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ENDO PAINTING SERVICE, INC.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

UNITED STATES OF AMERICA

ENDO PAINTING SERVICE, INC. Employer, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADE, PAINTERS UNION 1791, Union.	Case No. 20-CA-080565 ENDO PAINTING SERVICE, INC.'S AMENDED POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE.

ENDO PAINTING SERVICE, INC.'S AMENDED POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.42 of the Narional Labor Board's Rules and Regulations, Employer ENDO PAINTING SERVICE, INC. ("Endo") by and through its attorneys, O'Connor, Playdon & Guben, LLP, hereby, respectfully submits this amended post-hearing brief in the above-listed case involving Endo and the INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, PAINTERS LOCAL UNION 1791, AFL-CIO's ("Union").

I. STATEMENT OF ISSUES PRESENTED

1. Whether the Complaint lacks ripeness when the Union failed to

follow the procedures for Grievances and Arbitration as set forth in various Sections of the collective bargaining agreement ("CBA").

2. Whether Endo violated Section 8(a)(5) of the Act by refusing to provide the Union with all of the information requested by the Union concerning a grievance where the refusal was due to the fact that the request seeks irrelevant information, is overbroad, is unduly burdensome, and the grievance, improperly labeled by the Union as a "class grievance" or "class action grievance," does not meet the Federal Rules of Civil Procedure ("FRCP) Rule 23 requirements of a Class Action.

3. Whether substantial evidence supports the allegation that Endo violated Section 8(a)(5) of the Act by refusing to provide certain information as part of a contractual grievance and arbitration clause in the CBA.

II. MATERIAL FACTS

1. Endo and the Union are parties to a CBA covering the period of February 1, 2008 through January 21, 2013. See Stipulation of Facts and Documents ("Stipulation") at p. 3, ¶ 9(c). The CBA is shown as Joint Exhibit #6.

2. On or about March 8, 2012, the Union, by letter from Union representative Mitchell Shimabukuro, herein referred to as "Shimabukuro," submitted a purported "Class Grievance" number MS-12-001 to Endo as shown in Joint Exhibit #7. The "Class Grievance" alleged that Endo violated the CBA by (i) "refusing to pay overtime on jobs" and requiring "banking of hours[,]" (ii) "chang[ing] time sheets to show less hours worked" which caused underreporting of "contributions to the health fund, training fund, vacation fund, LMCF, promotion and charity funds and annuity fund[,]" (iii) "paying cash on the weekends[,]" and (iv) requir[ing] some of their employees to use their personal cars to transport workers and material." See Joint Exhibit #7 at p. 2, ¶¶ 3b – 3e,

respectively.

3. The pertinent parts of the CBA, including the sections governing the grievance and arbitration procedure are as follows:

Sec. 17. GRIEVANCE PROCEDURE

> All grievances or disputes involving the application, interpretation, or alleged violation of this Agreement shall be handled in the following manner:
>
> Step #1. A written and signed complaint must be presented to the Union within 7 working days from the date the alleged grievance occurred.
>
> Step #2. The Union Representative and the Employer or his/her representative shall attempt to adjust the grievance or dispute promptly.
>
> Step #3. If the grievance or dispute is not satisfactorily adjusted at Step #2 within 2 working days after being submitted, it shall be referred to the Joint Industry Committee. If a member of the Joint Industry Committee is a party to the grievance or dispute, he/she shall be replaced by an alternate.
>
> Step #4. If the Joint Industry Committee cannot reach a decision by a majority vote within 30 days after the grievance or dispute is first submitted to it, then the grievance or dispute shall be submitted to arbitration. Because of the complexities and the constantly changing interpretations of the specific laws involved, in cases involving alleged charges of discrimination or alleged OSHA violations, the Joint Industry Committee may elect to by-pass acting on such cases, and instead refer such cases to the State or Federal agencies in charge of such matters.

Joint Exhibit #6 at p.13 (emphases added).

Sec. 18. ARBITRATION

> A. Within 15 days after the Joint Industry Committee reaches an impasse on a grievance decision, the Association and the Union shall mutually agree upon an arbitrator. If the parties cannot agree, the arbitrator shall be selected by the First Judge of the U. S. District Court of Hawaii.
>
> B. The decision of the arbitrator shall be limited to matters relating to the agreement. The arbitrator shall not

amend the Agreement.

C. The decision of the arbitrator shall be final and binding upon the parties and shall be in writing and signed by the arbitrator. A copy of the decision shall be given to each party.

D. All fees and expenses of the arbitrator shall be borne equally by the Union and the Association (or non-member employer in grievance involving non-member Employers). Each party shall bear the expenses for the presentation of its own case.

