Exhibit 1, ¶ 20. Even more shocking, he asked at least one of them if she would be willing to revoke her

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signature on the decertification petition, hardly the act of an "impartial investigator," assuming that is what he is supposed to be.

On September 23, 2010, an employee of the Hotel filed a formal petition with the National Labor Relations Board office in Anchorage seeking to decertify the Union. Exhibit 1, ¶ 21. This petition was supported by the one hundred and ten (110) employee signatures on the decertification petition presented to the Hotel. See September 23, 2010 Decertification Petition attached to Exhibit 2 as Attachment "J." The Board has also been presented with sixty (60) handwritten statements by Hotel employees explaining the reasons why they have chosen to decertify the Union. See Exhibit 3. Each of the statements was collected as part of the defense against the Union's claims that the Hotel improperly withdrew its recognition. The declarations ask the employee to acknowledge the specific conditions under which they gave the statements:

> 1. The Hotel would like to ask me questions about my signature on a petition that withdraws my support from the Union. The Hotel is asking me these questions because the Union has filed a charge with the National Labor Relations Board claiming that the petition was the result of Hotel management influence. The Hotel would like to gather more information about this to better understand the situation.
>
> 2. I will not be retaliated against for anything that I say, or do not say, in response to the Hotel management's questions.
>
> 3. This entire interview is voluntary. I do not need to answer any questions. In fact, I am not required to talk with Hotel management about this at all. I can end this discussion at any time.

See generally id.

Acknowledging these options, employees were given the opportunity to explain in their own words, and in a language with which they were the most comfortable, why they wanted to be rid of the Union. See generally Exhibit 3. It is notable that none of the employees mentioned

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anything that could be considered any sort of anti-Union environment as described by the Union. Id. None of statements cite the actions of the Hotel as the basis for their choice to de-certify the Union. Id. Every statement identifies actions and behaviors of the Union and its representatives that led each employee to sign the decertification petition. Id.

Employee Margarita Lucero on September 24, 2010 filed a Motion the Intervene in the ongoing ULP hearing on September 24, 2010. See Exhibit 8. Ms. Lucero, who filed the decertification petition, in the petition states that "a decision in favor of the Charging Party on the allegations in this Complaint would likely result in the unwanted union being imposed on a unit where there is a majority opposition."

In advance of the hearing, the Union has attempted to intimidate Hotel employees into testifying on its behalf. On September 28, 2010, employee Irene Rodriquez received a telephone call from Mr. Esparaza, who informed her that if she did not report to court to testify in favor of the Union, "the federals were going to come to her home and arrest her for not doing so." See September 29, 2010 email from Eduardo Canas, attached to Exhibit 2 as Attachment "K". Mr. Esparaza told Ms. Rodriquez that she would be taken away to jail in handcuffs if she did not testify on behalf of the Union. Id. Ms. Rodriguez felt so threatened and intimidated by Mr. Esparza's aggressive demeanor that she reported the entire experience to the Federal Bureau of Investigation. Id.

Although the relationship between the Union and the Hotel has remained static since July 2, 2010, only a few days after the Petition was filed, the Union filed a sixteen (16) new ULPs in an attempt to "block" the de-certification petition from going forward. The Hotel continues to suffer extreme prejudice before the National Labor Relations Board so long as the Respondent

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refuses to comply with its obligation to fairly investigate all ULPs filed by the Employer, and ignores the employees' desire to decertify the Union. Exhibit 1, ¶ 22. The Hotel's counsel has asked for immediate service of all new ULP charges as permitted under 29 CFR 102.14(b), which gives the NLRB the ability to serve ULP charges on the respondent via facsimile. That expressly written and discussed request has been ignored, and ULP charges continue to arrive at Hotel counsel's satellite offices via US mail, more than one week after they have been filed and an investigation is already underway.

Three of these ULPs were never served on the Hotel. The Hotel found out about these ULPs after asking the NLRB for a full accounting of all ULP charges filed between the Union and the Hotel on October 5, 2010. These three charges, 19-CA-32731, 19-CA-32732, and 19-CA-32735, were allowed to proceed, without the knowledge of the Hotel, for more than two weeks.

Meanwhile, the Hotel's ULPs charging the Union with making death threats, vandalizing the Hotel, and systematically harassing the Hotel's workers are still, more than sixty days later, under investigation. Mr. Hayashi, a Board agent, visited the Hotel on October 4, 2010 to interview Hotel employees about the Union's harassment by taking unwanted photographs of employees in the employee lunchroom. Upon arriving at the Hotel, he indicated that he would only interview a couple of employees because he was "sure that they would all say the same thing," and would only interview employees comfortable speaking English even though English is not the first language for a sizable portion of the Hotel's workforce. Exhibit 2, ¶ 7.

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The Regional Director, through counsel, on August 26, 2010, indicated that the Region was pursuing a request for injunctive relief under Section 10(j) of the Act to return the relationship of the Parties to the *status quo ante*. See Exhibit 4, p. 1613; see also Exhibit 9.

