

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

**PRIME HEALTHCARE CENTINELA,  
LLC dba CENTINELA HOSPITAL  
MEDICAL CENTER,**

**Respondent,**

**and**

**SEIU-UNITED HEALTHCARE  
WORKERS - WEST,**

**Charging Party.**

**Cases 31-CA-030055  
31-CA-030091  
31-CA-068109  
31-CA-072675**

**RESPONDENT PRIME HEALTHCARE  
CENTINELA, LLC DBA CENTINELA  
HOSPITAL MEDICAL CENTER'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE  
LAW JUDGE**

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**I.**  
**INTRODUCTION**

In this case, the Respondent and the Union negotiated over a successor agreement for more than a year. During the course of those negotiations, the Respondent insisted on its proposal to provide health insurance through its corporate parent's own provider network and to require employees to pay premiums for that insurance, and that there would be no collective bargaining agreement without the inclusion of that proposal in the agreement. The Union, just as adamantly, insisted that Respondent provide health insurance coverage through a different outside, fully-insured health care network and that employees pay nothing for coverage. Despite the undisputed evidence in the record establishing these facts, the ALJ concluded that the Employer violated the Act when it implemented its proposal. The ALJ's conclusion that the implementation violated the Act was based primarily on the ALJ's conclusion that Respondent was required to provide the Union with information requested by the Union which the Union would most assuredly use to attack the quality of care provided by Respondent and its corporate parent, as well as their business ethics, as part of the Union's corporate campaign against them. Respondent submits that the ALJ's conclusions are contrary to both the Act and the undisputed evidence in the record and must be reversed accordingly.

**II.**  
**STATEMENT OF THE CASE**

**A. Background**

**1. Respondent, Its Corporate Parent And The Union's Corporate Campaign**

Prime Healthcare ("Prime") is the parent corporation of Respondent Prime Healthcare Centinela, LLC dba Centinela Hospital Medical Center. Prime, through subsidiary entities, owns and operates more than a dozen hospitals in Southern California, Centinela Hospital ("Centinela"), Garden Grove Hospital ("Garden Grove") and Encino Hospital

(“Encino”), as well as hospitals in Northern California, Nevada, Texas and Pennsylvania. Charging Party SEIU-United Healthcare Workers-West (“Union”) has represented certain employees employed at Centinela Hospital since at least 2003, when Centinela was owned by Tenet Health Systems (“Tenet”), and also represents bargaining units at Garden Grove and Encino.<sup>1</sup>

Throughout the period relevant to the allegations of the complaint, the Union and its parent, SEIU, have been engaged in a corporate campaign against Prime. The tactics employed by the Union during the course of the campaign have included:

- Sending multiple letters requesting that Prime be investigated to law enforcement and public health agencies having regulatory authority over Respondent and other Prime facilities asserting, among other matters, that Prime hospitals have abnormally high incidences of septicemia, and are engaged in Medicare and MediCal fraud.
- Sending multiple letters to politicians in California and elsewhere asserting, among other matters, that Prime hospitals have abnormally high incidences of septicemia and Prime is engaged in Medicare and MediCal fraud.
- Publishing multiple reports, including reports and articles published through California Watch, a media organization directed and controlled by the Union, asserting, among other matters, that the Union has analyzed data relating to Prime hospitals and its analysis shows that Prime hospitals have reported abnormally high incidences of septicemia and patient malnutrition indicating pervasive patient care and quality issues or that Prime is engaged in Medicare fraud.

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<sup>1</sup> Prime created Respondent to facilitate Prime’s acquisition of Centinela.

- Sending multiple letters to Centinela physicians criticizing Prime’s patient care and business practices, as referenced above, and also referencing the Union’s analysis of Prime’s Medicare bills.
- Sending multiple letters to patients and members of the community soliciting negative information about Prime and Respondent.
- Interfering in Prime’s attempts to purchase additional healthcare facilities.
- Sponsoring legislation designed to block Prime from purchasing any additional healthcare facilities.

2. **Respondent’s EPO Plan Proposal To Duplicate The Health Insurance Benefits Already In Place Throughout The Prime System, Including Other Hospitals Where Employees Are Represented By The Union**

As noted, Prime operates health care facilities throughout Southern California. By January 2010 the base medical insurance plan in place at all Prime facilities in Southern California except Centinela, including Garden Grove and Encino, was an “exclusive provider organization,” or “EPO” plan. In an EPO plan sponsored by a healthcare employer, the healthcare employer (i.e., Kaiser) directly provides most covered healthcare services to employees through the healthcare employer’s facilities or providers affiliated with the healthcare employer’s network, with referrals outside of the network only for covered services not available within the network, and is responsible for the costs of all medical services rendered under the EPO. The Prime EPO Plan, hereinafter also referred to as “EPO Plan,” included two primary components as most relevant to Respondent’s exceptions. The first component is a “closed network” with a designated primary care physician (“PCP”), hereinafter also referred to as “PCP requirement.” Pursuant to this component, employees/plan participants have no-cost or reduced-fee access to Prime hospitals and other affiliated providers in the Prime network, and designate a

physician affiliated with the Prime network as their PCP. If the Prime network providers do not provide a particular medical service or if the employee/plan participant wishes to utilize a service provider in the Anthem Blue Cross network (“Anthem network”), the employee/plan participant can receive a referral to the Anthem network provider from his/her PCP. The second primary component of the EPO Plan is a premium sharing requirement for all levels of coverage except employee-only. Under this component, employees who wish to have their spouses and/or other family members covered by the EPO Plan are required to pay a specified premium to obtain that coverage; employee-only coverage is free with no premium sharing payment required. During the parties 2010 negotiations, Respondent repeatedly explained to the Union that Respondent wanted to implement the EPO Plan at Centinela in place of the existing HMO plan affiliated with the Anthem network, made numerous proposals to the Union that would allow it to do so, and repeatedly advised the Union that there would be no final collective bargaining agreement without agreement to the EPO Plan. The Union repeatedly rejected Respondent’s EPO Plan proposal, insisting that the then-existing Anthem HMO be retained and provided to employees for free at all levels of coverage, including employee/spouse and employee/children. On January 1, 2011 Respondent implemented its EPO Plan proposal.

**B. The Complaint**

The Consolidated Complaint (“complaint”) was issued on April 27, 2012 and alleges as relevant to Respondent’s exceptions that Respondent engaged in violations of Section 8(a)(5) of the Act as follows:

Unilateral Change Allegations:

- On or about September 1, 2010 Respondent distributed a memorandum to employees announcing that it would offer a new EPO medical plan effective January 1, 2011. GCX 1(z), ¶18(a).

- On or about January 1, 2011 Respondent discontinued the HMO medical plan option and replaced it with an EPO medical plan option. Id., ¶18(b).

Refusal To Provide Information Allegation:

- Since about August 9, 2010 Respondent has failed and refused to furnish the Union with information requested by the Union in a letter dated July 23, 2010. Id., ¶16.

General Bad Faith Bargaining:

- During the period beginning on or about December 4, 2009 and continuing through December 22, 2011, Respondent has failed and refused to bargain in good faith with the Union by making unlawful unilateral changes as described in the complaint, failing to provide information as described in the complaint, and by conditioning bargaining with the Union on acceptance of a last, best and final offer that contains the implemented EPO medical plan option. Id., ¶19(c).

**C. The Record Resulting From The Hearing On The Complaint**

The hearing on the allegations of the complaint began on July 30, 2012 and continued on consecutive days until completed on August 3, 2012. The following recitation summarizes the record produced during the hearing, excluding all testimony that was specifically discredited by the Decision, and is based for the most part on undisputed documents or uncontroverted testimony.

**1. Background: Prime Healthcare, Prime Centinela, The Union And The Players**

Daniel Bush has represented the Union with respect to legal matters since approximately August 2009, and was chief spokesperson for the Union in negotiations with Respondent until approximately September 2011, at which time he was replaced as chief spokesperson by Richard Ruppert. During the first collective bargaining sessions held in

December 2009 Respondent's chief spokesperson was Prime Assistant General Counsel Rhada Savitala. In January 2010 Savitala was replaced by Mary Schottmiller, who had recently been hired by Prime as Assistant General Counsel. During 2009 and early 2010 Tammy Valle was Senior Account Manager at Keenan & Associates, the benefits broker and administrator for Respondent and other Prime hospitals, with primary responsible for health insurance and other benefits offered at Prime hospitals. In April 2010 Valle was hired by Prime as Corporate Benefits Manager. In her new position Valle continued to be responsible for corporate-wide benefits for Prime, including health insurance and other benefits at Centinela, Garden Grove and Encino. See, i.e., T 68, 314, 355, 562-563, 713-715; RX 175-176; GCX 2-3.<sup>2</sup>

2. **Background: The Health Insurance Benefits Provided To Bargaining Unit Employees Under The Expired CBA**

The Union has represented certain employees employed at Centinela since at least 2003, when Centinela was owned by Tenet Health Systems. The collective bargaining agreement between Tenet and the Union included an "interest arbitration" clause. In November 2007 Respondent purchased Centinela and assumed the Tenet-Union agreement. Although Respondent and the Union agreed to most of the terms for a successor agreement, they were unable to reach final agreement on nine separate contract provisions, including Article 15 relating to health insurance benefits. Each of the party's "last, best and final" proposals on the disputed articles was submitted to interest arbitration before Arbitrator R. Douglas Collins, who ultimately selected the language that is included as Article 15 in the collective bargaining agreement between the Union and Respondent that expired on December 31, 2009 and that provided as follows:

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<sup>2</sup> The transcript from the hearing will be referred to herein as "T" followed by the appropriate page number; AGC exhibits will be referred to as "GCX"; Respondent's exhibits will be referred to as "RX."

## **ARTICLE 15 - STANDARD BENEFIT PLANS**

Bargaining Unit members shall be eligible to participate in the Facility's Paid Time Off (PTO) and standard benefit plans. The Facility shall continue to offer, directly or indirectly, the following core benefits during the term of this Agreement: Paid Time Off (PTO), HMO medical plan, PPO medical plan, dental plan, long-term and short-term disability plans, life insurance and 401(K) plan. The Facility shall continue to maintain an HMO medical insurance option for full-time and part-time Bargaining Unit members and their families **which will not require any employee payroll contributions.**

GCX 6, pp. 49-50 (emphasis added); see also RX 175-176. The HMO and PPO medical plans referenced in Article 15 were offered through the Anthem network. Importantly, and as indicated, employees were not required to contribute anything towards the HMO benefit no matter what level of coverage they enrolled for (employee only, employee plus spouse, employee plus child(ren), or employee plus family). See, i.e., T 72.

### **3. The Parties' Fall 2009 Pre-Negotiations Discussions: The Union Throws Down The Septicemia Gauntlet**

As a prelude to upcoming contract negotiations, representatives of the SEIU and Union, including Bush, held a series of meetings with Prime representatives during Fall 2009. During the course of these meetings the labor representatives raised "concerns" about septicemia rates at Prime hospitals. The Prime representatives were told that the Union was interested in "fixing" the septicemia problems "quickly and quietly," but if Prime was not interested in working with the Union then the parties would just proceed to negotiations. The Prime representatives did not accept the "offer." See, i.e., T 305-308, 314, 318.

By letter dated November 2, 2009 sent to the Hospital's then CEO and Savitala, Bush claimed that the Union had identified a "systemically high" level of septicemia claims at Prime hospitals. The letter requested various operational reports that are required to be filed by hospitals operating in California, reports containing patient treatment information, information

relating to coding procedures, and various other operational and health-care related documents. GCX 34. Savitala responded to the Union's information request by letter dated November 12, 2009 wherein Respondent denied the Union's assertions and pointed out various other flaws in the Union's requests. RX 3. Respondent's letter also advised that the Union's requests appeared to be made for purposes of harassment rather than good faith bargaining, but nonetheless offered to meet with the Union to discuss the requests:

Based upon all of the foregoing, it appears as if the UHW is more interested in employing oppressive tactics to gain an advantage in negotiations rather than engaging in good faith negotiations for a successor collective bargaining agreement. CHMC will not tolerate such tactics and will not be extorted. That being said, if UHW truly wishes to engage in good faith negotiations and believes the requested information is relevant to such negotiations, CHMC is willing to meet with UHW to discuss the requests and attempt to reach an agreement on an appropriate scope.

Id., p. 4. The Union did not respond to Respondent's letter or accept Respondent's invitation to meet, and Respondent did not provide any information requested by the letter.

**4. The Parties' December 2009 Initial Proposals Evidence Both Respondent's Intent To Modify The Historical Health Insurance Benefits Existing Under The Expired CBA And The Union's Resistance To Any Modification**

The parties held four bargaining sessions in December 2009. At the December 4 session the Union made a complete contract proposal (RX 4). The Union's Article 15 proposal included the Anthem HMO at no cost to employees at any level of coverage. Id., p. 55 ["the Facility shall continue to maintain an HMO medical insurance option for full-time and part-time Bargaining Unit members and their families which will not require any employee payroll contribution"]. The Union's proposal also included additional language freezing all employee deductibles and copayments for the term of the agreement. Id. Respondent's Article 15 proposal was delivered to the Union on December 29 and included language permitting Respondent to modify health insurance benefits at Respondent's discretion during the term of the agreement.

GCX 16 [“these benefits may be amended from time-to-time”]. Respondent also advised the Union that Respondent no longer wanted to provide free health insurance benefits to its employees. T 331.

**5. In Early 2010 Respondent Provides The Union With Its Initial EPO Plan Proposal**

As noted, Schottmiller started with Prime in January 2010. One of the first tasks she performed was reviewing the status of bargaining at Centinela, after which she prepared a chart of open items that she then provided to Bush. RX 12; T 570-571.

During the bargaining session on February 4 the parties discussed health insurance issues, including the Prime EPO Plan. Schottmiller advised the Union that Respondent would have Valle attend the next bargaining session because she had greater familiarity with the Plan. T 575; RX 205, p. 3.

There was extensive discussion about health insurance and the Prime EPO program during the February 5 meeting. During these discussions Schottmiller advised the Union that the EPO was in place at all other Prime hospitals and Respondent wanted to roll it out at Centinela. Bush stated that he did not trust Prime to have a self-insured plan and requested information about the EPO, including whether stop loss insurance was in place, and also stated that the Union wanted to maintain the free health insurance for all levels of coverage that was currently in place at Centinela. See, i.e., 575-579; RX 205, pp. 5-6. The parties also exchanged proposals on various articles not involving health insurance, and TA'd the Union's proposal on Article 23-Union Security and Article 20. During the course of the meeting Bush also made statements that Prime had lots of money, its proposals were “not close to acceptable” and that Respondent “better have an enormous amount of movement.” RX 205, p. 5. The Union

reaffirmed its “disappointment” with Respondent’s proposals by cancelling the negotiating session that had been scheduled for February 11. RX 21.

On February 16 the parties held another bargaining session. The day before the session Schottmiller provided Bush with an advance copy of Respondent’s Article 15 proposal it would be making that day. The proposal specifically referenced providing employees with the base EPO Plan and a PPO medical plan and included a premium contribution schedule requiring employees to pay premiums for coverage for the EPO Plan at all levels of coverage except employee only. The proposal also retained the “[t]hese benefits may be amended from time to time” language that had been included in Respondent’s Article 15 proposal made in December 2009. RX 27; GCX 1.

At the actual bargaining session Schottmiller presented Respondent’s Article 15 proposal and a presentation was made by Valle and Jim Tinyo, another Keenan & Associates representative. During the presentation and ensuing discussions the Union was advised that if employees did not wish to select the EPO Plan and utilize the Prime network, they would be able to access the Anthem network through the PPO option. Valle also provided the Union with a chart she had prepared comparing the Centinela health insurance benefit options to the benefits offered through the Prime “Legacy EPO Plan,” and worked the Union through the differences between the two. Valle explained the design of the EPO Plan, including the PCP requirement. Valle also discussed that employees could nominate their current primary physician for inclusion in the Prime network, at which point Valle would reach out to the physician to request that the physician join the network. Schottmiller also provided information responsive to the request made by the Union at the February 5 session, and the Union requested additional information relating to the EPO Plan and the employee premium contribution amounts. The parties also

discussed that the EPO Plan was in place at Encino and Garden Grove. RX 24-25, 27, 205, pp. 11-13; GCX 18, 20; T 719-722.

Due to the Union's questions and apparent confusion over the EPO Plan and PPO program, Valle revised the comparison chart she had provided to the Union on February 16, then provided the revised chart to Schottmiller, along with a dental/vision comparison chart and a Prime network physician list. Schottmiller created an email to Bush as a cover to the documents but neglected to attach the EPO/PPO comparison chart by mistake. During the parties' March 11 session they exchanged proposals and TA'd the Union's grievance proposal, but did not discuss health insurance. GCX 29; RX 29, 32-35, 205, pp. 14-17, 207, 214; T 722-723.

6. **In An Effort To Achieve Agreement On Implementation Of The EPO Plan On July 1, Respondent Offers To Continue Free Coverage; The Union Delays Its Response And Then Rejects Respondent's Concession**

On March 26 Schottmiller sent Bush an email stressing the importance to Respondent of resolving the EPO Plan issue prior to expiration of the Anthem plan on July 1 and making a major concession to entice the Union into agreeing to implementation:

Danny – Centinela would like to roll out our new EPO plan to your employees effective July 1, 2010. I know we are in the middle of bargaining in good faith on this issue. At this time, can we move to the new plan, which truly benefits the employees, **and keep contribution rates the same** until we reach an agreement or impasse?

GCX 21 (emphasis added). The urgency of the situation was further emphasized by Schottmiller's email to Bush sent the following day with the same message, as well as Schottmiller's March 30 email to Bush asking if he had received the prior emails (RX 37-38), and by the follow-up email sent on April 14, more than two weeks after Respondent's March 26 concessionary proposal, asking Bush why he had not responded and reiterating the March 26 proposal. RX 40.

Bush finally responded on April 19, almost four weeks after Respondent's March 26 proposal, and rejected the proposal without question or explanation:

After consulting with my client, the Union is not prepared to agree to the Company implementing its new self-funded health insurance system at this time. We continue to demand to negotiate over this matter and are willing to continue those negotiations at the next session.

GCX 22. Schottmiller expressed Respondent's disappointment with the Union's position within an hour after she received Bush's response:

We will continue to negotiate over this issue, of course, but would like to know what we can do to get this one issue pushed through. Again, we will continue to pay 100% of all coverages until we reach agreement or impasse, and the out-of-pocket costs for employees is cheaper on the new plan. If you have any ideas on how we can get this resolved, let me know.

RX 42.

7. **Respondent Reiterates The Firmness Of Its Position On Its EPO Plan Proposal; The Union Responds With A Re-Packaging Of Its October 2009 Septicemia Information Request**

Due to the delay in the Union's response to the March 26 proposal, as well as the content of that response, Schottmiller sent Bush a letter dated April 23 reiterating and expanding upon the importance of Respondent's EPO Plan proposal to the prospects for the parties to reach a final agreement:

**Re: Change of Medical Insurance – HMO to EPO**

Dear Danny:

As you are aware, we have bargained for several months in an attempt to reach an agreement with the SEIU for a new labor agreement. During the negotiations we have extensively discussed the Company's proposal to change from the current Anthem HMO plan to the new Prime self-insured EPO plan. For example, **the Company made a presentation in October 2009 regarding the EPO, how it will be administered, and how employees would benefit from the plan change.** We provided you with side-by-

side comparisons of the two plans (copy attached), demonstrating that the new EPO will cost employees less than the current plan. For example, copays for office visits are \$10, compared to \$30 under the current plan, and prescription drugs have no deductible, compared to \$100 under the current plan.

Moreover, on February 16, we invited Keenan and Associates, Prime's broker and TPA, to again review the plan with you and your committee, provided you with stop-loss insurance information, and again explained how the plan functions.

**In emails dated March 26 and April 14 2010, I requested that SEIU permit us to implement the EPO plan on July 1, since that was the date that the Anthem Blue Cross plan expires. If Prime does not implement the EPO on July 1, the annual cost to Prime for continuing the current plan just for Centinela employees will be an additional \$2.2 million. I also offered on behalf of the Company to continue the 100% employer contribution for the EPO upon implementation, subject to future negotiations. Unfortunately, in your email of April 19, you stated that the union cannot agree to implement the new plan "at this time," despite the obvious benefits to employees. You also stated that the Union wishes to continue to negotiate over the issue, but the Union has thus far refused to make any proposals addressing the EPO or suggest any modifications that would make the EPO acceptable to the Union.**

We will resume bargaining on May 3 and May 6. We would like to bargain exclusively on the medical insurance change and implementation during those two sessions. **In light of the fact that we have provided you with all the information on the plan numerous times, made presentations, and agreed to maintain employer contributions, we believe we have offered the Union everything we have to offer on this subject. This single, critical issue is vitally important to us, and must be resolved, either by agreement or impasse, by the end of May given the July 1 expiration date of the Anthem Blue Cross plan and the fact that reaching agreement on any other economic terms and a final, complete contract is dependent on resolving this issue.**

GCX 23, pp. 2-3 (emphasis added).<sup>3</sup> Schottmiller and Valle were also in communication during this period, with Schottmiller advising Valle that moving Centinela to the EPO on July 1 would be dependent on the outcome of negotiations with the Union. RX 208.

The importance of Respondent's EPO Plan proposal, at least to Respondent, was also highlighted by discussions during the May 3 bargaining session. During the session Schottmiller reiterated to the Union that there would be no collective bargaining agreement without Respondent's EPO Plan. She also again explained that the EPO Plan had already been implemented at all other Prime hospitals, including Garden Grove and Encino, as of January 1, 2010. Bush responded by emphasizing the importance to the Union that all levels of coverage for the basic plan be free to employees (no premium sharing) and requesting information relating to the EPO Plan, including "quality of care" information, that could have been requested by the Union when the Employer made its first EPO Plan proposal in February. The Union made no counterproposal on the EPO Plan or health insurance notwithstanding the emphasis placed on the issue by Respondent. See, i.e., RX 205, pp. 19-24; RX 47; GCX 26; T 355, 624-625.

The parties had another bargaining session on May 6. Prior to the bargaining session, Bush emailed Schottmiller the Union's proposal made on December 4, 2009 as well as the Union's opening wage proposal, advising that the Union was "not re-proposing these items at this time" but just wanted to ensure that Schottmiller had the proposals. At the meeting the Union again made no counterproposal to Respondent's EPO Plan proposal, professing that it was "ready to bargain about it but not yet today." The parties also discussed the premium sharing component of Respondent's EPO Plan proposal, with the Union making clear its position that it would not agree to premium sharing for any level of coverage for the base plan. During the

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<sup>3</sup> The quoted portions of the parties' communications appearing in this brief include corrections to typographical and other non-substantive errors appearing in the referenced exhibits.

meeting the parties also TA'd the Union's proposals on Articles 25 and 26. See, i.e., RX 205, pp. 25-29; RX 48-49; T 357, 628-629.

On May 7 Schottmiller emailed Bush requested documents relating to Respondent's EPO Plan proposal. Included within the documents was the chart previously prepared by Valle comparing the historical HMO/PPO plan available at Centinela to the EPO Plan proposed by Respondent (GCX 29; RX 214), as well as a comparison of the Centinela HMO/PPO plan to the EPO Plan that had been implemented at Encino and Garden Grove. RX 50. Bush responded to the information provided by Schottmiller by email later the same day confirming that he had received the information. RX 51.<sup>4</sup>

On May 24 Schottmiller emailed Bush the SPDs for both the EPO Plan and PPOs being proposed by Respondent. RX 54. The SPD for the EPO Plan included the requirement, previously explained to the Union during the parties' February 16 meeting and included in the comparison chart Schottmiller emailed to Bush on May 7 (GCX 29; RX 50), that employees covered by the base EPO Plan would be required to obtain a referral from a Prime PCP in order to access services from an Anthem network provider. Also consistent with the explanation provided to the Union at the February 16 meeting and in the comparison chart provided on May 7, the SPD for the PPO plan did not require that the participating employee utilize physicians or facilities within the Prime network, select a Prime PCP, or receive a referral from a Prime PCP prior to accessing services from an Anthem provider. *Id.*, p. 9 (PPO SPD at p. 3.).

