UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC D/B/A DANBURY HEALTH CARE CENTER; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC D/B/A WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC D/B/A WETHERSFIELD HEALTH CARE CENTER	Case Nos.	34-CA-12715 34-CA-12732 34-CA-12765 34-CA-12766 34-CA-12767 34-CA-12768 34-CA-12769 34-CA-12770 34-CA-12771

And

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU, AFL-CIO

RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondents submit the following reply brief to Counsel for the Acting General Counsel's Answering Brief to Respondents' Exceptions to the Decision of the Administrative Law Judge ("Answering Brief").

I. Introduction

For all its rhetoric and sophistry, the Acting General Counsel's ("AGC") Answering Brief fails to cite to, and indeed ignores, the evidence. Respondents' Brief in Support of their Exceptions ("Exceptions Brief") rebuts the majority of the points raised by the AGC in his Answering Brief and contains a detailed discussion of the evidence supporting Respondents' positions. Accordingly, Respondents will not make cumulative arguments or repeat that evidence here. However, Respondents will address the more egregious instances of the AGC making bold assertions with no citations to the record and with no legal basis. As Respondents previously have argued, the ALJ's findings of fact and conclusions of law are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to established Board law or policy.

II. The AGC's Arguments about Respondents' Violation of the Act Based on Their Conduct in Hiring Former HSG Employees as New Employees Are Meritless

A. HSG Terminated the Full-Service Contracts

The AGC's arguments about Respondents' violation of the Act based on their conduct in hiring former HealthCare Services Group, Inc. ("HSG") employees as new employees hinge on an erroneous assertion that Respondents directed HSG or arranged for HSG to terminate the full-service contracts and/or the employees. *See, e.g.*, Answering Brief at 1, 2, 26-27. There is absolutely no evidence in support of that assertion and the AGC cites to none. The AGC claims that the Union "has never been able to learn why" this happened. (Answering Brief at 29). However, the undisputed testimony from the Union's own representative was that HSG (not Respondents) terminated the full-service contracts because Respondents owed it money. (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25). The only evidence in the

record on this issue, therefore, directly contradicts the ALJ's finding on this issue and the AGC's assertion.

B. The Joint Employment Test Is Not Subjective

The AGC argues that "the relevant test [for joint employment] concerns changes which the employees at issue perceived," without citing any legal support for this argument. (Answering Brief at 7). As explained in Respondents' Brief, the Administrative Law Judge ("ALJ") and the AGC are incorrect in this regard. Board precedent does not focus on the subjective perception or perspective of employees in determining whether a joint employment relationship exists, but rather on the objective factors outlined in the cases set forth in Respondents' opening brief. (Exceptions Brief at 19-26, 37); *American Air Filter Co.*, 258 NLRB 49, 52 (1981) (affirming ALJ's findings, including the finding that a joint employer is one who shares control with another employer "as established by objective evidence").

C. Respondents Did Not Control HSG's Hiring Decisions

The AGC is incorrect that Ed Remillard ("Remillard") and/or Respondents had sole or any input into HSG's hiring decisions because Remillard "told" HSG to maintain the housekeeping and laundry employees with the same terms and conditions of employment. (Answering Brief at 11, 12). The express and unambiguous provisions of the CBAs, however, not Remillard or Respondents, required HSG (as a subcontractor) to retain all of the housekeeping and laundry employees with their terms and conditions intact. (Article 9F. of Exs. GC3, GC4, and GC6). This provision was requested by, bargained for, and agreed to by the Union. Therefore, why not say that the Union required HSG to hire all the employees?