F. Summary.

The Respondent Regional Director has at all times proceeded expeditiously to pursue claims by the Union against the Petitioner, while refusing to recognize the validity of claims against the Union filed both by the Hotel and the employees themselves. In the face of direct and clear evidence of the Union's loss of support, which occurred due to its own conduct and not due to conduct by the Hotel, he has dug in his heels and refused to allow the voices of the employees themselves to be heard.

The Regional Director has refused to discharge his responsibilities to impartially investigate ULP charges, dismiss those that are unmeritorious and pursue those that are meritorious. Specifically, his refusal to reopen the dismissed charge based on the new evidence of bad faith bargaining, his refusal to dismiss charges that have been effectively settled, and his refusal to delay the pending hearing so that the new ULPs could be properly investigated and defended, are all failures to comply with Board procedure and the purposes of the National Labor Relations Act. The Petitioner has no administrative recourse, but must seek assistance from this Court to obtain recourse. Moreover, it is plain that the pending proceedings before the Board should be stayed while the wishes of the employees themselves are determined and effectuated in the form of a secret ballot election.

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II. JURISDICTION

A. Petition for Mandamus - 28 U.S.C. § 1361

This Court has original jurisdiction in the nature of mandamus to compel an employee of the United States or any agency thereof to perform its duty to petitioner. 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); see also Haneke v. Secretary of Health, Ed. and Welfare, 535 F.2d 1291 (D.C. Cir. 1976). A violation of a governmental agency's own regulations can be the basis for § 1361 jurisdiction. For example, in Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970), the Second Circuit held that mandamus would lie to compel the army to act in accordance with a duty imposed by its own regulations. See also Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974); Leonhard v. Mitchell, 473 F.2d 709 (2d Cir. 1973), *cert. denied*, 412 U.S. 949, 93 S. Ct. 3011, (1973); Mattern v. Weinberger, 519 F.2d 150, 156-157 (3rd Cir. 1975); Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773 (1946); Andujar v. Weinberger, 69 F.R.D. 690, 693-694 (S.D.N.Y. 1976).

B. Federal Question - 28 U.S.C. § 1331

This Court also possesses jurisdiction over this action because it arises from a violation of the Hotel's loss of constitutionally protected rights to procedural due process before a federal agency under 10 U.S.C. § 1331. Under Fay v. Douds, 172 F.2d 720, 23 LRRM 2356 (2d Cir. 1949) and its progeny, a federal district court has jurisdiction to intervene in Board proceedings if there is a "clearly colorable" or at least a "not transparently frivolous" claim of a violation of

constitutional rights. Sparks Nugget, Inc. v. Scott, 583 F. Supp. 78, 81 (D. Nev. 1984) ("In the present case, … petitioner has claimed that the Board has failed to perform a mandatory obligation to process its representation petitions. If petitioner's claim is valid, the Board's failure to act would constitute conduct in excess of its delegated powers, and would bring the Board within the Court's jurisdiction under Leedom v. Kyne [358 U.S. 184 (1958)]."); Douds, *supra*, 172 F.2d at 723; McCormick v. Hirsch, 460 F. Supp. 1337, 1347 (M.D. Penna. 1978). Since Petitioner contends that the Board's delay has violated its due process rights, this Court has jurisdiction under § 1331.

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III. ARGUMENT

A. Litigants Before the National Labor Relations Board Are Owed Their Constitutional Rights to Due Process.

The United States Supreme Court has determined that the basic constitutional protections of the Due Process Clause must be provided when Federal agencies adjudicate, hold trials, determine civil liability, issue orders, impose legal sanctions and generally make determinations that deprive persons of their property. See, e.g., Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."); Greene v. McElroy, 360 U.S. 420, 474, 496-499 (1959). It is settled Supreme Court precedent that litigants before the National Labor Relations Board are owed procedural due process rights. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938), citing Morgan v. U.S., 298 U.S. 468, 480 (1936):

> [A quasi-judicial function] is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order.

See also Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (J. Frankfurter, concurring):

> [S]ummary administrative procedure may be sanctioned by history or obvious necessity. But these are so rare as to be isolated instances. This

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> Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies, rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process.

Petitioner here has been denied the most basic safeguard of fair judgment, an impartial investigation.

B. <u>The Board's Failure to Act Violates a Clear and Nondiscretionary Duty, While Alternative Remedies Remain Unavailable to the Hotel and its Employees</u>.

The National Labor Relations Act [hereinafter "the Act"] [7] establishes that the Board is obligated to investigate charges brought to it, to order elections when confronted by employees seeking to elect or change a bargaining representative, and to enforce ethical principles applicable to those who practice before it. Since its inception in 1935, the Act has had as its primary concern the rights of employees, both as individuals and collectively: "It is hereby declared to be the policy of the United States to …encourage[e] the practice and procedure of collective bargaining and … protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Section 7 of the Act was fashioned to implement this policy. <u>See</u> 29 U.S.C. § 157

[7] 29 U.S.C. § 151 *et seq*.

(ensuring employees the right to self-organization and to bargain collectively "through representatives of their own choosing").