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<sup>4</sup> Although Bush acknowledged that he received the comparison, he testified that he was unsure of how or when he received the document, and advised Region 31 that he could have received it as late as June 14. See, i.e., GCX 29; T 116. As shown, he actually received it on May 7. Moreover, it is curious that Bush did not specifically note the date he received the document on the document itself, even though it was his practice to do so. See, i.e., GCX 32. Similarly, Bush testified that the comparison of the "Legacy EPO" to the existing Centinela HMO and PPO plans (GCX 20) was provided ("I believe") *after* the February 16 bargaining session and that it was discussed with the Company in May. All other evidence in the record indicates otherwise.

Bush replied within twenty minutes, noting that the information provided did not include the quality of care information (“MS – DRG request”) requested by the Union’s May 4 letter. RX 51. Schottmiller replied by advising Bush that Respondent was reviewing whether it had an obligation to provide those documents. RX 52. During this period of time the Union also requested to cancel the bargaining sessions that had been scheduled for June 1 and 2 (RX 53), and Schottmiller came to the conclusion that the Union would not agree to the EPO Plan prior to July 1, and probably not ever. Respondent was therefore required to renew the Anthem policy, set to expire on July 1, despite the exorbitant cost of doing so. See, i.e., RX 209-210; T 622-624, 629.

By letter dated June 1 Schottmiller formally responded to the Union’s May 4 information request. Schottmiller advised the Union that the “quality of care” information request was not relevant, and also advised the Union where information relating to quality of care was publicly available:

If the Union’s true interest in this information request is accessing quality, there are many agencies that provide such information such as the Joint Commission or American Osteopathic Association websites, CMS’-hospital compare.hhs.gov, Thomas Reuters Ratings website, and California Department of Public Health.

GCX 27, p. 2.

The next bargaining session was held on June 14. At this session the Union made its first proposal on health care since its initial proposal made in December 2009. The Union’s proposal provided in relevant part as follows:

The parties agree that Centinela will offer three new health plan options - - the EPO plan, a low PPO plan and high PPO plan - - to replace the existing HMO and PPO plans, commencing with the 2011 benefit year. The evidence of coverage\* document provides the schedule of benefits. The Employer shall not reduce the

benefit levels and will not increase employee deductibles and/or copayments absent mutual agreement by the parties.

The biweekly employee health insurance premium contributions are set forth below. The employee premium contribution rates for the EPO medical plan, the low PPO plan, the high PPO plan, and the dental and vision plan shall not increase absent mutual agreement by the parties.

GCX 30, p. 1. The “employee premium contribution rates” for the “EPO medical plan” referenced in the Union’s proposal included “zero,” or free, EPO benefits at all levels of coverage, and thereby rejected the premium-sharing component of Respondent’s EPO Plan proposal. Id. The Union’s proposal also rejected the PCP requirement component of Respondent’s EPO Plan proposal by allowing employees to access the Anthem network without first receiving a referral:

**Schedule of Benefits Document**

The Union proposes the following changes to the Schedule of Benefits Document:

1. The Union proposes that the employees may select a primary care physician from either the Prime network or the Anthem network.

Id., p. 2.

During discussions of the Union’s proposal, Bush complained that there was not a lot of flexibility in Respondent’s EPO Plan proposal, identified as a “big problem” for the Union. Bush also again expressed the Union’s opposition to requiring premium sharing. Schottmiller responded that the Hospital believed that all employees, both union and non-union, should be required to pay the same thing for health insurance benefits. T 359-360, 632-635; RX 205, pp. 30-31. The parties also TA’d the Union’s proposals on Article 10 and Article 27. RX 58.

The parties met again the following day, June 15. The Union made a wage proposal (Article 13) that included annual across-the-board wage increases of 7% retroactive to

January 2010, an additional 6% in January 2011, and another 6% in January 2012, as well as additional wage increases built into the structured wage scale, for total increases of approximately 22 to 25% over the life of the agreement. RX 61. The meeting was also attended by Valle, who again explained that the EPO Plan had already been implemented at all other Prime hospitals, including Garden Grove and Encino, in place of the Anthem HMO. The parties discussed the Prime PCP requirement under Respondent's EPO Plan proposal, and that employees who wished to continue in the Anthem network would be required to sign up for coverage under the PPO plan. The parties also held additional discussions on what the Union believed to be the limited number of physicians associated with the Prime network, with Bush specifically complaining about the lack of OB/GYN services in the network. The Union was told that employees could nominate their current physicians for inclusion within the Prime network in order to assist in expanding the network. The Union then requested and received the nomination form to be utilized for that purpose. Schottmiller also again reiterated that the PCP requirement in Respondent's EPO Plan proposal was not going to be changed. See, i.e., 360-361, 386-387, 635-636, RX 205, pp. 32-37; RX 60, 211.

On June 28 the Employer provided the Union with additional information in response to requests made by the Union during the June 15 meeting, including the 2010 SPD for Encino and Garden Grove, a comparison of Centinela's current HMO/PPO to Respondent's EPO Plan/PPO proposal, and the provider nomination form. The email forwarding these materials to the Union also referenced that employees should submit their physician nominations with the attached form, that Prime had a full-time employee working on expanding the network, and that each nominated provider would be contacted both via phone and mail. GCX 31-32; RX 64.

The next meeting was scheduled for July 23. Prior to the meeting Schottmiller sent Bush a chart showing which articles remained opened, which had been tentatively agreed to, and which party had made the last proposal on the open items. RX 69. At the July 23 meeting the Union handed Respondent a four-page information request (GCX 33, hereinafter also referred to as “July 23 requests”) that was substantially the same as the “quality of care” request the Union had made in November 2009, expanded to cover all Prime facilities. Compare GCX 33, 34. Bush stated that the information was needed so that the Union could properly evaluate Respondent’s EPO Plan proposal inasmuch as employees who signed up for the EPO base benefit plan would be required to use Prime hospitals for their medical care. Schottmiller responded that the information request was a ploy by the Union as part of its corporate campaign against Prime to obtain organizing rights within the Prime network. T 134-135, 642.

During the July 23 meeting Respondent also made a counterproposal on Article 15. The proposal maintained Respondent’s prior positions on replacement of the existing HMO benefit with the EPO Plan, including the PCP requirement and employee premium sharing at all levels of coverage except employee only. GCX 35. However, Respondent’s July 23 EPO Plan proposal reduced the amount of the premiums to be paid for employee + spouse, employee + children and employee + family by 30-35%. Id. Respondent’s proposal also replaced the “[t]hese benefits may be amended from time to time” language in its prior proposals with a commitment to maintain the premium sharing levels for the duration of any new agreement. Id. [“The employee premiums contributions for any of the below plans shall not increase absent mutual agreement by the parties”]. Schottmiller also informed the Union that Respondent was rejecting the Union’s proposal, and in particular the Union’s language eliminating the PCP referral requirement and no premium sharing at any level of coverage. Schottmiller also

explained that Respondent was not going to move off of the PCP requirement and premium sharing, which already existed at all other Prime hospitals. Respondent also made counterproposals on Article 8, Article 11, Article 13 and Article 19.<sup>5</sup> For its part the Union made a counterproposal on Article 17; however, the Union made no counterproposal to Respondent's EPO Plan proposal. RX 75; T 136-137.

The next substantive communication between the parties was Schottmiller's August 9 letter to Bush in which she responded to the July 23 information request and explained why Respondent believed the request was not made for legitimate collective bargaining purposes:

This letter is in response to your July 23, 2010 letter setting forth an information request regarding collective bargaining negotiations and Centinela's ("Employer") proposed self-funded health plan.

**Danny, let me state that your request for information is suspect from the outset. For a substantial period of time, you have stated to me and others, including outside labor counsel for Prime, that it is the SEIU's desire to wage a corporate campaign against Prime, focusing in part on claims of high septicemia rates at Prime hospitals. Indeed, the SEIU has notified MPT, a major investor in Prime, of the SEIU's claim that Prime septicemia rates are high. In the fall of 2009, your union made an information request virtually identical to one made July 23, 2010. Now under the guise of "grave concern about Prime-Centinela's proposed self-funded health plan, particularly its EPO proposal," you have made an information request virtually identical to the one made in November of 2009. Let's be honest with one another. I do not question the Union's concern about employee safety. Yet, it is clear that the Union is simply attempting to use Centinela's EPO proposal as a vehicle to obtain information that it is not entitled to.**

In addition, the union is apparently only concerned with "some" hospitals, but fails to identify which hospitals. "Some" hospitals

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<sup>5</sup> Respondent's Article 13 proposal called for a one percent across-the-board increase upon ratification of the new agreement, with a one percent increase on the following anniversary dates. RX 73, p. 3.

are obviously irrelevant, such as Shasta Regional Medical Center in Redding and Paradise Valley Hospital in National City, since no employees live near either of these hospitals. Also, Prime acquired many of these hospitals, recently and Centinela was not acquired until November 1, 2007. Thus, any requests for information prior to said date are overbroad and burdensome in scope and time.

Our responses to each of your requests below are as follows:

1. **PEPPER reports:** These reports are not relevant to the quality of care at Prime Hospitals. If the union is in good faith interested in assessing quality of care, governmental reports in this highly-regulated industry are abundant and a matter of public record. These reports can be obtained online from the Joint Commission, American Osteopathic Association, CMS, Thomas Reuters Ratings, California Department of Public Health and many others.
2. **Q10 for PEPPER Reports:** See Response 1 above.
3. **Payor Claims Data:** This information is proprietary and confidential financial data that the Employer is not obligated to produce to the union. The Employer has not taken any position in bargaining that would even potentially raise any obligation to reveal such information. If you contend otherwise, please explain your position in writing at your earliest opportunity.
4. **Hospital Occupancy Rates:** See Response 3 above.
5. **Pressure Ulcers, Rates of Septicemia and Other Infections:** The Employer objects that this request impinges upon statutory patient privacy rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) as the request seeks production of records that would divulge private medical information about patients treated at Prime Hospitals.
6. **Pressure Ulcer Development and Septicemia:** See Response 5 above.
7. **JCAHO Communications:** To the extent that any of the communications covered by this request

cover publicly available records, the Employer submits that the information is equally available to the union from such entities and that the request addressed to Employer is burdensome.

To the extent that any of the communications covered by this request are confidential submissions that are not available to the public, the Employer will not produce them in the absence of a greater showing of relevance. Even assuming that such relevance is demonstrated, it would be expected that the union would execute an agreed upon confidentiality and non-disclosure agreement, prior to any production.

8. **Communications to state or local agencies:** See Response 7 above.
9. **Communications to California Department of Public Health:** See Response 7 above.
10. **Coding Guidelines:** The Employer submits that the company's coding guidelines and training materials are proprietary and confidential information.
11. **Coding Consultants:** This request seeks confidential information of the Employer and invades the privacy interests of such consultants.
12. **Communications with Coding Consultants:** See Response 11 above.
13. **Patient Charts:** The Employer objects that this request impinges upon statutory patient privacy rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) as the request seeks production of records that would divulge private medical information about patients treated at Prime Hospitals.
14. **Cleaning of Surfaces:** Employer objects as to time period, specific hospitals covered by this request and asserts that the request is overbroad and not relevant to the union's request for information related to the Employer's new self-insured EPO plan.

15. **Pressure Ulcer Training:** See Response 14 above.
16. **Nurse Practitioners and Hospitalists:** Employer objects as to time period, specific hospitals covered by this request and that the request is overbroad and not relevant to the union's request for information related to the Employer's new self-insured EPO plan.

If you have any questions, please feel free to contact me.

GCX 36 (emphasis added).

Bush responded to Schottmiller's August 9 letter by one of his own dated August

17. In his letter Bush answered certain allegations made by Schottmiller in her August 9 letter; however, Bush did not challenge Schottmiller's assertions that:

- Bush had made prior statements to Schottmiller and others that the Union wanted to wage a corporate campaign against Prime based on claims of high septicemia rates at Prime hospitals;
- The SEIU had notified a major investor in Prime of the SEIU's claim that Prime septicemia rates were high;
- The Union's request was virtually identical to the Union's request made in 2009;
- The request sought information regarding Prime hospitals that were hundreds of miles away and would not typically be hospitals where Centinela employees would be treated; and
- Most of the hospitals in the Prime network had only been acquired recently, including Centinela.

Compare GCX 36, 37. Bush repeated some of the same arguments made in his August 17 letter during the parties' negotiating session held that same day. However, the Union made no counterproposal to Respondent's EPO Plan proposal on August 17, although it did make a counterproposal on Article 29 and a proposal for a new article entitled "Joint Labor Management

Committee.” RX 80; T 141-142. For its part, Respondent made counterproposals on Article 5, Article 12 and Article 17, and the parties TA’d the Union’s proposal on Article 28. RX 79, 81.

On August 18 Schottmiller sent Bush a counter on Article 17 accepting certain language from part of the Union’s proposal but deleting other language for the reasons that had been explained at the meeting. Schottmiller’s cover email also advised that unless the Union agreed with the Respondent’s counterproposal, the parties were at impasse on Article 17. RX 83.

**8. Respondent’s Efforts To Address The Union’s “Concerns” About The Number Of Physicians Affiliated With The Prime Network Are Resisted By The Union**

By letter dated August 23, Schottmiller again advised Bush that Respondent was working towards implementation of the EPO Plan effective January 1, 2011 and requested the Union’s assistance in broadening the Prime network:

As you are aware, we have spent almost one year discussing the new EPO that Centinela Hospital plans on implementing effective January 1, 2011. For example, these discussions started in October 2009 when the company made a presentation about the EPO and new PPO plans to the SEIU and other unions.

In furtherance of our implementation goal of January 1 and for open enrollment in November 2010, we are currently building up the Prime Network for all Centinela employees. We specifically discussed this issue with you at our meeting on June 15, 2010. Tammy Valle, corporate director of benefits, stated that if employees wanted to keep their own physicians and not use any Prime doctors, they simply needed to complete a “Provider Network Nomination Form.” This will entitle employees to the excellent rates and enriched benefits provided for under the EPO plan without a change in doctors.

I have attached another copy of the Physician Nomination Form that was provided to you on that date. We intend to distribute the form to all Centinela employees within the next ten calendar days.

If you have any questions, feel free to contact me.

GCX 38.

The following day Schottmiller responded to Bush's August 17 letter concerning the Union's July 23 information request. In her letter Schottmiller again emphasized the importance of resolving Respondent's EPO proposal so that Respondent could be ready for the November 1 beginning of open enrollment for the new plan year beginning January 1, 2011. Schottmiller also requested that Bush meet with her prior to the next scheduled bargaining session to focus on EPO issues and the Union's information request:

We continue to have significant disagreements over documents that the SEIU seeks in connection with the proposed EPO plan. We believe that many of your requests are overbroad, irrelevant, create serious HIPAA problems and privacy concerns, are available through various public sources, and apply to hospitals which no Centinela employee would likely ever visit.

However, we are committed to bargaining in good faith and providing information that is relevant to the new plan. As such, I would like to schedule a face-to-face meeting with you to discuss the SEIU's positions and that of Centinela. In addition, in order to protect the interests of all concerned, we would require the execution of a confidentiality agreement with respect to any documents that might be provided.

I would like to schedule this meeting prior to our next negotiation date of September 30, 2010 so we can make significant progress on the proposed implementation of EPO plan on January 1, 2011. As stated previously, this single critical issue is vitally important to us, and must be resolved before November 1, 2010.

I look forward to hearing from you and can be reached at 909.235.4255. Thank you for your anticipated courtesy and cooperation.

GCX 39. Schottmiller also requested information from Valle concerning the cost to renew the Anthem HMO if Respondent was required to do so, and was told the increase would be approximately 40%. RX 215.

By email dated August 30 Bush acknowledged receipt of Schottmiller's August 24 request to meet to discuss EPO issues and stated that he would confer with his client

and get back to her. RX 87. Three days later, on September 2, Bush responded to Schottmiller's August 23 letter regarding Respondent's intention to distribute the physician nomination form to Centinela employees. Bush's response asked that Respondent not distribute the "letter or form" without negotiating with the Union. GCX 40. Bush also advised in the same email that he and Schottmiller could discuss the issue "when we talk tomorrow morning." Id.

The following day Bush and Schottmiller had a phone conversation. During the course of this conversation Bush advised Schottmiller that the Union was not interested in meeting to discuss the Union's information request or Respondent's EPO proposal, and would only discuss matters at the bargaining table. Bush emphasized to Schottmiller that the Union was very proud of the fact that they had free health care for all of the Union's members and also reiterated the justifications he had previously made in his letters to Schottmiller regarding the July 23 information request. Schottmiller responded that she believed that the whole information request was just a ruse and pointed out that the EPO Plan had been rolled out to the other Prime hospitals where the very same Union members worked, the quality of care issue had not come up at those hospitals and that if there were issues with the quality of care at Prime hospitals, she believed those issues would have been raised by Prime's own employees, particularly since those employees were the ones who were providing the care at the hospitals. Schottmiller and Bush also discussed the status of the negotiations, with Schottmiller advising Bush that the parties appeared to be at impasse on Respondent's EPO proposal and she believed that impasse on that single critical issue would allow implementation of the EPO on January 1. Bush asked Schottmiller for legal authority on the issue and Schottmiller subsequently provided it to him. T 650-653; RX 205, pp. 51-52.

9. **Additional Meetings And Communications Between The Parties Provides No Movement By Either On Respondent's EPO And Premium Sharing Proposal**

On September 10 the Union served Respondent with a 10-day notice of the Union's intent to engage in picketing at the hospital. That same day Bush and Schottmiller had an email exchange wherein Schottmiller advised Bush of an incorrect statement that had been made by a supervisor regarding the status of negotiations, and solicited the Union's input on how to address the misstatement. RX 89. Thereafter, Bush and Schottmiller exchanged a number of emails relating to the matter, with Respondent agreeing to post a notice in the supervisor's department reaffirming that the Union continued to represent employees even though there was no contract and that the negotiations were ongoing; however, the Union rejected Respondent's proposed solution. See, i.e., RX 89, 92.

On September 15, 2010, more than three weeks after Schottmiller had first requested that the parties schedule a special meeting to discuss the EPO Plan and the Union's information request, and two weeks after Bush advised Schottmiller that he would consult with his client and get back to her, Bush sent Schottmiller a letter advising that the Union was rejecting Respondent's offer. GCX 41.

On September 24 Schottmiller sent Bush a letter responding to his September 15 letter refusing to schedule a meeting to focus on the EPO Plan. In her letter Schottmiller again stressed the importance of the EPO Plan to Respondent and the need to resolve the issue so that Respondent could appropriately plan for open enrollment:

Dear Danny:

In response to your letter dated September 15, 2010, we regret the union's position declining an earlier face-to-face meeting regarding the proposed EPO plan. We believe that discussion of Centinela's responses to the union's objectionable information requests should not consume the limited time available for the entire bargaining teams to address contract proposals. Moreover,

we have already indicated that the union's requests are overbroad, irrelevant, create serious HIPAA problems and privacy concerns, are available through various publicly available websites, and apply to hospitals that no Centinela employee would likely ever visit. To the extent that the union has responded that documents covered by HIPAA may be redacted, Centinela further responds that such disclosure, absent patient authorization, is not provided for in the law, and that the extent of the necessary redactions to remove identifiers would be overwhelmingly burdensome.

As stated several times, we have spent almost one year discussing the proposed EPO plan. We have provided the union with hundreds of pages of documents relevant to the EPO plan. Two other SEIU-represented Prime Healthcare Services hospitals (Encino and Garden Grove) instituted the EPO plan almost a year ago with few complaints. Contrary to your suggestion, the EPO plan proposed by Centinela is not a *fait accompli*. We have listened to the concerns the union has raised about the plan - e.g. confidentiality, network size, and lower copays - and have responded by making changes to the plan. Our efforts to expand the network are continuing as we are actively contacting employees' doctors to add them to the Prime network, which also addresses the union's concerns regarding the quality of care offered by the current network physicians.

The health insurance plan has been, and continues to be, the focal dispute in our negotiations. This single, critical issue, upon which further discussion on all other economic issues is completely dependent, is vitally important to us. **At our bargaining session on September 30, we will be presenting our last and final proposal on health insurance. We anticipate coming to a conclusion on this single fundamental issue at or about that time.**

GCX 42 (emphasis added).

Prior to the September 30 bargaining session Schottmiller provided Bush with a directory of physicians who were included in the Prime network, noting that the lists had not yet been updated to include additional providers that had been nominated by Centinela employees. RX 100. The Union showed up for the meeting late, but did make a health insurance proposal. However, the Union's proposal was substantially identical to the proposal the Union had made on June 14. Compare GCX 30, 43. Most significantly, the Union's September 30 proposal

continued to maintain zero premium contributions for all levels of coverage under the EPO Plan as well as a provision creating an “open” network by permitting employees to obtain care from the Anthem network without receiving a referral from a Prime PCP. In presenting its proposal the Union reiterated that it did not believe employees should be required to pay premiums above what they were currently paying; in other words, free health insurance at all levels of coverage for the EPO Plan. Moreover, because the Union’s proposal maintained the ability of employees to receive care from providers affiliated with the Anthem network without a referral by a Prime PCP, the Union’s purported “acceptance” of the EPO Plan was illusory. See, i.e., T 180, 649, 653-654, 714.

Following a caucus, Respondent presented its EPO Plan/PPO proposal. GCX 44. The proposal was substantially identical to the proposal Respondent had made on July 23, with the exception that the low and high PPO options had been collapsed into a single PPO option. Schottmiller also again emphasized to the Union that health care was a single critical issue, that Respondent would not modify the Prime PCP referral or premium sharing components of the EPO Plan as specified in the proposal. See, i.e., T 192-193, 654-655; RX 205, p. 59.

After another caucus the Union made a “revised” proposal on Article 15 by modifying the proposal it had made earlier that day to delete a decrease in the copay for mental health services. GCX 46. The Union also reiterated that it would not agree to a closed network or requiring employees to pay premiums for coverage that they were not currently paying. T 657; RX 205, p. 61. During the meeting the parties also TA’d the Union’s proposal on Article 1 and the Union made proposals on Article 5, Article 11 and Article 13. RX 102.

The next bargaining session took place on October 21, 2010. At the meeting Respondent presented the Union with a complete package of proposals on all open items as its

“final offer” to the Union, just as it had promised to do at the close of the September 30 meeting. The package included the EPO Plan proposal that had been presented to the Union on September 30, as well as a return to two PPO options. Schottmiller again explained to the Union that the EPO Plan was the single critical issue in the negotiations, reviewed the fact that the parties had exchanged proposals during the course of negotiations without any movement from the Union, and that even though the Union had included a reference to the EPO in its proposals, the Union had not changed its position of zero premium contribution for all levels of coverage as proposed by Respondent. Schottmiller also again reiterated that there would be no collective bargaining agreement without the Union’s agreement to the EPO Plan as proposed by Respondent, including premium sharing. Schottmiller also explained that if the Union had any counterproposals it needed to make them prior to November 1 when open enrollment would begin at the Hospital. Bush responded by again challenging Respondent’s assertion of impasse, but reiterated that the Union would not agree to any increases in premium costs above what employees were currently paying. Bush also repeated the Union’s claim that the Union was concerned about the number of doctors in the Prime network and quality of care issues. The parties also TA’d the Union’s proposal on management rights and subcontracting and the Union made proposals on Article 2 and Article 17. The Union made no counterproposals on Article 15. See, i.e., GCX 48; RX 205, pp. 59-61; RX 105, p. 59; T 194-198, 202, 658-660.

On October 22 Schottmiller provided Bush with a list of physicians who had been added to the Prime network as a result of nomination forms returned by Centinela employees (RX 111), and on October 29 she sent Bush a letter memorializing the status of negotiations:

**Re: Single, critical issue impasse on health insurance**

Dear Danny:

Effective November 1, 2011, Centinela Hospital Medical Center (“CHMC”) will begin open enrollment on health insurance for bargaining unit employees for the Plan year beginning January 1, 2011. In that open enrollment, CHMC intends to offer its self-insured EPO Plan and High and Low PPO Plans. Such open enrollment is necessary to timely prepare for implementation of such plans, along with CHMC’s levels of employee contributions, effective January 1, 2011. CHMC is taking these actions following the bargaining impasse reached during our October 21, 2010 bargaining session.