E. In addition to other determinations, the arbitrator may also determine back pay awards, fines, monetary penalties or damages.

F. No grievance subject to the grievance procedure or arbitration shall be recognized unless considered in Step #1 within 7 working days after the date of the alleged violation.

Joint Exhibit #6 at p.14 (emphasis added).

Sec. 19. JOINT INDUSTRY COMMITTEE

H. **When the committee receives a grievance or dispute it shall send notice by certified mail thereto to the parties involved.** The Employer involved may then designate any other signatory Employer to serve as a member of the committee in place of a regular Employer member. The Employer involved may be present or be represented by anyone, other than legal counsel, at any meeting during which the matter is heard and may present evidence and testimony on his/her behalf. If the Employer fails or refuses to designate a person to serve as a member of the committee, or fails or refuses to appear at the scheduled meeting, the committee as regularly constituted may consider and decide the matter before it.

Joint Exhibit #6 at p.15 (emphasis added).

Sec. 14. TIME AND MODE OF PAYMENT OF WAGES

A. Weekly Payment. Wages shall be paid weekly, each Friday, not later than quitting time and not more than one week's wages may be withheld at any time.

> B. Mode of Payment. All wages shall be paid either in lawful currency or negotiable check, together with a statement of earnings and deductions showing the Employer's name, and the employee's name, rate of pay, date and hours worked, all deductions made and amount due. The payment shall conform with all provisions pertaining to the payment of employees as required by Federal and State laws.

Joint Exhibit #6 at p.10.

Sec. 15. WORKING RULES

> The Association, Employers, employees and the Union shall observe the following working rules:
>
> N. Personal Automobile. The Employer will not **<u>require</u>** any employee to use his/her personal automobile to transport workers or material.

Joint Exhibit #6 at p.12 (emphasis added).

4. By letter dated March 14, 2012, Endo acknowledged receipt of "Class Grievance" MS-12-001 and <u>requested that the Union provide Endo with information necessary for the employer to investigate the "grievance" including, inter alia, the names of the allegedly aggrieved employees and the dates of the alleged violations</u>. <u>See</u> Stipulation at p.4, ¶ 11; Joint Exhibit #8.

5. By letter dated April 5, 2012, the Union acknowledged receipt of Endo's March 14, 2012 letter. However, the Union failed to provide any of the information that Endo requested. <u>Instead of simply identifying the allegedly aggrieved employees so that Endo could investigate the grievance, the Union attached a list identifying each and every bargaining unit employee of Endo and claimed that all of the employees were aggrieved and entitled to relief</u>. Similarly, instead of identifying the dates of the alleged CBA violations, the Union simply stated that it believed Endo has engaged in a continuing violation since

January 1, 2010, and therefore did not provide any date information beyond that statement. See Stipulation at p.4, ¶ 12; Joint Exhibit #9.

6. By letter dated April 12, 2012, Endo responded to the Union's April 5, 2012 letter, noting that the Union had failed to provide the information requested by Endo on March 14, 2012 and reiterated Endo's request for information. Endo also requested that the Union identify what provision of the CBA authorized the filing of a "Class Grievance." See Stipulation at p.4, ¶ 13; Joint Exhibit #10.

7. By letter dated April 24, 2012, the Union responded to Endo's letter of April 12, 2012, stating that it had received Endo's letter. However, the Union again failed to provide the very basic and critical information that Endo had requested for the last five weeks. See Stipulation at p.4, ¶ 14; Joint Exhibit #11.

8. By letter dated April 24, 2012, the Union requested that Endo supply it with an exhaustive amount of information for each and every Endo employee in the bargaining unit. The Union sought not only pay rate information for every single Endo employee for nearly two and a half years (i.e. from January 1, 2010 to April 24, 2012), but also the project sites worked on by each employee, the total hours worked by each employee, the date of each payment made to each employee, all timesheets for each employee, and various periodic reports weekly detail reports, work logs, daily reports, weekly project recaps for roughly the last 2.5 years. The Union also requested other information such as detailed data about each vehicle owned or operated by Endo during roughly the last 2.5 years, including, among other things, the model, make, year, date of purchase, purchase price, license plate, person assigned to the motor vehicle and description of use of each motor vehicle. The Union made this unreasonable request for information

despite the fact that it had failed to provide any of the information requested by Endo, failed to provide any written and signed complaints from any Endo employees upon which the grievance was purportedly based, and failed to provide any evidence supporting its allegation that every Endo employee was aggrieved and entitled to relief. See Stipulation at p.4, ¶ 15; Joint Exhibit #12.

