

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

REGION 31

PRIME HEALTHCARE SERVICES - ENCINO,
LLC D/B/A/ ENCINO HOSPITAL MEDICAL
CENTER,

Case Nos. 31-CA-066061,
31-CA-070323,
31-CA-080554 and
21-CA-080722

Respondent,

SEIU LOCAL 121RN,

Union,

and

SEIU UNITED HEALTHCARE WORKERS-WEST,

Union,

PRIME HEALTHCARE SERVICES - GARDEN
GROVE, LLC D/B/A GARDEN GROVE
HOSPITAL & MEDICAL CENTER,

Respondent,

SEIU UNITED HEALTHCARE WORKERS-WEST,

Union.

**EMERGENCY MOTION FOR RECONSIDERATION
AND MOTION TO REOPEN THE RECORD**

GLENN ROTHNER
JONATHAN COHEN
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101
Telephone: (626) 796-7555
grothner@rsglabor.com
Attorneys for Service Employees International
Union, SEIU United Healthcare Workers - West
("UHW") and SEIU 121 RN

I. INTRODUCTION

Pursuant to Rule 102.48(d)(1) and Rule 102.65(e)(2) of the Rules and Regulations of the National Labor Relations Board ("Board" or "NLRB"), Service Employees International Union ("SEIU"), SEIU United Healthcare Workers -West ("UHW"), and SEIU 121 RN ("121 RN"), respectfully request that the Board reconsider its decision in the instant case and reopen the record in light of SEIU's production of documents in response to the subpoena *duces tecum* of Prime Healthcare Services–Encino, LLC d/b/a Encino Hospital Medical Center ("Encino Hospital") and Prime Healthcare Services – Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center ("Garden Grove Hospital") (collectively, "Respondents" or "Prime").

At issue in this case is the propriety of a subpoena *duces tecum* issued by Prime to SEIU, UHW and 121 RN to support its alleged conflict of interest defense in the underlying unfair labor practice charges brought by 121 RN and UHW, two local unions affiliated with SEIU. SEIU is not a party to the underlying unfair labor practice proceeding and has no direct bargaining relationship with Prime.

In a nutshell, Prime contends that SEIU and its affiliates have an agreement with Kaiser Permanente ("Kaiser") – also not a party in the underlying proceeding – to promote Kaiser to the detriment of all of Kaiser's competitors in the healthcare industry; that Prime is one such competitor; and that the unions' interest in promoting Kaiser renders 121 RN and UHW with a disabling conflict of interest that prevents them from acting as the exclusive representative of Prime's employees in collective bargaining. Prime therefore purports to justify its subpoena by raising a sham "conflict of interest" defense to the underlying unfair labor practice allegations.

There are two important changed circumstances that merit the Board's reopening the

record and reconsidering its decision in this case. First, SEIU responded to the majority of Prime's subpoena on August 27, 2013. That response constitutes additional evidence that could not have been previously presented, and which considerably changes the posture of this case and requires the Board to decide it differently. *See* NLRB Rule 102.48(d)(1). Although SEIU maintains that the basis for Prime's subpoena is unsupported by existing case law, *it has now responded to all but one of Prime's requests*. Importantly, it responded to Prime's requests for documents concerning SEIU's financial stake in Kaiser; the response establishes that there are no documents in SEIU's possession indicating such a financial relationship. Because a union's financial stake in the competitor of an employer with which it bargains is the foundation for the conflict of interest defense, *see Bausch & Lomb Optical*, 108 NLRB 1555 (1954), SEIU's response makes clear that no such foundation exists here. Accordingly, requiring any further document production would not serve any cognizable legal claim and would only assist Prime in an unwarranted fishing expedition into the affairs of SEIU.

Having removed the factual predicate for Prime's allegation that SEIU has a financial stake in Kaiser, an alleged competitor of Prime, the Board on reconsideration can focus on whether the ALJ abused his discretion by upholding the subpoena as to the one request still in dispute: request number 13, which seeks documents concerning SEIU's involvement in the purchase, sale, ownership, reorganization or renaming of Prime hospitals. Prime mistakenly contends that such documents are relevant to support its theory that SEIU endeavored to block the acquisition of hospitals by Prime in order to assist Kaiser.

There is no basis for allowing Prime to obtain such documents. First and foremost, Prime has utterly failed to link request number 13 to existing Board law concerning a union's conflict of

interest. Indeed, even if SEIU had attempted to thwart Prime's acquisition of new hospitals, Prime fails to articulate how the "natural and probable effect" of such activity is the loss of work for employees in bargaining units *at Encino or Garden Grove hospital*, where 121 RN and UHW represent Prime employees. *See Valley West Welding Co.*, 265 NLRB 1597, 1604 (1982). Likewise, Prime fails to explain how SEIU, an international union with no direct bargaining relationship with Prime, could have a conflict of interest that would privilege Prime's withdrawal of recognition from *independent local unions*.

Moreover, upholding Prime's request would allow an employer to peer directly into a union's organizing and bargaining strategy, a result which is at odds with fundamental presuppositions of the National Labor Relations Act. Similarly, upholding the request would diminish the privilege protecting internal communications regarding union strategy from discovery and would chill a union's First Amendment right to employ diverse tactics in the public realm to gain leverage with an employer.