Following the statement of these Section 7 Rights, in Section 8 of the Act, Congress has identified certain activities in which Unions and Petitioners may not participate so as not to impede the fundamental Section 7 rights of the employees to choose whether or not they wish to be members of a labor union. See generally 29 U.S.C. § 158. Any person may charge either the Union or the Petitioner with a violation of one of these specific prohibitions under Section 8. The charge is filed with the appropriate National Labor Relations Board Regional Office. The General Counsel of the Board is charged with the investigation of these ULP charges and providing a recommendation to the Board's Regional Director. See generally 29 U.S.C. § 160 and accompanying regulations.

The Board is obligated to impartially and fairly investigate the charges brought before it. The requirement of fair play is binding on administrative agencies as well as on courts. NLRB v. Newberry Lumber & Chemical Co., 123 F.2d 831, 838 (6th Cir. 1941). Upon the filing of a charge or a complaint, the Board is required to investigate it. 29 CFR § 101.4; NLRB v. Barrett Co., 120 F.2d 583, 585 (7th Cir. 1941). Throughout the investigation, board agents are supposed to act as "impartial investigators." NLRB Casehandling Manual (Part One) Compliance §10050 ("As impartial investigators, Board agents should identify themselves as agents of the Board to all witnesses and parties, should explain the purpose of the investigation and should avoid conveying a prosecutorial image."); see also 29 CFR § 101.10(b) ("The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. § 557) are conducted in

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an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice.").

A simple side-by-side comparison between the Respondent's treatment of the Union and the Petitioner is illustrative. The Hotel filed charge 19-CB-10081 against the Union on June 6, 2010, for violent threats and acts of sabotage, and charge 19-CB-10092 for intimidating and harassing employees of the Hotel on July 7, 2010. The Union filed charges 19-CA-32598, 32599, and 32600 against the Hotel on July 6 and 7, 2010, for withdrawing its recognition of the Union, even though such withdrawal was based upon a signed employee petition containing more than one hundred (100) unique signatures. See Decertification Petition, attached to Exhibit 2 as Attachment "J." Mr. Schaff, a friend of Marvin Jones, the Union president, completed his "investigation" of the Union's charges by August 12, 2010, and the Regional Director issued a Complaint on August 13, 2010. The Petitioner's charges, however, are still under investigation as of October 8, 2010. No charges have been issued, no decision has been rendered, and there has been no indication as to when such decisions will be made. The Regional Director rushed his investigation of the Union's charges so they could be included in the ULP hearing beginning on August 17, 2010. But Petitioner's repeated requests for a delay of the ULP hearing to allow for the investigation of the Petitioner's charges were denied. Petitioner's charges against the Union have all been dropped by the Regional Director or languish in the investigatory procedure. The Regional Director and the Counsel for the General Counsel stacked as many charges as possible against Petitioner, as fast as possible. Petitioner's request for delay to prepare its defense was disregarded in favor of Mr. Schaff's undisclosed timeline. This is a perversion of the administrative process.

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The Regional Director has failed to discharge his statutory duties. He has not conducted impartial investigations and he has not prioritized the employees' right freely to determine their own labor relationship above the administrative procedures of the National Labor Relations Board. The Petitioner is not seeking to halt the Board's administrative procedures altogether, as the petitioners did in cases like Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); it is merely asking this Court to require the Regional Director to discharge the duties assigned to him by the Act. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action." Richardson v. Perales, 402 U.S. 389, 402 (1971); quoting Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

Moreover, the Petitioner has no recourse apart from seeking the assistance of this Court, because there are no procedures in place to require the Regional Director to act appropriately with respect to the issues described below. Due process requires the Board to take action on the matters that have been presented to it and for which there are no alternative remedies available to the Hotel and its employees. See, e.g., Sparks Nugget, Inc. v. Scott, 583 F. Supp. 78, 84 (D. Nev. 1984) ("[T]he Board cannot shield itself from the duty to comply with the due process clause of the Constitution by claiming that the matter is in the hands of an administrative law judge."); City of College Station v. USDA, 395 F. Supp. 2d 495 (S.D. Tex. 2005) (where USDA failed to follow established guidelines for providing loans for water service provision, plaintiff established its right to action pursuant to 28 U.S.C. § 1361).

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1. Refusal to Issue a Complaint against the Union Despite clear evidence of wrong-doing. The Hotel brought a bad-faith bargaining charge against the Union in October 2009 – in fact, it was the first charge brought between these parties. See Exhibit 2, Attachment "H." This charge cited the fact that the Hotel had requested important information about the Union's health, welfare, and pension trust funds to that it could quantify these significant expenses, and consider them when making its collective bargaining proposals. The Union refused to provide such information despite repeated written and oral requests over more than one year of bargaining. The Region dismissed the Hotel's charge.

The Union also filed a "bad faith bargaining" ULP charge only one day after the Employer. See Exhibit 2, Attachment "I." In contrast to its treatment of the Employer's ULP against the Union, the Board has proceeded as if the Union's charge against the Employer might have merits that support injunctive action under Section 10(j). The Region issued a Complaint based upon the allegations contained in the Union's ULP charge because there were "conflicting elements of fact" that must be determined at a ULP hearing. No such credence was given to the Hotel's ULP, which was summarily dismissed despite the provision of hundreds of pages of documentary evidence and support. Instead, the Region issued a complaint and ordered a hearing regarding nearly every ULP filed by the Union against the Hotel, including the Union's bad-faith bargaining charge against the Hotel.