9. In a letter dated May 4, 2012, Endo responded to the Union's letter of April 24, 2012, reiterating its request for the information that the Union was inexplicably and inexcusably refusing to provide for nearly two months and informing the Union that its request for information was improper in light of the Union's refusal to provide Endo with its requested information and the Union's failure to follow the grievance procedure set forth in the CBA. See Stipulation at p.4, ¶ 16; Joint Exhibit #13.

10. On May 7, 2012, the Union filed an unfair labor practice charge against Endo despite the fact that it had not bargained in good faith and failed to provide any of the information requested by Endo and necessary for the investigation of the grievance. Stipulation at p.1, ¶ 3(a); Joint Exhibit #2.

11. In a letter dated May 22, 2012, after an inexplicable and improper three-month delay, the Union finally furnished to Endo four signed written complaints from bargaining unit employees Erick Dias, Preston Foster, Jr., Yancy Medeiros, and Jantzen Song. The Union also reiterated its April 24, 2012 request for information from Respondent. See Stipulation at p.4-5; ¶ 17; Joint Exhibit #14. However, each of the complaints were vague and none of the complaints stated the date upon which the alleged CBA violations took place.

12. By letter dated July 20, 2012, Endo acknowledged receipt of the four written and signed complaints of Endo employees furnished by the Union on May 22, 2012. Endo agreed to provide the "relevant information requested for the four

employees in question...that relates to the 7-day period immediately preceding the date of the employee's written and signed complaint." Endo explained that all of the other information requested by the Union was irrelevant because it was outside the 7-day period immediately preceding the date of each signed written complaint and therefore, could not form the basis for any grievance under the terms of the CBA. Endo agreed to provide the information on the condition that the Union "provides all complaints related to the Grievance MS-12-001 or verifies that the only complaints the Union has in its possession are the Grievances from the four employees in question . . . ." See Joint Exhibit #15.

13. The Union failed to provide any response to Endo's July 20, 2012 offer to provide information.

14. To the best of the Endo's knowledge, the "Class Grievance" MS-12-001 have never been submitted to the Joint Conference Committee ("JCC") in accordance with Section 17, Step #3 of the CBA Grievance Procedure.

15. To the best of the Endo's knowledge, the JCC has never made a decision concerning the grievance.

III. DISCUSSION

A. Class Grievance is Invalid and Unauthorized

The Union's motivation for improperly labeling the underlying "grievance" as a "class grievance" is obvious. The Union claims to have "heard" from a non-employee that at most, four employees were paid in cash and the Union subsequently files a "class grievance" without having any idea whether the alleged action affects all Endo employees or whether the alleged action affects any employees beyond the four employees in question. The Union then proceeds to file a request for information for all employees so

that they can (1) go on a fishing expedition through the records of all employees, whether or not such employees are involved and (2) harass and burden Endo with an overly broad and unduly burdensome information request. This conduct is wholly improper and a clear violation of the CBA.

Society of Professional Engineering Employees in Aerospace v. Spirit Aerosystems, 2012 U.S. Dist. LEXIS 170320 (D. Kan. 2012) involved a CBA which stated that set forth the procedure for dispute resolution as follows:

> Article 3
> DETERMINATION OF DISPUTES
> . . .
> Section 3.3 Grievance Steps.
> Step 1 – Oral. Any employee having a complaint shall first bring it to the attention of his immediate supervisor . . . The decision in this Step will be final and binding unless . . . the employee proceeds to Step 2 of this procedure.
> Step 2 – Documented. Any complaint not resolved in Step 1 – Oral, must be documented and signed by the employee . . . and submitted to the employee's supervisor . . .
> Step 3 – Pre-Arbitration. The employee's managers' decision will be final and binding unless . . . the grievance is appealed in writing to Human Resourses . . .
> Step 4 – Arbitration. The decision of Human Resources will be final and binding unless . . . the grievance is appealed in writing to arbitration. Such appeal shall be directed to Human Resources . . . .

Id. at *6-7.

The Spirit court rejected the union's contention that the CBA grievance procedure in Article 3 allowed the union to file a general class-wide grievance against the employer. Spirit held that "the explicit langauge of Article 3 creates a grievance procedure for specific, individual employees to challenge a layoff, discharge, suspension, or involuntary resignation." Id. at *15 (internal quotation marks and citation omitted). A "limited exception to Article 3's restriction of the grievance procedure to individual workers" is found in CBA Section 15.1(d) which "permits the union to issue a grievance,

but only as to an alleged violation 'of the no-lockout obligation.'" Id. at *16.