Second, the Board's decision merits reconsideration because of the considerable and unresolved debate about the validity of Board decisions issued between January 1, 2011 and July 30, 2013, based on the decisions of various U.S. Courts of Appeals. *See Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013); *NLRB v. New Vista Nursing & Rehabilitation, LLC*, 2013 WL 2099742 (3d Cir. May 16, 2013); *NLRB v. Enterprise Leasing Company Southeast, LLC*, Case No. 12-1514 (4th Cir. July 17, 2013). Up and until the Supreme Court decides whether the Board was properly constituted during this time, there will remain a cloud on the Board's decision upholding the ALJ's ruling on the subpoena and the parties will be unable to rest assured that the decision is final and valid. Notably, Encino Hospital, one of the respondents here, invoked *Noel Canning* in a mandamus action before the D.C. Circuit seeking an order

preventing the Board from prosecuting an unfair labor practice case against it. *See In re Encino Hospital Medical Center*, Case No. 13-1130 (D.C. Cir. April 9, 2013). Although later withdrawn, the action suggests that Prime will not hesitate to pursue arguments based on *Noel Canning* wherever it suits its ends. Because the Board is now fully constituted with five Senate-appointed Members, it is appropriate to reconsider the earlier decision and lend this dispute the imprimatur of unquestionable Board authority.

Once the Board reviews the case in light of these developments, it should be clear that Prime's subpoena is unwarranted and that the subpoena should be revoked. For these reasons and those that follow, SEIU, UHW and 121 RN respectfully request that the Board reopen the record, reconsider its previous decision, and fully revoke Prime's subpoena.

II. PROCEDURAL HISTORY

A. The Consolidated Complaint

UHW is the exclusive representative of service and technical employee bargaining units at Encino Hospital and Garden Grove Hospital (Complaint ¶¶ 9(f), 10(b)).¹ 121 RN is the exclusive representative of a nurse bargaining unit at Encino Hospital (*id.* ¶ 10(a)).

On or about April 5, 2011, 121 RN requested that Encino Hospital furnish it with information related to the payment, processing and cost of employee healthcare claims at Prime hospitals, as well as similar information for employee healthcare claims at out-of-network hospitals (*id.* ¶ 11(a)). Encino Hospital failed and refused to furnish the information (*id.* ¶ 11(c)). On or about January 12, 2012, UHW requested that Encino Hospital furnish it with information related to a covered employee's ability to obtain a referral for medical care

¹ Attached hereto as Exhibit "A" is a true and correct copy of the Consolidated Complaint and Notice of Hearing.

outside of Prime's network, as well as information concerning coverage, premiums and costs associated with Prime's proposed healthcare plan (*id.* ¶ 12(a)). UHW requested identical information from Garden Grove Hospital on or about January 25, 2012 (*id.* ¶ 13(a)). Both hospitals failed and refused to furnish the information (*id.* ¶¶ 12(c); 13(c)).

Additionally, Encino Hospital failed to pay employees in the nurse unit represented by 121 RN and the service and technical unit represented by UHW anniversary wage step increases (*id.* ¶¶ 14(c), 15). Likewise, Garden Grove Hospital failed to pay employees in the service and technical unit represented by UHW anniversary wage step increases (*id.* ¶ 16).

B. Respondents' Answer

Respondents' answer admits and denies various allegations. Relevant here, they raise the defense that the charging parties' "conduct disqualifies them from serving as the representatives of Respondents' employees" (Answer, Affirmative Defenses, ¶¶ 5, 6).²

C. The Antitrust Lawsuit

While the unfair labor practice case was proceeding, so too was an antitrust lawsuit filed by Prime against SEIU, UHW and Kaiser (*see* First Amended Complaint, *Prime Healthcare Services, Inc. v. Service Employees Int'l Union, et al.*, Case No. 11cv2652-GPC-RBB, dated September 21, 2012).³ The first amended complaint alleges that SEIU, UHW and Kaiser engaged in an unlawful antitrust conspiracy to drive Prime and its competitors from the healthcare services market in California (*see id.*).

On April 4, 2013, the District Court for the Southern District of California issued a tentative order dismissing Prime's first amended complaint in its entirety (*see* Notice of Tentative Ruling in *Prime Healthcare Services, Inc. v. Service Employees Int'l Union, et al.*, Case No. 11cv2652-GPC-RBB, dated April 4, 2013).⁴ At a hearing regarding dismissal the following day, Prime's lawyers repeatedly and unsuccessfully urged the district court to allow it to engage in discovery, particularly with respect to the relationship between Kaiser and the Coalition of

² Attached hereto as Exhibit "B" is a true and correct copy of Respondents' Answer to the Complaint.

³ Attached hereto as Exhibit "C" is a true and correct copy of the First Amended Complaint in *Prime Healthcare Srvcs., Inc. v. Srv. Employees Int'l Union, et al.*, Case No. 11cv2652-GPC-RBB.

⁴ Attached hereto as Exhibit "D" is a true and correct copy of the federal district court's Notice of Tentative Ruling in *Prime Healthcare Services, Inc. v. Service Employees Int'l Union, et al.*, Case No. 11cv2652-GPC-RBB, dated April 4, 2013.

Kaiser Unions.⁵ On July 25, 2013, the district court issued an order dismissing the anti-trust complaint in its entirety and allowing Prime to file an amended complaint by August 25, 2013.⁶

Prime did not file an amended complaint by the cutoff date.

D. Respondents' Subpoena to SEIU

On April 15, 2013, less than two weeks following issuance of the tentative order dismissing the first amended complaint, Prime served its subpoena *duces tecum* on SEIU (Prime Subpoena, p. 1).⁷ The subpoena sought the testimony of an SEIU Custodian of Records, and asked for documents far afield from the allegations in the underlying unfair labor practice complaint.