On the very first day of the unfair labor practices hearing, however, testimony from Union president Marvin Jones demonstrated that the points made by the Hotel in support of its charge were in fact true. Daniel Esparza testified similarly one week later, on August 24. This was evidence that should have and would have been elicited by the Region if it had done a

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proper investigation of the Hotel's charge, instead of summarily dismissing it for "lack of evidence."

The Hotel had asserted to the Board investigator, David Schaff, and provided documentary evidence to prove, that the parties had met in October 2008 to begin bargaining, that the Hotel had thereafter repeatedly requested that the Union provide it certain information (which the Union never did), and that the Union failed to respond to numerous requests to schedule additional negotiation sessions. The Union took the position to the Board that that two-day meeting had been merely a "get-acquainted" session, and not the onset of bargaining.

The testimony of Marvin Jones and Daniel Esparza at the ULP hearing, however, belied the Union's position. It was apparent from their testimony that everything the Hotel had said was true: the parties actually talked in detail about the contract, the state of the economy and how it would affect the negotiations, and other substantive issues during those October meetings. Their testimony also confirmed that the Hotel requested information from the Union that it never provided, and that the Union repeatedly refused to arrange to meet with the Hotel after the October meetings, until January 21, 2008 when it informed the Hotel that a new individual would be taking over the negotiations, HEREIU Vice President Rick Sawyer. See Exhibit 4, pp. 189-190.

After these admissions were made by Mr. Jones on the record at the hearing, the Hotel petitioned the Regional Director to reopen its investigation of the bad-faith bargaining charge it had made against the Union. See August 24, 2010 letter from Peter G. Fischer to Regional Director Richard Ahearn, listed hereinafter as Exhibit 7. That request not only cited the testimony from the hearing, but also pointed out to the Regional Director that he had the

authority under the Board's own Casehandling Manual, as well as Board precedent, to reopen investigations into charges where information was fraudulently concealed. See ULP Casehandling Manual § 10123 (authorizing reopening of charge within 10(b) period and even outside of 10(b) period where the charged party has fraudulently concealed evidence); Kanakis Co., 293 NLRB 435 (1989); *see also* Brown & Sharpe Mfg. Co., 312 NLRB 444 (1993), citing Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) ("The Board consistently has applied the equitable doctrine [that] if a party 'has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . ."'); Morgan Holiday's Markets, 333 NLRB 837 (2001). The Regional Director has never even bothered to respond to this request and the Hotel is left with no remedy for the Regional Director's refusal to act.[8]

2. Refusal to Postpone Hearing While New ULPs Were Being Investigated. The Hotel similarly has no remedy for the Regional Director's refusal to consent to a delay in the hearing so as to investigate the new ULPs pending when the hearing was set to begin. The Hotel was already at a disadvantage in defending itself during the hearing due to the Board's antiquated and absurd practice of refusing to allow the charged party to see the evidence against it until the hearing itself. The Hotel had no choice but to allow a complaint to issue on the Union's new ULPs alleging unlawful withdrawal of recognition while it prepared to defend itself against the already pending ULPs, meaning that it had no opportunity to present a defense to the new ULPs,

[8] The Hotel's prejudice as a result of the ineffective and one-sided investigation was exacerbated by the Board's inexplicable policy that the charged party cannot obtain any evidence presented against it unless and until a complaint is issued and the witness who has given evidence to the Board during this secret investigation is actually called to testify in the ensuing hearing. In that event, the charged party is given about five minutes to look at the witness's sworn affidavit prior to cross-examination. This abstruse and absurd method of conducting investigations ensures that innocent charged parties will be forced to undergo significant time, expense and, in the case of an Employer, operational interference regardless of the merit of the charges against it. That system alone is a violation of due process.

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which are in fact groundless. The evidence will show, as described above, that it was the Union's own treatment of the employees that led to its loss of support, not any conduct by the Hotel. Indeed, as noted, an individual employee has filed a decertification petition on her own with the Board and is seeking to intervene in the ULP hearing to ensure that the employees' voices are heard, because the Regional Director has shown no inclination to listen to those voices himself.

Meanwhile, the Regional Director promptly issued a complaint on the Union's new ULPs, without even conducting further investigation, such as interviewing the employees who actually signed the petition seeking to withdraw support from the Union. In fact, the Counsel for the General Counsel has informed the Hotel that she has turned the matter over to the Injunction Branch for consideration as a potential action under Section 10(j) of the Act. All this because the Regional Director refused to conduct his own thorough investigation and refused to agree to a continuance of the pending ULP hearing so that the Hotel itself could have participated in the investigation. The Hotel has no recourse except to this Court to combat this biased conduct by the Regional Director in violation of his obligations to conduct impartial investigations.

3. Refusal to Dismiss Charges Settled in Negotiations. One of the matters included in the Complaint is the termination of four employees, allegedly for engaging in protected concerted activity. After detailed negotiations with NLRB agents, on June 9, 2010, the Hotel agreed to reinstate those discharged employees and provide them back pay as calculated by the Board. See June 9, 2010 letter from Arch Stokes to the National Labor Relations Board, attached to Exhibit 7 as Attachment B. The consideration for this June 9, 2010 agreement was that the Board would not seek 10(j) relief against the Hotel.