CHMC and SEIU, UHW-West (“SEIU”) reached impasse following almost one year of bargaining, most of which focused on the new EPO and PPO plans previously implemented at other Prime Healthcare Hospitals with bargaining units represented by SEIU on January 1, 2010. Briefly, our bargaining history has been as follows:

1. In October 2009, you attended presentations by Prime as to the plan benefits and designs of the new EPO and PPO plans, which were to go into effect on January 1, 2010 at all other Prime Hospitals, including other SEIU-represented facilities. Specifically, at Garden Grove and Encino, the SEIU raised no objection to implementation of the EPO and PPO plans for its represented employees.
2. On February 16, 2010, CHMC and SEIU began negotiations specifically on the new plans and their costs. Keenan and Associates, the consultants who designed the plans, made a presentation to the SEIU bargaining committee on that day, providing documentation on the designs and costs of the plans.
3. In emails dated March 26 and April 14, 2010, CHMC requested the SEIU to allow CHMC to implement the self-insured plans on July 1, 2010, as the current Anthem Blue Cross plans were expiring. On April 19, 2010, the SEIU stated that it could not agree to the new plans, so CHMC decided in good faith to continue the Anthem Blue Cross plans until January 1, 2011, at a substantial cost to the hospital. CHMC also agreed to continue to negotiate in good faith on these plans until the parties could reach agreement or impasse.

4. On April 22, 2010, CHMC informed the SEIU that the self-insured plans and employee contributions to the plans are, and continue to be, the focal dispute in our negotiations and that it is the single, critical issue upon which further discussions on all other economic issues are dependent.
5. Following the April 22 letter, SEIU engaged in a variety of tactics designed to delay implementation of the new plans and employee contributions. The SEIU often could only meet once a month for negotiations, and often either cancelled negotiations or stopped after only a few hours. You even made a comment in one bargaining session that if Prime's former negotiator was still present, you would keep us from "reaching impasse for 10 years."
6. During negotiations in April 2010, SEIU agreed to include Prime's EPO and PPO plans among the options from which employees could select their health insurance, but insisted that the employees would not incur any cost for such coverage. CHMC was offering free coverage only at the single employee level, and insisting on employee contributions toward the cost of all other levels of coverage.
7. More delay tactics ensued, including irrelevant and disingenuous requests for information, allegedly to determine the "safety of the plans," but thinly disguised as part of a corporate campaign that SEIU has engaged in against Prime. Further evidence of this tactic included a statement by you that it was the SEIU's goal to "get a neutrality agreement or SEIU was going to put the Reddys in jail."
8. In my letter dated September 24, 2010, CHMC reiterated its continuing position that the parties needed to come to an agreement or reach impasse on the single, critical issue of the new self-insured plans. I indicated that CHMC would focus exclusively on the plans during our September 30 negotiation session.
9. On September 30, when CHMC again presented its proposal on the new EPO and PPO plans, you made a self-serving statement that although the union

would continue to bargain “at the present time,” it would not “move off its demand for no employee contributions and the Anthem Blue Cross network” as an alternative to the self-insured plans. You made two proposals that day, both reflecting this exact position.

10. On October 21, CHMC made its final offer on the plans and employee contributions. I stated that “we will not have a contract without an agreement on the plans and contribution rates.” The SEIU made no proposals on that day.

While you stated in the October 21 negotiations that you would provide CHMC with more negotiation dates, to date, CHMC has, not received any new proposed dates from you.

Although impasse has been reached on the new EPO and PPO plans, CHMC is willing to continue to meet and discuss any other economic or non-economic issues that the SEIU believes are not at impasse.

GCX 49.

On October 25 Bush sent Schottmiller another disingenuous information request.

Bush’s email provided in relevant part as follows:

In evaluating Centinela’s health insurance proposal, it has come to my attention that while the Union has the aggregate data concerning which health plans bargaining unit employees are currently enrolled (i.e., that three part-time bargaining unit employees are enrolled in the employee plus family base HMO plan), the Union does not presently have this information broken down by individual bargaining unit employees ....

\* \* \* \*

Please also note that this request does not constitute the Union’s final response regarding the health insurance proposal. The Union will respond in the next few days. I make this request now simply because the information is very important to the Union’s deliberations and it is information that I only now have realized that the Union does not have.

RX 112. Schottmiller provided Bush with the information the following day. Id.

On November 1 Schottmiller sent Andy Prediletto, chief spokesperson for the California Nurses Association, the union which represents Centinela's RNs, a letter. Schottmiller's letter laid out the history of Respondent's negotiations with the CNA relating to the impasse which existed in those negotiations on the EPO Plan proposal that Respondent had made to CNA, and advised that Respondent would be implementing the EPO Plan on January 1, 2011. RX 114; T 661.

Bush responded to Schottmiller's October 29 letter by one of his own dated November 1. In his letter Bush repeated the Union's contentions that the parties were not at impasse, Respondent had been bargaining in bad faith throughout the negotiations and characterized Schottmiller's recitation of the parties' bargaining history as "offensive." GCX 50. Bush further demonstrated his gamesmanship skills by initiating an email exchange with Schottmiller on that same date in which he pressed Schottmiller for "clarification" regarding the "implementation" of Respondent's health insurance proposal:

1. Please confirm that you implemented your plan today November 1, 2010. Your letter states November 1, 2011, but I assume you meant 2010.
2. Please confirm that the plan you are implementing is your last proposal to the Union submitted October 21, 2010.

RX 115. Schottmiller responded to Bush's contentions the following day:

1. We did not implement the EPO and PPO plans on November 1, 2010. We plan on beginning open enrollment for these plans on November 8, 2010. Implementation of the EPO and PPO plans, following impasse in October, will be on January 1, 2011.
2. We will be implementing our final offer, provided to you on October 21, 2010 regarding the EPO and PPO plans, and employee contributions, on January 1, 2011.

Id. During this period Bush also made additional requests for information, all of which were responded to by Schottmiller notwithstanding Bush's obvious gamesmanship. See, i.e., RX 116-117. Schottmiller also provided Bush with an updated list of physicians affiliated with the Prime network as well as the open enrollment materials being provided to all Centinela employees. RX 118, 122. During this period Bush and Schottmiller also exchanged communications during which Schottmiller explained that while Respondent was willing to schedule a meeting with the Union, its willingness to do so should not be interpreted as a waiver of Respondent's contention that the negotiations were at impasse. See, i.e., RX 123.<sup>6</sup>

**10. The Union Rejects Respondent's Final Concession To Achieve A New Collective Bargaining Agreement Prior To The January 1, 2011 Effective Date Of The EPO**

In one final attempt to reach agreement with the Union on Respondent's EPO Plan and other proposals, Respondent provided the Union with a "last, best and final offer" on December 15, 2010. GCX 52. In its LBF, Respondent advanced the date of the initial pay raises that had been included in Respondent's October 21 proposal by more than six months. Respondent also advised the Union that this enhancement would be withdrawn if its LBF was not accepted by December 31. Bush responded to Respondent's LBF by referring to the December 31 expiration of the wage rate increase timing enhancement and claiming that he did not understand how the Company could "make a last, best, and final offer that changes after a certain date?" RX 125. Despite Bush's obvious gamesmanship, Schottmiller still answered his

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<sup>6</sup> RX 123 is a continuation of the partial email string offered into evidence by AGC as GCX 51. Respondent does not know if AGC deliberately chose to offer this and other incomplete email strings in other documents during AGC's case in chief, or whether Bush had failed to provide Region 31 with complete documents. Respondent believes the latter is more likely. Compare, i.e., GCX 53 [incomplete email string forwarded by Bush to Board Agent six months after receipt of email], RX 125 [complete email string]. In any event, the ALJ let AGC put anything in he wished to put in, even when Respondent objected to the incomplete nature of the exhibits proffered by AGC. See, i.e., T 101.

question. Id. [“The modification to Article 13 was made in order to facilitate a final agreement prior to the end of the year. If the Union is not willing to agree to the Company’s LBF within that time period the modification will be withdrawn. As an experienced negotiator I am sure you understand the statement in my letter”]. Approximately one week after this exchange, Bush advised Schottmiller that the Union would not be responding to Respondent’s LBF by December 31. GCX 54.

On December 30 Bush sent Schottmiller a letter again claiming that the Union did not understand Respondent’s position and “request[ing] clarification regarding these proposals.” GCX 55. Bush’s December 30 letter also repeated many of the claims the Union had been making in prior communications relating to the status of negotiations and claimed that “the Union is willing and interested in continuing negotiations”; however, Bush’s letter did not include any modifications to the Union’s prior health insurance proposal, and most certainly did not agree to Respondent’s final EPO Plan proposal made on October 21. Id.

**11. Discussions And Communications Between The Parties In 2011 Confirm The Continuing Existence Of The Impasse In Bargaining**

Schottmiller responded to Bush’s December 30 letter on January 13 by a letter of her own in which Schottmiller referenced Bush’s claims that he did not understand Respondent’s position with respect to its LBF and specifically asked for confirmation of the Union’s position on the more significant items included in Respondent’s LBF:

This is in response to your December 30, 2010 letter.

I have previously explained to you CHMC’s position with respect to its last, best and final offer. The term “last, best and final offer” is also a term which you, as an experienced labor attorney, are very familiar with. Additionally, I do not believe an employer has a legal obligation to explain to a union its legal positions or analysis, why it believes collective bargaining negotiations are at impasse, or what its options are when, like here, impasse exists. Given these circumstances, as well as other conduct by the Union both at

the bargaining table and away from the table, it is clear to me that your request for “clarification” has been made in bad faith and not for purposes relating to good faith bargaining. Nevertheless, and without waiving any of its positions based on the parties’ conduct and communications during the last many months, I will confirm that CHMC will not make any substantive changes or movement from the last, best and final offer sent to you on December 15, 2010. Accordingly, please respond to the following questions:

1. Will the Union now agree to all of the substantive terms of CHMC’s final proposal on Article 15 presented to the Union on October 21, 2010, including the specified employee contributions for the Prime Healthcare EPO Medical Plan for Employee plus Spouse/Children/Family and selection of Primary Care Physicians from Prime Network physicians only?
2. Will the Union now agree to all of the substantive terms of CHMC’s proposals on Article 2-Union Representation?
3. Will the Union now agree to the substantive terms of CHMC’s proposals on Article 11-Hours of Work, Overtime and Scheduling?
4. Will the Union now agree to CHMC’s proposal to delete Section B from Article 12-Floating and Transfers?
5. Will the Union now agree to CHMC’s proposal to delete Section C-Joint Training and Education Trust Fund from Article 18-Education Benefits?
6. Will the Union now agree to CHMC’s proposals for Appendix A?

With respect to your requests for information, for the same reasons we believe they are not being made in good faith and for the purpose of good faith negotiations, but instead are being made in order to frustrate the bargaining process and manufacture potential unfair labor practices. Nevertheless, we are in the process of gathering the requested information to the extent it has not already been provided to the Union, including in a different format than that requested, and is reasonably available to CHMC. However, our willingness to do so is not intended to be, and should not be interpreted as, a waiver of any of CHMC’s positions involving the

status of negotiations and/or whether CHMC is legally required to provide information in response to your requests.

GCX 56, pp. 1-2; GCX 58.

Bush responded by letter dated January 21, 2011 in which he once again repeated the Union's contentions that the negotiations were not at impasse and that "there is still much to negotiate in this contract and movement to be made by both parties." GCX 57. Bush's assertions was belied, however, by the fact that his letter refused to respond to any of the itemized requests set forth in Schottmiller's January 13, 2011 letter, as well as the portions of his letter recognizing that Respondent was not moving off its LBF and cancelling the meeting scheduled for January 27, 2011. *Id.* During the same period of time, the Union continued its corporate campaign attacking the quality of care provided at the Hospital. See, i.e., RX 136. Despite the Union's tactics, however, Respondent continued to provide the Union with requested information. See, i.e., RX 132-134, 137.

Schottmiller responded to Bush's January 21, 2011 letter on February 7, 2011:

I was surprised and disappointed to receive your January 21, 2011 letter cancelling the parties' meeting previously scheduled for January 27. Part of my surprise was based on your December 30, 2010 letter in which you requested voluminous information, claiming that it was needed because the Union had questions concerning what you characterized as Centinela's "new" proposals. In response, Centinela devoted substantial resources towards gathering the information that had been requested. Centinela also looked forward to the opportunity to respond at the January 27 session to any of the questions you claimed the Union had. Your January 21 letter cancelling that session illustrates, once again, that the Union's requests for information have not been made in good faith. It also illustrates that the Union is not truly interested in discussing the "new" proposals.

Additionally, your January 21 letter further illustrates the impasse that exists in these negotiations. First, your letter failed to address the very specific and straight-forward questions enumerated in my January 13, 2011 letter to you. We believe that the Union's failure to respond not only confirms the impasse in the negotiations but

also constitutes an unfair labor practice by the Union. Although you claim in your letter that there is “movement to be made by both parties,” we have tried to make clear to the Union that Centinela will not make any changes to the substantive terms and fundamentals of its proposals on which agreement has not been reached. For its part, the Union has not agreed to those proposals, as is exemplified by your January 21 letter. Centinela therefore continues to believe that the negotiations are at impasse, despite the Union’s hollow claims that it is prepared to modify its positions.

Moreover, even if the Union is in fact prepared to modify its positions, let me reiterate that Centinela is not prepared to, and will not, move off of the fundamentals of its positions and proposals. Unless and until the Union is prepared to agree to those fundamentals and to enter into a collective bargaining agreement confirming its agreement to them, the negotiations between the parties will remain at impasse. The Union had the opportunity to agree to the fundamentals of Centinela’s proposals by answering “Yes” to each of the questions enumerated in my January 13 letter. Unfortunately, no such agreement was articulated in your January 21 letter. We urge the Union to reconsider its prior positions and to now accept Centinela’s proposals.

I also disagree with the self-serving statements in your letter accusing Centinela of bargaining in bad faith. As you well know, the fact that an employer seeks contract terms that are more to its liking than the terms proposed by the union, or maintains its position on its proposals even after they have been rejected by the union, does not mean the employer is bargaining in bad faith. In this regard, it is important to remember that these negotiations are the first instance in which the current owner of the Hospital has had the opportunity to negotiate over the terms to be included in the collective bargaining agreement without having any terms on which no agreement is reached submitted to interest arbitration. Thus, it should not be surprising that we want to have, and are insisting upon, a collective bargaining agreement that allows the Hospital greater operational freedom, conforms with the health insurance and other benefit programs in place at other affiliated hospitals, and otherwise allows the Hospital to control its costs and operations so that the Hospital and all of its employees, including the employees represented by SEIU, can focus their efforts on providing quality patient care in a cost effective manner. The Union seems to believe that Centinela is engaging in good faith negotiations only if it will concede to the Union’s demands. The law, of course, does not support this position.

At this point it appears the Union would rather file unfair labor practice charges, which will most certainly result in years of litigation no matter what the outcome, instead of entering into a collective bargaining agreement with terms that are acceptable to Centinela. We urge the Union to reconsider its strategy and return to the table so the parties can finalize a collective bargaining agreement containing the terms included in the last, best and final offer that has been submitted to the Union.

GCX 58, pp. 1-3. Bush's February 15, 2011 response (RX 139) provided Schottmiller with another opportunity to highlight the basis for the Respondent's contention that the negotiations were at impasse, as exemplified by the Union's own conduct and notwithstanding Bush's claims that there was "much to be bargained and movement to be made by both parties":

Dear Danny,

I have your February 15, 2011 letter.

I will not here attempt to correct the numerous inaccuracies in your letter, nor will I respond to your self-serving statements setting forth your views, beliefs and characterizations of what has transpired during the course of the parties' negotiations. Instead, I refer you to my prior letters and other communications so that you can better understand what has actually occurred during the course of the parties' negotiations. If you review those letters and communications, and do so in an objective manner, you will conclude that the current state of affairs is largely the result of the Union's intransigence and refusal to recognize Centinela's sincere and legitimate desire to reach a collective bargaining agreement that is fair to our employees, the community and to Centinela. If the Union will simply recognize Centinela's legitimate desire to achieve such an agreement, as exemplified by Centinela's last, best and final offer made to the Union more than two months ago, we should be able to quickly reach a final agreement. However, if the Union continues its stubborn behaviors that have marked the parties' negotiations from the outset, then the impasse that currently exists in the negotiations will continue.

Additionally, your letter repeats many of the same inaccurate statements you have made previously, most if not all of which have been specifically addressed in my prior communications to you. For example, you blame Centinela because the parties have not met during the past several months. However, you neglect to acknowledge that it was the Union that cancelled the most recent

scheduled meeting. You also still have not answered the simple and straight-forward questions put to you in my January 12, 2011 letter. And while you continue to state that “there is much to bargain and movement to be made by both parties,” the Union has not identified what movement it is willing to make. More importantly, the Union has not indicated any willingness on its part to agree to the fundamentals of Centinela’s last, best and final offer. Instead, your letter demands that Centinela abandon its positions as a precondition to any further meetings. In response, let me reiterate Centinela’s position: Centinela will not change the substantive terms and fundamentals of its proposals on which agreement has not been reached. The Union’s demand that Centinela do so before the Union will agree to meet with Centinela further evidences the stalemate that exists in the parties’ negotiations.

As I have previously explained, Centinela believes the Union should return to the table so that the parties can finalize a collective bargaining agreement containing the terms included in Centinela’s last, best and final offer. To this end, Centinela remains willing to meet with the Union to explain, again, its proposals and the basis for those proposals. Centinela also remains willing to consider any word-smithing suggestions the Union might have that would not alter the substantive terms and fundamentals of its proposals but would result in the Union agreeing to those proposals. However, Centinela’s willingness to meet for these purposes, and to do so unconditionally, should not be seen as a waiver of Centinela’s legal positions concerning the impasse in the negotiations that has been in place for many months and that continues to date.

Centinela is available to meet on March 17, a date offered in your letter. We will hold this date for five days from the date of this letter. Please let me know during that period if the Union wishes to meet, and to do so unconditionally.

RX 140, pp. 1-2.

The parties held their next meeting on March 29, 2011, During the course of the meeting both parties essentially restated the same positions which they had been communicating to each other since April 2010 when Respondent first advised the Union, in writing, of the critical nature of Respondent’s EPO Plan proposal to a final collective bargaining agreement. The Union also made proposals on Article 3, Article 13 and new proposals separating out

vacation benefits from sick leave benefits in Article 15. GCX 59. However, the Union did not indicate it was prepared to agree to Respondent's EPO Plan, or to accept the other proposals included within Respondent LBF; in fact, the Union did not even make a proposal on health insurance during the meeting. Following a caucus, Respondent advised the Union that unless the Union was prepared to agree to Respondent's LBF there was no need to meet any further. See, i.e., RX 205, p. 65.

By letter dated April 20, 2011 to Schottmiller, Bush set forth the Union's version of what had occurred during the March 29 meeting, including an extended discussion of the Union's vacation and sick leave proposals and claims that "significant changes" were made by the Union to other proposals. GCX 60. Schottmiller responded by letter dated April 29, 2011 in which she reiterated that unless and until the Union was ready to accept the fundamentals of Respondent's LBF, and particularly the EPO Plan as contained in the LBF, further meetings between the parties would be fruitless:

I have your April 20, 2011 letter.

At no time during our meeting on March 29, 2011 did the Union ever indicate that it was willing to agree to all of the substantive terms of Centinela's Article 15 proposal, and most certainly never indicated any willingness to include in any final agreement the Prime Healthcare EPO Medical Plan for Employees plus Spouses/Children/Family, including selection of Primary Care Physicians from Prime Network physicians only. Centinela remains firm that any final agreement between the parties will have to include those terms.

At no time during our meeting on March 29 did the Union ever indicate that it was willing to agree to all of the substantive terms of Centinela's proposals on Article 2-Union Representation. Centinela remains firm that there can be no final agreement between the parties without those terms.

At no time during our meeting on March 29 did the Union ever indicate that it was willing to agree to all of the substantive terms of Centinela's proposals on Article 11-Hours of Work, Overtime

and Scheduling. Centinela remains firm that there can be no final agreement between the parties without those terms.

At no time during our meeting did the Union indicate that it was willing to agree to Centinela's proposal to delete Section B from Article 12. Centinela remains firm that there can be no final agreement between the parties without the deletion of Section B.

At no time during our meeting did the Union indicate that it was willing to agree to Centinela's proposal to delete Section C from Article 18. Centinela remains firm that there can be no final agreement between the parties without the deletion of Section C.

The Union did modify its prior demands on Article 13 as indicated in your letter. However, the Union most certainly did not indicate that it was willing to agree to the fundamental terms set forth in Centinela's Article 13 proposal, nor did the Union indicate that it was willing to agree to Centinela's Appendix A proposal. Centinela remains firm that there can be no final agreement between the parties unless and until the Union agrees to those terms, including Centinela's Appendix A proposal.

Your letter describes the proposals made by the Union during the meeting as involving "significant movement" and also labels the Union's proposals on Employee Status as "critical." Your letter also repeats your false accusations of bad faith bargaining by Centinela during the course of the negotiations. These statements are not supported by the record created by the many, many months of bargaining and other communications that have taken place between the parties relating to the negotiations. Most importantly, and notwithstanding the self-serving statements set out in your letter, Centinela's positions on what will be required in any final agreement has not changed, and as of the date of this letter the Union still has not indicated a willingness to agree to those positions.

If the Union wishes to continue to make proposals that fall short of what is required for the parties to reach a final agreement, it certainly has the right to do so. If the Union wants to discuss those proposals with Centinela's committee, we are willing to do that also. However, do not think that Centinela's willingness to do so means that Centinela has changed its positions as communicated on numerous occasions both at the table and in communications away from the table, as referenced in part above. Nor should Centinela's willingness to do so be interpreted as a waiver of Centinela's legal positions concerning the impasse in the

negotiations that has been in place for many months and that continues to date.

As I have previously explained, Centinela believes the parties' time is best spent in finalizing a collective bargaining agreement containing the terms that we have repeatedly told the Union must be included in any final agreement between the parties. To this end, Centinela remains willing to consider any word-smithing suggestions the Union might have that would not alter the substantive terms and fundamentals of Centinela's proposals but would result in the Union agreeing to those proposals. However, Centinela will not abandon or modify the fundamental components of its last, best and final offer made to the Union. Accordingly, unless and until the Union is willing to agree to those components, further meetings are not only not required legally, they will be a waste of the time and energy of all concerned.

GCX 61, pp. 1-3.

**12. The Union's Change Of Chief Negotiators In October 2012 Does Not Result In A Change In The Parties' Bargaining Positions**

There were no communications between the parties following Schottmiller's April 29, 2011 letter until October 2011 when Ruppert, who had assumed the role of chief negotiator for the Union in place of Bush, contacted Schottmiller to schedule a meeting. The communications between the parties thereafter (see, i.e., GCX 64-75) only served to deepen the impasse inasmuch as the Union made no movement to accept the EPO plan or other items in Respondent's LBF that had been specifically referenced in Schottmiller's January 13, 2011 letter, and Respondent showed no willingness to concede on any of those items.

**D. The ALJ's Rulings And Conduct During The Hearing**

As will be discussed in more detail in Part IV below, at the outset of the hearing on the complaint the ALJ granted AGC's petition to revoke Respondent's subpoena *duces tecum* directed to Region 31, and also granted in substantial part the petitions to revoke Respondent's subpoenas *duces tecum* directed to the Union, Bush and the law firm with which Bush was associated during the relevant time period. See, i.e., T 243-247; RX 182-202. The ALJ also

applied different standards depending on the party who filed the petition, and also applied different standards in regulating Respondent's examination and cross-examination of witnesses and ruling on Respondent's offering of or objecting to admissibility of exhibits as compared to AGC's examination and cross-examination of witnesses and offering of or objecting to admissibility of exhibits. See, i.e., Exception # 153.<sup>7</sup> By these and other rulings made during the hearing, the ALJ precluded Respondent from obtaining evidence, eliciting testimony and introducing documents relevant to the allegations of the complaint and Respondent's defenses to the allegations of the complaint. The ALJ also made a number of gratuitous remarks disparaging Respondent's legal positions and counsel, and refused to allow Respondent to make offers of proof in response to the ALJ's rulings, erroneously limiting the evidence Respondent was prepared to present during the hearing. Id., ## 152-157.

**E. The ALJ's Rulings On Respondent's Post-Hearing Motions**

Respondent made two post-hearing motions, one to reopen the record to allow the introduction of relevant evidence not available prior to the close of the hearing and one to dismiss the complaint, or alternatively to stay all proceedings and vacate prior proceedings because neither the Board nor the Regional Director who issued the complaint are or were legally authorized to take any action. The ALJ denied both motions. See, i.e., Exceptions ## 158-159.