Specifically, the subpoena sought the following:

- information related to SEIU's communications with UHW and 121 RN concerning guidance of advice about bargaining proposals and information requests to Respondents and all other Prime hospitals (Request Nos. 1-2);
- documents related to the relationship between SEIU, UHW, 121 RN and California Watch, yet another third party (Request No. 3);
- documents related to communications between SEIU, UHW, 121 RN and California Watch concerning Prime, Respondents, any Prime hospital and/or Kaiser (Request Nos. 4-5);
- agreements between SEIU and Kaiser (Request No. 6);

⁵ Attached hereto as Exhibit "E" is a true and correct copy of excerpts from the transcript of the April 5, 2013 proceedings before the federal district court in *Prime Healthcare Svcs, Inc. v. Svc. Employees Int'l Union, et al.*, Case No. 11-cv-2652-GPC-RBB.

⁶ Attached hereto as Exhibit "F" is a true and correct copy of the federal district court's order, issued on July 25, 2013 in *Prime Healthcare Svcs, Inc. v. Svc. Employees Int'l Union, et al.*, Case No. 11-cv-2652-GPC-RBB.

⁷ Attached hereto as Exhibit "G" is a true and correct copy of Respondents' subpoena *duces tecum* for SEIU.

- documents concerning SEIU's or its affiliates' ownership in Kaiser and various related entities (Request No. 7);
- records of payment from Kaiser to SEIU or the Coalition of Kaiser Unions (Request Nos. 8-9); records of payments to SEIU or the Coalition of Kaiser Unions from the Labor Management Partnership between Kaiser and SEIU ("LMP") (Request No. 10);
- various documents concerning the relationship of Kaiser and SEIU to the LMP, as well as the goals of the LMP (Request No. 11);
- documents concerning any federal, state or local legislative issues or agenda that SEIU has supported concerning the healthcare services industry in California, including Respondents, Prime and/or its market competitors (Request No. 12);
- documents concerning SEIU's involvement at the federal, state or local level in the purchase, sale, ownership, reorganization or renaming of hospitals by Prime or its market competitors (Request No. 13);
- documents or correspondence between SEIU and Kaiser concerning the healthcare services industry in California, Kaiser's competitive position in the market and its costs of doing business, Prime and its competitors, actions before regulatory agencies, and the establishment of coding and billing practices for Medicare and Medicaid patients and uninsured patients (Request No. 14);
- various other documents prepared by or for SEIU, or by Kaiser, related to the establishment of coding and billing practices for Medicare and Medicaid patients and uninsured patients (Request Nos. 15-17);
- and finally, documents or correspondence between SEIU, UHW, 121 RN, Kaiser and the Coalition of Kaiser Unions concerning Kaiser's competitors in the California healthcare services market (Request No. 18).

(Ex. F).

In sum, Prime went on a fishing expedition at SEIU's expense. Not coincidentally, the documents sought by Prime related directly to its now-dismissed antitrust suit against SEIU, UHW and Kaiser (*see generally* Ex. C; *see also* Ex. E, 20:21 (acknowledging that the Labor Management Partnership is "one of the foundations" for Prime's antitrust lawsuit)).

E. SEIU's Petition to Revoke

SEIU timely filed and served its petition to revoke on April 18, 2013. It contended that the subpoena was an impermissible attempt to obtain discovery in Prime's antitrust lawsuit; sought documents unrelated to any matter in question in the proceeding; did not describe with sufficient particularity the evidence it sought; was overly broad and burdensome with respect to the time frame and scope of the requests; and was overly broad and burdensome insofar as it sought information subject to privilege or right of confidentiality arising under § 7 of the Act (SEIU Petition to Revoke).⁸

F. Respondents' Opposition to SEIU's Petition to Revoke

Prime opposed SEIU's petition to revoke. For the first time, it elaborated upon its conflict of interest affirmative defense, which it claims justifies the subpoena to SEIU.⁹ The gravamen of its position is that "SEIU and its affiliates and local unions (including the Charging Parties) have engaged in extensive conduct over the past several years that is openly hostile not only to Respondents' business, but to all hospitals owned and operated by Prime." (Ex. I p. 4).¹⁰ At the same time, Prime contends, SEIU and its local unions actively promoted Kaiser's growth in the healthcare services market to the detriment of Prime and other Kaiser competitors. Such

⁸ Attached hereto as Exhibit "H" is a true and correct copy of SEIU's Petition to Revoke.

⁹ Prime's answer failed to state *any* facts supporting its affirmative defenses and should therefore have been stricken. See *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011) (holding that "ordinary rules of pleading support striking the affirmative defenses here to the extent the Respondent articulated no factual support (or reason to believe it could obtain such factual support) for their application to specific employees."); *Greyhound Lines, Inc.*, 319 NLRB 554 (1995) (striking conflict of interest affirmative defense where respondent's allegations concerning conflict were "too remote and speculative"). In any case, Prime's opposition to SEIU's petition to revoke was Prime's first attempt to articulate a factual basis for its affirmative defenses, and relatedly, its subpoena to SEIU.

¹⁰ Attached hereto as Exhibit "I" is a true and correct copy of Prime's Opposition to SEIU's Petition to Revoke.

conduct, alleges Prime, is a conflict of interest that would privilege its withdrawal of recognition from UHW and 121 RN, and therefore be a defense to the underlying unfair labor practice complaint (*id.* at 12-13).

