#### UNITED STATES OF AMERICA

#### **BEFORE THE**

### NATIONAL LABOR RELATIONS BOARD

**REGION 31** 

VERITAS HEALTH SERVICES, INC. d/b/a CHINO VALLEY MEDICAL CENTER,

Employer,

and

UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO,

Petitioner.

Case No.: 31-RC-8795

# PETITIONER'S ANSWERING BRIEF IN OPPOSITION TO EMPLOYER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON EMPLOYER'S ELECTION OBJECTIONS

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#### I. INTRODUCTION AND STATEMENT OF THE CASE

Petitioner United Nurses Associations of California/Union of Health Care Professionals ("UNAC" or "Union") ran a fair and informative campaign for an approximately 125-nurse unit at Employer Veritas Health Services d/b/a Chino Valley Medical Center ("Employer," "CVMC," or "Hospital"), and the Union soundly won in the April 2010 election conducted by the National Labor Relations Board ("NLRB" or "Board"). After the election, the Employer filed 29 election objections, alleging prounion supervisory conduct, union vandalism and threats of violence, and union manipulation and unauthorized use of employee photographs. A four-day hearing was held before Administrative Law Judge ("ALJ") Lana H. Parke on May 25-27 and June 7, 2010. In the Employer's post-hearing brief, the Employer withdrew a number of objections regarding prounion supervisory conduct and all objections regarding union vandalism and threats of violence [Report at 2:11-13]. On July 7, the ALJ issued her Report and Recommendations on Objections ("Report"), recommending that "the Employer's objections, in their entirely, be overruled" [Report at 14:19-20].

On August 18, the Employer filed Exceptions to the ALJ's Report and a brief in support, claiming that Judge Parke prejudicially erred by failing to require production of and admit allegedly relevant evidence; by improperly determining that the supervisors' prounion conduct did not materially affect the outcome of the election; and by wrongly concluding that the Union's use of employee photographs did not interfere with the election. The Employer's fact section manipulatively cites to the record exhibits and transcript references to stand for propositions that are either not supported by—or in multiple occasions are directly contradicted by—the record evidence to which it cites. Even under the Employer's fanciful description of the evidence, the Employer has not asserted objectionable conduct that materially affected the outcome of the

election so as to support setting aside the election. Because the ALJ's recommendations are soundly rooted in the substantial evidence introduced at the hearing, the Union submits that the Board should adopt the ALJ's recommendation to overrule all objections in their entirety.

#### II. STATEMENT OF FACTS

The Union's organizing campaign began around December 2009 [Tr. 198:11-13]<sup>1</sup> when the Union was contacted by non-supervisor staff nurse Sharon Lamoine [Tr. 52:9-11, 202:24-25].<sup>2</sup> On February 22, 2010, the Union petitioned for an election of all nurses, including charge nurses and relief charge nurses, at CVMC [Report on Objections, p. 1 & Attachment C (Union's Petition provided as an exhibit therein)]. On March 5, 2010, the Union and Employer agreed to a list of 25 names as supervisors for purposes of the Act and signed a stipulated-election agreement [*see* Tr. 297:1-6; EX 2, Attachment A-2 (list of 25 names)], which led to the petitioned-for unit to be approximately 125 nurses. After that point, any supervisory conduct vis-à-vis the nonsupervisory nurses completely stopped through the election on April 1-2, 2010, as is described in detail herein. There were 72 votes for the Union, 39 votes against, 4 challenged ballots, and 1 void ballot [Report on Objections, p. 1], meaning the Union's margin of victory was 15 votes. *See Chinese Daily News*, 344 NLRB 1071, 1072 (2005) (calculating

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<sup>&</sup>lt;sup>1</sup> References to the Reporter's Transcript of the hearing will be formatted as Tr. [page]:[line] – [page]:[line], the Employer's exhibits will be formatted as "EX" followed by the exhibit number, and the Union's exhibits will be formatted as "UX" followed by the exhibit number.

<sup>&</sup>lt;sup>2</sup> The Employer erroneously describes Lamoine as a Charge Nurse [ER Brief at 6 & 32] even though the ALJ did not consider her to be a supervisor because "her name does not appear on the 2010 Supervisory Status Stipulation" entered into by the parties [Report at 8, n.11]. The ALJ's finding is supported by the substantial evidence in the record because the only record evidence as to Lamoine's position is that she was a staff nurse in the Emergency Department until she ended her employment during the first week of January 2010 [Tr. 52:2-11]. Lamoine's name also did not appear on the 2008 Supervisor Status Stipulation entered into by parties.

margin of victory by assuming the challenged votes would have voted in favor of the objecting party, and dividing the new revised total by two).

#### A. Only UNAC Passed Out and Collected Union Authorization Cards from Employees.

Although the Employer alleged that supervisors solicited Union authorization cards from employees, the Employer did not produce any evidence to support that Supervisors passed out, collected, or were able to get any specific employee to sign a card. In fact, multiple witnesses called by the Employer consistently testified that the only person who obtained signed Union authorization cards from employees was then-UNAC Organizing Director Kyle Serrette [Tr. 196:15-5]. Before anyone could sign a Union card, Serrette gave a verbal test about the Union which the employee had to pass in Serrette's view before the employee would receive a Union card [Tr. 116:10-19 (then-unit employee Ronald Magsino), 295:7-14 (Serrette); 314:3-9 (Supervisor Cheryl Gilliatt corroborated that Serrette would not let her sign a card until she heard his speech first and then he allowed her to sign a card)]. Serrette was the only person to distribute Union authorization cards [Tr. 296:1-3]. Under Serrette's regime, charge nurses would not have been able to obtain Union authorization card signatures from nurses because Serrette alone determined whether a nurse was ready to sign and provided the card to the nurse.

#### B. Some Charge Nurses Learned about the Union Early in the Campaign.

The Employer alleged that supervisors engaged in union campaigning, such as supervisory pro-Union electioneering [Objection Nos. 4-6], supervisors attended Union meetings [Objection Nos. 7-9], supervisors signed authorization cards [Objection Nos. 10-13], supervisors directed employee support of the Union [Objection Nos. 14-16], and supervisors initiated and supported the Union's organizing drive [Objection Nos. 20-21]. In so far as the objections allege that the Union's organizing drive was "initiated" by supervisors, the undisputed evidence

introduced at the hearing was that non-supervisor Lamoine initiated the Union campaign [Tr. 52:9-11, 202:24-25; *See, supra,* footnote 2].

#### 1. Charge Nurses' Involvement Generally

The Union reached out to a broad range of people because—according to Serrette—the "union IQ" is pretty low everywhere, so Serrette wanted to bring people to a place where they understand what it means to have a union; for Serrette, anyone could hear this message—including the CEO—to overcome stereotypes about unions [Tr. 204:17-205:4].

The Employer asked Serrette many questions about the Union's leaders in its organizing campaign at CVMC. According to Serrette, "leaders are people who have followers," but not all leaders could assist in the Union's campaign; so to him, for example, then-relief charge nurse Angelica Silva "was a leader, but just not a leader that I could use in my campaign" [Tr. 214:19-24, 267:2-6]. The Union never used any charge nurses as leaders with respect to the Union's organizing campaign [Tr. 215:1-3]. While charge nurses may appear on a committee leader list because the lists were not diligently kept, no charge nurses were actually on the organizing committee [Tr. 245:13-22, 247:9-13, 298:21-299:7]. No supervisor testified to being on the organizing committee. The Employer asked about the Union's note sheets where charge nurses were marked as an "ID'd Leader," which simply meant that they had followers, not that they would be individuals who could assist the Union in its organizing campaign [Tr. 222:25-223:10]. Similarly, the "Targeted by leader" list merely meant an employee leader in the Union campaign was going to talk to this person in some fashion [Tr. 228:6-9]. The "potential leader" designation meant someone else had told Serrette that the person had leadership qualities, but Serrette had not confirmed that information [Tr. 272:5-16]. These designations never meant the person was a leader in the Union's campaign.

The Employer needed to introduce—but failed to introduce—non-hearsay evidence of actual leadership in the Union's campaign. The record evidence about supervisors' Union involvement is discussed below by nurse in alphabetical order. It's important to note that all of the below conduct with employees occurred **before** the parties' reached a stipulation as to supervisors on March 5—four weeks before the Union election.

#### 2. Dolly Casas' Involvement

Stipulated supervisor Dolly Casas testified that she never talked to any nurses in the ICU about the Union [Tr. 178:17-19]. The ALJ found that "Casas attended some union meetings prior to March 5" [Report at 6:5-6], but the record contains no evidence about Casas attending Union meetings [Tr. 177:4-181:22 (Casas' testimony); EX 27 (corroborating Union note showing not one Union meeting is checked off as attended by Casas)].

#### 3. <u>Liezle Castro's Involvement</u>

At the very beginning of the campaign, before Serrette had met with stipulated supervisor Liezle Castro, she identified the union sympathies of some Chino employees and gave the list to Gilliatt [Tr. 205:16, 218:10-16, 220:18-24]. At one point, Castro told Serrette that she had spoken to her mother Ofelia Margolis, who is a charge nurse, and Margolis had identified who in her department she regarded as prounion [Tr. 219:19-220:12]. Castro tried to set up a meeting with her mom and Serrette, but the meeting never occurred [Tr. 235:20-236:21]. Although at the end of one meeting Castro took assignments of people Serrette wanted to meet with at the Hampton Inn, none of those people ever went to the hotel [Tr. 218:22-219:3]. Castro did sign a Union card [EX 10], but no evidence was introduced to show Castro signed a card in front of employees over whom she had supervisory authority. Because Castro appeared at the hearing to

testify about the **rejected** exhibit, EX 60,<sup>3</sup> and Castro did not offer any evidence to show she engaged in supervisory prounion conduct at any point [Tr. 364:9], the ALJ properly noted that although "Magsino told Castro to let employees know that Union authorization cards could be signed at the Hampton Inn[, w]hether see did is unknown" [Report 6:10-11].

#### 4. Rhoda DeLeon's Involvement

Stipulated supervisor Rhoda DeLeon talked with then-staff nurse Ronald Magsino<sup>4</sup> about the Union on two occasions [Tr. 48:12-17, 82:13-23]. One conversation occurred at Denny's Restaurant, where Serrette talked to DeLeon mostly [Tr. 83:10-13] and staff nurse Teer Lina was present [Tr. 83:1, 337:2-12]. The Employer introduced a Union note, marked as EX 25, which

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Additionally, the Employer refers to statements in internal Union documents as evidence [see, e.g., ER Brief at 6-7 (citing EXS 21, 22, 25, 27, 29, 31 & 32)] even though the ALJ unambiguously cautioned at the Hearing that the Employer's counsel had not shown that these internal Union documents qualified as business records for evidentiary purposes [Tr. 237:5-238:1 (ALJ explaining "although I have received . . . all of these exhibits, it does not mean that I am receiving them for the truth of the matter asserted" because "these are not business records" as "they are not the kind of business records that rel[y] upon factual and specific and numerical information, and they have a different purpose entirely.")]. Despite the ALJ's clear ruling to the contrary, the Employer nevertheless boldly and repeatedly cites to the documents for the truth of the matters asserted in its Exceptions brief regarding Supervisor Casas, Castro, Rhoda DeLeon, Jane Huang, Lucia Eiley, and Angelica Silva [ER Brief at 6-7]. The Employer did in fact call Casas, Castro, Eiley, and Silva to testify, and could have asked them about the content of these documents, but chose not to do so. The Employer's decision not to call its own supervisors Huang and Deleon similarly precludes it from relying exclusively on hearsay documents as probative evidence in its brief to the Board.