**F. The ALJ's Decision**

The ALJ's decision ("ALJ Decision" or "Decision") was issued on April 12, 2013. As relevant to Respondent's exceptions and as discussed in Part IV below, the Decision

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<sup>7</sup> "Exception(s)" shall refer to the "Respondent's Exceptions to the Decision of the Administrative Law Judge field herewith, and when cited in this brief shall incorporate by reference all evidence cited therein.

begins with a description of the negotiations and other communications between the parties during the relevant period (ALJD, pp. 4-18 (Part I(B-C))) that includes findings that are contrary to undisputed evidence in the record and that are unsupported by probative evidence, that mischaracterizes undisputed evidence, and that ignores and fails to make findings supported by undisputed evidence and relevant to the issues. The Decision's description also includes findings that are directly contrary to evidence that Respondent sought to introduce during the hearing but was rejected by the ALJ. Moreover, the Decision's description includes characterizations of Respondent's proposed EPO Plan that are gratuitous, pejorative and irrelevant to the issues, particularly when contrasted to the Decision's gratuitous and positive characterizations of the Union's positions and actions. See, i.e., Part IV(G-I) below.

In the next section of the Decision relevant to Respondent's exceptions (ALJD, pp. 18-20 (Part II(A))), the ALJ disparages both Respondent's lead negotiator and Respondent's counsel under the guise of making credibility findings. In doing so, the Decision misstates and misapplies the Board's regulations and basic law relating to examination of witnesses. This portion of the Decision also appears to be based on the false premise that a witness who refreshes her recollection concerning specific details relating to over a dozen bargaining sessions that occurred as much as 30 months prior to an evidentiary hearing by reviewing contemporaneous notes or other documents created while bargaining was occurring is providing fabricated testimony. The Decision also appears to apply this false premise even when the witness's testimony is consistent with contemporaneous writings and is not inconsistent with testimony or other evidence submitted by the adverse party. This section also illustrates instances in which snippets of testimony or other evidence are spun by the Decision into findings that are not supported by those snippets and that are oftentimes contrary to other undisputed evidence in the

record, as well as “cherry-picking” of evidence that arguably supports the Decision’s conclusions while discounting or ignoring the same evidence when it supports Respondent’s contentions and arguments. Moreover, the Decision does not describe the specific findings that resulted from “sharp conflicts” in testimony, what evidence beyond Schottmiller’s testimony was not credited in making those findings, where Schottmiller’s testimony was not supported by “more reliable evidence” or what “more reliable evidence” existed, where the findings were based on “documents” instead of a “conflict” between the testimony of Bush and Schottmiller, or even an explication of all instances where such a “conflict” occurred. Finally, this section of the Decision illustrates additional examples of unsupported findings, failures to make relevant findings, and intemperate, irrelevant and unsupported descriptions of Respondent’s positions and actions as are referenced in the paragraph immediately above discussing Part I(B)(C) of the Decision. See, i.e., Part IV(A), (G-I) below.

The Decision next sets forth the ALJ’s analysis relating to the Union’s July 23 requests for information (ALJD, pp. 20-28 (Part II(B)((1)-(3))). Relying primarily on the self-serving claims made by the Union during the parties’ negotiations and repeating the errors described above regarding the findings made, and not made, in the prior sections of the Decision, the ALJ concludes that the information requested was “presumptively relevant” and had not been made in bad faith. In doing so, the ALJ expands the “quality of care” concept referenced by the parties during the negotiations well beyond the meaning fairly assigned to the phrase by the parties during the relevant period. The Decision also draws distinctions between the Union’s November 2009 request for information and the July 23 request that are neither legally nor factually supported, and fails to even address Respondent’s Section 10(b) defense to the complaint’s allegations (paragraph 16) relating to the July 23 requests. The Decision also

contains the incredible finding that there is no indication the Union's July 23 requests were made to assist in the Union's corporate campaign, to stall negotiations or to delay implementation of employee premium sharing for the base plan available to employees, and that the information was not requested to harass Respondent. Consistent with the ALJ's rulings during the hearing, the Decision also finds, again incredibly, that the Union's agreement to the EPO Plan at Encino and Garden Grove is not even relevant to assessing whether the July 23 requests were made in bad faith. The Decision also discounts the Union's refusal to meet with Respondent to discuss the requests as not relevant and accuses Respondent of being "disingenuous" to contend otherwise. The portion of the Decision concludes by misrepresenting Respondent's positions as dependent on the "baseless" assertion that the information requested was confidential and would be unduly burdensome to provide. See, i.e., Part IV(D) below.

Building off of the foregoing sections of the Decision discussed above, the next portion of the Decision finds that because Respondent did not provide the information requested by the Union's July 23 letter, there was no impasse as of January 1, 2011 when Respondent implemented its EPO Plan proposal (ALJD pp. 28-30 (Part II(B)(4))). This portion of the Decision begins with the implicit, and incredible, finding that the Union might have agreed to Respondent's EPO Plan had it received the requested information. The Decision also relies on Board law that does not apply given the undisputed evidence in the record and fails to address Board law supporting Respondent's arguments that implementation of the EPO Plan proposal was lawful even if Respondent violated the Act by failing to provide the Union with the requested information. This portion of the Decision concludes by finding that Respondent "violated" paragraphs/subparagraphs of the complaint containing factual and legal allegations and that because impasse was never reached Respondent may not argue that it did not unlawfully

condition bargaining on the Union's acceptance of its last, best and final offer. See, i.e., Part IV(C) below.

The next section of the Decision is titled "Consideration of the Totality of Circumstances" (ALJD, pp. 30-37 (Part II(C))) and is particularly difficult to understand because, among other reasons, it addresses arguments not relevant to the allegations of the complaint and Respondent's defenses to those allegations, conflates the concept of impasse with general bad faith bargaining and the indicia alleged in the complaint as supporting the complaint's general bad faith bargaining allegation (Paragraph 19), and conflates the allegations of Paragraph 19 with the conclusory allegation of Paragraph 21 that is standard boilerplate in any complaint alleging violations of Section 8(a)(5) and derivatively Section 8(a)(1). The first subsection within this portion of the Decision presents a truncated discussion of bargaining and other communications between the parties that is replete with the same infirmities referenced above, including finding significance in the Union's "acceptance" of and "tentative agreement" to Respondent's EPO Plan proposal even though the Union consistently rejected the two core components of the proposal (the PCP requirement and employee premium sharing) that Respondent repeatedly advised would not change, and that bargaining between the parties both prior to implementation and thereafter supported the Union's claim that it did not "believe" impasse was ever reached and that "further bargaining could be productive." The Decision next discusses the concept of "unreasonable bargaining demands" and repeatedly disparages Respondent and its EPO proposal while doing so, even though the complaint does not allege the content of Respondent's EPO proposal as an indicia of bad faith and the AGC reinforced during the hearing that the only indicia being relied on in support of general bad faith bargaining were the complaint's information and implementation allegations (see, i.e., T \_\_\_\_). The Decision next finds that

Respondent violated Section 8(a)(5) by “announcing the implementation of a unilateral change” through the September 1 memo distributed to employees, and subsequently relies on this finding in concluding Respondent engaged in general bad faith bargaining. The Decision next references its prior findings relating to the Union’s requests for information and concludes by finding that Respondent’s failure to provide information, issuing the September 1 memo and unilaterally implementing the EPO Plan in January 2011 “demonstrated an intent to frustrate the possibility of reaching any agreement.” See, i.e., Part IV(B) below.

The Decision next discusses what it labels “critical issue impasse” (ALJD, pp. 37-38 (Part II(D))). This section of the Decision again disparages Respondent, this time because Respondent referenced the concept in its communications to the Union during the relevant period and also argued the applicability of the concept in its brief. The Decision then dismisses the applicability of the concept in this case based on its prior finding that Respondent did not engage in overall good faith bargaining.

The Decision next launches into a discussion of waiver by a union’s failure to request bargaining (ALJD, pp. 38-37 (Part II(E))) that is noteworthy only because it again exemplifies the Decision’s failure to understand and apply basic Board law and to address the arguments actually made by Respondent in defense of the allegations of the charge. That is, the Decision discusses waiver with respect to the Union’s July 23 information requests and January 2011 implementation of the EPO Plan. However, Respondent’s contention is and was that the Union failed to request bargaining over the unilateral change allegation in the complaint based on the September 1 memo, not with respect to the information requests or EPO implementation. See, i.e., Part IV(E) below.

The Decision then sets forth its conclusions of law (ALJD, pp. 39-40), finding that Respondent violated the Act by certain conduct discussed in the Decision that have some relationship to the actual allegations of the complaint, and some that do not, as referenced above and below and in Respondent's Exceptions filed herewith, including a conclusion that Respondent failed and refused to bargain in good faith "by the overall conduct referred to herein from early 2010 through December 2011, including Respondent's conditioning bargaining upon acceptance of the Respondent's last, best, and final offer." The remedy section of the Decision (ALJD, pp. 40-41) orders Respondent to rescind the implemented EPO plan, make employees whole for losses and expenses incurred as a result of the implementation and bargain with the Union, and includes a number of provisions that are not tied to the allegations of the complaint and impose upon Respondent broad obligations not within the scope of the violations plead in the complaint. The order section of the Decision (ALJD, pp. 41-42) incorporates the provisions of the remedy section and also includes a provision requiring Respondent, upon the request of the Union, to "restore the coverage, co-pays, premiums, and healthcare provider networks available to employees prior to January 1, 2011." See, i.e., Part IV(J) below.

### **III.**

#### **SPECIFICATION OF THE ISSUES RAISED BY RESPONDENT'S EXCEPTIONS**

1. Did Respondent engage in general bad faith bargaining as alleged in paragraph 19(c) of the complaint (Exception ## 1, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 33, 35, 36, 37, 38, 39, 41, 43, 44, 45, 46, 48, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63, 65, 66, 67, 71, 72, 73, 74, 75, 77, 78, 80, 81, 84, 85, 86, 87, 89, 91, 92, 93, 95, 97, 98, 99, 100, 102, 109, 111, 112, 113, 114, 115, 116, 121, 123, 126, 129, 132, 133, 136, 139, 160)?

2. Did Respondent make an unlawful unilateral change by distributing the September 1 memo as alleged in paragraph 18 and 21 of the complaint (Exception ## 5, 127, 128, 130, 131, 134, 135, 137)?

3. Did Respondent make an unlawful unilateral change by implementing its EPO Plan on January 1, 2011 as alleged in paragraph 18 and 21 of the complaint (Exception ## 3, 4, 5, 6, 8, 10, 11, 13, 14, 15, 17, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 33, 35, 36, 37, 41, 43, 46, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 84, 85, 86, 87, 89, 91, 92, 93, 97, 98, 99, 100, 102, 109, 110, 111, 112, 113, 114, 115, 116, 117, 123, 126, 129, 133, 138, 160)?

4. Did Respondent unlawfully condition bargaining on the Union's agreement to Respondent's last, best and final offer as alleged in paragraph 19 and 21 of the complaint (Exception ## 39, 125)?

5. Did Respondent unlawfully fail to provide information to the Union as alleged in paragraph 16 and 21 of the complaint (Exception ## 4, 5, 10, 11, 13, 14, 15, 17, 22, 21, 24, 26, 28, 29, 30, 33, 35, 36, 37, 40, 43, 44, 46, 48, 49, 50, 51, 54, 58, 60, 61, 62, 63, 64, 65, 67, 68, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 89, 91, 92, 93, 97, 98, 99, 100, 102, 103, 104, 105, 108, 109, 110, 111, 112, 114, 115, 126, 136, 160)?

6. Does the undisputed evidence in the record support a determination that the parties were at impasse on Respondent's EPO Plan proposal as of January 1, 2011 (Exception ## 3, 4, 5, 6, 8, 10, 11, 13, 14, 15, 17, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 33, 35, 36, 37, 41, 43, 46, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 84, 85, 86, 87, 89, 91, 92, 93, 97, 98, 99, 100, 102, 109, 110, 111, 112, 113, 114, 115, 116, 117, 123, 126, 129, 133, 138, 160)?

7. Does the undisputed evidence in the record support a finding that Respondent would not agree to a final and complete collective bargaining agreement if the agreement did not include Respondent's EPO Plan proposal (Exception ## 3, 4, 5, 6, 8, 10, 11, 13, 14, 15, 17, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 33, 35, 36, 37, 41, 43, 46, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 84, 85, 86, 87, 89, 91, 92, 93, 97, 98, 99, 100, 102, 109, 110, 111, 112, 113, 114, 115, 116, 117, 123, 126, 129, 133, 138, 160)?

8. Does the undisputed evidence in the record support a finding that the Union may have agreed to Respondent's EPO Plan if Respondent would have provided the information requested by the Union (Exception ## 23, 26, 27, 29, 30, 48, 53, 55, 57, 61, 62, 64, 65, 68, 71, 72, 73, 78, 79, 81, 83, 84, 87, 92, 98, 99, 100, 102, 109, 110, 111, 112, 113, 114, 117, 120, 121, 125, 126, 129, 133, 138, 160)?

9. Is the Decision's order requiring Respondent to restore the coverage, co-pays, premiums, and healthcare provider network available to employees prior to January 1, 2011 lawful and appropriate (Exception ## 141, 142)?

10. Is the Decision's order unduly broad (Exception ## 141, 142)?

11. Are findings in the Decision contrary to the undisputed evidence in the record (Exception ## 2, 9, 21, 25, 26, 31, 32, 36, 37, 44, 47, 49, 55, 57, 68, 69, 70, 72, 73, 74, 75, 78, 80, 81, 82, 86, 89, 90, 91, 94, 95, 103, 104, 106, 108, 112, 114, 115, 118, 119, 120, 121, 122, 124, 125, 126)?

12. Does the Decision fail to make relevant findings that are supported by undisputed evidence in the record (Exception ## 1, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 19, 20,

22, 23, 24, 26, 27, 28, 29, 30, 33, 35, 40, 41, 42, 46, 48, 51, 53, 54, 55, 58, 59, 60, 61, 62, 63, 64, 65, 74, 77, 79, 83, 92, 95, 102, 104, 123, 135, 160)?

13. Were the ALJ's evidentiary and procedural rulings made during the course of proceedings before him consistent with the law and facts (Exception ## 149, 150, 151, 152, 153, 154, 156, 157, 158, 159)?

14. Was Respondent denied due process by the ALJ's evidentiary and procedural rulings made during the course of the hearing (Exception ## 47, 149, 150, 151, 152, 153, 154, 156, 157, 158, 159)?

15. Does the record support a finding that the ALJ's determinations made during the course of proceedings and in his Decision evidence bias, or at least the appearance of bias, against Respondent (Exception ## 9, 11, 18, 22, 25, 26, 30, 31, 32, 34, 35, 36, 37, 40, 43, 44, 46, 47, 48, 49, 55, 57, 58, 59, 60, 61, 62, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 80, 81, 82, 89, 90, 91, 95, 96, 100, 105, 106, 107, 115, 118, 119, 120, 149, 150, 151, 152, 153, 154, 155, 157)?

16. Are the ALJ's findings, rulings and statements on which he based his credibility determinations supported by the evidence and the law (Exception ## 18, 30, 67, 69, 70, 71, 72, 73, 74, 82, 86, 87, 88, 89, 90, 91, 92, 93, 95)?

17. Does the ALJ's failure to make detailed factual findings that fully address all issues presented by the record evidence and all theories presented by Respondent in defense of the complaint require that the matter be remanded and a supplemental decision prepared (Exception ## 44, 48, 67, 69, 70, 71, 88)?

#### **IV. ARGUMENT**

##### **A. The Uncontroverted Record Evidence Must Be Considered When Reviewing The Findings And Conclusions Made, And Not Made, In The Decision**

When deciding cases under the Act, an administrative law judge, as well as the Board itself when reviewing an administrative law judge's decision, is required to "draw all those inferences that the evidence fairly demands." See, i.e., *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). This review must include consideration of not only evidence supporting the General Counsel's position or the findings and conclusions contained in an administrative law judge's decision, but also the evidence, including relevant evidence that was not admitted into the record, that tends to detract from it. See, i.e., *Flagstaff Med. Ctr., Inc. v. NLRB*, D.C. Cir. No. 11-1326 (April 26, 2013); *Lakeland Healthcare Associates v. NLRB*, 696 F.3d 1332 (11th Cir. 2012). In sum, the Board must consider "all of the reasonable inferences compelled by the evidence in reaching its decision." See, i.e., *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 514 (4th Cir. 1998); see also *Gibson Greetings v. NLRB*, 53 F.3d 385, 393 (D.C. Cir. 1995). It is therefore the Board's responsibility to overturn findings and determinations where the evidence in the record does not support them. See, i.e., *Contempora Fabrics, Inc.*, 344 NLRB 851, 852 (2005) [reversing ALJ discrimination finding based on Board's determination that employer legitimately relied upon an employee complaint when issuing the discipline]; *River Ranch Fresh Foods*, 351 NLRB 115, 116 (2007) [reversing ALJ discrimination determination based on Board's disagreement with ALJ finding that the employer's testimony was inconsistent; Board determines ALJ took portions of testimony out of context]; *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007) [reversing ALJ discrimination determination after concluding that the record as a whole established that the employer would have discharged the employee even in the absence of protected conduct]; *T-West Sales & Service Inc.*, 346 NLRB

132, 134 (2005) [reversing ALJ discrimination determination after determining that the record considered as a whole established that the termination was motivated by violation of employer's policies]; *The Roanoke Hotel*, 293 NLRB 182 (1989) [reversing ALJ good faith bargaining determination based on review of all relevant evidence]; *Litton Microwave Products*, 300 NLRB 324 (1990) [reversing ALJ bad faith bargaining determination based on review of all relevant evidence]; *American Commercial Lines, Inc.*, 291 NLRB 1066 (1988) [same]. Indeed, the current Board has recently applied these standards in a case involving Prime wherein the Board combed the record to tease out evidence that might support an inference that the decision to terminate an employee was unlawfully motivated even though the administrative law judge who conducted the hearing and listened to witness testimony decided otherwise, and remanded the case because the judge had not specifically addressed the evidence in the record that was contrary to his conclusion. *Encino Hospital Medical Center*, 359 NLRB No. 78 (2013).<sup>8</sup>

Similarly, the Board need not accept an administrative law judge's "credibility" findings when those findings are not supported by the record as a whole; the Board will instead independently evaluate witness credibility based on the "reasonable inference" standards discussed above, as well as the logical consistency and probability of the testimony taken as a whole. See, i.e., *River Ranch Fresh Foods*; *BJ & R Machine & Cureco*, 270 NLRB 267, 267-268 (1984); *SCA Services*, 275 NLRB 830 (1985); *Leshner Corp.*, 260 NLRB 157, 157-159 (1982). Other factors to be evaluated when assessing an administrative law judge's credibility determinations include unreasonable conclusions, the discrediting of uncontroverted testimony, the acceptance of inherently unbelievable testimony, or where there is a showing of bias. See,

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<sup>8</sup> Respondent contends that the *Encino* decision, as well as other decisions cited in this brief that were issued subsequent to the expiration of Member Liebman's term on 8/27/2011, are invalid. Respondent cites these cases only to the extent the analysis contained in those decisions is relevant to Respondent's exceptions.

i.e., *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); *Packing House Workers v. NLRB*, 210 F.2d 325, 329-330 (8th Cir. 1954); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982); *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 407-408 (7th Cir. 1997); *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 928 (5th Cir. 1993).

Respondent will discuss the Decision’s stated rationale for discrediting testimony by Schottmiller regarding specific matters in Section G below. However, even if the Board upholds those credibility determinations, application of the standards set forth above requires that the Board set aside numerous findings made by the ALJ, and make other findings not made by the ALJ (collectively “challenged findings”), based on the weight of the uncontroverted evidence in the record, or that the ALJ wrongfully excluded from the record. Although the challenged findings are too numerous to allow for individual discussion in this brief, the following examples are illustrative.<sup>9</sup>

- Findings that the PCP requirement of the EPO Plan proposal is a “referral expense through a gatekeeper,” that the “gatekeeper” “referral expense” made Respondent’s EPO Plan more expensive to employees than the Anthem HMO because it resulted in “significantly higher cost[s],” and that the “referral expense” was eliminated by the Union’s proposal to allow access to Anthem providers as part of the EPO (see, i.e., ALJD 9:1-3, 20:1-7, 25:27-31). In fact, both the Anthem HMO and the EPO Plan required employees to make a co-pay for any office visit. See, i.e., RX 64; GCX 29 [description of current Anthem HMO co-pays under “Anthem HMO Base Plan” column, Prime EPO co-pays under “Prime Network” column]. Moreover, the Anthem HMO co-pay was more expensive for employees than the EPO Plan co-pay. *Id.* [\$10 per office visit for proposed Prime EPO as compared to \$30 under current Anthem HMO].

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<sup>9</sup> Respondent has set forth all challenged findings in Respondent’s Exceptions.

Accordingly, even if the ALJ correctly found that the Prime EPO had a “gatekeeper” element that was not present in the Anthem HMO (which it did not), a participant in the Prime EPO would have only been required to pay a one-time cost of \$10 to be referred to his/her desired Anthem provider, and could have continued to receive care from the Anthem provider thereafter. Additionally, the Union’s proposal to expand the EPO Plan to include all providers in the Anthem network as part of the Prime EPO network was akin to a proposal to require Kaiser plan participants to use physicians not associated with Kaiser as if they were employed by Kaiser. Such a request, as the Union well knows as it represents thousands of Kaiser employees, is antithetical to the entire concept of the Prime EPO Plan, or any EPO plan. Moreover, the Union’s proposal would have created a different plan for Centinela bargaining unit employees than the plan in place for all other employees in the Prime network, including employees represented by the Union at Garden Grove and Encino, and would have also resulted in a different plan for the non-bargaining unit employees at Centinela. The Union’s proposal would have also required Respondent to pay the higher Anthem premiums it sought to avoid by moving from the Anthem HMO to the Prime EPO Plan. See, i.e., RX 23, 50, 64, 215. For the ALJ to find that the Union’s proposal was a reasonable response to Respondent’s EPO Plan proposal indicates a total misunderstanding of managed healthcare and health insurance generally, as well as the evidence that was presented during the hearing.<sup>10</sup>

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<sup>10</sup> For the reasons explained in Sections (B-C) below, it is not truly relevant as a matter of law whether the Prime EPO Plan did or did not result in additional cost to employees in comparison to the Anthem HMO, would have required employees to go to physicians they had no experience with or who were in inconvenient locations, etc. Respondent points out these erroneous findings not so much because they are relevant to whether Respondent bargained in bad faith or unlawfully implemented the Prime EPO Plan, but because the ALJ relied on them in finding those violations. The same is true for many of the challenged findings discussed in this brief.

- Findings that Union tentatively agreed to Respondent's EPO Plan proposal at the September 30 meeting (ALJD 15:31-33, 31:47-32:1). In fact, the Union countered with a proposal that would have required all Anthem physicians to be added to the Prime network (discussed above) and that maintained free health insurance for the EPO Plan at all levels of coverage (T 180-181; GCX 30, 43).
- Failure to find that by its proposals and statements during the pre-implementation period, the Union repeatedly communicated to Respondent that the Union would not agree to an EPO with a Prime PCP requirement or that required employee premium sharing for any level of coverage, and never modified those positions. See, i.e., T 355, 357, 359-361; GCX 21-23, 26, 30, 35, 43-44, 46, 48; RX 37-40, 42, 205.
- Failure to find that throughout the course of the pre-implementation period Respondent provided the Union with all responsive information requested by the Union, including information relevant to Respondent's EPO Plan proposal, other than the illegitimate information requests in the July 23 letter. See, i.e., Part II(C)(5-10), evidence cited therein.
- Failure to find that the Union never responded to Respondent's requests set forth in Respondent's January 13, 2011 letter, and repeated thereafter, requesting the Union to state whether it was prepared to agree to the identified portions of Respondent's LBF. See, i.e., GCX 56-58, 60-61, 69.
- Failure to find that Respondent advised the Union that the workplace issues the Union raised in November-December 2011 should be discussed with Respondent's HR representatives. See, i.e., GCX 69.
- Finding that Schottmiller's testimony was the product of leading questions and Respondent's counsel engaged in misconduct as referenced in Section 102.177(b) of the Board's

rules and regulations by continuing to ask leading questions after being admonished not to do so (ALJD 18:46-19:7, 45-52 (n.20-22)). In fact, the questions put to Schottmiller were almost without exception proper questions, including questions that were not objectively leading or that were permissible because they sought to lay a proper foundation, focus the testimony on a particular subject, or elicit testimony after Schottmiller's testimony about a particular matter had been exhausted (see, i.e., T 573, 576, 580-581, 586, 594, 621, 623, 626, 643, 667-668). Additionally, Section 102.177(b) was never intended to apply to asking leading questions.<sup>11</sup>

- Finding that Respondent referenced the physician nomination form during the July 21 meeting in response to the Union's concerns about keeping employee premium contributions at "roughly" what employees were then paying (ALJD 8:38-41). In fact, the form was developed and had been rolled out throughout the Prime network by at least February 16 in order to broaden the Prime EPO network throughout the Prime system (see, i.e., T 722; RX 211); the form was not developed to reduce the costs to employees associated with either premium sharing or co-pays. Moreover, the phrase "roughly paying" is an oxymoron as it is undisputed that employees were not required to pay any amounts towards coverage under the then-existing Anthem HMO, and as noted above the co-pays and other costs under the EPO Plan were lower than the costs under the Anthem HMO.