The alleged conduct falls into several categories or types of activity. First, SEIU and/or UHW allegedly took various actions to criticize Prime's services or lobby the government to take action concerning Prime.¹¹ Second, SEIU and/or UHW allegedly attempted to stop Prime from acquiring new hospitals and/or actively promoted Kaiser's growth in the healthcare services

¹¹ The specific examples provided by Prime are as follows: UHW issued a report in October 2010 describing high septicemia rates at Prime hospitals; UHW issued another report in January 2011 describing malnutrition at Prime's hospitals, but mentioned nothing about Kaiser; SEIU and its allies obtained the assistance of a media organization, California Watch, to publish criticisms of Prime, but not Kaiser; UHW requested California officials to stop issuing hospital licenses to Prime until the completion of investigations into septicemia at Prime hospitals; in November 2010, following Prime's acquisition of Alvarado Hospital in San Diego, SEIU contacted California public health officials, alleged that Prime was violating licensing laws, and demanded that the agency initiate legal action; and UHW and Kaiser designed legislation to impose unspecified sanctions on Prime if Prime did not accept unspecified bargaining demands (Ex. I pp. 4-8).

market.¹² These allegations mirror the bogus allegations raised in its tentatively dismissed antitrust lawsuit against SEIU, UHW and Kaiser.

G. ALJ's Ruling on SEIU's Petition To Revoke

The ALJ granted certain aspects of SEIU's petition to revoke, but concluded that some of Prime's requests were relevant to its conflict of interest defense:

Having duly considered the matter, contrary to SEIU, I find that revocation of the Respondents entire subpoena is not warranted on the ground that it seeks information relevant to Prime's antitrust suit against it and Kaiser. In agreement with Respondents, I find that at least some of the requests are also relevant to Respondents' "conflict of interest" defense in this proceeding, for which Respondents have articulated a factual basis, and which is at least arguable under extant Board law.

(ALJ Order, dated April 29, 2013 p. 5) (footnote omitted).¹³ The ALJ cited the following cases as examples of existing Board law concerning the conflict of interest defense: *Catalytic Industrial Maintenance Co.*, 209 NLRB 641 (1974); *Visiting Nurses Ass'n, Inc.*, 254 NLRB 49 (1981); *Pony Express Courier Corp.*, 297 NLRB 171 (1989); *Sahara Datsun, Inc.*, 278 NLRB

¹² The specific examples provided by Prime are as follows: a UHW representative gave a presentation in May 2010 in which she described UHW's campaign to block Prime from acquiring new hospitals; SEIU advocated for the passage of state legislation designed to restrict Prime from acquiring new hospitals; in September 2011, SEIU worked to prevent Prime from acquiring Victor Valley Community Hospital; in early 2013, SEIU obtained the assistance of an employee represented by UHW to testify at a public hearing in opposition to Prime's acquisition of two hospitals in Kansas; and UHW obtained signatures necessary for two unspecified ballot initiatives that, according to Prime, "targeted Kaiser's competitors" (Ex. H pp. 4-8). Additionally, Prime notes SEIU's alleged "strategic partnership with Kaiser" which it claims "invests them with an interest in the success of Kaiser to the detriment of Kaiser's competitors." (*id.* at 8).

¹³ Attached hereto as Exhibit "J" is a true and correct copy of the April 29, 2013 ALJ Order.

1044 (1986), and *Garrison Nursing Home*, 293 NLRB 122 (1989). As we discuss later, these cases are clearly distinguishable from the present case.

To support the conflict of interest defense, the ALJ allowed Prime to subpoena from SEIU the following categories of documents:

- all documents since January 2010 concerning agreements between SEIU and Kaiser, excluding local agreements (Request No. 6);
- all documents since January 2010 showing the ownership by SEIU, UHW and/or 121 RN of any shares of Kaiser, Kaiser Federal Bank, or Kaiser Federal Financial Group, Inc. (Request No. 7);
- records of payment since January 2010 from Kaiser or the Labor Management Partnership to SEIU or the Coalition of Kaiser Unions (Request Nos. 8-10);
- documents since January 2010 concerning the relationship of Kaiser and SEIU to the Labor Management Partnership, as well as the goals of the Labor Management Partnership (Request No. 11); and
- documents since January 2010 concerning SEIU's involvement in the purchase, sale, ownership, reorganization, or renaming of Prime hospitals (Request No. 13).

(Ex. I pp. 6-8).

H. Request for Special Permission to Appeal

On May 20, 2013, SEIU filed a Request for Special Permission to Appeal the ALJ's ruling, pursuant to Section 102.26 of the NLRB Rules and Regulations. On June 28, 2013, an NLRB Board Panel made up of Chairman Pearce and Members Griffin and Block issued an order denying SEIU's request for special permission to appeal.¹⁴

¹⁴ Attached hereto as Exhibit "K" is a true and correct copy of the June 28, 2013 Board Order.

I. SEIU's Response to Subpoena

On August 27, 2013, SEIU responded to Prime's subpoena with documents responsive to all but one of the categories of requests that were upheld by the ALJ.¹⁵ As specified in SEIU's Response and Objections, with respect to request Nos. 7, 8, 9, 10, which generally seek documents concerning any financial relationship between SEIU and Kaiser, Kaiser Federal Bank, or Kaiser Federal Financial Group, Inc., without waiving its objections, *SEIU stated that it had no responsive documents.*

With respect to request Nos. 6 and 11, which sought documents concerning agreements between SEIU and Kaiser and various documents regarding the Kaiser-Coalition of Kaiser Unions Labor Management Partnership, although SEIU is not a party to any such agreements or a member of the Coalition, in an abundance of caution SEIU provided all publicly accessible agreements and documents responsive to the requests.

With respect to request number 13, by separate letter SEIU offered to enter a factual stipulation pertaining to the information sought in order to obviate further litigation over the request.¹⁶ No such stipulation has been reached.

III. ARGUMENT

A. Just as Before, the Requested Information Is Not Relevant To Prime's Conflict of Interest Defense

¹⁵ Attached hereto as Exhibit "L" is a true and correct copy of SEIU's Response and Objections to Subpoena Duces Tecum, dated August 27, 2013.