Here, nothing in the CBA authorizes the Union to issue, file, or submit a class grievance against Endo. Like, the grievance procedure in the Spirit CBA, the CBA grievance procedure in the instant case is also individual-specific – that is, it only authorizes complaints against Endo from "specific, individual employees to challenge" an employment-related action of Endo. It certainly does not authorize the Union to file a grievance or a "class grievance" against Endo. This fact is evident from the requirement in CBA Section 17, Step #1 that "[a] written and signed complaint must be presented to the Union within 7 working days from the date the alleged grievance occurred." Joint Exhibit #6. Clearly, the "written and signed complaint" must be provided by employee "to the Union" because it would be nonsensical to suggest that the Union could write its own complaint and "present" it to itself. Thus, there is no merit to any contention that the Grievance Procedure of CBA Section 17 can be used by the Union to file a class-wide grievance against Endo.

Moreover, there is absolutely no other provision in the CBA under which the Union can pursue a class grievance against Endo because Section 17 is the sole clause for handling grievances. Indeed, the Union itself does not argue that it is entitled to file a grievance under any provision other than Section 17. CBA Section 17 plainly states in its opening paragraph that "[a]ll grievances or disputes involving the application, interpretation, or alleged violation of this Agreement shall be handled" in the manner set forth in that section. Joint Exhibit #6 at p.13. Thus, in accordance with Spirit, Section 17 recognizes and authorizes as grievances only those actions commenced by complaints filed by "specific, individual employees." Furthermore, because all grievances or disputes alleging a violation of the CBA must be handled in accordance with Section 17, class action or class grievances filed by the Union allegedly on behalf of employees are

not valid grievances within the meaning of the CBA. Hence, the Union's "class grievance" is invalid, unauthorized, and simply unrecognizable under the CBA. Thus, Endo has no duty to provide any information so the Union can "investigate" this fictitious and improper Class Grievance MS-12-001.

To read the CBA as allowing the Union to file a class grievance on behalf of every employee in the bargaining unit, no matter when the alleged contract violation occurred, is absurd. Section 17 of the CBA imposes a statute of limitations period of 7 days from the date of the violation occurrence, during which a complaint may be filed and a grievance may be initiated. This limitations period is critical to promoting the policy of repose and to prevent unfair prejudice the employer would suffer if it was required to continually respond to grievance upon grievance and the information requests related thereto from its multitude of employees, where the grievance causes of action never expired. It is unreasonable to suggest that the Union can file grievanes outside of Section 17, on behalf of employees, based on allegations of CBA violation. Allowance of such conduct by the Union would negate the limitations period and the other rules and safeguards of Section 17. Instead, where a grievance is based upon the allegation that the employer has violated the CBA with respect to its payment, or other employment-related treatment of one or more individual employees, the grievance must be based on a written and signed complaint from the employee, filed within 7-days of the date of the employer's alleged violation.

To date, the Union has failed to cite any case law or provide any rational argument supporting its allegation that it is allowed to file a "class grievance." One of the Union's only arguments is the extremely weak contention that nothing in the CBA prohibits the filing of a class grievance. This argument ignores the language of Section 17, which like the CBA grievance resolution language in Spirit, clearly contemplates that

each grievance will be based on the specific complaints made by an individual employee in his or her written complaint presented to the Union. Moreover, if Section 17 authorizes the Union to file class action grievances against Endo without underlying employee complaints, how is the Union supposed to present a complaint to itself as required in Section 17, Step #1. See Joint Exhibit #6 at p. 13. In addition, the Union's argument is nonsensical as it simplistically suggests that the parties are allowed to do every act that is not specifically and expressly prohibited by the CBA. Under the Union's logic, the parties should therefore be allowed to make false statements against each other, file frivolous claims against one another, etc. because such acts are not expressly prohibited in the CBA.

The only other argument advanced by the Union is that it has filed class grievances in the past without objection from employers. Whether or not any party objected in the past to the filing of a class grievance is not germane and the Union has failed to cite any authority to the contrary.

Even if a class grievance were authorized, the Union would be required at a minimum to prove the existence of a class of workers that have suffered the grievances alleged by the Union in its "Class Grievance" MS 12-001. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970). The Union has failed to do this. The Union has also failed to even identify the names of individuals in the Class allegedly aggrieved. Rather, the Union cites the name of every single employee of Endo and argues that all of these individuals have been aggrieved without any facts to support such assertion. The Union would also be required to comply with FRCP Rule 23 requirements for recognition of class actions as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

In the instant case, the size of the class is at most 4 and thus, it is impossible to determine the numerosity of the class. The "class action" aspect of this matter must be dismissed.

(2) there are questions of law or fact common to the class;

Alleging a "class grievance" requires there to be questions common to the class. In this case, there is no way of knowing whether there are questions common to the class. By naming "all employees," the Union has failed to show that each of the allegations is common to the class. This means the Union must prove such things as all of the employees were at one time paid in cash, had hours banked, were not paid proper overtime rates, and were required to use personal vehicles for work-related tasks. This is unlikely at best. The "class action" aspect of this matter must be dismissed.