<sup>&</sup>lt;sup>3</sup> The Employer refers to Employer Exhibit 60 throughout its brief [ER Brief at 11, 13, 29 & 33], but fails to note that the exhibit was rejected [Tr. 364:3-7]. Similarly, the Employer cites Employer Exhibit 4 in its brief [ER Brief at 7], and yet that exhibit was never offered or admitted into evidence at the hearing [Tr. 93:25-94:5]. The Employer refers to Employer Exhibits 42-43 & 46-57 in its brief [ER Brief at 5 & 6], but again fails to note that the ALJ rejected those documents [Tr. 195 (exhibit summary)].

<sup>&</sup>lt;sup>4</sup> The Employer improperly refers to Magsino as "[a]nother union organizer and former employee," who "identified a number of Charge Nurses as being Leaders for the Union" [ER Brief at 5 (citing Tr. 82-84, 143, 145)]. There is no evidence that Magsino was a UNAC organizer during the Union's campaign, but only that he was a CVMC employee [Tr. 48:12-17]. Reviewing the Employer's transcript citations, Magsino does not identify any Charge Nurses as Leaders in Tr. 82-84, and his testimony ended at Tr. 141.

stated "Rhoda showed her support by bringing along [redacted name] to the meeting" [Tr. 224:11-16], and then asked Serrette what this note indicates, to which Serrette responded "she probably brought some of her coworkers with her to the meeting" and she was prounion [Tr. 224:19-23]. There was, however, no testimony from any witnesses, including DeLeon or Serrette, that she actually brought people to the meeting, merely what he thought his note might mean, which suffers from all the problems associated with hearsay. The other conversation with Magsino was a short conversation when Magsino was passing by either the nursing station or in the hallway and he asked her how the nurses upstairs are doing—meaning if they have any questions with regards to the Union—and she responded "they're fine" [Tr. 83:20-84:12]. DeLeon signed a Union card [EX 11], but there was no evidence presented that any unit employees over whom she has supervisory authority were present when she signed the card. The Employer did not call DeLeon to testify.

#### 5. John Del Valle's Involvement

On more than one occasion, stipulated supervisor John Del Valle spoke with unit employees to say: "I have been there (meaning at the hospital) for seventeen years, I had never been part of the Union, and I really didn't feel the need for a union" [Tr. 366:3-15]. At Magsino's request, Del Valle went to the Hampton Inn to speak with UNAC employees, and signed a Union authorization card while he was there [Tr. 366:16-23, EX 12; *accord* Tr. 222:13-14 (Serrette)]. Two other charge nurses—and no unit employees were present—during Del Valle's visit at the hotel, but the other two charge nurses were not present during Serrette's presentation about the Union [Tr. 367:2-368:12].

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#### 6. Susy Eiley's Involvement

Stipulated supervisor Lucia "Susy" Eiley first became involved with the Union when Magsino asked her to meet with Serrette [Tr. 143:5-9], but Magsino and Eiley never discussed whether or not she would support the Union [Tr. 143:13-15], nor did she tell Magsino how she felt about the Union [Tr. 143:21-23]. Eiley met with Serrette to become informed about the Union [Tr. 144:1-2]. Serrette recalls Eiley attending a meeting at a nurse's home where seven or eight nurses attended, and Eiley started off with a lot of questions, but at the end seemed to understand what it meant to have a union and the merits of having a union [Tr. 231:5-232:17]. Eiley also attended a meeting at Denny's Restaurant with Magsino, Lamoine, and Annie Arona [Tr. 144:12-17], where Serrette informed them about the Union and what the Union could do [Tr. 144:21-145:7].

Serrette later asked Eiley to ask other people to come to hear what he had to say regarding the Union [Tr. 145:11-17]. Eiley never affirmatively approached an employee to say that he or she should go hear what Serrette has to say about the Union [Tr. 147:5-8]. Instead, when coworkers approached her with questions about Serrette or Union meetings, Eiley would respond "if you want to know anything, go ask Kyle [Serrette]" [Tr. 146:14-23]. She thinks she may have told employees that the Union was holding meetings at the Hampton Inn to have cards signed [Tr. 164:13-16]. Eiley never encouraged any nurse over whom she has supervisory authority to sign a Union authorization card, never distributed a Union authorization card, and never directed any employee over whom she has supervisory authority to vote for the Union [Tr. 166:3-10]. There was a hearsay note taken by Serrette that Eiley told unidentified people "to stay strong" with no further explanation of what that meant, nor was Eiley asked whether she had in fact made that statement when the Employer called her to testify [Tr. 230:21-231:4; EX 29].

Eiley attended two meeting at the Hampton Inn [Tr. 147:21-148:2], and drove by herself on both occasions [Tr. 164:20-165:1]. Present at the first meeting were Magsino, Marlene, and two other employees whose names Eiley did not know [Tr. 148:21-149:1, 166:11-18]. Serrette asked questions, gave information regarding what unions do and stated that this was the first of two meetings; no Union cards were signed at the first meeting [Tr. 149:12-150:19]. Present at the second meeting were Magsino, Marlene, and four other employees whose names Eiley did not know [Tr. 151:6-11, 166:19-23]. Serrette began the second meeting recognizing that employees were ready to sign cards at this meeting, but he first gave a test [Tr. 151:19-152:13]. After Serrette determined which employees had passed the test Serrette would tell the person that he or she could now sign a Union card [Id.]. One person at that second meeting did not sign a Union card [Tr. 152:17]. Eiley asked questions, but does not recall voicing support for the Union [Tr. 152:22-153:6]. Eiley may have told two or three people that she signed a Union card [Tr. 155:12-156:2].

Magsino communicated with Eiley through text messages [Tr. 58:3-16], but not relating to getting employees to sign cards [Tr. 156:3-5]. Although UNAC sent an e-mail to Eiley, she "just deleted it" without "pay[ing] much attention to it" [Tr. 156:6-9].

#### 7. Cheryl Gilliatt's Involvement

Stipulated supervisor Cheryl Gilliatt was a relief charge nurse when the Union campaign began, and was promoted to Director of Emergency Services on March 15, 2010 [Tr. 307:17-21]. She testified that she was never supportive of the Union because she was "always undecided" and "wanted to gather facts and be open-minded" [Tr. 320:13-15]. When she was promoted on March 15, she started attending briefings; and after she learned more, she "became pro-Hospital" [Tr. 320:16-18]. After March 15, Gilliatt informed "at least half of the [Emergency Department]

staff"—between twenty and thirty unit employees—that she did not support the Union [Tr. 320:20-23, 321:18-24]. She explained to the unit employees: "I have been learning a lot and the Union has made promises that I don't believe they can uphold" [Tr. 322:6-8]. She also instructed approximately twenty employees, whom she supervises, to vote against the Union by saying: "I have learned about both sides, and I believe that supporting the Hospital is going to be the best choice" [Tr. 323:10-324:18]. In the week of the election, Gilliatt joined in a letter with top management officials to encourage all eligible votes to the vote "no" in the Union election, and this letter is discussed below.<sup>5</sup>

Gilliatt testified that she talked to employee Magsino and "other employees" about the union organizing on several different occasions, although the identities of the nurses present and the location of the conversations were not recalled [Tr. 55:17-20, 56:10-15, 57:18 (Teer Lena "might" have been present during the discussions); 308:10-310:10 (Gilliatt had no recollection of specific conversations, but recalled "general conversation about we need to find out more facts" and "learn all we can")]. Magsino, however, testified that Lamoine "was doing the organizing" and Gilliatt "was just present when they were talking about it" [Tr. 56:16-17]. Lamoine was the person who approached Magsino about the organizing campaign—not Gilliatt [Tr. 51:15-52:11, 53:20-22, 54:5-6], and it was Magsino who asked Gilliatt to talk with Serrette [Tr. 84:17-23].

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<sup>&</sup>lt;sup>5</sup> The Employer claims that an active union supporter told Gilliatt—after she decided to oppose the Union—that she was "lucky it was just [her] car" that was vandalized and "at least you're not dead" [ER Brief at 6, n.4]. These allegations, which were the basis of separate objections, were disproven by the Union at the Objections Hearing [see Union Post-Hearing Brief at 15-16, 30-32], but the ALJ did not rule on the Employer's objections concerning these alleged threats because the Employer withdrew the objections in its post-hearing brief [Report at 2:11-13].

<sup>&</sup>lt;sup>6</sup> The Employer further embellishes the record when it writes: "According to RN Teer Lina, Gilliatt openly and actively campaigned for the union" [ER Brief at 6 (citing Tr. 337-38)]. What the records shows is that the Employer's counsel asked Lina the leading question: In January

Gilliatt attended the Hampton Inn during the period when Union cards were being signed [Tr. 313:13-15]. Immediately upon arrival, Gilliatt told Serrette that she "was in a hurry and wanted to leave" [Tr. 314:2-3]. Although other unit employees attended the meeting, Gilliatt did not supervise any of the people who were present at that meeting [Tr. 313:20-23, 322:13-323:9]. Gilliatt did not sign the Union authorization card until after she had spoken with the Union's attorney in another room and the nonsupervisory employees **had already left** by the time Gilliatt finished speaking with the attorney [Tr. 314:9-315:4, 316:21-317:5, EX 13].

After the meeting, Gilliatt spoke with the Radiology nurse Geneva Coates to see if she had been to the Hampton Inn since she had until Sunday to sign a card, and spoke to Radiology nurse Tracy \_\_\_\_ to ask "if she had gone," to which Tracy replied that she had already talked to Lina [Tr. 316:12-18]. Gilliatt claimed that she told approximately ten employees to go to sign cards, but she only identified employees Helen Kuebler (correct spelling is Kibbler)<sup>8</sup> and Jimmy Johnson [Tr. 311:11-23]. Gilliatt stated that she would ask: "[H]ave you signed a card? When are you planning on going? You only have until Sunday, and you need to go and sign the card"

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<sup>2010, &</sup>quot;Ms. Gilliatt was involved in organizing on behalf of the union, correct?" To which Lina replied "Right" [Tr. 337:18-23].

<sup>&</sup>lt;sup>7</sup> The Employer incorrectly states that Gilliatt "signed cards in the presence of eligible voters" [ER Brief at 31]. Also as noted above, Gilliatt did not supervisor the eligible voters who were present when she visited the Hampton Inn.

<sup>&</sup>lt;sup>8</sup> On cross examination, Gilliatt first claimed to tell Kibbler in person, but she changed her account—after Union's counsel pointed out that Kibbler was on a leave of absence at that time—to telling her over the phone when Gilliatt claimed to have interrupted a call between Kibbler and Denise Guerrero, a non-supervisory employee who was Kibbler's friend [Tr. 329:14-330:12].

<sup>&</sup>lt;sup>9</sup> Johnson did not corroborate Gilliatt's account when the Employer called him to testify after Gilliatt at the hearing; in fact, he testified that he knew Gilliatt was against the Union closer in time to the election [Tr. 376:3-9].

because "Kyle told me he wanted a hundred percent of the nurses involved to sign the cards" [Tr. 328:22-329:13].