¹⁶ Attached hereto as Exhibit "M" is a true and correct copy of the August 27, 2013 letter from SEIU's counsel to Prime's counsel.

"Lack of relevance is a valid ground for quashing subpoenas or granting petitions to revoke." *Rainbow Coaches*, 280 NLRB 166, 173 (1986); NLRB Rule 102.31(b) (stating that the ALJ or Board "shall revoke the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation . . .").

For the reasons that follow, the ALJ erred in permitting Prime to subpoena the requested information since Prime has failed to establish any factual basis for its alleged conflict of interest defense, and in particular those going to subpoena request number 13. *See NLRB v. Pinkerton's, Inc.*, 621 F.2d 1322 (6th Cir. 1980) (holding that ALJ properly quashed subpoena where employer failed to establish any factual basis for asserting conflict of interest defense).

1. The Conflict of Interest Defense Is a Narrow One, Limited To Two Unique Circumstances

The Board has emphasized the exceedingly narrow reach of the conflict of interest doctrine and instructed that "[i]n order to find that a union has a disabling conflict of interest the Board requires a showing of a 'clear and present' danger interfering with the bargaining process." *CMT, Inc.*, 333 NLRB 1307 (2001); *see also NLRB v. David Buttrick Co.*, 399 F.2d 505, 507 (1st Cir. 1968) ("There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present."). Even assuming the truth of Prime's allegations, they do not remotely support the conclusion there is a "clear and present danger" that UHW and/or 121 RN has a conflict of interest that disqualifies the unions from representing Prime employees, or justify its extraordinary third-party subpoena to SEIU.

The first narrow circumstance in which the doctrine applies arose in *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954), where the Board held that the employer did not violate

Section 8(a)(5) of the Act by refusing to deal with a union that "established a business enterprise in the same locality and industry as that of the employer, and ha[d] thus become one of its direct competitors." *Id.* at 1555-56. The Board noted that the case was "fraught with potential dangers," since the union would have an inherent conflict between its duty to fairly represent Bausch & Lomb employees and its simultaneous control of a direct competitor of Bausch & Lomb. *See id.* at 1559-60. The Board found that "the Union might be sorely tempted in negotiations to make intemperate demands upon the Respondent with respect to wages, hours, and working conditions of the Respondent's employees, under the guise of performing its function as bargaining agent, which would redound to the benefit of its company at the Respondent's expense." *Id.* at 1560.¹⁷

In *CMT, Inc.*, the Board acknowledged that *Bausch & Lomb* applied to only the "unique" circumstance where "a union is in direct *business* competition with the employer whose employees it represents." *CMT, Inc.*, 333 NLRB at 1308 (emphasis in original). The Board described that situation as a "far cry" from a conflict alleged "to arise because the union *represents* employees of different companies who have a business relationship with each other."

¹⁷ The *Bausch & Lomb* conflict has since arisen in other cases cited by Prime or the ALJ. Each of the cases, however, addresses a union's or a union agent's *ownership of a competitor*, not a mere cooperative relationship with a competitor, as is the central allegation here. *See Pony Express Courier Corp.*, 297 NLRB 171 (1989) (finding conflict of interest where founder and business agent of union owned consulting company with close business relationships to customers and competitors of employer); *Visiting Nurses Ass'n, Inc.*, 254 NLRB 49 (1981) (holding that conflict of interest existed where union created and controlled nurse registry in business competition with employer); *Harlem Rivers Consumer Cooperative, Inc.*, 191 NLRB 314 (1971) (holding that union seeking to represent employees of a grocery store had conflict of interest where business agent had financial interest in an enterprise dealing goods to the employer); *see also R & M Kaufman v. NLRB*, 471 F.2d 301 (7th Cir. 1973) (finding conflict of interest based on union's representation of independent contractors that competed directly with employer).

Id. (emphasis in original). As the Board pointed out, unions routinely represent employees of direct competitors, as is the case here:

Unions typically represent not only employees of companies doing business with each other, but also employees of direct competitors in the same industry. *Surely, this situation does not present such an "innate danger" to the bargaining process that the Board could justify limiting employees' statutory right of free choice.* To hold that an employer can refuse to deal with a union simply because that union also represents employees of a company doing business with the employer would improperly extend the conflict-of-interest doctrine far beyond its purpose.

Id. (emphasis added).

The second context in which the Board applies the doctrine first arose in *Catalytic Industrial Maintenance Co.*, 209 NLRB 641 (1974). There, the union represented a bargaining unit of maintenance employees of Catalytic, and another bargaining unit of maintenance employees of Oxochem, which contracted with Catalytic for maintenance work at its facilities. *Id.* at 642. The Board granted Catalytic's request to revoke the union's certification following the union's bargaining proposal to Oxochem to eliminate the subcontracting of maintenance work and to transfer Catalytic's bargaining unit employees to Oxochem. *Id.* at 646. Thus, the Board found not only that the union sought elimination of the subcontract, but "the dissolution" of the Catalytic bargaining unit. *Id.*¹⁸

The Board has emphasized the narrow scope of *Catalytic* as well. In *CMT, Inc.*, the

¹⁸ The only case relying primarily on *Catalytic* is *Valley West Welding Co., Inc.*, 265 NLRB 1597 (1982). There, the union simultaneously represented separate bargaining units of production workers of Valley West and Consolidated Aluminum. *Id.* at 1603. Consolidated Aluminum subcontracted certain production work to Valley West, which was performed by employees represented by the union. *Id.* The Board allowed Valley West to withdraw recognition from the union after the union obtained Consolidated Aluminum's agreement to limit the subcontracting. *Id.* at 1598. Indeed, as the ALJ found, the result of the agreement was the loss of nearly all of the jobs in the Valley West bargaining unit, described as "[t]he natural and probable effect" of the union's conduct. *Id.* at 1604.

