UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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MILWAUKEE, WI 53203-2281

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November 29, 2012

RICHARD SAKS, ESQ.
HAWKS QUINDEL, S.C.
222 E ERIE ST STE 210
MILWAUKEE, WI 53202-6000

Re: Palermo Villa, Inc. and BG Staffing (Joint employers)
Case 30-CA-082300

Dear Mr. SAKS:

We have carefully investigated and considered your charge that PALERMO VILLA, INC. and BG STAFFING have violated the National Labor Relations Act.

The Region has carefully investigated and considered your charge against Palermo Villa, Inc. and BG Staffing alleging violations under Section 8 of the National Labor Relations Act.

Decision to Partially Dismiss: Based on that investigation, I have concluded that further proceedings on the following portions of the charge are not warranted, and I am dismissing those portions of the charge for the below stated reasons. All other portions of the charge remain outstanding.

The Board's analytical framework for examining alleged violations of Section 8(a)(3) of the Act was established in *Wright Line,* 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation of Section 8(a)(3), it must be proven by a preponderance of the evidence that employees' protected activities were a motivating factor in the employer's decision to take adverse employment actions against the employees. *Id.* In establishing such, it must be shown that employees engaged in union and/or protected concerted activity, that the employer had knowledge of such activity, and that the employer carried out adverse employment actions because of the activity. *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002). Once a showing is made with respect to these elements, the burden shifts to the employer to establish it would have taken the same action notwithstanding the union and/or protected concerted activity. *Manno Electric,* 321 NLRB 278, 280, fn. 12 (1996); *Park 'N Fly, Inc.*, 349 NLRB 132, 136 (2007).

The charge alleges, in part, that on May 29, 2012, Palermo Villa, Inc. (Employer) required employees to re-verify their work authorizations within an unreasonable and unwarranted 28 day period, as a means of interfering and retaliating against employees' union and protected concerted activities. This allegation is not supported by the evidence. The investigation disclosed that the Employer received a Notice of Inspection from the U.S.

Department of Homeland Security, Homeland Security Investigations (HSI) on or about February 15, 2011, which commenced a review of the Employer's Form I-9 documents, and the Employer's compliance with the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986. Following a review of the Employer's relevant documents, U.S. Department of Homeland Security, U.S Immigration and Customs Enforcement (ICE) notified the Employer on or about May 2, 2012, that it had concluded its review of the Employer's documents, and that it would be issuing a Notice of Suspect Documents (NSD) to the Employer regarding certain affected employees. The investigation further disclosed that ICE continued to communicate with the Employer regarding this matter during the weeks following the initial May 2, 2012, contact. Subsequently, on or about May 29, 2012, the Employer notified a large number of employees of the need for them to re-verify their work authorizations within 28 days. The investigation established that the Employer required the affected employees to re-verify their work authorizations in response to the information provided by ICE regarding the forthcoming NSD, as well as the Employer's general obligations under extant immigration law, and not because of any union or protected concerted activities in which the employees engaged.

The charge further alleges, in part, that on May 31, 2012, the Employer unreasonably accelerated the re-verification time period to 10 days as a means of further interfering with and retaliating against employees on account of the aforementioned protected activities. The investigation determined that on or about May 29, 2012, the Employer, in the course of its continued investigation and response to the NSD and other immigration issues that had been presented by the ICE investigation, learned that HSI has a policy that all re-verifications that occur within 10 days of receipt of a NSD will be presumed to be reasonably timely, and that in order to comply with this presumption of responding within a reasonable time period, the Employer needed to shorten the timeframe for which employees could re-verify their work authorizations. As such, on May 31, 2012, after having been served with the official NSD by ICE on May 30, 2012, the Employer began informing the affected employees of the need to re-verify their work authorizations within 10 days. Although the employees had engaged in union and protected concerted activities around this time period, including their actions in connection with the filing of the petition in Case 30-RC-081963 on May 29, 2012, the evidence established that the Employer would have taken its actions of shortening the time period for employees to re-verify their work authorizations to 10 days, even absent any protected activity on the part of the employees, thus satisfying its burden under *Wright Line.*

The charge further alleges, in part, that the Employer engaged a temporary staffing agency and required employees to train the temporary agency workers in an effort to chill the employees' protected activities. The investigation demonstrated that the Employer has consistently used employees from temporary staffing agencies to supplement its workforce for many years. The evidence did reveal that the Employer increased the number of temporary employees in its workforce in or about the middle of May 2012. However, the investigation showed that the Employer's increase in the number of temporary employees was done in response to the pending immigration issues discussed above and in anticipation and preparation for the possible disruptions to its workforce that could result from the notification to the affected employees of their obligation to re-verify their work authorizations in order to continue working

for the Employer. Thus, it was concluded that the Employer would have taken this action of increasing the number of temporary employees in its workforce, even absent any protected activity on the part of its employees.

The charge further alleges, in part, that the Employer, on June 8, 2012, terminated approximately 75 striking employees for their alleged failure to provide work authorization documents, notwithstanding the June 7, 2012, letter from ICE Regional Counsel that ICE stayed further action regarding the NSD that it had previously issued to the Employer. The investigation revealed that although ICE had stayed the processing of its previously issued NSD, that did not relieve the Employer of its general obligations under immigration law precluding it from employing individuals unauthorized to work in the United States. Neither did the stay of the NSD provide any temporary work authorizations to the employees named in the NSD, or shield the Employer from any possible civil or criminal liability for employing individuals who may not be authorized to work in the United States, if and when the processing of the NSD were to be resumed. Accordingly, the investigation determined that the Employer would have taken its action of terminating those affected employees who did not re-verify their work authorizations to the Employer, even absent any protected activity on the part of its employees.

The charge further alleges, in part, that the Employer did not require non-striking employees to similarly re-verify their work authorization documents. There was insufficient evidence submitted by the Charging Party or otherwise revealed during the course of the investigation to support this allegation.

In consideration of the dismissal of certain allegations of this charge, the Charging Party has not established that its strike was an unfair labor practice strike, either at its inception nor through conversion at some later point in time. The charge further alleges, in part, that the Employer declined to recognize the majority status of the union and refused to bargain with the union. An employer is generally not required to accede to a request from a union to voluntarily recognize it as the collective-bargaining representative of its employees, and an employer can lawfully wait for a union to be certified by the National Labor Relations Board (Board) following an election before bargaining with the union regarding the terms and conditions of employment of its employees. However, the Board has the authority to issue a bargaining order where the union's majority support among the employees has been otherwise established to remedy employer unfair labor practices that are sufficiently serious as to preclude the holding of an election that truly reflects employee choice. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In light of the dismissal of certain allegations of this charge, as outlined above in this letter, the remaining unfair labor practice allegations are not sufficiently egregious, nor would they have the tendency to undermine majority strength or impede the election process, as to preclude the holding of an election that would fairly reflect the will of the employees. Rather, they are the type of unfair labor practice allegations that can be remedied by the Board's traditional means and allow for the re-establishment of the laboratory conditions necessary for conducting a fair election.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **December 13, 2012.** If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other documents you want us to consider through the Agency's website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than December 12, 2012.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov, click on **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before December 13, 2012.** A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is

successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Irving E. Gottschalk

IRVING E. GOTTSCHALK
Regional Director

Enclosure

cc GENERAL COUNSEL
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Form NLRB–4767

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

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Case Name(s).

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Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

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(Signature)