#### 8. Xiuying "Jane" Huang's Involvement

Serrette met with stipulated supervisor Xiuying "Jane" Huang on one occasion at Denny's Restaurant [Tr. 205:16]. According to Serrette, Huang was a supporter of her coworkers, but not a supporter of the Union [Tr. 211:8-10]. Serrette asked Huang if she knew a particular person, and Huang responded that the person was on vacation [Tr. 211:17-19]; this was the only time Huang made a report on a coworker [Tr. 211:1-19]. Serrette took notes of a conversation with a unit employee (whose name was redacted) from January 14, where he writes what the employee has told him about Huang and Med-surge, including Huang's concerns and that the "full group is for it → the union," but the notes do not indicate who said that or if the prounion sentiments were in any way connected to Huang other than those employees were in her unit [ER 41; Tr. 254:8-25]. The only "union" activity regarding Huang known to the Union heard mid-February was that she was trying to convince people to vote against the Union [Tr. 297:24-298:2]. The Employer did not elicit any testimony from Huang or anyone other than Serrette about Huang's Union involvement.

#### 9. Ann Johnson's Involvement

Stipulated supervisor Ann Johnson reviewed a schedule of employees and the times of their shifts, and helped correct errors [Tr. 234:4-21]. Johnson also signed a Union card [EX 14]. The Employer did not call her to testify.

#### 10. Samantha Jones' Involvement

At some point, stipulated supervisor Samantha Jones was asked to meet with Serrette [Tr. 169:6-7], and she met with him that day at a hotel alone and signed a Union card [Tr. 169:18-20,

170:8-9, 172:19-23, EX 15]. Jones drove to the meeting by herself, did not tell anyone about it or how it went, and no one asked her about it [Tr. 170:15-171:10]. That was her only meeting with the Union, and she never talked to anyone at the Hospital about it [Tr. 171:7-15]. Other than this one meeting, Jones' only conversations about unions were when others asked her questions about her union at another hospital where she works [Tr. 174:15-16, 176:3-7].

#### 11. Angelica Silva's Involvement

Stipulated supervisor Angelica Silva was a Telemetry staff nurse, who occasionally served a relief charge nurse, until she became Director of Med-Surge and Telemetry in mid-March 2010 [Tr. 342:19-343:2, 356:9-13]. At the beginning of the Union campaign in January and February 2010, Silva had multiple discussions relating to the Union, where she explained that a union had done a lot for her father with respect to medical benefits, which covered her when she had her daughter [Tr. 343:5-22].

Silva attended four Union meetings in January and February 2010 [Tr. 343:23-344:2]. The first meeting occurred at Lina's house with approximately six unit employees, without any indication of whether she supervised any of them at that time, where she mentioned her father's experience [Tr. 344:3-345:24]. Two meetings occurred at Denny's Restaurant, where Silva provided her assessments of Union support to Serrette based on general knowledge, and one was based on a comment she had heard that person make regarding his/her support [Tr. 346:16-347:6]. She also attended a meeting at the Hampton Inn, and she forwarded the text message from Serrette with the hotel's address to approximately six people's cell phones [Tr. 347:10-348:19]. She asked one person if he heard about the meeting, about which he had already heard and was planning on attending, and Silva forwarded him the address to him after he said he did not have it [Tr. 349:7-20]. There was no mention of the purpose of the meeting during the

discussion [Tr. 349:21-23]. Silva went alone to the meeting [Tr. 350:21]. After she took a quiz about unions, she met in a separate room with a lawyer, and then signed a Union card when no unit employees were in the room [Tr. 351:9-21, EX 16].

Silva communicated with two unit employees, who were known Union supporters, about the Union during the campaign. Silva sent a text message on January 30 with names of unidentified unit employees and two charge nurses to say they "have not signed up yet" and that "Ronnie is on board" [Tr. 70:6-71:21, 72:24], but the Employer did not elicit any further testimony from Magsino or Silva about what was meant by that text message even though both testified at the hearing. Silva told Magsino about "more than one discussion" with other employees about the Union, where she said if the employee had talked to someone from the Union [Tr. 73:11-74:1]. In January, Silva told unit employee Tyrone Clavano that the Union is trying to organize again [Tr. 185:7-18]. Silva never told Clavano to be for the Union because she knew that he was already for the Union [Tr. 186:7-11; *cf.* Tr. 187:15-25 (Instead, Clavano was told by his supervisor Maryann Yan in the break room on several occasions in January and February her stance that "she's very against the union")].

Silva later stated to about four unit employees that she was no longer supporting the Union because "I changed my opinion" after seeing both sides and that unions are not what people think and they cannot answer all problems and make changes overnight [Tr. 356:11-357:5]. During the week of the election, Silva joined in a letter with top management to encourage all eligible votes to the vote "no" in the election, and this letter is discussed below.

#### 12. <u>Laurel Smith's Involvement</u>

Stipulated supervisor Laurel Smith met with Serrette at Denny's Restaurant [Tr. 205:17]. According to hearsay statements in notes taken by Serrette on March 6 of a phone conversation

between Serrette and Smith, after a unionbuster entered the Hospital, Smith expressed concern that the Telemetry nurses would not be strong based on her belief that the nurses in Telemetry folded in the previous Union campaign in 2008 [Tr. 242:4-243:2; EX 33]. Although this phone conversation is documented as occurring on Saturday, March 6, no evidence was introduced that any nonsupervisory employees were involved in the call or learned of it. Smith signed a Union card [EX 17], but no evidence was introduced regarding if any unit employees who she supervises were present when she signed the card. The Employer did not call her to testify.

#### 13. Leslie Terrazas' Involvement

There was no testimony about Leslie Terrazas, but she signed a union card [EX 19]. Nor was any evidence introduced regarding whether any unit employees whom she supervises were present when the card was signed.

#### 14. Bienvenido Trinidad III's & Dulce Suzon's Involvement

Stipulated supervisor Bienvenido Trinidad III, a relief charge nurse in Med-Surge, was first contacted by Lina about the organizing drive [Tr. 453:25-454:4, 455:18-22, 457:9-10]. Trinidad attended a meeting at Denny's with Serrette, stipulated supervisor Dulce Suzon, and about five employees from Med-Surge; and at this meeting, Trinidad and unit employee Maricar were selected to be point persons for the group, meaning talk to people and attend meetings, but Trinidad was never able to talk to other nurses about the Union because he was busy with preparations for his upcoming wedding at the time [Tr. 456:5, 456:19-23, 458:10-459:21].

Trinidad attended two meetings at the Hampton Inn [Tr. 463:18-22, 464:13]. At the first meeting, four or five nurses (which included him and Suzon) were present, and there was a discussion about what the Union could do; after the nurses listened to Serrette, Union cards were signed and given to Serrette [Tr. 464:5-466:16, 469:7-11, EX 18 (Suzon card) and EX 20

(Trinidad card)]. There was a second meeting at Hampton Inn with the Union's attorney to see if Trinidad would qualify as a supervisor because he occasionally served as a relief charge nurse, and no coworkers from Trinidad's department were present at the Hampton Inn at that time [Tr. 466:17-467:21]. The Employer incorrectly states that "the Union also had the Charge Nurses accompany eligible voters to the meetings" and specifically that "Trinidad also accompanied another group of eligible voters to a second card signing meeting" [ER Brief at 12], but the record merely states that another group of nurses was present when he was at the Hampton Inn [Tr. 463:25, 467:2-6].

Trinidad had conversations about when Union meetings were scheduled to occur, and asked questions about whether there was going to be a Union election [Tr. 470:11-471:9]. As to a conversation with Lin Lee, Lee told him that cards were being signed [Tr. 474:18-25]. Serrette believed Trinidad to be a leader—meaning he had followers in the Hospital—but regardless of this quality, Trinidad was busy with his wedding and another job at Casa Colina so, according to Trinidad, he never actually did anything to garner support of nonsupervisory employees for the Union [Tr. 263:20, 459:18-21, 473:25-474:1].

#### 15. Charge nurses sign petition that only one unit employee signs at organizer's request

Nonsupervisory employee Magsino took a petition around to the charge nurses and asked them to sign it with the intent that it would be submitted to management showing that the charge nurses agree that they are not part of management [Tr. 84:24-85:10; ER 3]. Magsino believed he saw Gilliatt, Jones, and Smith sign the petition [Tr. 115:11-12], but Jones recalls signing it in Serrette's presence at the hotel [Tr. 171:24-172:13]. Gilliatt stated that staff saw her sign it, but the only people she identified were Magsino and supervisor Eiley [Tr. 312:17-313:4].

No evidence was presented that any unit employees—other than Magsino and Clavano—saw the signed petition [Tr. 87:18-21, 277:25-278:1 (Serrette stated he never provided the signed petition to unit employees), 368:4-9 (Del Valle corroborating)]. Magsino and Clavano admitted to supporting the Union early in the campaign, and never attributed their support to any supervisor influence, including seeing this petition. No evidence was introduced that a charge nurse solicited signatures of unit employees on this petition, and the only unit employee who signed the petition was Clavano, who signed it at Serrette's request [Tr. 189:20-21].

### 16. <u>Cooling-off period occurred with no prounion supervisory conduct for two-thirds of critical period</u>

The parties entered into a stipulation about supervisory status on March 5, 2010, and no charge nurses were involved in the Union organizing drive after March 5 [Tr. 297:1-6].

Magsino communicated with three charge nurses, but "only during the first part of the campaign," explaining: "When we figured out that they were [not] able to vote, we didn't even talk after that" [Tr. 59:23-60:3], which occurred around February or March [Tr. 60:18-19] when those who would not be allowed to vote in the election were called into a meeting and informed of the decision that they were considered part of administration [Tr. 60:23-61:2; *accord* Tr. 131:3-7]. During this meeting with the nurses who were ineligible to vote in the election because of their supervisory status, Hospital management instructed attendees to take an anti-union stance and warned that if they openly supported the Union, they could be terminated [Tr. 478:17-479:1 (Trinidad)]. After the announcement was made, there was a clear delineation between supervisors and unit employees, and charge nurse supervisors were left out of Union conversations [Tr. 173:10-14, 174:17-18 (Jones' testimony); 460:11-21 (Trinidad's testimony)].

The parties stipulated that the Employer "had a Vote No campaign" and "took the position in opposition to the Union" and conveyed this message to employees through "multiple

flyers that were distributed at the Hospital" [Tr. 126:3-10]. The antiunion flyers are in the record at UX 5 (with the exception of pages 8 and 14), and the parties stipulated regarding the flyers' distribution method [Tr. 437:8-439:10].

As mentioned briefly above, during the week of the Union election, top management personnel prepared a letter to go to all nurses eligible to vote in the election encouraging the nurses to: "Please vote no on Thursday, April 1 and Friday, April 2, 2010" [UX 2; Tr. 127:17-128:21, 130:25-131:2; 328:13-14]. This letter was signed by Chief Medical Officer Dr. James Lally ("the boss" and "the head at Chino"), Silva, and Gilliatt, among others [Tr. 129:1-20]. Gilliatt testified that she "signed one for every single nurse" who was eligible to vote in the 2010 Union election [Tr. 326:17-23]. The parties stipulated that this letter, in the record as UX 2, "was intended to be distributed to all eligible voters in the election, and the Hospital took steps to effectuate the intention of distributing it to all eligible voters" [Tr. 327:19-25]. Gilliatt hand delivered the letter to Magsino and other employees while they were working, and Silva also delivered the letter to employees working when the letters were ready to be distributed [Tr. 129:20-24, 326:3-327:10 (Gilliatt), 359:7-360:4 (Silva)].