Board noted that in both *Catalytic* and *Valley West Welding Co., Inc.*, 265 NLRB 1597 (1982), the only case mirroring *Catalytic*, the union engaged in specific conduct directly causing a significant loss of work to a bargaining unit it represented, if not the complete dissolution of it. *CMT, Inc.*, 333 NLRB at 1308. That element, present in each case, was the defining element of the conflict of interest. *See id.*

As described the following section, nothing alleged by Prime or cited by the ALJ in support of his order denying SEIU's petition to revoke comes close to meeting the narrow scope of these cases.

2. SEIU's Subpoena Response Establishes the Absence of a Conflict Of Interest Under *Bausch & Lomb*

SEIU's August 27, 2013 subpoena response conclusively establishes that it has no financial stake in Kaiser or any related entity. Nor does anything that Prime alleges in support of its subpoena suggest otherwise. Thus, SEIU's subpoena response makes abundantly clear that *Bausch & Lomb* has no application here whatsoever.

Nor is Prime's subpoena bolstered by its insistent focus on the "Labor Management Partnership" between Kaiser and the Coalition of Kaiser Unions, alleged to be a "strategic partnership" to promote Kaiser's growth. Neither *Bausch & Lomb* nor any case relying on it has ever held that a union has a disabling conflict of interest warranting the extreme remedy of withdrawal of recognition simply because the union actively supports the growth of an employer with whom it bargains. Needless to say, if that were true few unions would be conflict-free. *See CMT, Inc.*, 333 NLRB at 1308 ("Unions typically represent not only employees of companies doing business with each other, but also employees of direct competitors in the same industry.").

In fact, Congress explicitly endorsed labor-management partnerships such as that

between Kaiser and the Coalition of Kaiser Unions, by enacting the Labor-Management Cooperation Act of 1978, 29 U.S.C. §§ 173(e), 175a, & 186(c)(9) ("LMCA"). The LMCA allows joint labor-management committees to form for the purpose of "improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern." 29 U.S.C. § 175a(a)(1)(B). Thus, far from evidencing a conflict of interest, the Labor Management Partnership is entirely consistent with and furthers the purposes of federal labor law. Nothing Prime alleges is to the contrary.

Moreover, such a partnership does not create a disabling conflict of interest simply because a union chooses to partner with one employer but not with another direct competitor of that employer. No case cited by either Prime or the ALJ comes anywhere close to warranting that spurious conclusion. Just as a union must bargain with each employer based on the particular circumstances of the relevant bargaining unit, it must decide whether to enter a labor-management partnership with an employer based on the unique circumstances of each bargaining relationship.

In short, *Bausch & Lomb* and its progeny provide absolutely no support for Prime's continued pursuit of its subpoena to SEIU.

3. Prime Has Failed to Allege With Sufficient Particularity Anything Supporting An Alleged Conflict Of Interest Under *Catalytic*

Similarly, the *Catalytic* line of cases fail to support Prime's subpoena, and in particular, request number 13, which seeks documents related to SEIU's involvement in Prime's acquisition of new hospitals. Prime does not allege any facts that establish, or tend to establish, that SEIU, UHW or 121 RN has done anything to harm *the represented bargaining units at Encino Hospital or Garden Grove Hospital*, let alone cause their complete dissolution. That critical omission distinguishes *Catalytic* from the present case and is fatal to the theory underlying Prime's continued pursuit of documents related to SEIU's involvement in Prime's acquisition of hospitals *where no SEIU members are employed*. See *CMT, Inc.*, 333 NLRB at 1308.

The ALJ credited Prime's description of various alleged "overt acts" in support of his order allowing Prime to obtain evidence in support of its conflict of interest defense (Ex. J p. 4).¹⁹ Yet none of that alleged conduct establishes a factual basis for the conclusion that SEIU, UHW or 121 RN sought to dissolve, or even jeopardize, the Encino Hospital or Garden Grove bargaining units. To be sure, Prime alleges that SEIU and/or its affiliates have criticized Prime's business practices and have facilitated legal, political and/or regulatory pressure on Prime, particularly concerning Prime's attempts to acquire new hospital facilities in California and

¹⁹ In addition to the cases cited and discussed in this brief, both the ALJ and Prime cite *Sahara Datsun, Inc.*, 278 NLRB 1044 (1986), in support of the conflict of interest defense, *even though that case did not address that defense at all*. Rather, the case concerned whether the employer could refuse to bargain with a single agent of the union following various activity deemed to be disloyal under *NLRB v. Elec. Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). See *Sahara Datsun, Inc.*, 278 NLRB at 1045-47 (concluding that union representative's remarks resulted in employer's lawful refusal to meet with representative). That case provides absolutely no support for Prime's conflict of interest defense, which privileges *withdrawal of recognition* from a union, not simply a refusal to bargain with a particular representative of the union.

elsewhere (*see id.*). Prime complains that such alleged activity exemplifies the unions "working against [Prime's] business interest," (Ex. I p.8), and with request number 13 Prime seeks evidence from SEIU concerning all such activity (Ex. G, Request No. 13 (documents "concerning [SEIU's] involvement, whether at the federal, state or local level, in the purchase, sale, ownership, reorganization, or renaming of hospitals by Prime")).