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

It is not known what employees may or may not be involved. There is no way of knowing what claims or defenses may be appropriate.

Based on the foregoing, the "Class Grievance" is invalid, unauthorized, and unrecognizable under the CBA. Accordingly, any requests for information associated therewith are precluded.

B. The Information Requested by the Union is Not Relevant

In order for a union or an employer to be required to provide information to the other party for the processing of a grievance, the information sought must be both necessary and relevant. NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967); Knappton Maritime Copr., 202 NLRB 236 (NLRB 1985). See also Emeryville Research Center, Shell

Dev. Co. v. NLRB, 441 F.2d 880, 883 (9th Cir. 1971) (stating that "[t]he first question in such a case is always one of relevance" and "[i]f the information requested has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice"). Although, the NLRB interprets the "relevant and necessary" standard as a broad "dicovery-type standard[,]" the requesting party must nonetheless show "a probability that the desired information is relevant." North star Steel Co., 347 NLRB 1364, 1368 (NLRB 2006). See also NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967) (stating that the issue of whether an employer is obligated to supply requested information turns on whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities"). Therefore, the United States Supreme Court has explained that withholding requested information is not a per se violation. Rather, "[e]ach case must turn upon its particular facts" with the inquiryt always being "whether or not under the circumstances of the particular case the statuory obligation to bargain in good faith has been met." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-154 (1956).

Another requirement for an information request is that the Union must make the request in good faith. Island Creek Coal Co., 292 NLRB 480, 492 at n. 14 (NLRB 1989). "[A]n employer need not comply with an information request where the sole purpose for the request is to harass the employer . . . ." Wachter Construction, 311 NLRB 215, 216 (NLRB 1993).

Here, the information requested by the Union is not relevant. The Union has admitted that the only reason it seeks the information in question is to investigate the Class Grievance MS-12-001. See Joint Exhibit #12 (stating that the request for information is "in connection with the class action grievance in MS-12-001"). There is absolutely no evidence in the record that Endo sought the information because it was

pursuing or considering the pursuit of any matter or grievance other than Class Grievance MS-12-001, which the Union filed "pursuant to Section 17 of the [CBA]." See Joint Exhibit #7. However, because the Union was not authorized under the CBA to file a class grievance as described, supra in Section III.A., Class Grievance MS-12-001 was an unauthorized, invalid, and unrecognizable "grievance." Inasmuch as the Union has failed to show why it has a need to investigate invalid, unrecognizable and moot grievances for which no relief or redress may be had, Endo has no duty to provide the requested information because it is irrelevant and unncessary.

Even if the invalidity and illegality of the class grievance could be ignored, the information requested is also irrelevant because it cannot possibly give rise to any valid and recognizable grievance nor can it save the class grievance from being time barred. As discussed in Section III.A. above, the CBA grievance procedure clearly requires that in order for a grievance between the parties to be recognized, the grievance procedure must be commenced by the filing of a written and signed complaint from the employee that is presented to the Union within 7 days of the date of the alleged CBA violation. See Joint Exhibit #6 at p.14 (stating that no grievance "shall be recognized unless considered in Step #1 within 7 working days after the date of the alleged violation"). Tthe Union has failed to comply with Section 17 of the CBA grievance procedure. Although after a two-month delay the Union finally provided a written and signed complaint from each of four different Endo employees, the complaints did not contain any information regarding the date(s) of the alleged CBA violation(s). Rather, the complaints contained vague and ambiguous allegations about various violations that Endo allegedly committed at some point in the past. The correspondence from the Union even alleges that the violations occurred as early as January 2010. See Joint Exhibit #11 (where the Union alleges that Endo has "engaged in a continuing violation of various