- Finding that no evidence was provided regarding the steps necessary to add a physician to the Prime network (ALJD 15:50-54). In fact, the process was explained both in documents submitted in evidence and through undisputed testimony (see, i.e., RX 64, 205, 212, 214; GCX 76; T 125-126, 189, 361, 722).

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<sup>11</sup> To the extent the Board agrees that Schottmiller's testimony should be discredited because it came in response to leading questions, the same standards should be applied to the testimony of Bush in response to similar questioning by AGC. See, i.e., T 78-80, 124-126, 130-133, 139, 141-142, 147, 148, 177, 179, 199-202.

- Failure to find that the Union responded to Respondent's February 5 discussion of its upcoming proposal to eliminate the Anthem HMO and replace it with the Prime EPO, including premium sharing (see, i.e., ALJD 5:23-27)<sup>12</sup> by stating at the meeting that it did not trust Prime and believed it would take the premiums paid by employees and then walk away, and then cancelled the scheduled February 11 meeting due to the Union's dissatisfaction with Respondent's proposal. See, i.e., RX 21; RX 205, p. 5.
- Failure to find that the Union failed to respond to Respondent's March 26, March 27, March 30 and April 14 emails offering to continue free health insurance at all levels of coverage for the duration of negotiations if the Union would agree to implementation of the EPO Plan on July 1, until April 19. See, i.e., RX 37-38, 40; GCX 21-22.
- Findings that Schottmiller's assertion in her April 23 letter that the Anthem policy had an expiration date of July 1 was "inaccurate as it would not would expired but would have continued (albeit in increased costs to Respondent) had Respondent not unilaterally decided to implement its new EPO healthcare plan on January 1, 2011, because it did not want to incur increased premium costs" (ALJD, p. 6 (n.9). In fact, the Anthem HMO contract expired on June 30 and would have been unavailable to Centinela employees after that date had Respondent not purchased a six-month contract in order to continue to provide the Anthem HMO through December 31. See, i.e., RX 209. For this same reason the Anthem HMO policy expired on January 1, 2011. See also RX 216-218.<sup>13</sup>

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<sup>12</sup> The Decision finds that during the February 4-5 meetings Respondent stated the EPO Plan would require premium contributions "at all levels of coverage." There is no support in the record for this finding.

<sup>13</sup> The ALJ refused to admit these exhibits, which are relevant to show among other matters that the Anthem policy was set to expire on July 1, Respondent was forced to renew the policy at the 11th hour due to the Union's stalling of negotiations during the March-May period, and the renewal expired on January 1, 2011, in response to the objections of AGC and Union counsel

- Finding that the “quality of care” argument raised by the Union included the number of physicians in the Prime provider network and Schottmiller’s testimony to the contrary was “untrue and disingenuous.” See, i.e., ALJD 19:13-18. In fact, the Union’s argument was based on the Union’s claim that the quality of care provided at Prime hospitals was substandard and Schottmiller’s testimony was both consistent with the arguments articulated by the Union and reflected her opinion. See, i.e., T 686; GCX 33-34, 36-37, 40-41; RX 179-180.
- Finding that the PCP physician nomination form was a “sham” and there was no evidence that physicians were added to the network through the nomination process (ALJD 19:15-21). In fact, Prime had a full-time employee dedicated to processing employee nominations and utilized nomination forms submitted by Centinela employees to add several hundred physicians to the Prime network. See, i.e., RX 65, 100, 111. Moreover, Respondent expressly advised that submission of a form would not guarantee that the physician would agree to join the network. See, i.e., GCX 76; T 719-722. And as discussed above, the form was used throughout the Prime network, notwithstanding the ALJ’s suggestion that it was created only as a “sham” in an attempt to mislead the Union.
- Finding that proposed EPO Plan “evolved” to become “more expensive and more restrictive” between February 16 when first presented to the Union “as the bargaining sessions progressed in May, and finally, July 23” (see, i.e., ALJD 19:33-38). In fact, the written proposals show the amount of the premiums to be paid by employees actually *decreased* in Respondent’s July 23 proposal as compared to its February 16 proposal, and remained at the July

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based on the documents not having been shared with the Union during the course of bargaining. Given that most of the issues here turn on the totality of the circumstances, the documents should have been admitted. See, i.e., Section H below. Additionally, that the ALJ would exclude this evidence and then make a finding that is directly contrary to the excluded evidence further illustrates bias, or at least the appearance of bias. See, i.e., Section I below.

23 amounts through implementation in January 2011. See, i.e., RX 27; GCX 18, 35, 48. For this reason, the statement later in the Decision that Respondent's July 23 proposal "suggest[ed] higher employee contributions at all levels [of the] EPO" (ALJD 31:45-46) is demonstrably false. Additionally, the co-pays in the proposed EPO Plan, which were lower than the co-pays under the HMO base plan then available to bargaining unit employees, remained constant. See, i.e., RX 50, 64; GCX 31. The documents also establish that the Union received written notice on May 7 of the PCP referral requirement, and that this "restriction" was not modified during the rest of the pre-implementation period. See, i.e., RX 50, 64; GCX 31, 49, 111. Moreover, testimony by Valle regarding discussions regarding the PCP referral requirement during the February 16 meeting, a comparison she prepared immediately after that meeting to clarify the requirement, Schottmiller's emails to Bush during March-April requesting the Union's agreement to implement the EPO Plan, and the undisputed fact that the EPO Plan with the PCP referral requirement was already in place at all other Prime facilities, establish that the PCP referral requirement was part of the EPO Plan proposed by Respondent beginning in February, notwithstanding the ALJ's contrary finding. See, i.e., T 720-723; RX 25, 29, 32, 37-40, 42, 50, 54, 64, 205 pp. 11-13, 206-207, 211, 214, 219; GCX 20-21, 29, 31, 111; see also T 594-595 [Schottmiller testimony confirming discussions at February 16 meeting of PCP requirement and that the Prime EPO Plan was in place at Encino and Garden Grove for employees represented by the Union]. Moreover, Bush testified on cross-examination that he did not interpret Schottmiller's March 26, 2010 email (GCX 21) as indicating that the EPO was being offered in addition to the Anthem HMO, and thereby conceded that the EPO Plan would replace the Anthem plan. T 348.

- Findings that it was “unreasonable” for Centinela employees to be required to receive care at Prime hospitals because those hospitals were “unavailable to Respondent’s employees due to their inconvenient locations from where the employees lived and worked” and that reliance on arguments relating to the EPO being in place for Union-represented employees at Garden Grove and Encino was misplaced because of “their separate geographic locations miles, and in some cases, counties apart from each other.” See ALJD 8:23-36, 25:52-26:2. However, there is no evidence in the record that establishes where all of the bargaining unit employees lived, and to the extent they would be able to access care at their workplace under the Prime EPO Plan, those services are extremely “convenient.” The ALJ’s findings also ignore the evidence of the physicians in the immediate area of Centinela who were added to the Prime EPO through the physician nomination forms (see, i.e., RX 111). Furthermore, Centinela is less than 20 miles from Encino, both are within the same distance of another Prime hospital, and Centinela is 15 miles closer to Garden Grove than is Encino. Accordingly, the Prime EPO is no more “inconvenient” for Centinela’s employees represented by the Union than it is for the Union-represented employees at Garden Grove and Encino. Moreover, there are many more Prime hospitals within Centinela’s geographical area than there are within the range of other Prime hospitals. See, i.e., <http://www.primehealthcare.com/Prime-Hospitals.aspx> (last visited 6/14/13). In any event, this “unreasonable” requirement is the nature of any EPO—again the appropriate comparison is the Kaiser EPO model.

- Failure to find that the two essential components of Respondent’s proposed EPO Plan (PCP referral requirement and employee premium sharing) were part of the proposed EPO Plan from February 2010 forward. See, i.e., T, 720-723; GCX 18, 29; RX 24-25, 27, 29, 32-35, 37-38, 40, 64, 205, 207, 214; GCX 20-21.

- Finding that Respondent “refus[ed] to respond at all to the Union July 23 information request” (ALJD 16-17). In fact, Respondent repeatedly responded to the requests, both in writing and at the bargaining table. See, i.e., RX 179, 205; GCX 36.
- Finding that the record does not support a determination that the July 23 requests were made to harass Respondent (ALJD 24:34-35). In fact, the record contains overwhelming evidence that the requests were made to harass Respondent (see, i.e., T 575-578, 591-595, 600-611, 616-617, 623-624, 629, 642, 645, 657, 672-673, 720-723; RX 1, 3, 25, 29, 32, 37-40, 42, 50, 54, 64, 101, 122, 136, 178-180, 205-207, 211, 214, 219; GCX 20-21, 25, 29, 31, 33-34, 111; Offer of Proof), the ALJ simply chose to discount, ignore, or unreasonably discredit that evidence.
- Finding that the Union may have agreed to Respondent’s EPO Plan if Respondent had provided the information specified in the Union’s July 23 requests (ALJD 28:46-49). In fact, the record contains overwhelming evidence that the Union would not have agreed to the EPO Plan at any time prior to its implementation even if it had received additional information. See, i.e., T 575-578, 591-595, 600-611, 616-617, 623-624, 629, 642, 645, 657, 672-673, 720-723; RX 1, 3, 25, 29, 32, 37-40, 42, 50, 54, 64, 101, 122, 136, 178-180, 205-207, 211, 214, 219; GCX 20-21, 25, 29, 31, 33-34, 111; Offer of Proof.
- Finding that the EPO Plan limited the geographical area in which employees could receive emergency medical care (ALJD 34:31-35). In fact, the Plan allows participants to receive emergency care from providers in wherever the participant was located when emergency care is required. See, i.e., GCX 111.
- Failure to find that the Union engaged in classic offensive bargaining tactics during the course of negotiations with Respondent during the period relevant to the complaint, including

cancelling meeting, making burdensome information requests designed to stall negotiations and refusing to discuss or make counterproposals on significant issues during bargaining, with the intent of frustrating the negotiating process and creating obstacles to the implementation of the EPO Plan proposed by Respondent. See, i.e., T 575-578, 591-595, 600-611, 616-617, 623-624, 629, 642, 645, 657, 672-673, 720-723; RX 1, 3, 25, 29, 32, 37-40, 42, 50, 54, 64, 101, 122, 136, 178-180, 205-207, 211, 214, 219; GCX 20-21, 25, 29, 31, 33-34, 111; Offer of Proof.

- Failure to find that the Union was engaged in a corporate campaign against Respondent and Prime at all times material to the allegations of the complaint and that central components of the corporate campaign included charges of high septicemia rates and other medical complications at Prime hospitals connected to fraudulent and criminal business practices, publication of the charges, and calls for law enforcement and regulatory agencies to investigate septicemia rates in hospitals operated by Prime to determine whether such rates were caused by fraudulent/criminal business practices or substandard patient care. See, i.e., GCX 34, RX 178, Offer of Proof.<sup>14</sup>

**B. The Undisputed Evidence Establishes That Respondent Did Not Engage In General Bad Faith Bargaining: Paragraph 19(c) Must Be Dismissed**

The Decision finds that Respondent engaged in general bad faith bargaining by its “overall conduct referred to herein from early 2010 through December 2011” (ALJD 40:18-21). This conclusion is not supported by the record taken as a whole, including the undisputed evidence in the record that is contrary to the Decision’s findings and conclusions that must be considered by the Board when reviewing the Decision (see, i.e., Section A above), as will now be explained.

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<sup>14</sup> The ALJ rejected RX 178 and did not allow Respondent to make an offer of proof that would have supported Schottmiller’s testimony regarding the components of the Union’s corporate campaign. See, i.e., T 565-569.

1. **An Employer Satisfies Its Statutory Obligation To Bargain In Good Faith When The Employer Bargains For A Final Agreement Consistent With The Employer's Interests**

Section 8(a)(5) of the Act requires an employer to recognize and bargain collectively with the lawful representative of its employees with respect to their terms and conditions of employment. Section 8(d) defines the duty to bargain as the mutual obligation of the employer and the union to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” The same subsection also specifically provides that “such obligation does not compel either party to agree to a proposal or require the making of a concession.” Accordingly, the statutory language requires that the parties enter into discussions with an open mind and a sincere intention to reach an agreement consistent with the respective rights of the parties; however, it does not compel either side to make a concession from a position sincerely held. *Ryan Iron Works*, 332 NLRB 506 (2000); *Concrete Pipe and Products Corp.*, 305 NLRB 152 (1991), *enf'd.*, 983 F.2d 240 (D.C. Cir. 1993); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C. Cir. 1969).

In accordance with the statutory language, “[f]irmness of a bargaining position does not constitute bad faith” (*Dow Chemical Co.*, 216 NLRB 82, 85 (1975)); the Act only requires that a party enter into negotiations with a *bona fide* intent to find a basis for agreement consistent with the respective rights of the parties (*id.*). Neither party is required to yield any bargaining position fairly maintained, and bad faith bargaining cannot be found unless the evidence supports the conclusion that a party deliberately sought to frustrate the bargaining process. See, *i.e.*, *Concrete Pipe*, 305 NLRB 152; *Sign & Pictorial Union v. NLRB*, 419 F.2d 726. The duty to bargain in good faith is not violated because one or the other of the parties has been unwilling to concede from its position and yield to the contentions or demands of the other,

even though the issues involved may be crucial to the negotiations. *California Pacific Medical Center*, 356 NLRB No. 159 (2011); *Matanuska Electrical Assn.*, 337 NLRB 680 (2002); *88 Transit Lines*, 300 NLRB 177, 178 (1990); *The Dow Chemical Co.*, 186 NLRB 372, 381-382 (1970); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 877-884 (9th Cir. 1978). “The question is whether the totality of the Respondent’s conduct demonstrates it unlawfully frustrated the possibility of arriving at **any** agreement.” *Otis Elevator Co.*, 283 NLRB 223, 226 (1987) (emphasis added). A finding of bad faith bargaining can only be made when the record demonstrates “a desire not to reach an agreement with the union.” *NLRB v. Reed Prince Mfg.*, 205 F.2d 131 (1st Cir. 1953). See also, i.e., *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995); *Gen. Electric Co.*, 150 NLRB 192 (1964); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943). Moreover, this assessment must be based on the totality of the circumstances surrounding the negotiations. As summarized by the Board in *KFMB Stations*, 349 NLRB 373 (2007):

The Board must assess a party's total conduct before determining whether that party has engaged in bad-faith bargaining. *Challenge-Cook Bros.*, [288 NLRB] at 388. “The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct.” *Garden Ridge Mgmt., Inc.*, 347 NLRB No. 13, slip op. at 2 (2006) (quoting *Reichhold Chemicals*, 288 NLRB 69, 69 (1988), enf. denied in part on other grounds 906 F.2d 719 (D.C. Cir. 1990)). In considering the totality of the conduct, the Board decides “whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), enf. 318 F.3d 1173 (10th Cir. 2003).

Id. at 374.

Because the determination of whether a party has refused to bargain in good faith requires examination of the entire course of conduct of the parties, there is no bright line test for ascertaining whether bargaining conduct falls on the good faith or bad faith side. *Borg-Warner*

*Controls*, 198 NLRB 726, 729-730 (1972) [“no two cases are alike;” “none can be determinative precedent for another, as good faith bargaining ‘can have meaning only in its application to the particular facts of a particular case’ . . . .”]. The Act provides the framework for employees to select a bargaining representative with whom their employer must negotiate, but it carefully preserves basic principles of freedom of contract. Accordingly, a party has no obligation to make counterproposals that offer concessions from the party’s prior proposals in order to discharge its duty to bargain in good faith. See, i.e., *California Pacific Medical Center*, 356 NLRB No. 159; *Coastal Electric Coop., Inc.*, 311 NLRB 1126 (1993); *APT Medical Transportation, Inc.*, 333 NLRB 760 (2001); *S & F Enters., Inc.*, 312 NLRB 770 (1993); *Wal-Lite Div. United States Gypsum Co. v. NLRB*, 484 F.2d 108 (8th Cir. 1973); *Adler Metal Products Corp.*, 79 NLRB 219 (1948). Indeed, this must be so because “the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position.” *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).

It therefore follows and is well-established that the existence of a clause in previous contracts does not, by itself, obligate the employer to include it in a successor contract. See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *Frontier Doge*, 272 NLRB 722, 730 n.24 (1984); *Challenge-Cook Bros.*, 288 NLRB 387 (1988) [“With respect to the Respondent’s proposal to eliminate union security as a condition of employment, it should be noted that the existence of such a clause in previous contracts does not by itself obligate the parties to include it in successive contracts.”]. A “once in, forever in” concept has no basis in logic or law. See *Atlas Metals Parts Co., Inc. v. NLRB.*, 660 F.2d 304 (7th Cir. 1981). Rather, an employer is entitled to advance a position sincerely held notwithstanding the fact that the employer had taken a different position at an earlier time. See, i.e., *California Pacific Medical Center*, 356 NLRB

No. 159; *Ferguson Enterprises, Inc.*, 349 NLRB 617 (2007); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978).

Additionally, because Section 8(d) prohibits the Board from directly or indirectly compelling concessions from either party, it may not sit in judgment upon the substantive terms of collective bargaining proposals; the Board may not evaluate the intrinsic reasonableness of a party's proposals or positions, as any such qualitative analysis necessarily involves the Board in the substantive aspects of the collective bargaining process. See, i.e., *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970). It is impermissible for the Board to sit in judgment of whether particular proposals are either "acceptable" or "unacceptable" to the other party; the Board is not permitted to require an employer to contract in a way which the Board deems proper or to directly or indirectly compel concessions under the guise of finding bad faith. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. at 408-409; *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231-232 (5th Cir. 1960); *Commercial Candy Vending Division*, 294 NLRB 908 (1989); *Challenge-Cook Bros.*, 288 NLRB 387, 389 (1988); *NLRB v. Tomco Communications*, 567 F.2d at 879. The touchstone principles in this area are that the Board may not engage in a subjective evaluation of the content of a party's proposals or positions, or substitute its business judgment for that of the employer. *Concrete Pipe*, 305 NLRB 152; *Stamping Specialty Co.*, 294 NLRB 703, 714 (1987); *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988); *Fiberglass Systems*, 278 NLRB 1255, 1270-1272 (1986).

These principles apply to both economic and non-economic proposals. Accordingly, the fact that an employer seeks economic concessions from a union only in order to maximize its own profits does not mean the employer has engaged in bad faith bargaining:

The Act does not require employers to be equitable in their dealings with their employees. An employer can be as greedy as it

pleases. . . . The Company that says it will do whatever it can to maximize its profits by minimizing its labor costs invites a test of strength with its unions. **It does not commit an unfair labor practice.**

*Graphic Communications International Union, Local 508 v. NLRB*, 977 F.2d 1168, 1171 (7th Cir. 1992) (emphasis added). See also *Hamady Bros. Food Mkts.*, 275 NLRB 1335 (1985) [employer's insistence upon position that reduced benefits is not by itself evidence of bad faith]. Indeed, research fails to disclose any cases where the Board or reviewing courts have determined that a party's insistence on wage or benefit reductions constitutes bad faith bargaining; in fact, the cases are to the contrary. See, i.e., *The Nielsen Lithographing Co.*, 305 NLRB 697, 698 n.7 (1991); *Concrete Pipe*, 305 NLRB 152; *AMF Bowling Co. v. NLRB*, 977 F.2d 141 (4th Cir. 1992); *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570 (7th Cir. 1986). The Board's statement in *Barry-Wehmiller Co.*, 271 NLRB 471 (1984), quoting *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102 (1981), is instructive:

While the judge appears to have viewed the Respondent's reasons as insufficient justification for withdrawing or revising its proposals, we are not similarly persuaded. As stated in *Hickinbotham*, above at 102-103, "It is immaterial whether the Union, the General Counsel, or [the Administrative Law Judge] find these reasons totally persuasive." **What is important is whether they are "so illogical" as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any Agreement.**

*Id.*, 271 NLRB at 473 (emphasis added).

Moreover, since the determination of whether a party intended to frustrate the negotiating process requires an evaluation of the totality of the evidence, the conduct of the party on the other side of the table (here the Union) must also be taken into consideration. *Hondo Drilling Company, N.S.L.*, 213 NLRB 229, 235 (1974); *Falcon Tank Corp.*, 194 NLRB 333, 338-339 (1971); *Wald Manufacturing Co. v. NLRB*, 426 F.2d 1328, 1331-1332 (6th Cir. 1970).

Where the union shares responsibility for the inability of the parties to reach an agreement, the employer cannot be found to have unlawfully negotiated in bad faith. *NLRB v. Stevenson Brick & Block Co.*, 399 F.2d 234, 238 (4th Cir. 1968); *Continental Nut Co.*, 195 NLRB 851, 858 (1972). If the parties' inability to resolve their differences in negotiations can no more be attributed to the employer's inflexibility than to the union's, or where the union insists on contract proposals which the employer refuses to accept, it is improper to conclude that the employer's conduct is anything more than hard bargaining, which the Act does not condemn; the employer cannot be found to have unlawfully frustrated the collective bargaining process in such circumstances. *California Pacific Medical Center*, 356 NLRB No. 159; *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1302 (4th Cir. 1995); *Concrete Pipe*, 305 NLRB 152; *Hondo Drilling Company*, 213 NLRB at 235; *NLRB v. Gopher Aviation, Inc.*, 402 F.2d 176, 180-181 (8th Cir. 1968); *NLRB v. Stevenson Brick & Block*, 399 F.2d at 238; *Falcon Tank Corp.*, 194 NLRB 338-339.

2. **The Totality Of The Circumstances Established By The Undisputed Evidence Mandates A Finding That Respondent Bargained In Good Faith With The Union**

Paragraph 19(c) of the complaint, in conjunction with paragraph 21, allege that Respondent engaged in general bad faith bargaining in violation of Section 8(a)(5) during the period from December 4, 2009 through December 22, 2011 by (1) making unilateral changes on or about September 1, 2010 (distribution of September 1 memo to employees) and January 1, 2011 (implementation of EPO Plan); (2) not providing information in response to the Union's July 23 information requests; and (3) conditioning bargaining on the Union's acceptance of Respondent's LBF.<sup>15</sup> For the reasons explained in Sections (C-F) below, Respondent did not

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<sup>15</sup> In Part II (C)(2)(d) of his Decision, the ALJ finds that Respondent engaged in overall bad-faith bargaining "as alleged in paragraph 21 of the complaint." However, paragraph 21 is the

violate the Act by any of its alleged conduct set forth in Paragraph 19(c) to show general bad faith bargaining. Moreover, even if the Board sustains the ALJ's contrary determinations on those violations, the totality of the undisputed evidence requires dismissal of Paragraph 19(c). See, i.e., *KFMB Stations*, 349 NLRB 373; *Litton Microwave Products*, 300 NLRB 324; *American Commercial Lines, Inc.*, 291 NLRB 1066.