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Although the employees were reinstated and have returned to work at the Hotel, the Board has refused to withdraw the charges relating to their termination. There is no justifiable reason to pursue charges for which there is no longer a remedy to be sought. It is unethical and a breach of contract for a party to renege on a settlement agreement that has already been fulfilled by the other party. The General Counsel is seeking injunctive relief, and, to the extent the injunctive relief being sought includes these charges, the Region has violated its part of the settlement agreement.

4. The Pending Decertification Petition Should Stay the Proceedings before the Administrative Law Judge.

The Court should recognize the rights of the Hotel employees and stay the ULP proceedings while the decertification petition is pending before the NLRB.

The National Labor Relations Act was established to protect the rights of the workers. Both the National Labor Relations Board and federal courts have acknowledged that the specific purpose of the Act is to protect the rights of the employees. Waterway Terminals Corporation, 118 N.L.R.B. 342 (1957) ("Section 7 of the Act guarantees employees the right to refrain from assisting a labor organization in its strike or other concerted activities"). The Act "was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the employees rather than a grant of power to the union." NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945); accord, NLRB v. Augusta Chem.

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Co., 187 F.2d 63, 64 (5th Cir. 1951); NLRB v. Red Arrow Freight Lines, Inc., 193 F.2d 979, 981 (5th Cir. 1952).

Section 7 of National Labor Relations Act (29 U.S.C. § 157) guarantees employees the right to self-organization, to form, join or assist labor organizations, and to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. The purpose of 29 U.S.C. § 157, the very heart of the National Labor Relations Act, is to secure the right of free choice to employees in the selection of their bargaining agencies – employers and unions must keep their hands off. NLRB v Thompson Products, Inc., 130 F.2d 363 (6th Cir. 1946); NLRB v American Creosoting Co., 139 F.2d 193 (6th Cir. 1943), *cert. denied,* 321 US 797 (1944). The provisions of 29 U.S.C. § 157 were intended to secure and preserve for employees the right to bargain collectively without intimidation, coercion or other improper influence, whether it be from employers, labor unions, or others. Valley Mould & Iron Corp. v NLRB, 116 F.2d 760 (7th Cir.), *cert. denied,* 313 US 590 (1941); NLRB v. Norbar, CCH LC § 11311. Section 7 affords employees the right to resign from union membership at any time and the union cannot lawfully restrict such right; thus, when an employee resigns his union membership, the union must promptly give effect to that resignation, and any attempt to impose internal union discipline on the employee after he resigns from union is unlawful. Local Union No. 104, Sheet Metal Workers' International Association, NLRB Advice Memo Case No. 32-CB-6336 (2008). The rights of employers and unions are secondary to the rights of the Employees.

Here, Hotel employees have submitted a petition to decertify the Union and, on September 24, moved to intervene in the ULP hearings. In the motion to intervene, employee

Margarita Lucero requested the opportunity to voice her "personal opposition to representation by this union, and their uncoerced efforts to collect signatures for the decertification petition." See Motion to Intervene , Exhibit "9."

The Board has recognized that an Employer appropriately withdraws its recognition of the Union when there is an objective showing of the loss of majority support among the Union. See Master Slack, 271 N.L.R.B. 78, 84 (N.L.R.B. 1984). There is a general presumption that the Union enjoys continued majority status; however, it can be rebutted by the employer's production of evidence that it had a good faith belief that the Union no longer enjoyed majority support. See Hotel, Motel & Restaurant Employees Local No. 19 v. National Labor Relations Board, 785 F.2d 796, 799-800 (9th Cir. 1986). Once the employer comes forth with such evidence, the burden shifts to the Board to come forward with evidence that the decline in union support was attributable to the employer's commission of unfair labor practices. Id. The mere allegation that an unfair labor practice occurred prior to a withdrawal of recognition does not automatically cause the withdrawal to be unlawful. Id. The Board must determine the causal relationship between Respondent's alleged unlawful conduct and the employees' dissatisfaction with the Union. Id. The Ninth Circuit has acknowledged four factors in determining that the unfair labor practices had tainted the signatures on the employee petition expressing dissatisfaction with the union: (1) the length of time between the unfair practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility for a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. East Bay Auto. Council v. NLRB, 483 F.3d 628, 634

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(9th Cir. 2007), citing Master Slack Corp., 271 N.L.R.B. 78, 84 (1984). If the Board cannot affirmatively prove an unlawful "taint", the withdrawal of recognition must stand as the uncoerced desire of the employees. See Hotel, Motel & Restaurant Employees Local No. 19 supra at 800.

The Board has approved procedures that allow the Regional Director to evaluate the relationship between unfair labor practices and a decertification petition. See e.g. Saint Gobain Abrasives, Inc., 342 N.L.R.B. 434 (2004). The Board has determined that Regional Director should investigate a possible causal relationship between the unlawful conduct and the petition by way of an evidentiary hearing. Saint Gobain Abrasives, Inc., supra; Olson Bodies, Inc., 206 NLRB 779 (1973). Such an evidentiary hearing would give the Regional Director the opportunity to review the handwritten declarations that clearly explain the reason for the employees' withdrawal of support for the Union.