#### C. Union Obtained Consent before Using Employee Photos during the Campaign.

Two to three weeks before the election, the Union had another round of meetings at the Hampton Inn, where prounion leaders told nurses that they needed to return to the Hampton Inn to show Serrette that they are still supportive of the Union's organizing effort [Tr. 284:9, 284:23-285:7]. During those meetings, the Union corrected misinformation from the Employer's antiunion campaign and answered questions; the nurses wrote down in their own words why they wanted to form a union; and then the nurses had their photographs taken with a blank sign that

the Union explained to them would say they are voting yes [Tr. 285:10-19]. The nurses' pictures were taken for the "Union photo flyer" (in the record as EX 6 and UX 3) [Tr. 279:5-8].

Serrette testified that before a photograph was taken, every employee whose picture was ultimately displayed in the Union photo flyer was shown a flyer of UNAC members from outside of CVMC showing not only their support for the organizing campaign at Chino as well as that there are a lot of happy nurses throughout California who belong to UNAC; this "UNAC members flyer" was produced in January or February 2010 specifically for the CVMC campaign [Tr. 281:18-282:5, 300:8-11, UX 1]. The UNAC members flyer was given to everyone as a "present" and to show nurses how their photograph would be used for a similar flyer where the message "I am voting yes" would be digitally composited on the flyer as the message had been digitally composited in the UNAC members flyer [Tr. 288:1-5, 289:23-290:4]. The reason the nurses were asked to hold a blank sign was because the Union's communications employee putting together the Union photo flyer explained to the organizers that it would be easier to digitally composite the message on the sign, rather than have the employees holding a sign where a finger is covering some of the message [Tr. 288:22-289:7, 298:21].

Serrette sometimes gave the instructions of the photo process, and sometimes it was another organizer [Tr. 286:3-10]. But the explanation of the photograph was "very uniform" [Tr. 286:19-23], and the Union's purpose was to succeed in forming a union because a person cannot just say that he or she wants to form a union—they must be visible and vocal, and the Union photo flyer accomplished the visible aspect of employee support [Tr. 286:25-287:4]. The nurses' willingness to have their photograph taken for this purpose was the main benchmark as to how Serrette would determine whether there was sufficient support to win the election [Tr. 287:4-7]. Using a blank sign prompted repeated questions about the message of the sign [Tr. 289:12-22].

It was explained that the Union photo flyer would be mailed to eligible voters' homes two to three days before the election and some of their coworkers would give it out in the facility two to three days before the election [Tr. 290:5-14, 293:11-25].

Quite a number of people were initially reluctant about showing their support publicly, so the Union organizers had to spend time reviewing the process, how the Union photo flyer would be distributed, and the importance of their visible support to: the campaign, themselves, others who viewed them as supporters, and the Union [Tr. 291:24-292:6]. No candid photographs were taken, instead every photograph was posed by UNAC staff and some people even applied makeup before their photographs were taken [Tr. 292:10-25]. The Union obtained verbal consent from all employees before taking and using their photographs in the Union photo flyer [Tr. 407:13-16].

Serrette recalls being present for these meetings, except for when James "Jimmy" Johnson came to the Hampton Inn [Tr. 286:9-18]. Around three to five nurses who came to the Hampton Inn refused to have their photographs taken [Tr. 290:15-22 (Serrette), 415:2-4 (Quijano)]. Two nurses who came to the Hampton Inn and had their photographs taken later asked for their photograph not to be used, and their requests were honored and those nurses' photographs did not appear in the Union photo flyer [Tr. 290:23-291:10 (Serrette), 415:5-8 (Quijano)]. After the Union photo flyer was disseminated, the only person who contacted Serrette directly to complain about the flyer was Johnson [Tr. 306:4-10].

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<sup>&</sup>lt;sup>10</sup> During the lunch break of his testimony at the Election Objections Hearing, Serrette saw that Johnson was present at the NLRB that day, jogging Serrette's memory that he was not present when Johnson's photograph was taken [*Compare* Tr. 301:22-302:3 *with* ER Brief at 15, n.6].

<sup>&</sup>lt;sup>11</sup> Magsino corroborated the UNAC organizers' testimony based on his two visits to the Hampton Inn when the Union took nurses' photographs, explaining that a flyer from another hospital was shown to the nurses, UX 1, and the organizers stated that their photos would be

Johnson questioned the Union representatives about the fact that a blank card would be in front of him in the photograph, and he said that the response lasted "about fifteen or twenty minutes," but "I don't exactly recall what their response was" [Tr. 371:23-372:2]. Johnson admitted that he allowed his picture to be taken [Tr. 372:5-7]; he twice claimed at the hearing that he thought his photograph "was only for legal purposes in case the facility were to retaliate against [him] for speaking to union representatives" [Tr. 371:20-372:9].

UNAC Organizer Olivia Quijano rebutted several key aspects and omissions from Johnson's account of the meeting at the Hampton Inn where his photo was taken [Tr. 393:1-6]. The ALJ credited Quijano's testimony over that of Johnson because she found Quijano "to be a candid and reliable witness," noting "[w]hen pressed in cross-examination to report exactly what she had told Johnson, she testified with remarkable recall and clarity" [Report at 13:50-52].

One key omission in Johnson's testimony: When he first arrived in the hotel room, he indicated his voting time in the upcoming Union election [Tr. 395:2-7, 18-25]. Johnson highlighted a time on two places on a piece of paper with his name on it, but the yellow highlight did not appear on the black and white copy entered into the record [Tr. 396:23-397:7; UX 4]. The Union retained the top half, and the bottom half was given to Johnson as a reminder [Tr. 395:21-25]. Then Johnson was asked to write on the back side of the top portion, which the Union would retain, the reason he was voting yes for the Union [Tr. 396:2-9]. Johnson wrote: "I'm voting yes because I do not trust the Reddy group" [Tr. 397:8-10; UX 4, p.2]. Johnson did

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used in a similar flyer and the blank "sign that we were holding up would say that we are voting for the union" [Tr. 98:25-99:5, 117:9-12, 120:8-10 (Magsino identifying UX1); Tr. 123:25-124:2]. Magsino was asked for his consent before his picture was taken [Tr. 124:18-20], and it was explained to him that the flyer would be distributed to union supporters and posted in the Hospital [Tr. 124:21-125:5]. Contrary to the Employer's selection of testimony [ER Brief at 14-15], Telemetry nurse Sonia Chesterfield also corroborated that she was told: the blank sign would say that she's prounion; it would be posted in the hospital; and she was asked for her consent for her picture to be posted in the hospital [Tr. 427:23-25, 428:19-23, 430:25-431:8].

not acknowledge this step in his testimony or that he had stated to the Union that he was voting "yes" for the Union.

Quijano specifically recalled telling Johnson that the Union was creating "a flyer with as many Chino nurses' pictures that we can and we're going to circulate that flyer two to three days before the election [by] the leaders . . ., [a]nd the reason we do this is because we want to get management's focus out of an anti-union campaign and more focused in negotiations, the fact we're going to win this, so let's focus on negotiations" [Tr. 398:14-399:3, *accord* 414:5-15, EX 63, 488:12-19]. Quijano stated that the flyer would be circulated in the facility [Tr. 399:4-10], and the purpose was to show management that the Union will win the election [Tr. 414:11-13]. Quijano also explained that the Union photo flyer would look like the flyer showing CVMC nurse would look like the UNAC members photo flyer, which nurses from Kaiser facilities had put together for CVMC nurses [Tr. 487:24-488:6, ER 63].

Quijano explained the importance of the flyer to Johnson with the example "how would you feel if management created a flyer with a lot of nurses holding a sign that says 'I'm Voting No?,' to which Johnson responded "Well, I would feel defeated" [Tr. 399:19-24; *accord* Tr. 489:4-490:7 & EX 63 (Quijano corroborating notes)]. Quijano responded: "Well, that's what we want to do so we want to show management that we're moving forward" [Tr. 399:24-25].

Then Quijano escorted Johnson to the wall to have his photograph taken multiple times, handed him the blank sign, and explained that the Union's communications department would PhotoShop in the phrase "I'm Voting Yes" on the blank sign to make sure the message is clear [Tr. 400:1-18]. Quijano testified that Johnson joked about holding a blank piece of paper "Do

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<sup>&</sup>lt;sup>12</sup> Quijano had her notebook open during this meeting [Tr. 420:17-19, 487:8-11; ER 63 (stipulation on authenticity at Tr. 483:22-484:3)], but she did not look at these notes while meeting with Johnson because she had the talking points memorized [Tr. 490:23-25].

you also want to take my profile shot?" and she responded "No this isn't a mug shot" [Tr. 400:19-401:1]. Johnson did not refuse to have his photograph taken [Tr. 401:2-4]. Johnson first complained about the photograph when he was told by his manager Gilliatt—who he knew was against the Union—that his picture was posted in the Hospital [Tr. 373:10-15; 376:3-9]. As noted above, the ALJ credited Quijano's testimony over Johnson's, and for good reason.

#### III. ARGUMENT

Election results—which represent the democratic choice of employees to join or refrain from joining a union—should not be overturned lightly, particularly where, as here, the Union won by a significant margin and the Employer failed to introduce evidence to satisfy its burden of proof on any of its objections. The ALJ correctly recommended that the objections be overruled in their entirety.

Even under the most conservative of the oscillating Board precedent in the areas of law controlling the Employer's objections, the Employer has not shown that the Union engaged in conduct interfering with employee free choice during the election. The Employer repeatedly attempted to use the objections hearing as a discovery tool, and the ALJ's evidentiary decisions to which the Employer now excepts were fully consistent with her obligations to balance employees' right to protect their confidential Section 7 activities from compelled discovery by the Employer as well as to prevent the hearing from turning into the Employer's fishing expedition, stretching well beyond the evidence the Employer possessed in hopes of finally coming across evidence that could prove the allegations underlying its objections. As will become obvious from the below discussion of the Employer's exceptions and arguments, the Employer has not raised any meritorious reasons to support sustaining any of its objections. Accordingly, the Union respectfully submits that the ALJ's report should be adopted.

A. The ALJ Faithfully Executed Her Responsibilities at the Objections Hearing by Preventing the Employer from Probing into Protected Activities of Non-Supervisory Employees, from Flooding the Record with Exhibits and Testimony about Irrelevant Communications between Charge Nurses and Union, and from Conducting Fishing Expeditions into Areas where Employer Had, at Most, a Hunch.

The Employer claims that the ALJ improperly precluded it "from utilizing all possible avenues of obtaining and introducing relevant evidence" to its election objections [ER Brief at 16-21]. The Employer recognizes the ALJ's obligation to inquire fully into matters in issue and to obtain a full and complete record [id. at 19], but fails to appreciate the ALJ's corresponding duties to "endeavor to preclude the introduction or irrelevant or immaterial evidence" and to "prevent 'fisting expeditions' or other improper examination by the parties." *Cauthorne Trucking*, 256 NLRB 720 (1981). A hearing—although a possible avenue for obtaining evidence—is not designed to be a discovery tool as the Employer erroneously claims. The ALJ properly excluded irrelevant information about the Union's communications with charge nurses (even though she required the Union to produce such documents) and prevented the Employer's attempt on the fourth and final day of hearing to begin a fishing expedition about the union's photo taking process based on the ALJ's decision to redact some bargaining unit names in union notes even though it knew of the identities of all employees in the photo flyer well before the hearing began.

1. The ALJ properly revoked the portions of Employer's subpoenas which sought production of documents relating to nonsupervisory employees' protected activities.