First, because the general bad faith bargaining allegations in the complaint are not tied to any conduct by Respondent prior to September 1, 2010, AGC concedes that Respondent's bargaining conduct prior to that date was not unlawful. For this reason alone, the ALJ's determination that Respondent engaged in general bad faith bargaining prior to September 1 (see, i.e., ALJD 40:18-21 [finding general bad faith bargaining beginning in "early 2010"]) is erroneous. Moreover, the evidence in the record affirmatively demonstrates good faith bargaining during that period. Respondent met with the Union on request, exchanged proposals, discussed those proposals, provided information requested by the Union, entered into TAs, made concessions, and generally discharged all procedural and substantive good faith bargaining requirements. Respondent does not assert that it had no disagreements with the Union during this period, nor does it assert that all its proposals made to the Union during this period included enhancements in comparison to the terms of the expired CBA. However, what is clear from the authorities discussed in Subsection 1 above is that an employer is free to seek concessions from a union in collective bargaining. Moreover, it must be remembered that the negotiations that began in December 2009 were the first negotiations Respondent had with the Union where it had the ability to negotiate hard and without the sword of interest arbitration dangling over its head.

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boilerplate allegation referencing the prior paragraphs of the complaint containing allegations that fall within Section 8(a)(5) generally; paragraph 19 contains the allegations relevant to, and limiting, AGC's general bad faith bargaining theory.

For this reason alone the allegations of Paragraph 19 (c) must be dismissed inasmuch as it is dependent on a showing of bad faith bargaining beginning in December 2009.

The evidence is also clear that Respondent continued to seek a final and complete collective bargaining agreement that was consistent with Respondent's lawful interests on and after September 1. During this period Respondent continued to meet with the Union, respond to Union information requests and proposals, make concessions, enter into TAs, make proposals of its own, and recognize the Union as the collective bargaining representative of Bargaining Unit employees. Respondent did not seek to unlawfully undermine the Union's status as the representative of the Bargaining Unit and in fact tried, unsuccessfully, to work with the Union to insure that Bargaining Unit employees understood that the Union was their lawful representative and that Respondent had an obligation to bargain with the Union over their terms and conditions of employment. See, i.e., RX 92.

In sum, the evidence establishes that Respondent at all times was willing to enter into a final collective bargaining agreement with the Union, made concessions in an attempt to get a final agreement, and would have been happy to enter into a final agreement had the Union agreed to a contract that was acceptable to Respondent. See, i.e., GCX 48, 52. There is no evidence that would support a conclusion that Respondent engaged in conduct that "demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any Agreement."

The fact that the negotiations had not resulted in a final collective bargaining by December 4, 2011 can no more be attributed to Respondent's positions and actions as to those of the Union. In fact, the failure of the negotiations to result in a final agreement is far more attributable to the Union's tactics and refusal to accept Respondent's lawful proposals than to the

actions of Respondent. See, i.e., Part II(C) above [burdensome information requests, threats and actions taken in support of Union’s corporate campaign against Prime, disingenuous statements by Bush, cancelling bargaining sessions and delays in responding to Respondent requests and proposals, interference in expansion of providers affiliated with Prime network, etc.]; Offer of Proof. To again quote from *Dow* and *NLRB v. American Nat’l Ins. Co.*, “[f]irmness of a bargaining position does not constitute bad faith” (216 NLRB at 85) and “the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements” (343 U.S. at 404). To determine in this case that Respondent failed to engage in general good faith bargaining in violation of the Act would do serious violence to both of these principles. The ALJ’s finding that Respondent engaged in general bad faith bargaining must be reversed (see, i.e., ALJD 37:4-22), and the associated portions of the Decision modified or deleted accordingly (see, i.e., ALJD 40:18-21, 41:33-36).

**C. The Parties Were At Impasse When Respondent Implemented The EPO Plan**

The penultimate issue presented by Respondent’s exceptions is whether an employer violates the Act when it implements changes to the health insurance plan available to union-represented employees by requiring premium sharing and that medical care be provided by a different network of providers (collectively “proposed changes”) when the overwhelming weight of the evidence establishes that:

- The employer proposed the changes after the prior collective bargaining agreement expired and more than six months prior to implementation;
- The union refused to agree to the new provider network even though the co-pays and other fees in the new provider network were less expensive for employees than under the current

provider network and the employer offered to waive the payment of premiums for all levels of coverage while the parties continued to negotiate over the proposed changes;

- The employer was required to renew its agreement with the existing provider network, at considerable cost to the employer, due to the union's refusal to agree to the conversion.;
- The employer, along with the plan design experts, and the union discussed the proposed changes on numerous occasions prior to implementation, both at the bargaining table and in other communications;
- During those discussions the employer explained the proposed changes and the employer's reasons for proposing the changes;
- During those discussions the employer repeatedly advised the union that it would not agree to a final collective bargaining agreement that did not include the proposed changes;
- During those discussions the union repeatedly refused to agree to the proposed changes and advised the employer that it wanted to maintain free health insurance at all levels of coverage;
- The proposed changes were already in place at all other facilities operated by the employer's corporate parent, including facilities employing employees represented by the same union in other bargaining units; and
- The employer's agreement with the existing network was due to expire and the employer would have been required to pay approximately 30% more than it had paid in the past to renew the agreement.

Respondent contends that the Act does not prohibit implementation by the employer in these circumstances, notwithstanding the contrary conclusion reached by the ALJ.

## 1. Impasse Exists When There Is No Reasonable Prospect Of Agreement

The Act does not require futile negotiations. Where the meetings previously held give ample reason to believe that no useful progress can be made toward a total agreement, neither party is required to bargain further. *Redburn Tire Co.*, 358 NLRB No. 109 (2013); *Litton*, 300 NLRB 324, 333 (1990); *Whittier Area Parents' Ass'n*, 296 NLRB 817, 831 (1989). Impasse will be found where there are irreconcilable differences in the parties' positions and they have exhausted the prospect of concluding a final and complete collective bargaining agreement. *E.I. DuPont & Co.*, 268 NLRB 1075 (1984). Impasse exists where a party to the negotiations is warranted in concluding that further good faith bargaining would be futile. *California Pacific Medical Center*, 356 NLRB No. 159; *ACF Industries, LLC*, 347 NLRB 1043 (2006); *Matanuska Electrical Assn.*, 337 NLRB 680 (2002); *Alsey Refractories Company*, 215 NLRB 785, 787 (1974);

In the seminal case of *Taft Broadcasting Co.*, 163 NLRB 475 (1967), the Board defined impasse as a situation where “good-faith negotiations have exhausted the prospects of concluding an agreement.” *Id.* This general principle was further clarified in *Hi-Way Billboard*, 206 NLRB 22 (1973), as follows: “A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.” *Accord: Bill Cook Buick, Inc.*, 224 NLRB 1094, 1095 (1976) [“A word of art meant to describe a set of circumstances in which it is unlikely that either party will move sufficiently so as to effectuate a contract. Finding impasse is recognition that agreement to a contract is not realistic, absent an additional factor such as economic pressure”].

Moreover, there need not be undue reluctance to find that an impasse existed. Its occurrence “cannot be said to be an unexpected, unforeseen, or unusual event in the process of

negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted.” *Hi-Way Billboards*, 206 NLRB at 23. See also *E.I. DuPont & Co.*, 268 NLRB at 1076. Where both parties have declared their positions and neither party will concede to the other, impasse has been reached. *Bloomsburg Craftsmen*, 276 NLRB 400, 405 (1985). This is particularly true where neither party has expressed any genuine willingness to concede to the other party’s position in exchange for movement on other items. See, i.e., *E.I. DuPont & Co.*, 268 NLRB at 1076.

Because a determination of impasse, like a determination of good faith bargaining, requires a determination of whether further negotiations would be futile because of the fixed and different positions of the parties, all relevant circumstances surrounding the parties’ negotiations must be assessed and no one factor, nor any combination of factors, is determinative. See, i.e., *Lou Stechers Super Markets*, 275 NLRB 71 (1985); *Bio-Science Laboratories*, 209 NLRB 796, 797 (1974). For example, the Board will consider any pressing business or operational needs when determining whether impasse had been reached. *Bell Transit Co.*, 271 NLRB 1272 (1985). An employer may also be entitled to set a time limit by which the union negotiators must agree to its proposals or it will consider impasse to have been reached if circumstances warrant such action. *Financial Institution Employees Local 1182 v. NLRB*, 750 F.2d 757 (9th Cir 1985). Additionally, if the union is seeking to stall negotiations or engages in other tactics to forestall impasse, the Board will not hesitate to find a lawful impasse. See, i.e., *Matanuska Electrical Assn.*, 337 NLRB 680.

The Board has also long held that it is unnecessary for the parties to be deadlocked on every bargaining issue before an impasse in the contract negotiations as a whole can be declared. A fixed determination by one party or the other not to yield on one or more

major items is enough to create an impasse in the negotiations as a whole, even if there are other proposals or issues that remain “open” and might be resolved through further discussions. *California Pacific Medical Center*, 356 NLRB No. 159; *Matanuska Electrical Assn.*, 337 NLRB 680; *CalMat Co.*, 331 NLRB 1084 (2000); *Georgia-Pacific Corp.*, 305 NLRB 112, n.2 (1992); *Hyatt Regency Memphis*, 296 NLRB 289, 316 (1989), overruled on other grounds by *McClatchy Newspapers*, 321 NLRB 1386 (1996); *Western Publishing Co.*, 269 NLRB 355 (1984); *E.I. DuPont & Co.*, 268 NLRB at 1076. A deadlock is still a deadlock, whether produced by one or by a number of significant and unresolved differences on “major items.” *Id.* Thus, parties are not required to bargain to impasse on all mandatory issues when stalemate on one issue of importance cripples the prospects of a final, complete agreement. *Id.* As the Board wrote in *CalMat Co.*:

Those who bargain collectively are normally under an obligation to continue negotiating to impasse on all mandatory issues. **The law relieves them of that duty, however, when a single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement.**

337 NLRB at 1097 (quoting *NLRB v Tomco Communications, Inc.*, 567 F.2d, at 881) (emphasis added)). This principle can also be confirmed by the scores of Board cases in which the Board has found impasse based on rejection of the employer’s last, best and final offer, without a parsing of all open items in the offer. See, i.e., *Taft Broadcasting*, 163 NLRB 475, and its progeny.

**2. Respondent’s Determination That The Parties Were At Impasse Is Fully Supported By The Uncontroverted Evidence: Paragraph 18(d) Must Be Dismissed**

Respondent admits that on January 1, 2011 it implemented the EPO Plan in place of the prior Anthem HMO plan, as alleged in paragraph 18(b) of the complaint. However, Respondent denies that it did so without bargaining to a good faith impasse, as is alleged in

paragraph 18(d). See, i.e., GCX 1(bb), ¶ 18. Respondent's denial is fully supported by the record.

Respondent first expressed to the Union the urgency and importance to Respondent of having Centinela join all other Prime hospitals in the EPO Plan program during negotiations and communications between the parties in February. See, i.e., Part II(C)(5) above. This urgency was again communicated to the Union by Respondent's March 26 email offering to suspend the premium sharing portion of its EPO Plan proposal in order to allow implementation of the rest of the EPO Plan on July 1, when Respondent's HMO policy with Anthem expired, as well as by two separate follow-up emails within the next several days. See GCX 21; RX 37-40. The Union ignored these communications for over three weeks, then dismissively rejected Respondent's offer. GCX 22. Respondent immediately responded to the Union's rejection, reiterating that Respondent was willing to forego premium sharing while the parties continued to negotiate if the Union would otherwise agree to implementation of the EPO Plan and that the out-of-pocket costs for employees would be reduced if the Union agreed to do so. RX 42. Respondent also asked the Union for any ideas on how to resolve the issue. *Id.* The Union did not even bother to respond.

On April 23 Respondent emphasized, in writing, that no collective bargaining agreement was possible without the Union's agreement to the proposed EPO Plan. GCX 23 ["we have offered the Union everything we have to offer on this subject" and "a final, complete contract is dependent on resolving this issue"]. Thereafter Respondent reiterated that no contract would be possible without the EPO Plan on many, many occasions. However, throughout this period the Union consistently and adamantly refused to accept the EPO Plan, both in concept and in practical application.

Moreover, despite Respondent's constant raising of the issue, the Union made only two substantive proposals addressing health insurance subsequent to March 26 and prior to the January 1, 2011 implementation of the EPO Plan. Moreover, and importantly, both of those proposals included an "open" Anthem network option and zero premiums for all levels of coverage provided by the EPO Plan, positions that the Union knew would never be accepted by Respondent. Throughout this period the Union also engaged in various evasive tactics signaling that it had absolutely no intention of ever agreeing to Respondent's EPO Plan, including delayed responses to Respondent's communications stressing the urgency of the issues, refusing to cooperate in Respondent's efforts to expand the Prime network of providers, requests for voluminous information, claiming at the eleventh hour that additional information was required to analyze Respondent's proposal, and generally dragging its feet in an effort to either force Respondent to capitulate by renewing the Anthem policy, without any premium support from employees, or to set up bad faith bargaining allegations.

**3. The Decision's Conclusions Of Unlawful Implementation Are Contrary To The Facts And Law**

Despite the undisputed evidence summarized above and elsewhere in this brief, the Decision builds off of various findings contrary to that evidence, as well as evidence that is not at all relevant to the allegation that Respondent unlawfully implemented the EPO Plan,<sup>16</sup> in concluding that there was no lawful impasse. First, and primarily, the Decision finds there was no lawful impasse because the Union did not get the information sought by its July 23 requests. See, i.e., ALJD 28:45-30:2, 36:37-40. The Decision also finds no impasse because the Union

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<sup>16</sup> The discussion in the Decision at Part III(C) repeatedly conflates discussion of impasse with discussion of overall good faith/bad faith bargaining, including relying on conduct subsequent to the implementation of the EPO Plan in assessing whether there was impasse on the date of implementation (January 1, 2011).

consistently took the position that there was no impasse by, for example, stating “there was more to bargain over” and making proposals on other subjects subsequent to implementation of the EPO Plan (see, i.e., ALJD 32:10-33:10). The Decision also finds no impasse because the parties continued to meet and the Union continued to modify its proposals on open issues other than the EPO Plan after implementation (see, i.e., ALJD 32:19-42, 4-37:23).<sup>17</sup> However, the Decision’s conclusions cannot stand given the undisputed record evidence and Board law.

As will be discussed in further detail in Section D below, the totality of the credible evidence in the record establishes that the Union’s July 23 requests were made by the Union to obtain information in support of its corporate campaign against Prime, to otherwise harass Respondent, or to stall negotiations so that employees would continue to receive free health insurance under the Anthem HMO plan. Particularly instructive regarding the Union’s tactics is *Graphic Comm. Int’l Union v. NLRB*, 977 F.2d 1168, where the court discussed the abuse of information requests in order to avoid impasse and implementation of an employer’s proposals demanding union concessions:

The union may want the information in the hope that the company will refuse its demand, thereby handing the union a legal issue that may enable it to convert an economic strike into an unfair labor practice strike and thus get its members reinstated when the strike is over. Or the union may want the information simply in order to delay the evil day on which the company cuts the workers’ wages and fringe benefits; and the threat of delay may cause the company to moderate its demands.

The third point will bear some elaboration. The possibility of delay arises because the company can unilaterally institute changes in the wages and working conditions of its workers as soon as bargaining reaches a dead end (“impasse”). [Citations omitted]. The longer that takes, the longer the workers will continue to receive the benefits of the superior terms of the existing contract. And the

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<sup>17</sup> To the extent the Decision relies on a finding of general bad faith bargaining in support of its no impasse conclusion, that finding is addressed in Section (B)(2) above.

bargaining will take longer the more information the company has to disclose, especially if the information provides a basis for further discussion.

Id. at 1170 (emphasis added).

Moreover, the Union's claim at trial, subsequently adopted by the ALJ in his Decision, that it needed the information because Respondent's EPO Plan proposal would not allow employees to obtain medical services from Anthem without a referral from a Prime PCP is wholly undercut by other facts established by the record evidence, including the Union's November 2009 request seeking the same type of information, the Union's delay in requesting the information for many months after it knew, or should have known, that Respondent's EPO Plan included the PCP requirement, and that no employees ever raised issues about the quality of care that they provided to Centinela's patients during the course of their duties. Moreover, nowhere in his letters and emails addressing the information request did Bush ever reference the "gatekeeper" or referral requirement. The Union also never agreed to the premium sharing component of Respondent's EPO Plan proposal, nor did the Union ever waver from its position, announced as early as December 2009 and reiterated throughout the entirety of 2010, that the base plan medical insurance must be provided free of charge for all levels of coverage. And the Union's information request had nothing to do with this issue, which also was undeniably at impasse. See, i.e., *Peterbilt Motors Company*, 357 NLRB No. 13 (2011), cases cited therein.

Additionally, and most persuasively, the Union agreed to the EPO Plan at Garden Grove and Encino. Given these circumstances, it would require the suspension of reason to believe that the Union might have agreed to the EPO Plan, including both the PCP requirement and premium sharing by employees, if Respondent would have provided the Union with all information requested by the Union's July 23 letter. For these same reasons Respondent's refusal to provide the Union with all of the information it requested does not taint the

implementation, even if it is determined that Respondent committed an unfair labor practice by that refusal, the refusal occurred prior to impasse, and that impasse had not been reached on the premium sharing issue (all of which determinations would be invalid). See, i.e., *Peterbilt Motors*; *Titan Tire Corp.*, 333 NLRB 1156, 1158-59 (2001); *Alwyn Mfg. Co.*, 326 NLRB 646, 688 (1998); *Noel Corp.*, 315 NLRB 905, 911 (1994).

The ALJ's reliance on the Union's claims of "no impasse" is also without merit inasmuch as self-serving claims made by one party or another regarding the existence of impasse are not truly relevant, or particularly helpful, in assessing whether negotiations are at impasse. Respondent recognizes that Board law sometimes references that "both parties must believe that they are at the end of their rope" in order for impasse to be established. See, i.e., *AMF Bowling Co.*, 314 NLRB 989, 978 (1994). However, this does not mean that a union can defeat a finding of impasse simply by declaring that the party does not believe the negotiations are at impasse. If this was the law, there would be no such thing as impasse inasmuch as the party filing a charge of false impasse necessarily is contending that there was no impasse, and can be expected to testify in support of that contention at trial. It is for these reasons that the Board looks to the totality of circumstances in determining whether it was reasonable for the employer to "assume that further bargaining would be futile," and discounts self-serving statements of "no impasse." In the absence of conclusive evidence that one party is willing to concede to the fundamentals of the other party's position, impasse will be found, notwithstanding such "gamesmanship." See, i.e., *Holiday Inn Downtown - New Haven*, 300 NLRB 774 (1990); *Bloomsburg Craftsmen*, 276 NLRB at 405; *E.I. DuPont & Co.*, 268 NLRB at 1076. Here, there is absolutely no credible evidence that the Union was willing to concede to the fundamentals of Respondent's EPO Plan proposal; in fact, the evidence conclusively establishes otherwise.

Interestingly, the ALJ seems to recognize this principle in his Decision, as least as it relates to Respondent's statements that the parties were at impasse. See, i.e., ALJD 31:12-19. What is unclear is why the ALJ did not apply this same maxim to the Union's statements that there was no impasse. Moreover, Respondent did much more than simply say "impasse;" Respondent repeatedly explained to the Union that without agreement on the EPO Plan there would be no collective bargaining agreement. By his citation to and quoting of *The Hotel Roanoke*, 293 NLRB 182 (ALJD 31:8-12), the ALJ seems to acknowledge that these statements by Respondent, in conjunction with the Union's refusal thereafter to agree to the EPO Plan, are consistent with the existence of impasse. Yet the ALJ failed to apply these principles to the undisputable evidence in the record.

Moreover, the cases relied on by the ALJ in finding that the Union's claims of no impasse defeated a showing of impasse (ALJD 33:1-10) are distinguishable. In *Newcor Bay City Division*, 345 NLRB 1229 (2005), the parties had been bargaining for only one month when the Respondent unilaterally declared impasse, and did so without any prior notice of the issues creating the claimed deadlock. Here, the parties engaged in bargaining for nearly a calendar year, Respondent notified the Union for months that there would be no final agreement without agreement on its EPO proposal, and the Union did not modify its positions despite such notice. In *Grinnell Fires Protection Systems*, 328 NLRB 585 (1999), these facts were also absent. In particular, here the Union never stated it was willing to move on the critical issues, while in *Grinnell* the Board specifically relied on the union's statements during the parties' final bargaining session that it was willing to make significant movement on the significant issues in that negotiation. *Id.* at 586. Finally, in *Cotter & Co*, 331 NLRB 787 (2000), the Board rejected the employer's claims of impasse because the record established that numerous, significant

concessions had been made by the parties during the previous bargaining session and the employer declared the negotiations at impasse one day after making its initial economic proposal. Again, the record in this case is clearly, and significantly, different.

The ALJ's apparent conclusion that Respondent could not lawfully implement its EPO Plan proposal because there were other open items that had not yet been beaten to death during the pre-implementation period and that the Union continued to make proposals on items other than the EPO Plan subsequent to implementation (see, i.e., ALJD 32:19-33) finds no support in Board law or the Act. When a particular issue or issues is so important to a party to negotiations that the party will not agree to a final contract unless that issue is resolved in its favor, impasse on that single critical issue allows implementation. See subsection 1 above. Indeed, to forbid implementation in such circumstances would require the parties to engage in potentially marathon negotiations over other issues that, even if resolved, would not result in a collective bargaining agreement. The law does not require such futile acts. See, i.e., *NLRB v. American Nat'l Ins. Co.*, 343 U.S. at 404 ["it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position"]. Moreover, matters occurring subsequent to the date of implementation are not relevant to assessing the status of negotiations at the time of implementation, which is when the negotiations must be at impasse for the implementation to be permissible. And even if post-implementation conduct was relevant, the evidence shows that Respondent never modified its EPO Plan proposal or its position that there could be no final collective bargaining agreement without agreement on the Plan during the post-implementation period, and the Union never agreed to the Plan during that period. See, i.e., Part II(C)(11)-(12) above.

Finally, the ALJ ignored that *the Union's own bargaining notes* from the parties' September 30 meeting confirm the Union's acknowledgment of impasse prior to implementation, without regard to the information requested by the Union's July 23 letter:

12:50 Resumed

Article 15

Danny = What is not going to change from our proposal is the move off the employee being able to select from either the Prime or Anthem network. Secondly, we still feel strong about the EPO coverage being free to employee and family. In light of what I just said how do we move forward.

RX 179, p. 11.

In sum, any fair reading of the record in this case can lead to only one conclusion—Respondent was not moving off of the two primary components of its proposed EPO Plan under any circumstances, and the Union was not going to agree to the proposal under any circumstances. Implementation of the EPO Plan was privileged by impasse.

**D. The Decision's Conclusion That Respondent Violated The Act Because Respondent Did Not Provide The Union With All Information Requested By The Union's July 23 Letter Is Contrary To The Law And The Facts**

The Decision concludes that Respondent's refusal to provide the Union with all information requested by the Union's July 23 letter violated Respondent's obligation to provide information under Section 8(a)(5). In support of this conclusion the ALJ finds, incredibly, that there is no evidence to support Respondent's contentions that the Union's requests were made to assist in the Union's corporate campaign, to stall negotiations, or to frustrate the collective bargaining process and implementation of the Prime EPO Plan. See, i.e., ALJD 24:27-30. The ALJ attempts to support these findings by other equally dubious findings, including that it is not relevant when assessing Respondent's refusal to provide the requested information whether the Union was seeking the information for any of the purposes set forth in the preceding sentence or

that members of the Union employed at Garden Grove and Encino are enrolled in the Prime EPO Pla. See, i.e., ALJD 24:34-26:2. The ALJ also based his conclusion that all of the information requested was relevant and not confidential, including such items as the names of the coding consultants working for Prime, based on the Union's claims that the items were relevant. See, i.e., ALJD 22:21-48. Neither the ALJ's analysis nor his conclusions can be supported by the record in this case. Moreover, and as will now be explained, the allegations of the complaint relating to the Union's July 23 requests should be dismissed because they are barred by Section 10(b).