provisions of the [CBA] from January 1, 2010 to the present"). Thus, the Union has failed to produce any evidence that it is investigating valid complaints or grievances (or facts that could lead to the filing of valid complaints or grievances) that are not time barred by Section 17. Rather, what the Union is transparently doing is stating that at some point in time on or around January 2010, Endo may have violated the CBA and aggrieved every single one of its bargaining unit employees. Thus, the Union argues that it is entitled to detailed information regarding each of Endo's employees for the period of January 1, 2010 to the present, including not only pay rate information for every single Endo employee for nearly two and a half years (i.e. from January 1, 2010 to April 24, 2012), but also the project sites worked on by each employee, the total hours worked by each employee, the date of each payment made to each employee, all timesheets for each employee, and various periodic reports weekly detail reports, work logs, daily reports, weekly project recaps for roughly the last 2.5 years, not to mention detailed data about each vehicle owned or operated by Endo during roughly the last 2.5 years, including, among other things, the model, make, year, date of purchase, purchase price, license plate, person assigned to the motor vehicle and description of use of each motor vehicle. Not only is such an allegation unreasonable and even laughable, but the information requests seeks items pertaining to a grievance that is necessarily time barred. To date, the Union has failed to explain how it could circumvent the 7-day limitations period imposed by Section 17 and why the violations occurring at some time in January 2010 through April 24, 2012 would not be precluded by the limitations period. Thus, because the Union has failed to explain why it is necessary to have the aforesaid information for investigation of a grievance that will be time-barred, invalid, and unrecognizable under the CBA, the information requested is irrelevant and Endo is under no obligation to produce it. See Emeryville, 441 F.2d at 883.

The only "grievances" that might be recognizable and might not be time barred are the four grievances that could conceivably be based on the only four written and signed complaints from Endo employees that the Union has in its possession, i.e. the complaints from employees Dias, Foster, Medeiros, and Song. See Joint Exhibit #14. If Endo's records indicate that the CBA violations alleged in the four employees' respective complaints occurred within the 7-day period prior to the date of their respective complaints, then valid grievances could be initiated and recognized based on those complaints. Thus, Endo offered to provide relevant information within these parameters to the Union because such information is the only data that could possibly give rise to a proper, valid, and recognizable grievance eligible for redress and remedy. Accordingly, Endo satisfied its duty to provide relevant requested information. Any information falling outside of these parameters is irrelevant and the Union has failed to provide any explanation to the contrary or to otherwise rebut Endo's arguments above about why the information is not relevant.

Moreover, the Union's request for information is overbroad, unduly burdensome and in bad faith. The information that the Union would need to investigate a grievance must necessarily come from the employee as he is the party that would know when a grievance has allegedly occurred. What the Union is impermissibly asking is for permission to essentially conduct an audit on the entire Endo bargaining unit for the last 2.5 years so that it can verify that there have been no violations of the CBA. This is entirely impermissible and as stated in testimony, would take Endo approximately 5 or 6 months to compile such information. See Testimony of Endo Vice President, Ivan Yamasaki (Tr. 304). In addition, such request is clearly harrassment with which and employer need not comply "where the sole purpose for the request is to harass the employer . . . ." Wachter Construction, 311 NLRB at 216. The information request

constitutes harrassment because as explained extensively above, the Union has failed to explain how the information requested can give rise to a valid and cognizable grievance that is not barred by the 7-day limitation period of the CBA. Thus, the Union has failed to explain why it needs informatio pertaining to a moot, unenforceable, and unrecognizable grievance, i.e. Class Grievance MS -12-001.

Finally, under the circumstances, Endo responded in a timely manner to the Union's Request for Information of April 24, 2012. The Union attempts to hide its unclean hands while simultaneously taking issue with the fact that Endo's offer to provide information was not made until July 20, 2012. However, the Union conveniently ignores the following important facts that require consideration here in judging the timeliness of Endo's offer to provide information:

(1) Endo has maintained continuously that the Union's "grievance" is invalid until it can be shown that written and signed complaints from Endo employees were presented to the Union within 7 days of the date of the alleged CBA violations. Thus, since March 14, 2012, Endo has requested from the Union the copies of the written and signed complaints so that the validity of the grievance, and hence the information request, could be verified. The Union failed to provide this most basic and necessary information to Endo until over two months after Endo's initial request in March 2012. The Union even went as far to file the instant unfair labor practice charge on May 7, 2012 before it had bothered to comply with Endo's critica request;

(2) to this day, the Union has failed to answer Endo's request about the date(s) of alleged violations of the CBA that form the basis of the Class Grievance MS-12-001. As repeatedly mentioned, without this information, the ability of the 4 complaints to give rise to cognizable and valid grievances cannot be determined. Thus, Endo has every right to continue to deny the Union's request for information. Nonetheless, in the

interest of promoting settlement, although under no obligation, Endo agreed to provide relevant information for each of the four employees for the 7-day period preceding the dates of their respective complaints.

(3) the power to avoid a dispute and/or expediently settle the issues in question lay entirely with the Union. Endo repeatedly informed the Union through correspondence between March and May 2012 that no grievance could be recognized between the parties until written and signed complaints presented to the Union with 7-days of the date of alleged CBA violations by Endo were provided. Rather than simply provide copies of employee complaints to Endo as any logical and sensible party would do, the Union instead chose to stubbornly refust to provide any employee complaints to Endo for over 2 monts. Moreover, the Union failed to ask the four complaining employees for the dates of the alleged violations and then took the position that Endo could not itself ask the employees for the dates because any questions posed by Endo to a complaining employee would be a violation of the Labor Management Relations Act. See Joint Exhibit # 11 (where the Union makes improper threats to Endo that "[e]mployees tell [the Union] that [Endo is] questionting them about whether they filed complaints" and that such questioning constitutes "interrogating [of] employees" in violation of Section 8a 1 of the LMRA).