The Employer contends that it was denied due process because the ALJ partially revoked its subpoenas duces tecum served on the Union and charge nurses requesting communications between the Union and charge nurses [ER's Brief at 16-19]. The Employer specifically identifies Request Nos. 2, 6, 7, 8, 12, and 23 from the subpoena it served on non-supervisory employee Ronald Magsino as relevant to its contention because these requests sought documents

that "would be relevant to develop additional evidence involving supervisory interference in the election" [*Id.* at 19; EX 2]. The Board should quickly dispose of the Employer's contention because the ALJ required the Union to produce communications between the Union and stipulated supervisors and only limited production to the extent that communications protected from disclosure under well-established Board precedent were being subpoenaed.

Before responding to the Employer's contention, it must be noted that while the subpoenas served on the Union and nurses are similar, the request numbers do not match. The Union used the request numbers in the subpoenas served on it for its petition to revoke [EX 1]. The ALJ likewise used the request numbers in the subpoenas served on the Union when ruling on the Union's petition to revoke [Tr. 9:6-40:11]. The Employer, in its brief, relies only on the request numbers in the subpoena served on nonsupervisory nurse Magsino [ER Brief at 16-19]. To compensate for this inconsistency, the Union has cross-matched the request numbers from Magsino's subpoena [EX 2] with the similar or identical requests in the subpoena served on the Union [EX 1, Attachment 1] to explain the ALJ's ruling on the requests identified in the Employer's brief to the Board.

The Employer states that the ALJ "refused to require production" of "information about communications between Charge Nurses and the Union's representatives and organizers" [ER Brief at 16-17]. In fact, the ALJ did not revoke the Employer's subpoenas as to communications between charge nurses and the Union; she only limited them by allowing the Union to redact the names of nonsupervisory nurses after balancing the employees' right to keep their protected activities confidential [Tr. 17:10-19:24 (ALJ recognizing that "communication[s] between [] the union and an individual who is one of the stipulated charge nurses" must be produced under Request No. 1 (EX 1, Attachment 1, p.3), but Request No. 2 "is just way too broad" as it "casts a

net that will bring in [] protected communications between the union and non-supervisory employees")]. The Board routinely affirms ALJs' revocations of subpoenas requesting union communications with members. *See Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977). While *Berbiglia* concerned an already organized unit, the Board has recognized an even greater interest in confidentiality in organizing campaigns. *See Guess?, Inc.*, 339 NLRB 432, 435 (2003).

To support its argument, the Employer relies on an inapposite line of cases—which do not involve discovery disputes—but instead concern the initial showing of support's adequacy based on proof that supervisors solicited all or most of the signed union cards provided to the Board to permit the petition to proceed to an election [ER Brief at 18-19]. In *Dejana Industries*, *Inc.*, the Board found that the union's showing of interest had been tainted, warranting dismissal of the petition before an election were set, because a supervisor admitted that "he solicited all of the authorization cards constituting the showing of interest." 336 NLRB 1202 (2001). The Board also noted that the Regional Director incorrectly evaluated the supervisor's prounion conduct under the test used in objections cases, which is not uses in cases where the sole issue is "whether the petition should be dismissed because the showing of interest has been tainted." *Id.* at 1202 & n.2. The other showing of interest cases cited by the Employer are similarly irrelevant to the Employer's election objections [ER Brief at 19 (citing Se. Newspapers, Inc., 129) NLRB 311 (1960) (dismissing a petition where a supervisor participated in obtaining all cards submitted by the petitioner); Wolfe Metal Prods. Corp., 119 NLRB 659 (1957) (showing of interest obtained almost entirely by supervisors)]. These cases in no way support that the ALJ here improperly ruled on the Union's petition to revoke by protecting employees' Section 7 activities from being produced to the Employer.

The Employer further complains about specific requests in the subpoena it served on Magsino "that would be relevant to develop additional evidence involving supervisory interference in the election" [ER Brief at 19]. The Employer notes Requests Nos. 6-8 on Magsino's subpoena, seeking communications between charge nurses and non-supervisory employees, but fails to recognize that the ALJ did **not** revoke the subpoena as to such communications after the Employer limited the request to communications related to the Union organizing campaign [Tr. 22:5-17; Compare EX 1, Attachment 1, p.3, Request No. 6 with EX 2, pp.3-4, Request Nos. 6-8]. As to Request No. 12 on Magsino's subpoena, regarding "all documents relating to the distribution and/or solicitation of Union authorization and/or membership cards," the ALJ recognized that her revocation did **not** apply to "those cards distributed by the stipulated supervisory charge nurse" but revocation was granted in so far as the request merely sought cards signed by non-supervisory employees [Tr. 23:10-24:25; Compare EX 1, Attachment 1, p.3, Request No. 11 with EX 2, p.4, Request No. 12]. Even going as far back as 1955, the Board has recognized as its "customary rule" that union authorization cards should not be produced pursuant to an employer's subpoena duces tecum in a representation case. Midvale Co., 114 NLRB 372, 374 (1955); see also Wright Elec., Inc., 327 NLRB 1194 (1999), enf'd 200 F.3d 1162 (8th Cir. 2000); Nat'l Tel. Directory Corp., 319 NLRB 420, 421 (1995) ("[T]he Board has always held authorization cards in confidence during representation cases.").

As to Request No. 23 on Magsino's subpoena, seeking "[a]ll documents relating to any meeting . . . involving the Union's organizing activity directed at personnel employed by the Employer that was attended by any Charge RN," the ALJ ruled that balancing the rights of the employees "would require [the ALJ] to conclude" that the Employer is not entitled to know

which nonsupervisory employees were present at union meetings [Tr. 38:9-39:20; Compare EX 1, Attachment 1, p.5 (Request No. 21) with EX 2, p. 5 (Request No. 23)]. Section 7 of the Act provides employees the right "to keep their union activities confidential," Guess?, Inc., 339 NLRB 432, 434 (2003), including "their attendance at union meetings" as well as the discussions occurring there, Nat'l Tel. Directory Corp., 319 NLRB 420, 421 (1995); see also RCC Fabricators, Inc., 352 NLRB 701, 702 (2008) (affirming the ALJ's reasoning that the "willingness of employees to attend union meeting would be severely compromised if an employer could, with relative ease, obtain the identities of those employees"). The ALJ did note that "once the charge nurses are identified as having been at meetings or having been instrumental in setting up the meetings that [the Employer] certainly would be entitled to ask them what their involvement was and what they said" [Tr. 39:21-24]. The Employer called eight stipulated supervisors, and was allowed to ask—and in fact did ask—them about their meeting attendance and what they stated at the meetings in front of non-supervisory employees. Moreover, the Union produced all documents involving charge nurses' attendance at Union meetings with nonsupervisory employees' names redacted. Accordingly, the ALJ largely required production of documents relevant to the requests of which the Employer now complains, and the Employer has not proven it was prejudiced by the ALJ's limitations, which were well-within Board precedent—precedent that is entirely ignored in the Employer's Brief.

The Employer describes its subpoenas as "narrowly tailored," but the ALJ—after careful review of the Employer's subpoena and the Union's Petition to Revoke [Tr. 9:6-42:15]—found several requests in the Employer's "lengthy" subpoena [Tr. 9:6] to be either "too broad" [Tr. 18:8 (Request No. 2), 20:10-15 (Request No. 3), 22:5-8 (Request No. 6 before the Employer's proposed limitation), 22:18-23 (Request No. 7), 23:6-8 (Request No. 9), 38:9-19 (Request No.

21)] or irrelevant [Tr. 29:3-8 (Request No. 13), Tr. 31:7-13 (Request No. 14), Tr. 31:14-17 (Request No. 15), 33:9-15 (Request No. 17), 36:13-20 (Request No. 18), 37:25-38:8 (Request No. 20)]. The Board has recognized that "examining each challenged subpoena paragraph is not necessary" where "the subpoenas generally were drafted without regard for the usual standards applicable to subpoenas." *Brink's, Inc.*, 281 NLRB 468, 469 (1986); *see also Millsboro Nursing & Rehab. Ctr., Inc.*, 327 NLRB 879, n.2 (1999) (noting the Board's long history of revoking subpoenas which are clearly "fishing expeditions"). Given the Employer's lengthy subpoenas with irrelevant and overly broad requests covering protected concerted activities, the ALJ could have simply revoked the Employer's subpoenas in their entirety. Instead, the ALJ required the Union to produce documents relevant to the requests identified in the Employer's brief except to the extent that they sought information about non-supervisory employees' protected activities. As such, the ALJ did not err when she partially granted the Union's petition to revoke only to the extent necessary to prevent disclosure of confidential protected communications and activities.

2. The ALJ properly limited the Employer from introducing exhibits and testimony on the irrelevant issue of whether the Union sought charge nurse support during the organizing campaign.

The Employer asserts that it was prejudiced by the ALJ's "refus[al] to allow the Employer to cross-examine (sic) Charge Nurses regarding their communications with the Union, and to cross-examine Union representatives regarding their communications with Charge Nurses" because if allowed, "the Employer would have likely been able to identify additional instances in which Charge Nurses solicited for and otherwise encouraged eligible voters to

<sup>&</sup>lt;sup>13</sup> Moreover, to the extent that the subpoenas sought documents relating to nonsupervisory employees protected Section 7 activities, the Union has filed an unfair labor practice charge, which is currently being investigated by Region 31 [Case No. 31-CA-29749].

support the Union" [ER Brief at 20-21]. The ALJ repeatedly refuted the Employer's logic by explaining that the Union asking a charge nurse to do something does not prove that the charge nurse actually did what was asked [Tr. 30:16-20 (ALJ explained: "What you'll be asking me to do is to make an inference that because the union recruited charge nurses then the [charge nurses] must've done something, and that's not an inference that I will make. You're going to have to have evidence that the charge nurses interacted with the employees."); Tr. 71:19-72:19].

The Employer called eight supervisory employees to testify—Eiley, Jones, Casas, Gilliatt, Silva, Castro, Del Valle, and Trinidad—and was permitted to ask them about their prounion conduct. That the ALJ prudently limited their testimony to actions taken rather than the Union's requested actions is highlighted by Trinidad's testimony that he was asked to talk to other nurses about the Union, but never did because he was too busy preparing for his upcoming wedding [Tr. 458:1-459:21] and working a second job [Tr. 473:25-474:4].

The ALJ nevertheless allowed the Employer to make offers of proof as to union and charge nurse communications with supporting documents, submitted as Employer Exhibit 61 [Tr. 85:15-24, 276:17-277:15, 353:21-354:19, 360:20-361:5, 364:3-7, 480:2-12]. The Employer cannot show prejudice because the Board can review the rejected exhibits and decide the issue based on the Employer's offers of proof made at the hearing even though the ALJ rejected them. See Del Rey Tortilleria, Inc., 272 NLRB 1106, 1107-08 (1984) (Board "find[ing] it unnecessary to decide whether the judge properly barred [] testimony" because it did not find the employer's rejected offer of proof supported that the union engaged in objectionable conduct). The ALJ did not preclude the Employer from introducing evidence in support of its objections where the ALJ here, as with the ALJ in New York New York Hotel, 334 NLRB 762, 763 (2001), "held an extensive colloquy with the [Employer's] counsel, in which counsel explained in detail the

theories behind [the Employer's argument]" and was permitted to make "a detailed offer of proof, including exhibits, which the judge rejected." [Tr. 30:16-20, 71:19-72:19, 85:15-24, 276:17-277:15, 353:21-354:19, 360:20-361:5, 364:3-7, 480:2-12; EX 61]. Because evidence of a Union plan to recruit charge nurses does not show that they ever tried to organize nonsupervisory employees, the ALJ properly excluded such attenuated evidence [Report at 5:35-50].