1. **Paragraph 16 Must Be Dismissed Because The Union Did Not File A Charge Within Six Months Of The Employer's November 2009 And June 2010 Refusals To Provide "Quality Of Care" Information**

The Union's July 23 information request was essentially a "do-over" of the Union's November 2, 2009 "quality of care" information request (GCX 34). For example, both were authored by Bush and recited as a basis for the requests "a systemically high level of septicemia claims at Prime facilities/hospitals" that, according to the Union, "implicate several mandatory subjects of bargaining, including workplace safety." Both also requested the identical types of information that could be used by the Union in its "fraudulent/criminal billing practice and septicemia" corporate campaign against Respondent and Prime (see, i.e., Offer of Proof), including billing aka "PEPPER" reports, documents "reporting on, analyzing, discussing, or otherwise concerning incidents of Stage 3-4 pressure ulcer development, or septicemia infection or diagnosis," communications with governmental agencies "concerning Stage 3-4 pressure ulcer development, or septicemia infection ... septicemia," communications between Prime Stage 3-4 pressure ulcers, septicemia rates, or other rates of hospital-acquired infections," "coding guidelines and training materials for [CHMC/Prime] coders," and the "names of any coding

consultants used by [CHMC/Prime]. Compare, i.e., GCX 34, ¶¶ (a), (g)-(j), (l)-(m); GCX 33, ¶¶ 1, 5-8, 10-11.

Respondent replied to the Union's November 2, 2009 by letter dated November 12, 2009 in which it advised the Union that it would not be providing the requested information. RX 3. The letter closed with a summary of the Union's requests that was prophetic of the tactics the Union would be employing throughout the negotiations in 2010: "[I]t appears as if the UHW is more interested in employing oppressive tactics to gain an advantage in negotiations rather than engaging in good faith negotiations for a successor collective bargaining agreement." Id. Respondent did not thereafter provide any information to the Union in response to the November 2009 request, and there is no evidence the Union filed an unfair labor practice charge within six months of Respondent's November 12, 2009 response. The Union should not be able to avoid the Section 10(b) limitations period in the Act by renewing its November 2009 request more than eight months later, then filing an unfair labor practice charge based on its renewed request after another five months had passed. For this reason alone the allegations of Paragraph 16 must be dismissed.<sup>18</sup>

2. **An Employer Does Not Violate Section 8(a)(5) By Failing To Provide Information Unless The Information Is Both Relevant To And Necessary For Collective Bargaining Between The Parties**

Any assessment of the Decision's findings relating to Respondent's responses to the Union's July 23 requests for information must begin with the overriding principle that an employer violates Section 8(a)(5), which provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," only if the information that has been requested by the union is relevant and necessary to a union's

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<sup>18</sup> The Decision does not address Respondent's 10(b) defense even though it was included within Respondent's answer and argued in Respondent's posthearing brief.

representational obligations under the Act. See, i.e., *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). As explained by the 8th Circuit, an employer’s failure to furnish relevant materials upon request may violate Section 8(a)(5) if the withholding of the information “conflicts with the statutory policy to facilitate effective collective bargaining.” *Procter & Gamble Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

Accordingly, an employer’s refusal to provide even relevant information is not a *per se* violation of Section 8(a)(5); all the relevant circumstances must be evaluated when determining whether the information is necessary for collective bargaining. As stated by the Supreme Court in *Detroit Edison*, “[t]he duty to supply information under § 8(a)(5) turns upon ‘the circumstances of the particular case’ . . . and much the same may be said for the type of disclosure that will satisfy that duty.” 440 U.S. at 314 (quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 153). As stated by the Court in more detail in *Truitt*,

The Board concluded that under the facts and circumstances of this case the respondent was guilty of an unfair labor practice in failing to bargain in good faith. We see no reason to disturb the findings of the Board. We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. ***The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.***

*Id.*, 351 U.S. at 153-154 (emphasis added). It is therefore established that an employer’s failure to provide requested information will violate the Act only if the withholding of the information frustrates effective collective bargaining.

Primary among the requirements that trigger the statutory duty to furnish requested information is that the information be “relevant” either to the union’s negotiation of a

collective bargaining agreement or to the union's policing of such an agreement. *General Electric Co. v. NLRB*, 916 F.2d 1163, 1168 (7th Cir. 1990). However, a union's "bare assertion" of relevance does not automatically oblige the employer to supply all the information in the manner requested. *Detroit Edison Co. v. NLRB*, 440 U.S. at 304. Where the union fails to "affirmatively demonstrate relevance, the employer is relieved of its Section 8(a)(5) duty to provide the information." *Coca-Cola Bottling Co.*, 311 NLRB 424, 425-426 (1993); *General Electric Co.*, 916 F.2d at 1171. The union must make an affirmative showing of relevance at the time the request is made or upon the employer's challenge to relevancy, as relevancy must be established within "the fact situation presented to the company at the time it acted." *A.S. Abell Co.*, 624 F.2d 506, 513, n.5 (4th Cir. 1980). An attempt to demonstrate relevance at a subsequent NLRB hearing is too late. *General Electric Co.*, 916 F.2d at 1169, and authorities cited therein. *Accord, Calif. Portland Cement*, 283 NLRB 1103 (1987). Moreover, "mere incantations" or "bare suspicions" of potential relevance are insufficient to trigger an employer's Section 8(a)(5) duty to provide information. *U.S. Postal Serv.*, 308 NLRB 1305, 1311 (1991).

The ordinary standard used in determining whether the union is seeking "relevant" information is a "liberal" one akin to that applied in determining whether information is relevant for the purposes of discovery under the Federal Rules of Civil Procedure. *Acme Industrial Co.*, 385 U.S. at 437. However, this does not mean that an employer must provide all relevant information in order to properly discharge its Section 8(a)(5) obligation to bargain in good faith with the union. For example, an employer may be relieved of a duty to provide even relevant information where the requests are either overbroad or unduly burdensome. *General Electric Co.*, 916 F.2d, at 1168; *AMCAR Division, ACF Industries, Inc. v. NLRB*, 596 F.2d 1344, 1351 (8th Cir. 1979); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 981-82 (10th Cir. 1990); *A-*

*Plus Roofing, Inc.*, 295 NLRB 319 (1984); *Westinghouse Electric Corp.*, 129 NLRB 850, 864 (1960). In such circumstances, the employer is only obligated to “comply with the request to the extent it encompasses necessary and relevant information.” *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

Thus, even if relevant, an employer’s failure or refusal to provide information does not necessarily violate Section 8(a)(5). In determining whether a violation has occurred, the Board will assess the extent to which the information is relevant, and will dismiss an allegation if the information at issue is not sufficiently relevant to have impeded the union in discharging its statutory obligations under the Act. This principle is made clear in *Columbus Products Company*, 259 NLRB 220 (1981):

Our dissenting colleague correctly states the rule requiring an employer to provide information which is of probable or potential relevance to the proper performance of the duties of a collective-bargaining representative. **However, the rule is not per se, and in each case the Board must determine whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation of the other party to produce it.** *Tool and Die Makers’ Lodge No. 78, IAM, AFL-CIO (Square D Company, Milwaukee Plant)*, 224 NLRB 111 (1976).

We find, in agreement with the Administrative Law Judge, that **the information here requested is not of such significance or necessity to warrant a finding that the refusal to provide it violates the Act.**

*Id.* at n.1 (emphasis added).

Moreover, because the Act mandates that both the employer and the union “confer in good faith,” a union is also bound by good faith obligations in its dealings with the employer. *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979). For this reason, a union’s request for information must be made in good faith and for the purpose of facilitating good faith bargaining. If the union’s

information request is intended to frustrate bargaining or is made for some other inappropriate purpose, such as to create an unfair labor practice charge or stall negotiations and impasse, then the employer is relieved of whatever obligation it might otherwise have to provide the information. *ACF Industries*, 347 NLRB at 1043; *Coca-Cola Bottling Co.*, 311 NLRB at 425-426; *Wachter Construction Co. v. NLRB*, 23 F.3d 1378 (8th Cir. 1994); *Graphic Comm. Intl. Union v. NLRB*, 977 F.2d at 1170.

As will now be discussed, application of these legal principles to the record presented in this case demands that the Decision's conclusion that Respondent violated the Act by its responses to the Union's July 23 letter be overturned and the corresponding allegations of the complaint dismissed.

**3. The Union's Request Was Not Made For Proper Collective Bargaining Purposes**

For the reasons previously explained, and as shown by the limited evidence Respondent was allowed to present relating to the Union's duplicitous and bad faith conduct (see, i.e., T 623-624, 629, 642, 645, 649, 657, 672-673; RX 3, 136, 179-180), it should be clear that the Union's information request was a tactic to slow down bargaining, harass Respondent, assist the Union's corporate campaign against Prime, and/or forestall implementation of the Prime EPO Plan and premium sharing by Respondent. By the time July 23 rolled around, Respondent had been telling the Union for months that there would be no contract without the EPO Plan, including the PCP requirement and employee premium sharing. Respondent had shown no give on these fundamentals during over 6 months of bargaining, and Bush, as a seasoned union lawyer, certainly understood that the Union would not be able to force Respondent to modify its positions by making the same arguments at the table in the future that

the Union had been making at the table since the beginning of negotiations.<sup>19</sup> Even though the Union had forestalled implementation of the Prime EPO on July 1 by delaying its rejection of Respondent's March 26 proposal for almost a full month and refusing to accept that proposal thereafter, the Union was surely aware that it needed a "game changer" if it would have any hope of "delay[ing] that evil day" on which Respondent would implement premium sharing in conjunction with the Prime EPO Plan proposal.

Moreover, by the time the Union made its July 23 request, employees at Garden Grove and Encino represented by the Union had already been in the Prime EPO for more than 6 months, and there is no evidence whatsoever that any of those employees were dissatisfied with the "quality of care" provided to them by physicians and facilities in the Prime network. The ALJ discounts these facts by citing *Peterbilt Motors Co.*, 357 NLRB No. 13 (2011),<sup>20</sup> and arguing that the request for information here is "no different than any other bargaining situation where a union wants to know information about other employer plant locations." ALJD 25:33-41. Not so. First, and most importantly, the information requested by the Union was the exact type of information that the Union was already using in making accusations to law enforcement and other regulatory agencies, as well as to the general public and anyone else the Union might be able to enlist into its corporate campaign against Prime, that Prime was engaged in fraudulent/criminal billing practices or was providing woefully substandard patient care. Other

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<sup>19</sup> Which is not to say that Respondent did not listen to the Union's arguments, or modify its proposals in response to the Union's arguments if doing so did not compromise the fundamentals of the EPO Plan proposal and premium sharing. For example, during the negotiations Respondent decreased the amount of the premiums to be paid by employees, modified the Plan to allow employees enrolled in the EPO Plan to obtain pediatric, well woman and OB/GYN services from Anthem providers without having to first obtain a referral from their Prime PCP, and expended considerable time and effort to increase the number of physicians in the Prime network through the employee nomination process. See, i.e., T 654-655; RX 64, 100, 111.

<sup>20</sup> Actually the ALJ cites the case as "*Paccar, Inc.*," an additional example of the ALJ's apparent ignorance of routine Board convention. See, i.e., note 26 post.

significant and distinguishing facts here include the Union's attempt to obtain the same type of information in November 2009 as discussed in subsection 1 above, the delay between when the Prime EPO Plan was proposed to the Union and its July 23 request, the statements by Respondent for the preceding several months that there would be no final collective bargaining agreement without agreement to the Prime EPO Plan, and the other events and occurrences discussed in this brief. See, i.e., Part II(C)(1)-(7), IV(A)-(C) above.

Respondent does not quarrel with the propositions that, as general matters, an employer may be required by Section 8(a)(5) to provide information about operations at other facilities when those operations are relevant and necessary to the bargaining process, or that different bargaining units may have different needs. However, these general propositions simply cannot apply to the facts presented by this record. As the authorities discussed in subsection 2 above make clear, each request for information and the employer's response thereto must be evaluated in light of all the facts and circumstances involved in assessing whether the employer committed a violation of Section 8(a)(5) by failing to provide information necessary for effective collective bargaining. Respondent submits that the totality of the facts and circumstances here can only lead to the conclusions that the Union's requests were made for tactical reasons, and Respondent's failure to provide the information was both fully justified and had no impact on the outcome of these negotiations.

For these same reasons the cases cited by the ALJ in support of his findings that the requested information was presumptively relevant, that the Union established its relevance if it was not presumptively relevant, and that Respondent was required by the Act to provide the information if the Union could come up with even one "legitimate" reason for the information (see, i.e., ALJD 21:38-22:1, 22:21-28, 24:34-25:1), are inapposite. For example, the ALJ

cites *Honda of Haywood*, 314 NLRB 443 (1994), and *Aztec Bus Lines, Inc.*, 289 NLRB 1021 (1988), in support of the proposition that the requested information is presumptively relevant. However, both of these cases, which involve a failure to provide copies of the relevant policy and to identify the carrier, actually support Respondent's argument inasmuch as here Respondent provided the Union with hundreds of pages of information relating to the EPO Plan, including contact information for the sponsor of the Plan, the Plan document and multiple comparison charts explaining the Plan. Similarly, in *New Surfside Home*, 330 NLRB 1146 (2000) the Board affirmed the administrative law judge's finding that cost reports submitted by the employer to Medicaid were relevant because the reports included specific financial information that would assist the union in analyzing the employer's proposals. In this matter, the Union's requests were not so narrowly tailored, they sought information with no clear connection to Respondent's finances, and they sought information to use in an ongoing corporate campaign accusing Respondent of fraudulent and criminal business practices, not to develop a proposal. Additionally, none of the cases cited by the ALJ for the proposition that an employer must provide requested information if any reason for the request is legitimate involved a situation where the union was engaged in an ongoing corporate campaign smearing the targeted employer, the union had requested almost identical information previously, and the union engaged in a number of other stalling tactics during the course of bargaining.

Moreover, if the Union truly believed the information requested by its July 23 letter would assist the bargaining process, it is reasonable to believe that the Union would have filed an unfair labor practice charge when Respondent refused to provide the same information in November 2009. It most certainly would have requested the information in February when Valle explained the Prime PCP requirement to the Union or in May when Schottmiller emailed the

comparison chart to Bush that clearly spelled out the PCP requirement of the Prime EPO Plan. Moreover, the ALJ's finding that during the parties' May 3 bargaining session Respondent told the Union that there would be no contract without the Prime EPO Plan and the Union responded that it would not agree to any plan that required premium sharing or that did not allow employees to choose providers from the Anthem network or primary care physicians that were not affiliated with Prime (ALJD 7:1-6), illustrates that by that early date the battle lines had been drawn and those lines included the PCP referral requirement and premium sharing components of Respondent's EPO Plan proposal, yet the Union did not make its requests at issue here for another 12 weeks. Either the Union was not truly concerned about quality of care in relation to the EPO Plan, the Union knew that if it had requested the information earlier its stall game would not have been as effective, or the Union requested the information to support the Union's corporate campaign against Prime.

The ALJ makes a number of arguments to excuse the suspicious timing of the Union's July 23 requests, but those arguments are neither persuasive nor supported by the evidence. For example, the ALJ discounts the November 2009 request because the July 23 requests sought information about all Prime facilities, while the November 2009 requests were primarily directed to information relating to Centinela, and the two requests are therefore "materially different." See, i.e., ALJD 23:35-24:15. However, what is "material" is that both requested the same *type* of information, namely information that was central to the claims being made as part of the Union's corporate campaign that Prime was engaged in fraudulent/criminal business practices or woefully substandard patient care. See, i.e., subsection 1 above; Offer of Proof. Similarly, the ALJ relies on his findings that it was not until immediately before July 23 that Respondent revealed the "drastic revision" to its prior EPO Plan proposal that resulted in

“the new restrictive EPO option” (ALJD 24:30-31). However, as explained in Section A above, the facts do not support the ALJ’s chronology, and as explained in Section I below, his adjectives describing Respondent’s proposals have no place in a decision by an unbiased trier of fact.

In sum, the weight of all relevant evidence compels the conclusion that the Union’s July 23 information requests were a tactic employed by the Union to slow down bargaining, harass Respondent, assist the Union’s corporate campaign against Prime, and/or forestall implementation of the Prime EPO Plan and premium sharing by Respondent. And there is no credible evidence whatsoever that the Union would have accepted the Prime EPO Plan had it received the information, despite the ALJ’s incredible finding to the contrary. See, i.e., Section C above. The allegations of the complaint relating to the Union’s July 23 information requests must be dismissed.

**4. The Union Refused To Bargain With Respondent Over The Issues Raised By The Union’s Request**

By letter dated August 24 Respondent requested to meet and bargain with the Union over the issues raised by its information request. GCX 39. The Union refused. GCX 41. Under the legal authorities and principles discussed above, the Union’s refusal precludes Respondent from being found to have violated Section 8(a)(5) as alleged in the complaint.

The ALJ dismisses this argument in his Decision and accuses Respondent of being “disingenuous” for even having the temerity to raise it because, according to the ALJ, Respondent did not follow up on the Union’s “concessionary actions” in offering to bargain over confidentiality issues. See, i.e., ALJD 27:29-30, 41-28:2. At the same time, the ALJ totally discounts the Union’s refusal to meet and bargain over the information requests when Respondent requested that the Union do so. Respondent has a difficult time understanding how a neutral finder of fact can find that one party’s refusal to meet to discuss information issues is

fully justified while the other's is not, and why the first one's actions are "concessionary" and the second one's "disingenuous." Accordingly, Respondent relies on these findings by the ALJ in further support of its arguments made in Section I below.

**5. Respondent's Responses To The Union's Request Satisfied Respondent's Legal Obligations Under The Act**

Respondent did not ignore the Union's July 23 request, even though Respondent had every right to do so. Instead, Respondent answered the request by Schottmiller's August 9 letter (GCX 36). That letter explained Respondent's positions on each of the Union's enumerated requests, including why many of the demands included in the July 23 request sought information that was not relevant to bargaining, were overbroad and unduly burdensome, or sought private business or patient information. By doing so, Respondent properly discharged its legal obligations under the Act. For this additional reason the allegations of Paragraph 16 must be dismissed.

The ALJ also dismissed this argument in his Decision, essentially discrediting all of the statements made in Schottmiller's letter. See, i.e., ALJD 26:19-45. At the same time, the ALJ treated as conclusive statements making the same type of assertions when they were made by the Union's August 17 letter. See, i.e., 22:22-48. As such the same analysis regarding the neutrality of the ALJ discussed in subsection 4 immediately above applies here. And as one last example of the ALJ's meritless findings relating to the Union's July 23 requests and Respondent's responses thereto, the ALJ finds both that the names of Prime's coder contractors are relevant to the bargaining process and that their names are not confidential. See, i.e., ALJD 26:41-45. The first finding stretches the concept of relevance well beyond the breaking point, the second exhibits an astonishing lack of respect for personal privacy.

**E. All Allegations Of The Complaint Relating To The Distribution Of The September 1 Memo Must Be Dismissed**

**1. Distribution Of The September 1 Memo Did Not Modify Employees' Terms And Conditions Of Employment**

Paragraph 18(a), as placed into context by Paragraphs 18(c) and (d) and Paragraph 21, alleges that Respondent made an unlawful unilateral change by distributing a memorandum to employees on September 1, 2010 announcing that Respondent would offer a new EPO medical plan “effective January 1, 2011.” GCX 1(z), ¶¶ 18(a), (c)-(d), 21. However, in order to establish an unlawful unilateral change, the General Counsel is required to show, at a minimum, that the challenged action actually altered employees’ terms and conditions of employment in a “material, substantial, and significant” way. If the General Counsel does not meet this burden, the unilateral change allegations of the complaint are properly dismissed. See, i.e., *Toyota of Berkley*, 306 NLRB 893 (1992); *Haddon Craftsman, Inc.*, 297 NLRB 462 (1989); *UNC Nuclear Industries*, 268 NLRB 841, 848 (1984); *Crittenton Hospital*, 342 NLRB 686 (2004); *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001); *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005); *Peerless Food Products*, 236 NLRB 161 (1978); *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *Mitchellance, Inc.*, 321 NLRB 191 (1996); *Litton Systems*, 300 NLRB 324, 331-332; *Trading Port, Inc.*, 224 NLRB 980, 983-84 (1976); *Murphy Oil USA, Inc.*, 286 NLRB 1039, 1041 (1987); *St. John’s Hospital*, 281 NLRB 1163, 1168 (1986).

It cannot be credibly argued that the simple distribution of a notice, in and of itself, changes working conditions in any manner. And even if the posting of a notice, standing alone, could arguably result in a material change to terms and conditions of employment, AGC produced no evidence that the posting of the September 1 memo that is the subject of the

complaint's allegations (GCX 42A) did so here. At most, the memo advised of a change that was anticipated to occur four months later, in January 2011.

Parroting AGC's post-hearing brief, the Decision cites *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), *Kudziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998), and *CJC Holdings*, 320 NLRB 1041 (1996), in support of its finding that a notice advising of a change, standing alone, is an unlawful unilateral change. ALJD 36:1-19. However, each of these cases can be distinguished. In *ABC Automotive*, the Board noted that the employer's notice specifically stated that employees would "only" be able to return to work under the new conditions of employment presented in the notice, and there was evidence that the mere giving of the notice did substantial damage to the parties' bargaining relationship. 307 NLRB at \*4. At bar, the notice made no stipulations about employees' ability to return to work and there is no evidence the notice damaged the parties' bargaining relationship. In *Kudziel Iron*, the complaint alleged that the notice was a "threat" that violated Section 8(a)(5), and included allegations that the plant superintendent summoned employees into his office to verbally convey this threat; no such allegations are included in the complaint here. And in *CJC Holdings*, the respondent employer had engaged in a string of Section 8(a)(5) violations over several years that colored the findings made in that case. The cumulative conduct referenced in *CJC Holdings* is not present in this matter. Moreover, it is respectfully submitted that to the extent these cases stand for the proposition that announcement of a contemplated modification to the health insurance offered to employees is the equivalent of actually modifying the insurance, the cases are inconsistent with the Act and should be overruled.

In sum, because the AGC failed to establish that the distribution of the September 1 memo materially changed employees' terms and conditions of employment, and the ALJ made

no findings that it did, the allegations of the complaint relating to the September 1 memo must be dismissed and all contrary portions of the Decision (see, i.e., ALJD 35:36-36:32, 37:8-11, 40:10-12, 41:25-27, Appendix, 2nd WE WILL NOT paragraph) modified or deleted accordingly.

2. **The Allegations Relating To The September 1 Memo Must Be Dismissed Because The Union Did Not Request Bargaining Over Distribution Of The Memo**

Once a labor organization has notice of a change in working conditions, it is required to request that the employer bargain over the change in order to perfect the employer's obligation to do so. *American Diamond Tool*, 306 NLRB 570 (1992); *Kentron of Hawaii*, 214 NLRB 834, 835 (1974). As the United States Supreme Court stated in *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939):

Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer – when he has not refused to receive communications from his employees – without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or express desire to bargain, communicated to their employer . . . To put the employer in default here the employees must at least have signified to respondent their desire to negotiate.

Id. at 297-298. If, after receiving actual notice of a change, the union does not thereafter act with due diligence in requesting bargaining, it has waived its right to bargain over the change, be it contemplated or executed, and the employer cannot be found to have violated its obligations under Section 8(a)(5) of the Act. See, e.g., *WPIX, Inc.*, 299 NLRB 525 (1990) [union waives right to bargain about unilateral changes implemented without notice to the union when, after receiving actual notice, union fails to request bargaining]; *Emhart Industries*, 297 NLRB 215 (1989) [failure to request bargaining over post-strike reinstatement procedure after procedure instituted constituted a waiver of the union's right to bargain]. It is also clear under Board law

that filing an unfair labor practice does not constitute a request to bargain. *The Boeing Co.*, 337 NLRB 758, 763 (2002); *Citizens Bank of Willmar*, 245 NLRB 389 (1979). As stated by the Board in *American Diamond Tool*, “In our view, the Union could not accept such unilateral conduct without challenge at the bargaining table and thereafter seek to assert a bargaining right merely by the filing of an unfair labor practice charge” (id., 306 NLRB at 571).

AGC offered no evidence that the Union ever requested to bargain with Respondent over distribution of the September 1 memo. Moreover, to the extent certain portions of the Decision can be interpreted as excusing the Union for failing to do so (see, i.e., ALJD, 36:44-53 (n.42), 38:15-39:34), those findings are contrary to the law cited above. As noted, complaining about an alleged unilateral change is not the same as asking to bargain over the change, and a request to bargain must be made even if the change has already occurred. Accordingly, the ALJ’s characterization of Respondent’s argument as “disingenuous” (id.) illustrates either the ALJ’s failure to understand Board law, the ALJ’s bias against Respondent, or both. Moreover, the Union did in fact have advance notice that Respondent would be asking employees to nominate their physicians for inclusion in the Prime network, and had been provided with a copy of the form to do so more than two months prior to the distribution of the memo. See, i.e., RX 64; GCX 38; T 516-517.