These allegations are a plainly insufficient basis for Prime's invocation of the conflict of interest defense and pursuit of the accompanying subpoena. The duty of fair representation, in which the conflict of interest defense is rooted,²⁰ includes no duty to fairly represent *an employer*. Hence, SEIU's and its affiliates' alleged adversarial relationship with Prime does not in any way interfere with UHW's and 121 RN's fair representation of employees at Garden Grove Hospital and Encino Hospital. If anything, SEIU's and its affiliates' alleged criticism of Prime's business practices reflects a run-of-the-mill adversarial relationship between a union and an employer. *See Universal Fuels, Inc.*, 270 NLRB 538, 540 (1984) (rejecting conflict of interest defense and noting that "the basic frame of reference is not an economic vacuum in which the collective-bargaining representative of employees . . . and the employer . . . bear a bland and tensionless relationship to each other. On the contrary, their interests are to a large extent adversarial.").

More to the point, the conduct alleged by Prime is fundamentally different from a union's direct attempts to *dissolve its own existing bargaining unit*, the sole basis for the Board's

²⁰ *Bausch & Lomb* relied expressly on *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in explaining that a union could not simultaneously represent employees of Bausch & Lomb and own a direct competitor of Bausch & Lomb. *Bausch & Lomb Optical Co.*, 108 NLRB at 1559 n.20.

decisions in *Catalytic* and *Valley West*. See *CMT, Inc.*, 333 NLRB at 1308; *Catalytic Indus. Maint. Co.*, 209 NLRB at 646; *Valley West Welding Co.*, 265 NLRB at 1604. Prime does not allege, nor can it, that any represented employees at Encino Hospital and Garden Grove Hospital face imminent loss of work as a "natural and probable effect" of SEIU's or its affiliates' criticisms of Prime's business practices.²¹ See *id.* ("The natural and probable effect of [the union's agreement] was for Respondent, and therefore its employees, to lose work."); *Greyhound Lines, Inc.*, 319 NLRB at 557 (striking conflict of interest defense where union's allegedly disqualifying conflict – advocating for the hostile takeover of the employer by an employee stock option plan – was "remote and speculative.").

Prime's allegations regarding SEIU's and its affiliates' alleged involvement in Prime's attempts to acquire new facilities in California and in other states fare no better. First, Prime does not allege that UHW and/or 121 RN represent employees at the new hospital facilities Prime was attempting to, or did, acquire (Ex. I p.6 (admitting that "Charging Parties did not represent the employees [at the new facilities] and was not engaged in organizing the employees.")). Thus, there was no natural and probable effect on the jobs of UHW- or 121 RN-represented employees as a result of SEIU's and its affiliates' alleged involvement in those acquisitions. See *Valley West Welding Co.*, 265 NLRB at 1604; *Greyhound Lines, Inc.*, 319

²¹ To the contrary, Prime describes itself in its antitrust lawsuit as a successful hospital system that, far from being on the brink of eliminating jobs at Encino Hospital, Garden Grove Hospital or anywhere else, is a successful competitor in the healthcare industry (see, e.g., Ex. C ¶ 1 (alleging that Prime "threatens the dominance" of the healthcare model on which Kaiser is based); ¶ 4 ("Prime presents a competitive alternative to consumers that threatens Kaiser Permanente's supra-competitive profits . . ."); ¶ 246 ("The quality and quantity of services" offered by Prime "creates a competitive problem for Kaiser Permanente."); ¶ 248 ("Because Prime's independent model threatens Kaiser Permanente's profitability . . ."); ¶ 257 (describing Prime "competitive advantage"))).

NLRB at 557.

Second, the Board has held that a conflict of interest is not created where a union actively opposes an employer's expansion within an existing market. *See Universal Fuels*, 270 NLRB at 539-41 (holding that union's opposition to contracting out government services did not create a conflict of interest where it simultaneously represented employees of government contractor); *accord Mass. Soc'y For The Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41 (1st Cir. 2002) (rejecting conflict of interest defense where union representing employees of state contractor opposed privatization of state services, sponsored legislation limiting power of private contractors, and made bargaining proposal to limit use of private contractors). Thus, even assuming the truth of Prime's allegations, SEIU, UHW and/or 121 RN do not suffer from a conflict of interest by opposing Prime's expansion beyond its existing hospitals, including Encino Hospital and Garden Grove Hospital. *See Universal Fuels*, 270 NLRB at 539-41; *Mass. Soc'y For The Prevention of Cruelty to Children*, 297 F.3d at 48-51.

Try as it may, Prime cannot establish any basis for a conflict of interest under *Catalytic* or its progeny, and no documents sought by subpoena request number 13 would provide such a basis. It should therefore be barred from engaging in a transparent fishing expedition under the guise of an implausible defense. *See Burns Security Svcs.*, 278 NLRB 565, 566 (1986); *Pinkerton's Inc.*, 621 F.2d at 1326.

B. The Requested Information Is Not Relevant To Any Conflict of Interest With SEIU, a Separate Legal Entity from the Local Unions Against Whom Prime Has Asserted the Conflict of Interest Defense

In addition to the lack of any cognizable basis in extant Board law for Prime's conflict of

interest theory, it is even clearer that any such a defense cannot be asserted against *SEIU*, a separate international labor organization with whom Prime does not have a collective bargaining relationship. Prime's defense, that the local unions that filed the underlying unfair labor practice charges (UHW and 121 RN) have a conflict of interest with Prime, as a matter of logic does not implicate *SEIU*, a distinct labor organization with no direct bargaining relationship with Prime. For this separate reason, the subpoena against *SEIU* should be revoked.

International unions and their local union affiliates are distinct legal entities. *Carbon Fuel v. Mine Workers*, 444 U.S. 212, 217-218 (1979). As such international unions and their officers are not liable, as a matter of law, for the actions of local unions unless there exists a common law agency relationship between the international union and its local union affiliate. *Laughon v. Int'l Alliance of Theatrical & Stage Employees*, 248 F.3d 931, 935 (9th Cir. 2001) (citing *Carbon Fuel*, 444 U.S. at 216).