3. The ALJ properly limited Employer's attempt at a fishing expedition by limiting names to nonsupervisory employees who had already been called as witnesses when Employer had no basis for believing any particular nurse could testify in support of Employer's objections.

The Employer argues that the ALJ improperly refused to allow the Employer to learn the names of the non-supervisory employees listed on the union organizer Quijano's notes which were introduced as an Employer Exhibit 63 on the last day of the hearing [ER Brief at 20-21]. Employer's counsel argued at the hearing:

I would like to be provided with the names of the employees that have been redacted so that we can have those witnesses testify with respect to what they were or were not told by the union representatives in conjunction with having their picture taken and subsequently placed on a flyer which was distributed and is in the evidence as Union Exhibit 3.

[Tr. 480:20-25]. The ALJ required the names of three non-supervisory employees (Magsino, Lina, and Clavano) to be revealed because they had testified at the hearing [Tr. 481:9-482:17]. Given that the photographed employees' identities were already known to the Employer, who saw the photo flyer before the April 1-2 election, the Employer cannot genuinely assert prejudice by the ALJ's refusal to require a subset of those names appearing in a Union organizer's notes from being revealed on June 7, the last day of the hearing. Further, as the Employer notes, the photo flyer had been in evidence as Union Exhibit 3 since the second day of the hearing (and in the record as Employer Exhibit 6 since the first day of the hearing), so the Employer already had

ample opportunity to know which employees to ask about what they were or were not told by union representatives, and yet the only employee it produced in support was James Johnson.

Moreover, the ALJ aptly responded to the Employer's request as follows:

Merely calling individuals to question them about what may have occurred on that occasion is simply fishing. If you have evidence from individuals that certain things were said to them, I presume you've already put that into evidence. And unless you can produce witnesses whom you've talked to who have given you that kind of information, I will not permit you to put on individuals who you'll simply question them about what occurred at the photo-taking.

[Tr. 483:8-15]. Accord NLRB v. Precision Indoor Comfort Inc., 456 F.3d 636, 640 (6th Cir. 2006) (explaining an employer's argument that it needed to "compel testimony from . . . employees, and thereby develop the necessary evidence, has already been rejected by this Court" because it "ignores that it was their burden to come forward with evidence . . . in the first instance" (quoting NLRB v. Palmer Donavin Mfg. Co., 369 F.3d 954, 959 (6th Cir. 2004)). The ALJ properly ruled that the Employer's request for the additional names—when the identities of the photographed employees were already known to the Employer, who had called only one employee exclusively on those objections—would lead to an improper fishing expedition.

# B. Employer Failed to Prove that Supervisors Engaged in Impermissible Conduct and in the Alternative, Any Impermissible Prounion Supervisory Support Was Mitigated by the Employer.

According to the Employer, a wide-range of prounion supervisory conduct requires the Union's election victory be set aside [ER Brief at 21-34]. The record, however, lacks evidence of conduct of the sort found to coerce or interfere with employee free choice under Board precedent. Even if the supervisory conduct had interfered with employee free choice, the conduct did not materially affect the election outcome because: (i) the conduct was too isolated to affect a sufficient number of employees to overcome the Union's margin of victory; (ii) the Employer engaged in an aggressive anti-union campaign directed at all employees eligible

voters, including charge nurses repudiation of earlier support; and (iii) there was a sufficient cooling-off period of prounion supervisory conduct before the election. Thus, the ALJ properly recommended the Employer's objections as to prounion supervisory conduct should be overruled.

1. With one exception addressed later, all of the prounion supervisory conduct alleged by the Employer as objectionable is clearly lawful under Board precedent.

When evaluating "whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election," the Board's threshold consideration is to determine if "the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election." *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004).

In support of its objections, the Employer introduced testimonial evidence that stipulated supervisors attended Union meetings; one supervisor (Silva) made prounion comments at a Union meeting early in the organizing campaign; a few supervisors (Silva, Eiley, Gilliatt) passed on information about when Union cards could be signed; three supervisors (Silva, Castro, Johnson) helped the Union with providing scheduling information and assessments of union sympathies—but without any evidence that the supervisors reached out to employees to obtain that information; supervisors discussed the Union in general conversations with unit employees in the workplace; and supervisors signed authorization cards in front of fewer than five total employees over whom they have supervisory authority.<sup>14</sup> The Board has repeatedly held that

<sup>&</sup>lt;sup>14</sup> No unit employees were present when Silva [Tr. 351:19-21], Gilliatt [Tr.316:21-317:5], Jones [Tr. 170:8-9], Smith, Terrazas, and Del Valle [Tr. 367:2-368:12] signed Union cards. There is no evidence that unit employees were present when Castro, DeLeon, and Johnson signed union cards. Eiley identified two nurses from her department were present when she signed her card [Tr. 151:6-11, 166:19-23]. Trinidad said that four to five nurses from his group were present

making prounion statements, talking about the union, attending union meetings, and signing union authorization cards in front of employees is not conduct that tends to coerce or interfere with employee free choice. Thus, the ALJ correctly recommended that the Employer's prounion supervisory conduct objections be overruled.

In Northeast Iowa Telephone Co., 346 NLRB 465 (2006), the Board described as "limited at best" the following prounion conduct: "managers attended meetings held in employees' homes, spoke at those meetings along with the other attendees, signed authorization cards in front of other employees, and mentioned some of the potential issues that a union could help resolve." Id. at 467. The Board concluded that this conduct "did not reasonably tend to coerce or to interfere with employee free choice." Id. The Board contrasted this behavior from the prounion supervisory conduct in *Harborside*, where "the supervisor repeatedly told employees during the election campaign that they could lose their jobs if the union lost the election, initiated loud and intimidating confrontations with employees to cajole them to support the union, . . . told employees that she was counting on them to vote for the union, . . . solicited authorization cards from employees, pressured an employee to wear a union pin, solicited employee signatures on a union petition, and required at least one employee to attend union meetings." Id. The Board, in Harborside, distinguished "permissible expressions of opinion about the union" because supervisory prounion speech, without more, is not objectionable. 343 NLRB at 911.

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when he and Suzon signed cards, but he included himself and Suzon in that figure [Tr. 464:5-21, 469:7-9], leaving at most three employees Trinidad and Suzon supervise viewing them signing Union cards. At most, the Employer showed that five unit employees witnessed someone with supervisory authority over them sign a Union card. The Board, however, has held that signing union cards in front of employees does not constitute objectionable conduct. *See Glen's Market*, 344 NLRB 294, 295 (2005).

The instant matter is much more similar to *Northeast Iowa Telephone Co.* than *Harborside* because the supervisors here never tied Union participation to their jobs at CVMC, nor did they exert pressure to do anything for the Union or yell or intimidate employees. In fact, *Harborside* recognized that a supervisor can invite employees to union meetings, but a supervisor interferes with employee free choice when the supervisor tells the employee she "had to" attend all union meetings, repeatedly asked why the employee was not attending, and made an ominous warning about job loss. 343 NLRB at 911 (explaining the supervisor there "went beyond merely inviting [a nonsupervisory employee] to a union meeting"). Here, there were no such requirements, harassment, or veiled threats.

The ALJ's recommendation to overrule the Employer's supervisory prounion conduct objections is further supported by pre-*Harborside* precedent that *Harborside* did not expressly overrule—but merely implicitly overruled only as to soliciting union authorization cards. In *Terry Machine Co.*, 332 NLRB 855 (2000), supervisors "attended organizational meetings for the Union; encouraged employees to attend meetings held by the Union; spoke in favor of the Union at the workplace and at meetings held by the Union, often in response to employee inquiries; [and] . . . encouraged employees to support or vote for the Union." *Id.* at 856. The Board found this activity was neither "coercive, nor does it have a tendency to imply retaliation or reward." *Id.* The Board explained that "supervisory statements endorsing the union and pointing out possible benefits of union representation are not inherently coercive and are not objectionable when made without threats of retaliation or reward." *Id.* (ellipses omitted); *accord Livingston Shirt Corp.*, 107 NLRB 400, 405-07 (1953) ("If compelled attendance at multiple meetings demanded by the employer is not objectionable, then surely the lobbying of a single supervisor is proper.").

The Employer unpersuasively claims that the ALJ failed to properly account for other prounion supervisory conduct [ER Brief at 32-34], including Lamoine's early prounion statements [ER Brief at 32]; Eiley telling people to ask Serrette when they approached her with Union questions [ER Brief at 33], and Union noting some charge nurses as "leaders" [ER Brief at 34]. As to the first claim, the ALJ was very clear that the reason she did not discuss the Employer's allegations concerning Lamoine was that there was no evidence that she was a supervisor [Report at 8, n.11; see also, supra, footnote 2]. As to the second claim, Eiley answering employees' Union questions with the response that they should go to the source by asking Serrette is not objectionable conduct. See NLRB v. Mfr's Packaging Co., 645 F.2d 223, 226 (4th Cir. 1981) (finding as significant that most of the supervisor's "pro-union comments[] were not initiated by the []supervisor but were made in response to employee inquiries"). As to the third claim, Serrette testified that his notation of leader simply meant a person with followers, and that even if a charge nurse appeared as a committee leader on one of his lists, it was a mistake because the Union did not have any charge nurses as a committee leader [Tr. 214:19-24, 245:13-247:13, 267:2-6, 298:21-299:7]. The Board has upheld union election victories (and the Courts of Appeals have enforced certifications) where the Union had supervisors, specifically charge nurses, serve on the union's organizing committee. See, e.g., Wright Memorial Hosp. v. NLRB, 771 F.2d 400, 405 (8th Cir. 1985) (finding two charge nurses serving on an eighteenmember union campaign committee "does not in itself require that an election be set aside").

With the exception of one of Gilliatt's comments discussed in the next section, the Employer's alleged objectionable prounion supervisory conduct was clearly permissible under Board precedent.

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#### 2. The ALJ found one example of arguably coercive prounion supervisory conduct.

The ALJ found that Gilliatt urged about ten nonsupervisory employees to sign authorization cards by saying the **Union** wanted 100% participation, and concluded that "for purposes of this analysis," Gilliatt's urging constituted solicitation [Report at 10:18-19 & 12:7-12]. The ALJ, however, noted: "No evidence was adduced that Gilliatt furnished nonsupervisory employees with authorization cards, watched them sign cards, retrieved signed cards, or was informed as to which employees had signed cards" [Report at 12:7-10].

Gilliatt identified only two of the approximately ten unit employees by name: Helen Kibbler, who was on medical leave at the time of the alleged conversation, and Jimmy Johnson, the employee who testified against the Union at the hearing but the ALJ made a credibility determination against him [Tr. 311:11-23, 329:14-330:12; Report at 13:50-52]. Even though Johnson testified after Gilliatt, the Employer's counsel did not have Johnson corroborate Gilliatt's statements to him about card signing. Gilliatt testified that she asked the approximately ten employees: "[H]ave you signed a card? When are you planning on going? You only have until Sunday, and you need to go and sign the card" because "Kyle [Serrette] told me he wanted a hundred percent of the nurses involved to sign the cards [Tr. 328:22-329:13]. Gilliatt, therefore, was clear that she was not telling employees that they needed to sign cards to please her, but to satisfy the Union's goal of 100 percent participation. Just as a supervisor can freely state that the Employer wants employees to vote no, a supervisor can also state that that the Union wants employees to vote yes, or to sign a card, without it constituting coercion or interference. The ALJ did not cite to any Board precedent to support that reminding eight unidentified people that the Union would like 100 percent participation constitutes unlawful coercion or interference. The Union contends that at most the record supports a finding that

Gilliatt informed two unit employees about the Union's 100 percent goal as unidentified employees should not count because the Union cannot disprove the statement by questioning employees to see if the statement was ever made to them if their identities remain unknown.