Based on the foregoing, Endo's responses to the Union's request for information were made in good faith, timely, and more than fair.

C. The NLRB Does Not Have Jurisdiction to Decide the Instant Matter.

The case of Square D Co. v. NLRB, 332 F.2d 360 (9th Cir. 1964) is directly apposite to this case. There, the NLRB found that the company refused to bargain collectively with the Union in violation of § 8(a)(5) and (1) of the NLRA in "refusing to furnish the Union with relevant data with respect to the operation of its group incentive

plan and by refusing to discuss and negotiate with the Union concerning grievances arising out of the operation of said plan." Id. at 361. The NLRB argued "that an employer violates § 8(a)(5) and (1) of the Act by refusing, during the terms of a contract, to furnish information to the union upon request where such information is relevant to the union's exercise of its statutory function of policing the contract or of filing grievances on behalf of the employees in the bargaining unit" . . . [and] "the existence of a grievance procedure culminating in arbitration does not constitute a waiver by the union of its statutory right to seek redress by resort to the unfair labor practice procedures of the Act." Id. at 364-65.

The Company contended that under the collective bargaining contract, the Union had waived any right to bargain concerning the group incentive plan, to secure data concerning the plan, or to process grievances regarding the plan operation. Id. Therefore, according to the Company, insofar as (1) the outcome of the dispute involved the construction and interpretation of the collective bargaining agreement, and (2) the contract provides for arbitration of disputes regarding its construction, the dispute should have been submitted to arbitration. Id.

The Court of Appeals for the Ninth Circuit in Square D agreed with the company. Square D explained that the NLRB had no jurisdiction regarding the request for information and the unfair labor practice charge arising from the company's refusal to provide the information because "the existence of an unfair labor practice here is dependent upon the resolution of a preliminary dispute involving only the interpretation of the contract." Id. at 365-66. See also United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 569 (1960) (holding that arbitration of the dispute was required because it involved an allegation by the Union that the company violated the labor contract, an assertion by the company that it did not violate the labor contract, and

therefore was a dispute as to the meaning of the labor contract for which arbitration was the sole remedy). "It is well settled that when an employer defends against a refusal to bargain charge by contending that its actions were authorized by the collective bargaining agreement, the refusal to bargain charge presents an issue of contract interpretation . . . [and] the Board established the general rule, repeatedly affirmed by this court, that it will refrain from initiating an unfair labor practice proceeding if the collective bargaining agreement provides for arbitration as the method of resolving disputes over the meaning of the agreement."

Burns Internat'l Security Services v. National Labor Relations Board, 146 F.3d 873, 875 (D.C. Cir. 1998).

Where an allegation is made by an employer that a union has failed to comply with the grievance procedure established under the CBA, the matter must be resolved through arbitration or whatever means for dispute resolution is prescribed by the CBA. In Velan Valve Corp and Local Lodge 2704, 316 NLRB 1273 (NLRB 1995), the union alleged that the employer committed an unfair labor practice in refusing to arbitrate a grievance while the employer contended that "the grievance was facially invalid under the procedural time limits of the [CBA]." Id. at 1274. The NLRB held that because this type of dispute "involves precisely that type of narrow, fact-bound, contractual dispute[,]" the matter "should be handled by the parties through the contract-dispute mechanism, and not by recourse to the Board." Id.

In Washington Hospital Center v. Service Employees Int'l Union, Local 722, AFL-CIO, 746 F.2d 1503 (D.C. Cir. 1984), the union sought to compel arbitration of certain grievances while the hospital-employer refused to arbitrate the grievances on the ground that the Union had failed to follow several procedural prerequisites to arbitration, including a failure by the union to give contractually-mandated notice of arbitration

within the time period prescribed by the agreement. The D.C. Circuit Court of Appeals held that the allegation was that the Union failed to comply with procedural requirements and "[i]t is well-settled that the effect of such failure is for an arbitrator to decide." Id. at 1507 (citing Chauffeurs, Teamsters & Helpers, Local Union No. 765 v. Stroehmann Bros., Co., 625 F.2d 1092 (3d Cir. 1980)).