The proper course for the Regional Director to take would be to stay the pending proceedings and schedule an election so that the Hotel's employees can make their voices heard once and for all on whether they wish to be represented by the Union. See Sparks Nugget, Inc. v. Scott, 583 F. Supp. 78 (D. Nev. 1984). In Sparks Nugget, the National Labor Relations Board halted the processing of a decertification election petition and subsequent de-certification election to allow for the adjudication of Unfair Labor Practice charges before an administrative law judge. Id. The employer filed for mandamus in the district court to require the Board to investigate and process the election petition.

The Court exercised jurisdiction over the matter, noting that the petitioner asserted a Sparks Nugget violation of its due process rights. Id. at 82. The Court ordered the Board to

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report on the progress of the Administrative Law Judge hearing and on a timeline in which it would begin investigating the petition in accordance with petitioners' rights. Id. at 86.

Notably, in Sparks Nugget, unlike here, the Court concluded that the Board had extensively and adequately investigated the decertification petitions. In the present case, by contrast, the "investigation" of the signatures on the petition involved nothing more than a lawyer from the Regional Director's office asking employees if they would like to revoke their signatures. The Regional Director here should be ordered to proceed immediately to promptly and *properly* order a decertification election based on the employees' properly filed petition.

C. **The Petitioner is Entitled to Relief Under 28 U.S.C. § 1361 Because It Has No Other Remedy and Because the Regional Director is Violating His Clear Nondiscretionary Duties.**

The Petitioner acknowledges the requirement stated in Heckler v. Ringer, 466 U.S. 602, 616 (1984), that "[t}he common-law writ of mandamus, as codified in 28 U. S. C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." The requirements of Heckler are fulfilled here.

The Petitioner has no opportunity to appeal the Region's refusal to investigate its ULP against the Union for bad-faith bargaining, or to refuse to delay the pending ULP hearing while it seeks not only administrative but injunctive relief against the already-embattled Hotel. It has no recourse for the Region's refusal to abide by the terms of the settlement agreement whose terms the Hotel has already fulfilled. The Hotel has exhausted all avenues of relief for these clear violations. Moreover, both the Hotel and its employees are being left in a state of limbo while

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the Region refuses to investigate or pursue their claims or call an election and instead exclusively devotes itself to pursuing the claims made by the Union.

The Board is charged with investigating ULPs that are filed with it, and, as noted above, its own rules provide for the reopening of dismissed charges upon evidence of fraudulent concealment. In addition, its own Rules provide that all parties must conduct themselves within the canons of legal ethics; it is obviously improper for the Region itself to violate them, as it may be if it is seeking injunctive relief with respect to charges that were settled on condition that it would not do so. See, e.g., NLRB Rules and Regulations § 102.177(a) ("Any attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts…"). Because the Petitioner has no recourse and because the Regional has failed to discharge his clear duties, the requirements of Heckler have been satisfied.

D. The Board's Pursuit of 29 USC 160(j) Injunctive Relief is Unwarranted.

The Regional Director, through counsel, on August 26, 2010, indicated that the Region was pursuing a request for injunctive relief under Section 10(j) of the Act to return the relationship of the Parties to the *status quo ante*. See Exhibit 4, p. 1613; see also Exhibit 9. The Regional Director, and the Board, are pursuing injunctive action that is unwarranted by the law.

1. Injunctive relief pursuant to 29 USC 160(j) is inappropriate for the facts now pending before the Board.

29 USCS § 160(j) is an extraordinary remedy to be used by Board only when, in its discretion, an employer has committed such egregious unfair labor practices that any final order

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of the Board will be meaningless or so devoid of force that remedial purposes of statute will be frustrated. Boire v Pilot Freight Carriers, Inc. (1975, CA5 Fla) 515 F2d 1185, cert denied 426 US 934 (1976) (criticized in NLRB v Electro-Voice, Inc. (1996, CA7 Ind) 83 F3d 1559) and (criticized in Scott ex rel. NLRB v Stephen Dunn & Assocs. (2001, CA9 Cal) 241 F3d 652).

The Ninth Circuit determined that District Courts may only issue injunctive relief that is "just and proper" in light of the facts and law. See Miller v. California Pacific Medical Center, 19 F.3d 449 (9th Cir. 1994) (en banc). In determining the merits of the Board's petition for 10(j) injunctive action, Courts must keep in mind the underlying purpose of § 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes a charge. Id. at 459-460. In deciding whether interim relief is "just and proper," the Board must make a threshold showing of likelihood of success by producing some evidence to support the unfair labor practice charge, together with an arguable legal theory. Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO, 611 F.3d 483, 491 (9th Cir. Cal. 2010). If a likelihood of success is established, the petitioner must then also prove that irreparable injury is *likely* in the absence of an injunction. See id., citing Winter v. NRDC, Inc., 129 S. Ct. 365, 275 (2008) (in its ruling, the Supreme Court specifically overturned the more lenient standard found in Miller v. California Pacific Medical Center, 19 F.3d 449, 460 (9th Cir. 1994) (en banc) that permitted 10(j) injunctive relief that presumed the existence of an irreparable injury once petitioner established a likelihood of success). Thus a petitioner seeking an injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.