Prior to *Harborside*, for conduct to be considered objectionable, the conduct generally must occur during the "critical period"—the period between the filing of the union's representation petition and the date of the election. See Ideal Elec. & Mfg. Co., 134 NLRB 1275 (1961). Here, the critical period was February 22, 2010 and April 2, 2010. All of the cards signed by supervisors and meetings attended by supervisors occurred **before** the critical period [EXS 10-20]. The Employer did not prove that any prounion statements were made by supervisors after February 22 [Accord Report at 7 n.8 ("Although no specific evidence exists as to when Gilliatt urged employees to sign authorization cards, it is reasonable to assume that it occurred before the petition was signed on February 22."); Tr. 225:16-25 (Serrette testifying that card signing occurred at the Hampton Inn during a week in late January); accord Tr. 112:14-22 (Magsino testifying that, as far as he knew, all cards were signed at the Hampton Inn)]. Thus, the Employer has not shown that any supervisory prounion conduct occurred during the critical period, and thus the conduct cannot be considered objectionable to justify setting aside the election results under *Ideal Electric Manufacturing*. See also Harborside, 343 NLRB at 919-20 (Liebman, J., dissenting).

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<sup>&</sup>lt;sup>15</sup> The Employer quibbles with the ALJ's finding that "[n]o evidence was adduced that [after March 5] any stipulated-supervisory charge/relief charge nurse encouraged **any unit employee** to support the Union" [Report at 3:31-33 (emphasis supplied)], stating "the undisputed evidence in the record is to the contrary" and cites three hearsay examples of conversations between the Union and a charge nurse only [ER Brief at 29]. These conversations from Union notes suffer from being hearsay, but more importantly do not show any involvement with a nonsupervisory employee. The Employer then says the Union notes show that Serrette was "completely untruthful" when he testified that "we didn't even talk with [Charge Nurses] after [March 5]," citing Tr. 59-60. Yet this testimony was made by then-CVMC employee Magsino [Tr. 48-141] and not Serrette, who did not testify until the following day, beginning at Tr. 196.

The ALJ erred by finding Gilliatt's conduct constituted solicitation—particularly as to unidentified employees—without citation to a single prior Board case that found a similar statement constituted objectionable solicitation, but the error was harmless because the ALJ correctly found that it did not materially affect the election outcome.

3. Gilliatt's conduct did not materially affect the election because the conduct was too isolated to overcome the Union's margin of victory, Employer had a vigorous unit-wide antiunion campaign where the most prounion charge nurses repudiated earlier support, and a sufficient cooling off period of prounion supervisory conduct occurred before the election.

The ALJ correctly concluded that Employer's supervisory prounion support objections failed because it did not show that the alleged conduct materially affected the outcome of the election. Once the threshold inquiry of coercion/interference is met, the next step is to determine:

Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909.

The ALJ found that Gilliatt's solicitation—which at most affected only about ten employees—"was not significantly widespread" and "occurred almost six weeks before the election" [Report at 12:23-24]. The ALJ also relied on the facts that Gilliatt "personally informed [20-30] nonsupervisory employees that she no longer supported the Union," and "[i]n the week of the election, she signed more than 100 copies of the Vote-No letter" [Report at 12:19-23; Tr. 320:20-321:24 (record support for statement); Tr. 326:17-328:14 (record support for letter)]. Based on these facts, the ALJ properly concluded that the only arguably objectionable prounion supervisory conduct did not have "a lingering coercive effect," and "in

light of her broad repudiation," Gilliatt's conduct did not "materially affect the outcome of the election" [Report at 12:26-29].

### a. <u>Gilliatt's conduct was too isolated to change the Union's wide margin of victory to have materially affected the election's outcome.</u>

To materially affect the outcome of the election here, at least 15 votes would have needed to shift to change the election result. *See id.* at 913. In a unit of 125, 12 percent of the unit would have to have voted differently to change the election results. This means that the Employer was required to show that coercive prounion supervisory conduct affected at least 15 employees, and to qualify, the supervisor's conduct must have been addressed to employees over whom they have supervisory authority. *Glen's Market*, 344 NLRB 294, 295 (2005) (finding that the supervisors' solicitation of cards could not reasonably have coerced or interfered with employees' free choice where there was no evidence that their prounion activities were directed toward any employee over whom they exercised supervisory authority). Gilliatt's arguable solicitation affected at most ten employees [Report at 12:23-24; Tr. 311:11-23 (record support)], is too isolated to materially affect the election with a margin of victory of 15.

Accordingly, the ALJ noted that to sustain the Employer's objections it would have needed to prove that "the supervisor's prounion conduct was known to the number of employees sufficient to upset the Union's 33-vote margin of victory" [Report at 11:27-28]. Based on the record, the ALJ could not make, and properly did not make, that requisite finding.

### b. <u>Employer's antiunion campaign and charge nurse repudiation mitigated any earlier prounion supervisory conduct.</u>

The Employer sufficiently mitigated any prounion supervisory conduct with its admitted anti-union campaign when it distributed multiple antiunion flyers and a letter to the entire bargaining unit the week of the election asking employees to vote "no" in the Union election—

personally signed by CMO Lally, Gilliatt, and Silva (among others) [Tr. 129:1-20, 326:17-328:14; UX 2]. The ALJ also found as significant Gilliatt's and Silva's repudiation of their earlier union support with the following:

[D]uring the weeks before the election, the most active supervisory union proponents, Silva and Gilliatt, orally recanted their prounion stances to some unit employees. In the weeks before the election, the two supervisors also signed the Employer's Vote-No letter to all unit employees and therein urged unit employees to vote no in the election. By these actions Silva and Gilliatt made known their personal opposition to the Union. Silva and Gilliatt's widespread retraction of their former prounion stances must have significantly lessened if not eradicated any supervisory pressure employees might reasonably have earlier felt.

[Report at 11:33-12:2].

In Northeast Iowa Telephone Co., the Board stated any supervisory prounion statements are "less likely to be attributed to the [employer]" where the general manager states the Union is not necessary and the employer took an "admitted antiunion stance," so that even if the limited nature of the lower level supervisors' conduct had been objectionable, it "did not materially affect the outcome of the election." 346 NLRB at 467. The earlier prounion supervisory conduct is less likely to be attributed to the Employer, where Dr. Lally and other top management asked the entire unit to vote against the Union in the course of its general antiunion campaign. Along these lines, the ALJ found: "[N]onsupervisory employees could not reasonably have attributed the prounion supervisory sentiments to the Employer in the face of the vigorous antiunion campaign the Employer waged throughout the election period" [Report at 11:27-31; see also Tr. 126:3-10; UX 2; UX 5]. Accord WKRG-TV, Inc., 190 NLRB 174, 175 (1971) (ruling that the president's clear opposition to the Union made it "obvious to the employees that, in matters concerning the Union, [the prounion supervisors] in no way spoke for management" so the record "does not permit a finding that the employees may have signed cards out of fear of future retaliation"); but see SNE Enters., Inc., 348 NLRB 1041, 1044 (2006)

(noting that "it was never made widely known that [the supervisors] no longer were advocating support for the union").

In *Stevenson Equipment Co.*, 174 NLRB 865 (1969), the Board did not set aside a union election victory where the company's top three facility managers called staff to a meeting for two unions to talk with the employees about their unions, and after one of the two unions was selected, the top managers signed union cards alongside most of their subordinates at the meeting. The Board found that the Employer's subsequent opposition to the Union dispelled any earlier misleading implication of Employer favoritism. *Id.* at 866.

In *Harborside*, then-Board member Liebman explained in her dissent that "employees have little to fear from [a minor] supervisor: they need simply bring his actions to the attention of another manager." Id. at 917 (Liebman, J., dissenting) & n.20 (citing Turner's Express, Inc., 189 NLRB 106, (1971)). In *Turner's Express*, the Board agreed that "minor supervisors' who were themselves unsure as to whether or not they were entitled to vote in the union election" making their prounion sentiments known to various employees and encouraging them to vote in favor of the Union "were not threatening in nature." *Id.* The Board noted: "[W]e see nothing in this record to indicate that [the supervisors] were speaking to employees in their capacity as supervisors. Rather, all the evidence points to the fact that [supervisors] were merely expressing their own personal views and that the employees understood that these remarks were [supervisors'] own and not those of the Employer." *Id.* The Board concluded: "In any event, it cannot be argued that the employees were misled into believing that [prounion supervisors] were acting on behalf of the Employer because, during the course of the election campaign, the Employer made it abundantly clear to the employees that it strongly opposed unionization of the facility." Id. at 106-07. Similar to Turner's Express, all evidence here points to the fact that the

supervisors, who did not know if they would be able to vote until the supervisor stipulation, were merely expressing their own personal views, never tying their supervisory authority to persuade employees to get involved with the Union. Also as in *Turner's Express*, the Employer cannot argue that any employees were misled into believing the prounion supervisors were acting on behalf of the Employer because the Employer made it abundantly clear to employees that it strongly opposed the Union [Tr. 126:3-10, 127:17-131:2, 326:17-328:14; UX 2; UX 5 (with distribution stipulation at Tr. 437:8-439:10)].

The Employer relies heavily on *Flint Motor Inn Co.*, 194 NLRB 733 (1971), for support. This case is readily distinguishable. In *Flint Motor Inn*, one of two main in-house supervisors was leading the Union campaign right up to election day, and the employer was unable to mitigate the supervisor's support because it was not discovered until the election when it asked the supervisor to serve as an observer and employees did not feel free to go to the one other top manager because they were suspicious of him due to the actions and statements of the prounion supervisor. *Id.* at 734. Here, Gilliatt's conduct occurred six weeks before the election, the Employer had the time to, and in fact did, mitigate the conduct by having Gilliatt—along with several other higher managers above charge nurses—sign and assist in distributing a letter for all eligible voters, asking these employees to vote against the Union [Tr. 127:17-131:2, 326:3-328:14; UX 2]. Moreover, there were a number of people in the Employer's management above charge nurses to whom nurses could have gone to complain about then-Relief Charge Nurse Gilliatt's conduct, including Chief Medical Officer Dr. James Lally [Tr. 129:1-20].

## c. Gilliatt's conduct did not affect the outcome of the election because it concluded more than six weeks before the election.

The timing of the conduct is another relevant factor under *Harborside*. Here, the record is clear that there was at least a four-week cooling off period where absolutely no supervisory

prounion conduct occurred [Tr. 59:23-60:3, 60:18-61:2, 131:3-7 (Magsino); 173:10-13, 174:17-18 (Jones); 297:1-6 (Serrette); 460:11-21 (Trinidad)]. The election petition was filed two weeks before the parties entered into the supervisor stipulation; thus, the cooling off period in this election was two-thirds of the critical period, and the Employer did not show definitively that any supervisory prounion conduct—including Gilliatt's statement about the Union's 100 percent participation goal to approximately ten employees—occurred during the first two weeks of the critical period [Tr. 225:16-25 (card signing occurred at the Hampton Inn during a week in late January); *accord* Tr. 112:14-22 (record support that all cards were signed at the Hampton Inn)]. The ALJ therefore correctly found: "[T]here is no evidence the supervisors engaged in any prounion conduct after the parties reached stipulation on March 5, leaving supervisory-prounion silence in the several weeks before the election" [Report at 11:31-33].