Under Collyer Insulated Wire, 192 NLRB 837 (1871), the Union and the NLRB is precluded from pursuing unfair labor practice proceedings until the contractually-required arbitration proceeding has completed. Collyer holds that when the parties to certain types of disputes have provided for arbitration in their CBA, the NLRB will not pursue unfair labor practice proceedings until arbitration has run its course.

The NLRB has taken the position that an alleged refusal by an employer to furnish relevant information needed by a union for grievance processing is not subject to Collyer deferment absent a clear and unmistakable waiver. Daimlerchrysler Corp. v. NLRB, 288 F.3d 434, 439 (D.C. Cir. 2002). This is because the obligation to provide relevant information is derived from statutory duties independent of the labor contract. Id. (citing NLRB v. Acme Indus. Co., 385 U.S. 432 (1967); American Standard, Inc., 203 NLRB 1132 (1973)).

However, in the cases where the NLRB has held that a dispute regarding information requests are not subject to arbitration or Collyer deferrment, there was no allegation that the grievances were per se invalid due to time bar. See, General Dynamics Corp., 270 NLRB 829 (NLRB 1984) (involving an objection to information request on the ground that the request was waived by operation of a confidential records clause rather than on the ground of a statute of limitation). Endo is not aware of any court cases or NLRB cases holding that where an information request is objected to on the basis that the underlying grievance is time barred, Collyer deferrment is inapplicable.

This is most likely because limitation of Collyer deferment is based on the policy that "[a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims." Acme, 385 U.S. at 438. Hence, courts may be reluctant to permit deferrment of an information request pending arbitration where immediate supply of the information would alert a party to the fact that its grievance is unmeritorious. Such policy consideration is not applicable where a party contends that a grievance is barred by operation of the CBA's statute of limitations. This fact would be evident upon the face of the CBA and no additional information is needed to verify the operation of the limitation period which evidenced by the plain language of the contract and does not require any factual information from the employer.

Under Square D, Velan, and Washington Hospital, the NLRB has no jurisdiction over allegations and claims made by the Union in the charge. The potential violations of the CBA and the grievance in question involve an interpretation of the CBA because Endo has alleged inter alia, that the matter turns on whether (a) the CBA authorizes the Union to file a class grievance; (b) the 7-day limitations period imposed by CBA Section 17 precludes the class grievance entirely; etc. Furthermore, as mentioned above, this is not a case where the information requested by the Union is required in order to commence, process, or complete the grievance procedure. To the contrary, a proper grievance requires the aggrieved employee to provide to the Union information pertinent to the grievance such as the date of the occurrence constituting a grievance, a description of the occurrence, the name of the aggrieved employee, etc. Based on the foregoing, the arbitrator and not the NLRB has the authority to resolve this case.

Endo will suffer harm if improperly forced to produce information because the Union has failed to identify with particularity the information it requests or a reasonable need therefore. It is unreasonable and burdensome to require Endo to

produce voluminous books and records to the Union. Furthermore, the information contained in the books and records of Endo is confidential and proprietary. Endo should not be required to submit these documents as disclosure could have an adverse impact on its business.

This case is more than just a case of Endo asserting a valid defense against the Union's Class Grievance or asserting that the merits of the case should be arbitrated. Rather, Endo's position is that there is no manner in which the information requested by the Union (with the possible exception of relevant information regarding each of the four employees pertaining to the 7-day period preceding the date of their respective complaints) can possibly render Class Grievance MS-12-001 a valid and recognizable grievance under the CBA. Thus, the information requested by the Union is per se irrelevant. In short, the CBA defines the term grievance and establishes the requirements and parameters under which a valid, cognizable grievance exists under the agreement such that the aggrieved party is entitled or at eligible for relief. However, because under the express terms of the CBA a grievance is not recognizable and does not exist unless a written and signed complaint by an employee is presented to the Union within 7 days of the date of the alleged CBA violation, under the CBA there is no recognizable grievance and hence no concomitant obligation by Endo to supply information therefore until the Union produces written and signed complaints from employees submitted to the union within the aforesaid 7-day period. The Union has failed to produce such complaints,[1] hence, there is currently no "grievance" between the parties under the express terms of their mutually bargained for agreement.

[1] As mentioned previously, the 4 complaints from employees Song, Medeiros, Dias, and Foster do not contain any dates of any alleged violations.

IV. CONCLUSION

For the foregoing reasons, Endo respectfully requests that the complaint against Endo be dismissed.

DATED: Honolulu, Hawaii, December 3, 2012.

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

UNITED STATES OF AMERICA

ENDO PAINTING SERVICE, INC. Employer, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADE, PAINTERS UNION 1791, Union.	Case No. 20-CA-080565 CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document will be duly served on the following parties by the means indicated on the date shown below:

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