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Winter v. Nat'l Res. Def. Council, Inc., 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008); Toyo Tire Holdings of Ams., Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975, 982 (9th Cir. Cal. 2010). None of the Winter elements are met here.

First, the Regional Director is unlikely to prove the Hotel improperly withdrew its recognition of the Union. In other petitions for 10(j) relief, courts have denied the NLRB's request for injunctions because an employee-initiated decertification petition made it unlikely that the underlying ULP would succeed. Aguayo v. San Diego/Imperial Counties Chapter of the American Red Cross 2000 U.S. Dist. LEXIS 20579; 166 L.R.R.M. 2953 (S.D.Cal. December 14, 2000). In Aguayo, the court denied a regional director's petition for injunctive relief to compel a local chapter of the Red Cross to return recognition to the Union despite an employee decertification petition. Id. at *1. In support of his petition, the Regional Director argued that the Red Cross improperly encouraged the progress of the decertification petition by informing the employees of the number of signatures to de-certify the Union and by referencing wage increases for the group once the de-certification was complete. Id. at *7-9. The court walked through the four Master Slack elements, and found that the Employer's reference to increased wages and bald support of a decertification petition still did not justify a 10(j) injunction, and therefore, did not block a pending de-certification petition. Id. at *11. The de-certification was thus ruled an objective showing of the employee's interests and strong evidence that the Board's pursuit of a 10(j) injunction to compel the Employer to recognize the Union was misplaced.

Here, not a single handwritten statement gathered from the Employees mentions any sort of promised benefit or management inducement that persuaded the employees to sign a decertification petition. Instead, these Employee statements all refer to the Union's bullying

behavior, the failure of their pension fund, and the damage that the Union's boycott has done to the Hotel. The ULPs that the Regional Director argue influenced the employees in their de-certification petition were filed beginning more than nine (9) months prior to the de-certification petition being delivered to the management. None of the seventy-three (73) collective declarations mention anything involving alleged unfair labor practices by the Hotel. Based upon the declarations provided by a large majority of the petition's signatories, the allegedly unlawful conduct with which the Union has charged the Hotel had no effect on the employee's choice to be rid of the Union.

The bad-faith bargaining charge is also not likely to be successful. The Union's claim that the Hotel did not intend to actually reach an agreement will be frustrated by the 679 pages of material provided to the Board showing the internal bargaining notes, charts, calculations, and quantifications made by the Hotel and its executive team. Nowhere in the notes is there any suggestion of the Hotel's intention not to reach an agreement. Quite the opposite. Any organization that placed such a huge amount of effort, thought, and resources into negotiations and bargaining was not bargaining in bad faith. Furthermore, "[w]ithout substantial evidence that a negotiating party's attitude is inconsistent with its duty to seek an agreement, the mere fact that it adamantly insists on a bargaining position or has not budged from its position on most issues cannot suffice to render it guilty of a refusal to bargain in good faith." Wal-Lite Div. of United States Gypsum Co. v. NLRB, 484 F.2d 108 (8th Cir. 1973), citing NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26 (9th Cir. 1968). In Wal-Lite, for example, both parties proposed collective bargaining agreements, and the company changed its position on some provisions as it negotiated with the union. The company also willingly met with union representatives to explain

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its proposals. The Eighth Circuit found no evidence of bad faith when both parties were insistent in the positions "as they had a right to be." Id. at 112. Here, the evidence shows that the Hotel made similar good-faith efforts. It agreed with the Union on at least 87% of the provisions of a new collective bargaining agreement. See Exhibit 1, Attachment F, p. 13. Company negotiators willingly met with union representatives. Certainly, the union's claim that the company acted in bad faith cannot prevail when the union never even proposed a complete offer.

Second, the Board will not suffer irreparable harm in the absence of injunctive relief. The Ninth Circuit has held irreparable harm in the context of 10(j) junctions is "permitting an allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO, 611 F.3d 483, 494 (9th Cir. 2010). Here, the Board's remedial authority can only be properly exercised after it has conducted an investigation of the de-certification petition. The Hotel has not recognized the Union since July 2, 2010. There is no clamor for a return of unionization and bargaining from anyone other than the Union itself and its minority following at the Hotel. Therefore, forestalling a 10(j) injunction will not cause irreparable harm to the remedial authority of the NLRB.

Third, an injunction against the Hotel, after such a long drawn-out effort to reach an agreement, and in the face of the employees' disaffection for the Union, would be unfair. In balancing the burdens of a 10(j) injunction on the Hotel against the burdens on the public, the proposed injunction would clearly levy a more weighty and penalizing burden against the Hotel than is warranted by any public interest gain. Under a 10(j) injunction the Hotel will be forced to return to bargaining with the Union, go through great time and expense in revoking the policies

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and procedures put into place in its impasse offer, and be forced to ignore the clear intentions of a majority of its employees. The NLRB, even without an injunction, could still properly investigate the de-certification petition, investigate the ULPs filed by the Hotel, and then proceed with a ULP hearing based upon the properly, and fairly investigated facts.