Just as the law recognizes that international unions are distinct from affiliated locals for the purpose of liability, Prime's broad-brush conflict of interest theory cannot be extended to incorporate *SEIU* absent allegations that the local unions' purported conflict of interest was effected pursuant to *SEIU*'s control in the course of a principle-agent relationship. Because Prime has failed to make any such allegations here, this is yet another reason that request number 13 is not calculated to uncover facts supporting a viable conflict of interest defense.

C. Allowing Discovery into Strategic Organizing Tactics under the Guise of a Potential Conflict of Interest Is at Odds with the Policies of the Act

The Board has made very clear that extending the conflict of interest defense beyond the narrow set of circumstances to which it properly applies would wreak havoc with the

fundamental policies of the Act, which presuppose some "conflict" between union and employer.

In *Universal Fuels*, an aircraft fuel transport company with a U.S. Navy contract sought to justify its refusal to bargain with a newly-certified union on a conflict-of-interest theory because the union represented government-employed aircraft refueling employees and opposed contracting out government services. 270 NLRB at 539-41. Recognizing that "the basic frame of reference [of the Act] is not an economic vacuum in which the collective-bargaining representative of employees . . . and the employer . . . bear a bland and tensionless relationship to each other [but rather one in which] their interests are to a large extent adversarial," the Board rejected such a sweeping notion of a conflict of interest. *Id.* at 540. The Board further recognized that "to extend [the] closely delimited scope [of the conflict of interest defense] to a case, such as that here, would declare open season for sweeping, postelection, postcertification inquiries at yet more Board hearings (with attendant appeals) at the behest of every employer into the supposed bargaining objectives and tenacity of every union before recognizing or bargaining with it, notwithstanding the Act's command, the Board-conducted election, and the Board's formal certification." *Id.* at 540-41. The Act's command is in equal force here.

The Board's reluctance to allow expansive discovery based on an unfounded conflict-of-interest theory is supported as well by the privilege afforded to internal union communications regarding collective bargaining strategy. As stated in *Berbiglia, Inc.*,

requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure.

233 NLRB 1476, 1489 (1977).²² And, as the Supreme Court has recognized in another context, these strategies may involve vigorously-exercised antagonistic acts. *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960) ("The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.").

If a union's collective bargaining and organizing strategies could be discovered by an employer through the guise of an expansive conflict of interest theory, this balance, and a union's right to set internal strategy, would be severely impaired.

D. The Subpoena is an End Run Around Prime's Futile Anti-Trust Action

Given that the theory supporting Prime's subpoena is not anchored to any existing Board law, Prime's true motives are manifest. Prime attempts an end-run around its unsuccessful antitrust lawsuit against SEIU, UHW and Kaiser. Since it was unable to obtain discovery in that

²² In addition to this privilege for internal union communications, the Supreme Court has explicitly held that an "associational privilege" applies where state action "interferes with the internal organization or affairs of the group." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). *cf. DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 828-29 (1966) (holding that associational privilege applied to disclosure of political associations, meetings attended, and views and ideas expressed at such meetings). Lower courts have also held that associational privilege applies not only to membership information, but also to the association's internal communications and strategic communications. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009) (holding that internal campaign communications were privileged); *Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir. 1989) (noting that the First Amendment would protect political advocacy by an association and its members, and that the right to associate may be infringed by "interfering with the internal workings of the group"); *Wyoming v. USDA*, 208 F.R.D. 449, 454 (D.D.C. 2002) (holding that a non-party association's "internal communications and strategic communications on policy issues with other environmental advocacy groups were subject to associational privilege").

proceeding, it looks to the Board for help. The Board should decline Prime's invitation.

"It is axiomatic that a party cannot take [discovery] for purposes unrelated to the lawsuit at hand." *Echostar Commc'ns Corp. v. The News Corp. Ltd.*, 180 F.R.D. 391, 396 (D. Colo. 1998) (alteration in original) (internal citation omitted). Nevertheless, that is precisely what Prime seeks to do here. The information sought by the subpoena centers around the relationship between SEIU and Kaiser, and in particular the Labor Management Partnership, as well as SEIU's alleged involvement in Prime's attempts to expand its business. One need only skim Prime's first amended complaint, now dismissed, to conclude that the information Prime seeks through its subpoena to SEIU relates directly to the allegations in its unsubstantiated antitrust action against SEIU, UHW and Kaiser (*see* Ex. C ¶¶ 7-8, 42-43, 46, 95-97, 101, 175-87, 264, 272-79, 291-97).

It is no surprise that in nearly identical circumstances courts have closely scrutinized improper requests such as these. *See, e.g., Echostar Commc'ns Corp.*, 180 F.R.D. at 396 (expressing "healthy suspicion" that plaintiff issued subpoena to non-party to investigate potential antitrust lawsuit); *see also Premier Election Solutions, Inc. v. Systest Labs Inc.*, 2009 WL 3075597 (D. Colo. 2009) (denying motion to compel production of documents and expressing suspicion that information was subpoenaed from non-party for purposes unrelated to present litigation). There should be more than a "healthy suspicion" that Prime is putting its subpoena to an improper use; *its motives are transparent*. First, for the reasons described earlier in this brief the conflict of interest defense upon which Prime's subpoena is based is utterly without merit. Second, the documents sought by Prime's subpoena link directly to the allegations of its dismissed antitrust lawsuit. Third, the timing of its subpoena – issued less than