D. The Theory in the Alternative of a Finding of Joint Employment Is Circular

The AGC's arguments about the ALJ's alternative theory of why Respondents had an obligation to bargain with the Union when they hired housekeeping and laundry employees after the termination of the HSG full-service contracts demonstrate just how circular that theory is. *See* Answering Brief at 15-16. There are no facts in support of the ALJ's finding that the

subcontracting of the employees to HSG was "akin to a layoff." (Answering Brief at 19). Therefore, as Respondents assert, the employees were terminated. *See, e.g.*, Exceptions Brief at 8-9. The CBAs contain specific provisions addressing newly hired employees who previously were employed by the Centers and Respondents were permitted to treat the former HSG employees as new employees under those provisions. (Exceptions Brief at 41). The AGC argues that these contractual provisions should not apply and that the Union did not waive its right to bargain on behalf of the former HSG employees, citing to the ALJ's discussion of these issues, including the finding that "[t]he employees . . . were still also employed by Respondents." (Answering Brief at 16; ALJD at 60). Accordingly, the alternative theory can only survive if the housekeeping and laundry employees were still employees of the Centers when the full-service contracts with HSG ended. Without a finding of joint employment, the alternative theory collapses in on itself.

E. Respondents Were Not Successors to HSG

The AGC's argument in support of the alternative theory based on the successorship clauses in the CBAs is meritless. (Answering Brief at 19). Respondents were not successors to HSG. Respondents did not purchase HSG or take over its business. Instead, HSG continued in business after the end of the full-service contracts.

F. The Allegations about Petion and Parks-Hill Have No Basis in Fact

The AGC's broad assertions about Franz Petion and Claudette Parks-Hill have no basis in the record. (Answering Brief at 20, 23). Accordingly, the AGC cites no evidence in support of these assertions. As demonstrated in Respondents' Brief, however, the facts show that Petion did not use his seniority with Respondent Westport to transfer from HSG to the dietary department at Westport. (Exceptions Brief at 34-36). The grievance at issue involved action that pre-dated Petion's employment with HSG. The fact that Petion worked for HSG by the time the Center finally resolved his grievance does not create joint employment any more than a reinstatement order creates joint employment with any former employee's new employer.

Further, as shown in Respondents' Brief, Parks-Hill, who simultaneously was employed by Respondent Long Ridge and HSG, did not use her seniority with HSG to change positions at Long Ridge. (Exceptions Brief at 36-37). The change was based on her seniority with Long Ridge independent of her employment by/with HSG.

G. HSG's Use of Employees' Seniority with the Centers Is Irrelevant

The AGC's suggestion that joint employment existed because HSG used employees' seniority from the Centers to make decisions (Answering Brief at 23) ignores the plain contract language that required a subcontractor to hire all employees with their seniority intact. (Article 9F. of Exs. GC3, GC4, and GC6). The employees' seniority with the Centers, therefore, became their seniority with HSG. Under the AGC's analysis, such a subcontracting provision would always create joint employment; which is contrary to Board law.

H. The Additional Argument for Joint Employment Has No Basis in Fact or Law

The AGC's purported "additional argument" in support of the joint employer finding – that the subcontracting clause should be read to mean that the subcontractor, HSG, became obligated along with Respondents under the CBAs and that they operated as joint employers (Answering Brief at 27-28) – has no basis in fact or in law. Again, under this analysis, such a subcontracting provision would always create joint employment; which is contrary to Board law.

I. The AGC's Burden of Proof Cannot Be Shifted to Respondents

Finally, the AGC and ALJ state they do not know what actually occurred or why because Respondents called no managerial or supervisory witnesses to testify. The AGC, however, carried the burden to prove his case. Respondents cannot be held responsible for his failure to do so. The AGC had the power to subpoena Respondent witnesses, but made a strategic decision not to do so. Again, Respondents cannot be held responsible for this failure.

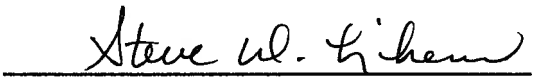
As demonstrated in Respondents' opening brief, the undisputed evidence is contrary to each "adverse inference" drawn by the ALJ. (Exceptions Brief at 39). With evidence in the

record through the AGC's case in chief that disproved the AGC's theories, Respondents had no obligation or duty to put on cumulative testimony. The AGC made a decision to rest his case without calling any Respondent supervisors and without meeting his burden of proof. Respondents did not have a burden to disprove the AGC's theories.

III. Conclusion

The ALJ's Decision and Order should be reversed; Judgment should be entered in favor of Respondents on all counts; and the Consolidated Complaint should be dismissed in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing pleading were served on October 24, 2012, in the manner set forth below:

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