Fourth, an injunction is not in the public interest. There is no public outcry for unionization and contract negotiation at the Hotel from any source other than the Union itself. In fact, the public interest appears to dictate the exact opposite. An injunction forcing unionization upon a group of individuals who clearly are opposed to Union membership is a violation of the rights protected in Section 7 of the National Labor Relations Act, and goes against federal Labor Policy. The public's interest is not to protect labor institutions at all costs; rather, it is to protect the rights of employees to determine their labor relationship with their employer. An injunction that returns the Union to the Hotel over the protests of a majority of the Hotel's hourly employees reeks of injustice.

2. The NLRB's pursuit of 10(j) injunctive action is subject to declaratory relief.

The Ninth Circuit has held that declaratory relief should be granted when it will clarify, settle legal relations in issue, or afford the parties relief from the uncertainty and controversy they face. See Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1112 (9th Cir. 1987); McGraw-Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 342 (9th Cir.), cert. denied, 385 U.S. 919 (1966). For example, in Zolin, the Ninth Circuit determined that declaratory relief was appropriate in a case in which the plaintiffs sought both damages and

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declaratory relief because such declaratory action would (a) educate the public about a handicapped person's rights under the law, and (b) forestall future litigation. Greater Los Angeles Council on Deafness v. Zolin, supra, 812 F.2d at 1113. Thus, courts may only issue declaratory relief when there is an actual case or controversy.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." John S. Griffith Constr. Co. v. United Brotherhood of Carpenters & Joiners, 785 F.2d 706, 709 (9th Cir. Cal. 1986), citing Stewart v. M.M.&P. Pension Plan, 608 F.2d 776 (9th Cir. 1979), quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)). Here, the Board and the Hotel have been engaged in adversarial proceedings before the Board since the Board filed its first Complaint on May 28, 2010. The Board's trial counsel has informed the presiding Administrative Law Judge on the record that the Regional Director has sought permission from the Board to pursue injunctive relief. See Transcript, pg. 1613. The Petitioner has no other means available to oppose the Board's pursuit of injunctive relief. Though Regional Directors cannot seek temporary restraining orders under 29 USCS § 160(j) without obtaining authorization from NLRB itself, the Employer is afforded no opportunity, either within the National Labor Relations Act or in the Board's Rules and Regulations, to oppose this procedure. *See* NLRB Release W-1444 (May 28, 1975); 29 CFR §§ 101 et seq. This Court is the only venue in which the Hotel may oppose the Board's misguided pursuit of an extraordinary injunctive action to return parties to a long-past *status quo ante*.

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IV. CONCLUSION

The action of this Court is necessary to vindicate the rights of the Petitioner and its employees against the refusal of the Respondent to fulfill his duty. Petitioner respectfully requests that its Petition for Writ of Mandamus under 28 U.S.C. § 1361 be GRANTED as set forth in the accompanying proposed Order.

DELISIO MORAN GERAGHTY & ZOBEL, P.C.

943 WEST 6TH AVENUE
ANCHORAGE, ALASKA
99501-2033

(907) 279-9574

Respectfully submitted this 8th day of October, 2010.

/s/ Arch Y. Stokes
Arch Y. Stokes, Esq., *pro hac vice pending*
Email: astokes@stokesroberts.com
Karl M. Terrell, Esq., *pro hac vice pending*
Email: kterrell@stokesroberts.com
Stokes Roberts & Wagner
3593 Hemphill St.
Atlanta, GA 30337
Telephone: 404-766-0076
Facsimile: 404-766-8823

/s/ Adolf V. Zeman
Adolf V. Zeman, Esq., ABA 0411082
Email: azeman@dmgz.com
DeLisio Moran Geraghty & Zobel, P.C.
945 West Sixth Avenue
Anchorage, Alaska 99501
Telephone: 907-279-9574
Facsimile: 907-276-4231

Arch Y. Stokes, Esq., *admitted pro hac vice*
Email: astokes@stokesroberts.com
Karl M. Terrell, Esq., *admitted pro hac vice*
Email: kterrell@stokesroberts.com
Peter G. Fischer, Esq., *admitted pro hac vice*
Email: pfischer@stokesroberts.com
Stokes Roberts & Wagner
3593 Hemphill St.
Atlanta, GA 30337
Telephone: 404-766-0076
Facsimile: 404-766-8823

Adolf V. Zeman, Esq., ABA 0411082
Email: azeman@dmgz.com
DeLisio Moran Geraghty & Zobel, P.C.
945 West Sixth Avenue
Anchorage, Alaska 99501
Telephone: 907-279-9574
Facsimile: 907-276-4231

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

REMINGTON LODGING & HOSPITALITY LLC Petitioner, v. RICHARD AHEARN, in his official capacity as REGIONAL DIRECTOR of NATIONAL LABOR RELATIONS BOARD, REGION 19, Respondent.	)	Case No. 3:10-cv-214

CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the above with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record:

Eric G. Moskowitz
Dawn L. Goldstein
Gary M. Guarino

This 8th day of October, 2010.

s/s Peter G. Fischer, Esq., *admitted pro hac vice*

DELISIO MORAN GERAGHTY & ZOBEL, P.C.

943 WEST 6TH AVENUE
ANCHORAGE, ALASKA
99501-2033

(907) 279-9574