The cooling period, therefore, provided a sufficient amount of time to pass to mitigate any material affect from earlier coercive conduct. *Cf. Delchamps, Inc.*, 210 NLRB 179, 180 (1974) (relying on the fact that the supervisors' prounion conduct continued "throughout the election campaign"); *see Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 877 (6th Cir. 1997) (relying on the fact that the supervisory pressure on subordinates to display campaign buttons "continued to the day of the election").

For the foregoing reasons, the ALJ correctly recommended that Employer's Objection Nos. 1-21 be overruled in their entirety because the one alleged type of objectionable prounion supervisory conduct that could even possibly be considered coercive under Board precedent did not materially affect the election outcome under *Harborside*.

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C. The Board Should Decline Employer's Invitation to Change Board Law to Retroactively Require the Union to Have Sought Written Consent before Using Employee Photographs during the Organizing Campaign.

The Employer invites the Board to establish a new rule mandating that "employers *and* unions [] obtain written consent from employees before using the employees' pictures and likenesses in campaign materials," and apply this new rule **retroactively** to set aside the Union's election victory [ER Brief at 35-37 (relying on *Sony Corp.*, 313 NLRB 420 (1993))]. The Board, however, has clarified: To the extent that "*Sony* has been construed as potentially establishing a blanket requirement that employers must obtain employees' explicit consent before including their images in campaign videotapes[, w]e find that such a per se rule was unintended and unwarranted." *Allegheny Ludlum Corp.*, 333 NLRB 734, 744 (2001) (footnotes omitted). The Board clearly stated: "[T]here is no requirement under the Act that an employer obtain signed consent forms from employees before including them in a campaign videotape." *Id.* at 743 n.67.

The Employer's proposed new rule is an even more radical departure from Board precedent analyzing a union's photography of employees in organizing campaigns. While the Board's law has oscillated between finding no objectionable conduct so long as threats did not accompany the union's photographing, *Randell Warehouse I*, 328 NLRB 1034, \*4 (1999); *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), and sustaining an objection unless the union provides a valid explanation for the photographing, *Randell Warehouse III*, 347 NLRB 591 (2006); *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), the Board has **never** set aside a union election victory because the union lacked employee consent—particularly written consent—for use of employee photographs.

The Board's precedent makes sense because an accompanying threat is obviously coercive and an unexplained photograph at the workplace to show union opposition arguably has

the ability to cause an employee to fear reprisal; by contrast, using a voluntarily-taken photograph in a manner the employee inconsistent with the employee's understanding of its purpose would simply anger the employee, motivating him or her to vote against the union in a secret ballot election—thus promoting, rather than destroying, laboratory conditions. As Serrette testified that he explained to Johnson when they were discussing the Union photo flyer after it had been distributed, the Union does not "have any interest in having anyone mad at any of our organizers or me" [Tr. 379:3-8]. Because the Board has not required a union to seek authorization from employees before use, the Union's victory here should not be set aside on the Employer's novel theory.

Even if the instant matter were analyzed under a less extreme version of the Employer's suggested new rule, the record shows that the Union had verbal consent to use employee photographs—including Johnson's photograph—in the Union photo flyer. But even if the Union had not proven it obtained Johnson's consent, such evidence of lacking authorization from one employee is insufficient to set aside an election where the Union's margin of victory was much greater than one vote.

Quijano testified that she explained to Johnson the employee photographs would be used to create a photo flyer to circulate a few days before the election in the Hospital to show there is sufficient employee support to win the election [Tr. 398:14-399:10, 414:5-15]. Quijano gave an example of what the Union photo flyer would like, stating that it would look like the UNAC photo flyer [Tr. 487:24-488:6]—a flyer Johnson admitted to having received when his photograph was taken [Tr. 372:13-20] and in fact is the same design and size with a similar prounion message [Compare UX 1 (UNAC photo flyer) with UX 3 (Union photo flyer at Chino)]. Quijano discussed with Johnson at length about the rationale behind showing Union support to

management and explained that the blank sign would read "I'm Voting Yes" [Tr. 399:19-400:18, 414:11-13, 489:4-490:7]. Johnson consented to posing for multiple photographs [Tr. 292:10-25, 400:1-5]. Quijano's explanation is corroborated by her notes [Tr. 487:24-490:7; EX 63]. The ALJ noted: "After careful consideration of Johnson and Quijano's testimony, I accept the account of Quijano, whom I found to be a candid and reliable witness." [Report at 13:50-51].

In the alternative, the Union's victory should not be set aside based on a lone employee's allegation of unauthorized use of his photograph where the Union's margin of victory was significant: 72 votes in favor, 39 votes against, and 4 challenged ballots [Report on Objections, p. 1]. *See*, *e.g.*, *Mike Yurosek*, 292 NLRB at 1074 (setting aside union election victory where the margin of victory was one vote because union photographed employees at the plant entrance "virtually everyday during the campaign" and threatened one employee with the photos); *Pepsi-Cola*, 289 NLRB at 736-37 (setting aside union election victory where margin of victory was one vote because "a change in only one vote would have altered the election's outcome" and multiple employees testified to being unlawfully videotaped and this "was disseminated among employees in the unit").

Additionally, the Union's photographing did not create an atmosphere of coercion to destroy laboratory conditions so as to make it appropriate to set aside an election on that basis because the Union provided a contemporaneous explanation for taking the photographs of employees who voluntarily came to the Hampton Inn and that explanation was consistent with the Union's use of the photographs. *See Nu Skin Int'l, Inc.*, 307 NLRB 223, 224 (1992) (distinguishing cases where the union photographed prounion and antiunion employees at the plant entrance from where the union photographed employees "voluntarily attending a union-sponsored" event); *accord Randell Warehouse III*, 347 NLRB at 592 & 596 (sustaining objection

where union photographed employees to see if they accepted or rejected union literature at the facility without **any** justification given to the employees for the photographing). Here all of the photographs were posed by UNAC staff, and no candid photographs were taken [Tr. 292:10-25]. *See Nu Skin Int'l*, 307 NLRB at 224 (noting that the employees posed in most of the union's photographs).

Even in *Randell Warehouse III* (where now-Chairperson Liebman vigorously dissented), the Board recognized that photographing employees is similar to a union's lawful solicitation and petition activity if the union explains that it is photographing to identify its supporters. *See* 347 NLRB at 596. Quijano credibly testified that the organizers explained the employee photographs were to identify union support to fellow supporters and management [Tr. 414:11-13 (Quijano); 286:19-287:7 (Serrette)] and this explanation was corroborated by employees Magsino [Tr. 98:25-99:5, 117:9-12, 120:8-10, 123:25-125:5] and Chesterfield [Tr. 427:23-431:81.

Because Johnson came to the Hampton Inn voluntarily, admitted to receiving the UNAC photo flyer [Tr. 372:17-20; UX 1], had "quite a long conversation about taking [his] picture" [Tr. 371:12-13], received a long response to his inquiry about holding a blank sign in the photograph

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<sup>&</sup>lt;sup>16</sup> The Employer contends that "had the Union actually secured the consent of RNs to manipulate their photographs and display manipulated photographs in a prounion campaign flyer, the Union would have been able to call dozens of RN witnesses to corroborate the self-serving testimony of Serrette and Quijano" [ER Brief at 36]. The Employer's contention misses that the Union called Chesterfield, who testified that she was told the blank sign would say that she's pro-union, it would be posted in the hospital, and she was asked for her consent for her picture to be posted in the hospital [Tr. 427:23-25, 428:19-23, 430:25-431:8].

The more striking problem with the Employer's contention is that after the Union called Chesterfield, the **ALJ specifically asked the Union not to call anymore witnesses to corroborate that the Union had their permission to be photographed** [Tr. 435:23-436:20 ("What you're asking me to do [is] infer [] from a string of witnesses who gave permission and who were told what the purpose of the photographs were . . . that Jimmy Johnson was not told otherwise[, but] I'm not willing to make that inference"; "I find the evidence just too tangential"; and "therefore I ask you not to put on anymore witnesses to prove a negative.")].

(most of the Union's response he admittedly did not recall) [Tr. 371:23-372:4], posed for multiple photographs [Tr. 400:1-5], and expressed no discontent—as some other employees had—until his antiunion manager approaching him about his presence on the Union photo flyer [Tr. 373:17] when not one of the other more than 60 employees appearing on the Union photo flyer testified in support of the Employer's objection, Johnson's uncredited testimony cannot genuinely support a finding that the Union failed to explain the purpose of its photographs. See Nu Skin Int'l, 307 NLRB at 224 (agreeing with ALJ's finding that two employees' testimony that they were "concerned" or "felt funny" about their pictures being taken "disingenuous" when the Union took about 88 snapshots of employees voluntarily attending the Union's picnic where in many of the photographs the employees were posing for the camera and displaying their voting yes union t-shirts).

Accordingly, the ALJ correctly found: "In these circumstances, the use of Johnson's photograph does not constitute objectionable behavior" [Report at 14:3-4 (citing *Gormac Custom Mfg.*, 335 NLRB 1192 (2001))]. "As there is no credible evidence the Union utilized any unauthorized photographs in the photo brochure," the Board therefore should adopt the ALJ's recommendation that the Employer's photograph objections be overruled [Report at 14:4-6].

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<sup>&</sup>lt;sup>17</sup> Johnson claims he gave his consent to protect from retaliation for speaking to union representatives [Tr. 371:20-23, 372:5-9], but the Employer must know of the picture in advance of taking action to constitute retaliation. Johnson's caveat to giving his consent demonstrates that he was told the Union would use his picture in a manner visible to management.

#### IV. **CONCLUSION**

Based on the foregoing reasons as well as those reasons identified in the Union's Post-Hearing Brief to the ALJ, the Union respectfully requests that the Board deny the Employer's Exceptions to the ALJ's Report and adopt the ALJ's recommendations that all remaining objections be overruled in their entirety so that the Union can be certified as bargaining representative of the nurses at CVMC.

Dated: September 1, 2010

LISA C. DEMIDOVICH, ESQ. UNITED NURSES ASSOCIATIONS OF CALIFORNIA/ UNION OF HEALTH CARE PROFESSIONALS

By \_\_\_\_\_LISA C. DEMIDOVICH

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Re: United Nurses Association of California/Union of Health Care Professionals -and- Chino Valley Medical Center; NLRB No. 31-RC-8795

#### PROOF OF SERVICE

#### STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 955 Overland Court, Suite 150, San Dimas, California 91773-1718.

On September 1, 2010, I served the foregoing document described as **PETITIONER'S ANSWERING BRIEF IN OPPOSITION TO EMPLOYER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON EMPLOYER'S ELECTION OBJECTIONS** on the interested parties in this action as follows:

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#### (Personal Service)

I caused such envelope to be delivered by hand to the addressee. Executed on September 1, 2010.

#### X (By Electronic Mail)

Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused such documents described herein to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful. Executed on September 1, 2010.

LISA C. DEMIDOVICH