**F. Respondent Did Not Unlawfully Condition Bargaining On The Union’s Acceptance Of Its Last, Best And Final Offer: Paragraph 19(b) Must Be Dismissed**

For the reasons explained above, the negotiations were at impasse when Respondent implemented its EPO proposal on January 1, 2011. Respondent was under no obligation to modify the provisions of its LBF after that date, and had every right to insist that the Union accept the LBF if it wanted a collective bargaining agreement with Respondent. See, i.e., Section B-C above. The Union had the corresponding right to refuse to agree to the LBF,

and has exercised that right. In sum, the impasse continues. If the status quo is to be changed, it is up to the parties, not the Board, to make that change. To require Respondent to return to the bargaining table in these circumstances is tantamount to requiring Respondent to modify the terms of its LBF, something that the Board is prohibited from doing by Section 8(d). Moreover, the Decision finds that Respondent did in fact engage in bargaining during this period. See, i.e., ALJD 32:19-33, 35:52-54 (n.40). Paragraph 19(b) must be dismissed.

**G. Evidence In The Record, Including The Testimony Of Schottmiller, That Is Not Contradicted By The Record Or Specifically Identified As Contrary To Other Credited Testimony Must Be Considered When Determining Respondent's Exceptions**

As is referenced in Respondent's exceptions and discussed elsewhere in this brief, the ALJ failed to make many findings supported by the record and relevant to the issues raised by AGC's complaint and Respondent's defenses thereto, and many of the findings made in the Decision are contrary to the evidence in the record. The ALJ attempts to cloak his findings in the cover provided by "credibility determinations," stating that "[t]he key aspects of my factual findings [in Part I of the Decision] incorporate the credibility determinations I have made," particularly as it relates to what the ALJ claims are "sharp conflicts" in testimony concerning the bargaining sessions occurring in 2009-2011. ALJD 18:26-28. The ALJ also specifically attacks Schottmiller's credibility as compared to Bush's credibility. See, i.e., ALJD 18:28-19:20. For the reasons that will now be explained, the ALJ's attempts to justify his determinations and conclusions on the basis of "credibility" cannot be sustained.

As an initial matter, the recitation of the record set forth in Part II(C) above is almost without exception fully supported by evidence that is not disputed, and therefore cannot be discounted because of "credibility." Similarly, and as is discussed in Section A above, the ALJ failed to make findings that are fully supported by undisputed evidence, and made other

findings that are contrary to the undisputed evidence. And as is also established by these portions of the brief and the record evidence cited therein and in Respondent's exceptions, there are not "sharp conflicts" in the evidence regarding most of what transpired during the bargaining sessions. In fact, the only potentially material conflict Respondent has identified involves whether the February 16 meeting's discussion of the EPO Plan included specific discussion of whether Anthem network physicians could be accessed in the same manner as Prime network physicians under the EPO Plan. And the record as most fairly read to all parties simply reflects that Respondent did not explain the PCP referral requirement as clearly as was necessary for the Union to understand how that process would work. See, i.e., GCX 20; RX 214; T 724. Moreover, Respondent clarified the PCP requirement in the comparison attached to Schottmiller's May 7 email to Bush and reviewed by Bush within 20 minutes of his receipt of the email (RX 50 (attaching GCX 29), 51). Accordingly, the ALJ's broad claim that the Decision's findings of fact are based on "credibility determinations" is not supported by the record. And to the extent such conflicts exist and are material to resolution of Respondent's exceptions, this matter must be remanded with directions that a supplemental decision be prepared that specifically identifies the conflicting evidence, states how the conflict is resolved, and provides a reasoned explanation for the resolution made. See, i.e., *Encino Hospital Medical Center*, 359 NLRB No. 78.<sup>21</sup> See also, i.e., *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981).

The same analysis applies to the ALJ's unfounded and personal attacks on Schottmiller. First, Respondent has been able to identify only one instance in which the Decision credits Bush over Schottmiller with respect to a particular conversation (ALJD 20:9-15 [Union threat to try to put Respondent's CEO in jail if "Respondent did not agree to a collective

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<sup>21</sup> For the reasons explained in Section I below, if the Board determines that remand is appropriate, Respondent believes the remand must be to a different administrative law judge.

bargaining agreement”)), and one instance in which the Decision discredits the references in Schottmiller’s bargaining notes as clarified by Schottmiller’s testimony during the hearing (ALJD 19:27-31 [February 5 bargaining notes referencing that Union was advised of EPO in Fall 2009]). The Decision contains no other reference to discrediting testimony by Schottmiller concerning what was communicated between her and Bush, either at the table or during other communications away from the table, much less instances in which their respective testimony was in conflict in any material way. To be sure, the ALJ takes several other pot-shots at Schottmiller by negatively characterizing her testimony. For example, the ALJ rejects Schottmiller’s testimony (as described in the Decision) that the number of physicians in the Prime network was not a “‘quality of care’ issue” as “untrue and disingenuous” (ALJD 19:13-18). However, the testimony apparently being referred to by the ALJ (T 686) did not involve a “he said-she said” situation, it related to Schottmiller’s assessment, shared by the Union and expressed in communications between the parties during the relevant period of time (see, i.e., GCX 36-37), that the “quality of care” issue raised by the Union related to the care provided at Prime hospitals. Moreover, this part of the transcript is far from clear in any event inasmuch as the ALJ’s questions put to Schottmiller were compound and confusing.

Similarly, the ALJ misstates Schottmiller’s testimony about the threat made towards Respondent’s CEO and mischaracterizes Schottmiller’s February 5 bargaining notes and testimony explaining them. The Decision states that Schottmiller testified that the threat was related to Respondent agreeing to a collective bargaining agreement. In fact, Schottmiller testified that the threat was related to the Union’s desire to obtain an organizing agreement from Prime, and the threat was directed to Prime’s owner and also to Respondent’s CEO. T 672-673. Schottmiller also explained why she did not make notes of the conversation in which the threat

was made, and why she recalled the threat even though she did not make written notes of it. T 639.<sup>22</sup> Moreover, even the Union's own bargaining notes reference statements made during bargaining referencing the Union's desire to obtain a neutrality agreement and that the Union's July 23 information requests were made in support of the Union's desire, and Bush did not dispute either the Union's desire for such an agreement or the connection to the July 23 requests in response. See, i.e., RX 179-180. And as explained by Schottmiller's testimony, the February 5 bargaining notes reference discussions that took place during that meeting regarding meetings prior to her involvement in negotiations, and not that she was present at those prior meetings. See, i.e., T 575-579.

As referenced in Section A above, the ALJ also discredited Schottmiller's testimony because the ALJ found that her testimony was the product of leading questions. ALJD 18:46-19:7. However, an objective review of the record shows that the questions put to Schottmiller by Respondent's counsel that the ALJ found to be objectionable were, in fact, entirely appropriate. In this regard, it is well established that leading questions during direct examination are entirely appropriate when necessary to develop a witness's testimony. See, i.e., FRE 611(c); *W&M Properties of Connecticut, Inc.*, 348 NLRB 162 (2006). This rule is commonly applied when the questions are foundational in nature, focus the testimony on a particular relevant matter, or are necessary to elicit testimony after the witness's testimony about a particular matter has been exhausted. And this rule applies to almost every instance in which the ALJ sustained AGC's leading objections, or interjected his own objection, during

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<sup>22</sup> Schottmiller was rudely interrupted by the ALJ when she attempted to explain why no note of the conversation was made during the course of her responsive answer to a question from AGC on cross. T 677. The ALJ's action in doing so is in sharp contrast to his failure to initiate any interjection when Bush provided nonresponsive answers during the course of his testimony. See, i.e., T 120-121, 271, 280.

Schottmiller's direct testimony. See, i.e., T 570 [foundational], 573 [foundational], 576 [focusing area of inquiry], 580-581 [following exhaustion of recollection] , 586 [foundational], 594 [focusing area of inquiry], 621 [foundational], 626 [following exhaustion of recollection (or would have if ALJ had not interrupted question)], 667 [focusing area of inquiry].<sup>23</sup>

A particularly good example of the ALJ's erroneous "leading" determinations is provided by a review of the transcript immediately preceding the ALJ's unfounded and unsupported admonishment of Respondent for asking leading questions referenced in the Decision, which exchange also serves as the basis for the ALJ's equally unfounded and unsupported accusation that Respondent's counsel engaged in misconduct as referenced in section 102.177(b) of the Board's rules and regulations by asking leading questions following the ALJ's admonishment (ALJD 19:1-4, n.20). The record shows that Schottmiller was first asked a series of non-leading questions relating to what was said during the course of the bargaining sessions of February 4 and 5. T 575-577. When Schottmiller indicated she could not recall any additional statements without reviewing her bargaining notes, she was allowed to do so and then testified to a number of other statements made during the meetings. T 577-579.<sup>24</sup> When Schottmiller's recollection following review of her notes was exhausted, Respondent's counsel then properly attempted to ask her a question concerning a particular matter, at which point the question was interrupted by AGC and the ALJ stated he was admonishing counsel. T 580. In

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<sup>23</sup> Note 21 of the Decision also references pages 566, 623 and 643 as support for the ALJ's "leading" findings. However, those pages do not contain any questions that were found to be leading by the ALJ, indicating that the ALJD simply did a word search in the transcript for the word "leading" and then plugged in a number of the pages containing the word.

<sup>24</sup> It is worth noting that this portion of the transcript evidences AGC's repeated interruption of Schottmiller's direct examination, without any interference or caution from the ALJ. The ALJ allowed AGC to engage in similar disruptive behavior throughout the hearing without making any comment, and in fact at times behaved in a similar fashion, as will be discussed further in Section I below.

sum, the ALJ's "draw[ing] of negative inferences from the use of leading questions during Schottmiller's direct examination" is contrary to both the record and the law and must be disregarded.

Finally, the ALJ cites as another reason to discredit Schottmiller's testimony the fact that she reviewed her bargaining notes to refresh her recollection about statements made during the bargaining sessions. ALJD 19:9-10. However, the record shows that Schottmiller attended over a dozen bargaining sessions during the critical period prior to the January 1, 2011 implementation of the EPO Plan, which sessions occurred as much as 30 months prior to the hearing. Given these circumstances, it is totally understandable that a witness would need to refresh her recollection while testifying about statements made during the course of bargaining. Moreover, Schottmiller's testimony as so refreshed was generally in accordance with the only bargaining notes that the Union produced at the hearing (RX 179-180) and AGC did not offer any rebuttal witnesses to that testimony. Frankly, logic and common experience would cause any neutral trier of fact to be suspicious of a witness who testifies about what was said during the course of bargaining sessions held months and years prior to the testimony without the witness having reviewed bargaining notes from those sessions. For the ALJ to find otherwise indicates a shocking lack of understanding of what occurs during collective bargaining or a predisposition to make certain conclusions without regard to the inherent probability of witness testimony, or both.

**H. The ALJ's Rulings During The Course Of This Proceeding Prevented Respondent From Fully Developing Evidence Supporting Its Defenses To The Complaint**

Due process requires that a litigant be permitted to obtain and present all relevant evidence to the trier of fact. See, i.e., *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2d Cir. 1990). While

time and space limitations do not allow Respondent to detail in this brief each and every instance in which the ALJ's rulings made during the course of this proceeding denied Respondent its fundamental right to due process of law, the following examples, as supplemented by the evidence and rulings cited in Respondent's exceptions, are illustrative.

- The ALJ precluded Respondent from obtaining relevant documents by his rulings on the petitions to revoke filed in response to Respondent's subpoenas. See, i.e., T 240-252; RX 182-198; Order Denying Petition to Revoke Subpoena B-63879. To the extent the ALJ's ruling granting AGC's petition to revoke was properly based on the AGC's determination that AGC need not produce any documents that are not public records and the Board's rules relating to AGC's determination (see, i.e., RX 192-198), due process has been violated because the Board's rules allow a prosecutor, rather than a neutral judicial officer, to determine what documents the prosecutor will be required to produce to party that is the subject of the prosecution.
- The ALJ repeatedly precluded Respondent from conducting a thorough examination of AGC's witnesses, including by not allowing cross-examination on the parties' communications during the course of bargaining if those matters had been generally covered during direct examination and by not allowing Respondent to examine AGC's witnesses on all relevant matters, including but not limited to the Union's corporate campaign against Prime, the Union's actions relating to its claims of high septicemia rates and other "quality of care" issues, and matters involving other Union-represented bargaining units that were covered by the EPO Plan proposed by Respondent. See, i.e., T 61-65, 101, 247-267, 274-279, 281-282, 308-315, 319, 322-327, 331-335, 337-338, 340-344, 353-358, 361-363, 365-367, 369-371, 379-381; RX 177.
- The ALJ repeatedly precluded Respondent from conducting a thorough direct examination of Respondent's witnesses by improperly granting AGC's unfounded objections

based on relevance and form of question (leading), allowing AGC and Union counsel to interrupt Respondent's counsel while attempting to ask questions and Respondent's witnesses while attempting to answer questions, and by not allowing Respondent to examine AGC's witnesses on all relevant matter, including but not limited to the Union's corporate campaign against Prime, the Union's actions relating to its claims of high septicemia rates and other "quality of care" issues, and matters involving other Union-represented bargaining units that were covered by the EPO Plan proposed by Respondent. See, i.e., T 61-65, 366-367, 565-573, 575-576, 580, 585-589, 607, 616-617, 626-627, 663, 676, 700-703, 716-719, 722, 725-730.

- The ALJ refused to admit into evidence documents relevant to the allegations of the complaint and Respondent's defenses to those allegations. See, i.e., RX 1, 105, 150, 156, 177-178, 200-204, 216-219.

- As one final example, the ALJ precluded Respondent from asking Valle questions about use of the physician nomination form at other Prime hospitals. T 722. However, the ALJ finds in his Decision that the form was created to address the Union's concerns about the number of physicians in the Prime network and was actually a "sham" because there was no evidence that any physicians were added through utilization of the form. See, i.e., ALJD 8:38-41, 19:15-22.<sup>25</sup>

It is one thing to preclude evidence that is relevant to the totality of the circumstances that must be assessed when determining issues relating to bad faith bargaining, impasse and the validity of a request for information, which the ALJ repeatedly did here. These errors are compounded when an administrative law judge subsequently relies on a finding that "no evidence was presented" in seeking to justify his conclusions when the administrative law judge committed error by not allowing the evidence into the record at the hearing.

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<sup>25</sup> As explained in Section A above, the record does contain evidence proving that physicians were added due to nominations made by Centinela employees; the ALJ just chose to ignore it.

**I. The ALJ's Rulings, Findings And Conclusions Evidence Bias, Or At Least The Appearance Of Bias, Against Respondent**

Respondent has detailed above and in its exceptions numerous examples of errors committed by the ALJ during the course of the proceedings, including but not limited to findings made in the Decision that are not supported by the totality of the evidence, findings that were not made but should have been made given the undisputed evidence, application of different standards relating to the production of subpoenaed documents depending on whether the documents have been subpoenaed by AGC or Respondent, application of different standards in regulating the examination and cross-examination of witnesses and introduction of documents into evidence by the AGC as compared to Respondent, and refusing to allow Respondent to pursue and offer all relevant evidence relating to its defenses to the complaint. These errors may be due to reasons other than bias, including unfamiliarity with long-standing Board law and procedures.<sup>26</sup> However, given the number and manner of these errors, the appearance of bias certainly is present. Evidence of the appearance of bias is also illustrated by other portions of the record cited in Respondent's exceptions, as the following examples illustrate.

- The Decision repeatedly utilizes negative, value-laden or pejorative adjectives or descriptions, all of which are not legally relevant, relating to Respondent's EPO Plan proposal, particularly in contrast to the adjectives and descriptions used when referencing the Union. For

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<sup>26</sup> It is surprising that one of the Board's administrative law judge's would appear to be unaware of, for example, basic rules relating to the way in which complaints allege violations of different sections of the Act, that rulings on petitions to revoke are not automatically included as part of the record, the authority of administrative law judges to approve or disapprove settlement agreements, that a failure to provide information only violates Section 8(a)(1) if it violates Section 8(a)(5), that a determination of supervisory status in a representation proceeding is not necessarily binding in a unfair labor practice proceeding and cannot be established by title alone in any event, that events away from the bargaining table are relevant to the totality of the evidence standard used in determining allegations of general bad faith bargaining, or basic rules involving the examination of witnesses. See, i.e., T 12, 31-32, 255-257; ALJD n.1; Sections G-H above.

example, at the Decision’s very first mention of Respondent’s EPO Plan proposal, the ALJ states that Respondent “tried to justify” the proposal by explaining its benefits to employees and Respondent (ALJD 5:42-43). Footnote 16 describes Respondent as “unfrank” for asserting that “quality of care” information requested by the Union regarding hospitals outside of Southern California was not relevant, that Respondent “preached” that a benefit to the proposal was access to Prime hospitals, and that it was “disingenuous” to “*force* its new healthcare plan on its employees and *only* offer them their own coworkers at Centinela as the only *legitimate* health care provider.” Id. (emphasis added). Similarly, the Decision finds that the EPO Plan “forced” employees to use Prime hospitals, it was “unreasonable” for Respondent to “expect” or “force” its employees to use Prime hospitals other than Centinela, and the Prime network had a “significant shortage” of pediatricians and gynecologists (ALJD 8:30-36). However, the ALJ precedes this language disparaging Respondent by describing the Union’s position as “legitimate” (id., ll. 24-26). Still later, the Decision describes Respondent’s EPO Plan proposal as a “push” for a “drastic revision in healthcare” through a “restrictive” option. ALJD 24:30-31. The ALJ also describes Respondent’s written response to the Union’s July 23 requests as a “blanket self serving statement” but credits the Union’s similarly self serving justifications for the requests as conclusive. Compare ALJD 28:18-19, 22:38-41. The ALJ’s intentional, injudicious and legally irrelevant bashing of Respondent’s EPO Plan proposal is encapsulated in the Decision’s discussion of the proposal under the subheading of “Unreasonable Bargaining Demands” in Part II(C)(2) of the Decision, even though the complaint does not allege the proposal as an indicia of bad faith bargaining by Respondent. See, i.e., ALJD33:34-35:14; GCX 1(z), ¶19(c).

- During the course of the hearing, the ALJ frequently disparaged Respondent’s legal positions and its counsel. For example, the ALJ described Respondent’s understandable reluctance to admit to legal conclusions when it had already admitted to all relevant facts relating to the conclusion as “silly.” T 31. The ALJ characterized Respondent’s subpoenas as merely reproductions of AGC’s subpoena directed to Respondent when a neutral comparison shows that Respondent’s subpoenas requested documents relating to many relevant areas that were not addressed in AGC’s subpoena to Respondent. See, i.e., T 243-244; RX 182, 186, 188, 190, 196.<sup>27</sup> The ALJ pejoratively described Respondent counsel’s articulation of Respondent’s legal position as a “speech” and requests to limit admission of the Union’s correspondence so that it would not be considered for the truth of the matters asserted therein as “frivolous,” “not helpful” and attempts to delay the proceedings. See, i.e., T366-367, 220-222.
- The ALJ repeatedly interrupted Respondent’s counsel and Respondent’s witnesses, and allowed AGC and Union counsel to do the same. See, i.e., T 308-311, 371, 573, 585, 677,.
- The ALJ directed Respondent’s counsel to “cut to the chase” when counsel was attempting to properly cross-examine AGC’s witness, accused him of asking AGC’s witness to make a comparison of documents when no such question was asked, accused him of seeking to impede the hearing based on conduct that was actually engaged in by AGC counsel, and accused him of attempting to stall proceedings when he offered exhibits relevant to Respondent’s defenses into the record. T 281, 285, 312, 674.

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<sup>27</sup> It is true that many of the document requests included in the AGC’s subpoena directed to Respondent are also included in Respondent’s subpoenas. Respondent did so, in part, in order to demonstrate the lack of due process inherent in Board proceedings relating to the compelled production of documents. See, i.e., RX 192-198; T 240-252.

Respondent's contention of bias, or at least the appearance of bias, is not made lightly. However, in this case the record fully supports Respondent's contention.<sup>28</sup> Accordingly, to the extent the Board does not dismiss the allegations of the complaint outright and determines remand is necessary, as it did in *Encino Hospital* referenced above, the matter must be remanded to a different ALJ for a *de novo* review of the record and reopening of the record in conjunction therewith as appropriate.

**J. The Decision's Order Is Overly Broad And Beyond The Board's Authority Because It Violates Section 8(d)**

Respondent has the right under the Act to insist on terms it believes are most beneficial to it, even if that insistence results in no final agreement. See Section B-C above. That is exactly what it has done here. Accordingly, and as noted, to order that Respondent return to the bargaining table and bargain further can only be seen as an order for Respondent to modify its positions, and therefore is beyond the Board's authority. See, i.e., *H. K. Porter Co. v. NLRB*, 397 U.S. at 108 ["While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract"]. Similarly, the Board is without authority to order Respondent to reinstate the Anthem network as the provider of healthcare to bargaining unit employees (ALJD 42:4-6) inasmuch as Respondent has no control over that network and Respondent's contract with the Anthem network expired more than two years ago, notwithstanding the ALJ's finding to the

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<sup>28</sup> Respondent is also concerned over reports it has received that the Acting General Counsel himself has made public statements disparaging Respondent for taking the position in communications to Union counsel that the Board is currently without authority to act.

contrary.<sup>29</sup> The ALJ's recommended order is also overly broad in a number of respects. For example, information relating to Prime's coding consultants and nurse practitioners or physician assistants who serve as hospitalists is not relevant and is confidential, yet the ALJ's recommended order requires Respondent to provide that information to the Union. Similarly, the July 23 requests seek information going back to 2001 and are therefore overbroad and requests information that does not exist because Prime did not operate most of the hospitals currently in the Prime network in 2001. Moreover, it would be unduly burdensome for Respondent to comply with many of the requests. See, i.e., GCX 36. Accordingly, even if the Board were to affirm some or all of the ALJ's conclusions, the recommended remedy and order must be modified.

**K. Respondent's Posthearing Motions Should Have Been Granted**

Respondent recognizes that the Board's ALJ's do not have the authority to disagree with Board law. Accordingly, Respondent anticipated that the ALJ would deny Respondent's Motion to Dismiss Complaint, or in the Alternative to Stay All Proceedings and Vacate Prior Proceedings Due to Lack of Board Authority to Act. The Board should take this opportunity to now overrule its decision in *Stamford Hospitality*, 359 NLRB No. 75 (2013), and similar cases and grant said motion based on the facts and law set forth therein, as further supported by the Third Circuit's recent decision in *NLRB v. New Vista Nursing and Rehabilitation*, 2013 U.S. App. LEXIS 9860 (May 16, 2013).

Additionally, because Respondent's November 2012 collective bargaining agreement incorporating Respondent's EPO Plan is relevant to the totality of the circumstances

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<sup>29</sup> Respondent believes issues relating to the order to restore the Anthem network as the provider of healthcare services is a compliance issue that need not be raised at this time, but has raised it anyway to protect its positions should the Board not dismiss the unilateral change allegations relating to the implementation of the Prime EPO Plan.

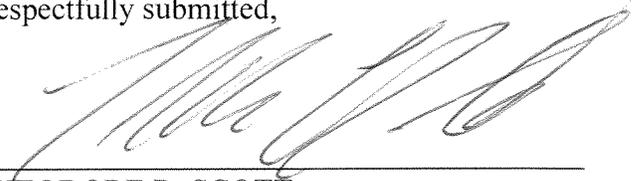
that must be considered when determining the general bad faith bargaining and unlawful implementation allegations in the complaint, Respondent's Motion to Reopen Record should also have been granted, and should be granted now by the Board.

**V.**  
**CONCLUSION**

WHEREFORE, it is respectfully requested that Respondent's exceptions be granted and the complaint dismissed, or alternatively that the matter be remanded for further proceedings before a different administrative law judge.

Dated: June 14, 2013

Respectfully submitted,



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