UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 21

UHS-CORONA, INC. d/b/a CORONA REGIONAL MEDICAL CENTER, Employer, and UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO, Petitioner.	Case No.: 21-RC-094258 PETITIONER'S ANSWERING BRIEF IN OPPOSITION TO THE EMPLOYER'S EXCEPTIONS TO ALJ'S RECOMMENDED DECISION ON EMPLOYER'S OBJECTIONS

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I. INTRODUCTION AND STATEMENT OF THE CASE

Petitioner United Nurses Associations of California/Union of Health Care Professionals ("UNAC" or "Union") ran a fair and informative campaign for an approximately 306-nurse unit at Employer UHS-Corona d/b/a Corona Regional Medical Center ("Employer," "CRMC," or "Hospital"), and UNAC soundly won in the January 3-4, 2013 election conducted by the National Labor Relations Board ("NLRB" or "Board"). After the election, Employer filed 22 election objections, alleging supervisory prounion conduct, improper display of prounion supervisory photographs, union harassment and intimidation, union appeals to ethnic or racial prejudices, union vandalism, Board agent election misconduct, and union election misconduct. A 14-day hearing was held in two sessions of seven days each before Administrative Law Judge ("ALJ") Mary Miller Cracraft between March 25-April 2, 2013 and June 24-July 3, 2013. On November 15, 2013, the ALJ issued a Recommended Decision on Objections ("Decision"), recommending that "Employer's objections to conduct allegedly affecting the outcome of the election be overruled in their entirety and that the election be certified" [Decision at 18:25-26].

On November 29, 2013, Employer filed 75 Exceptions to virtually every line of the ALJ's Decision and a brief in support, claiming that ALJ Cracraft prejudicially erred by: failing to apply the "physician conduct" standard; improperly finding that physicians treating patients at CRMC ("Physicians") are not managers of Employer; improperly finding that Physicians are not supervisors of Employer; failing to determine that Physicians are agents of CRMC or alternatively of UNAC; disregarding allegedly relevant evidence of objectionable prounion conduct; wrongly concluding UNAC did not harass and coerce staff registered nurses ("RNs"); failing to credit allegedly credible evidence that UNAC made appeals to racial sentiment; improperly crediting Union witnesses' testimony about alleged election misconduct; wrongly

declining to draw adverse inferences against the Union for not calling more witnesses; allegedly being prejudiced by Physicians' post-hearing letter brief; and making inconsistent, incorrect credibility determinations.

In support of its 75 exceptions and as it did in its post-hearing brief to the ALJ, Employer elevates quantity over substance by repeatedly citing to its presentation of 42 witnesses and the length of the post-election objections hearing to support the strength of its positions. Employer's fact section misleadingly cites to the record exhibits and transcript references to stand for propositions that are either not supported by—or in multiple occasions are directly contradicted by—the record evidence to which it cites. Even under Employer's fanciful description of the evidence, Employer has not asserted objectionable conduct that materially affected the outcome of the election so as to justify setting aside the decision of the 306 RN unit to democratically elect UNAC as its bargaining representative.

Moreover, the Decision negates the vast majority of Employer's exceptions because ALJ Cracraft expressly considered all of Employer's arguments, accepted its evidence for purposes of analysis, and nonetheless found no effect on the outcome of the election. Although ALJ Cracraft correctly found Physicians are not managers or supervisors of CRMC, the ALJ nonetheless assumed a managerial finding was warranted for purposes of analyzing whether Employer proved any objectionable conduct [Decision at 9:5-6].

Next, although Employer's evidence of objectionable conduct was vague, inconsistent, and strongly rebutted by Physician witnesses and Union witnesses, ALJ Cracraft accepted Employer's evidence "for purposes of [the] analysis" of the alleged prounion objectionable conduct [Decision at 10:5]. Even in doing so, ALJ Cracraft found Employer did not prove the alleged conduct had any tendency to coerce bargaining unit employees or interfere with the

election. Nonetheless, ALJ Cracraft found that even if the alleged Physician statements had "such a tendency to coerce or interfere, the statements attributed to physicians did not affect the outcome of the election" because the testimony was vague regarding how many voting employees heard these alleged statements and how frequently such alleged statements were made" and because "[t]here is no evidence of dissemination" [Decision at 11:5-10]. Alternatively, and as Employer advocated in its post-hearing brief to the ALJ, ALJ Cracraft analyzed the alleged Physician conduct under the heightened third-party standard and reasonably ruled, "it is impossible to conclude that the statements attributed to these five physicians could have substantially influenced the outcome of the vote by impairing employee free choice" [Decision at 12:4-6].

Finally, although Employer did not present a shred of evidence to support that Physicians are agents of UNAC, ALJ Cracraft found that even assuming Physicians had apparent authority to act on behalf of Union, their alleged objectionable conduct "would not interfere with the election even if made by a Union agent" [Decision at 12:26-32]. ALJ Cracraft's recommendations with respect to Employer's other objections alleging Union and Board agent misconduct are similarly well-supported by the record and Board precedent. Because the ALJ's recommendations are soundly rooted in law and the substantial evidence introduced at the hearing, UNAC respectfully submits that the Board should adopt the ALJ's recommendation to overrule all objections in their entirety.

II. STATEMENT OF FACTS

UNAC agrees that the record evidence supports the factual findings made by ALJ Cracraft in the Decision.[1]

Although correcting each instance of Employer's misrepresentation of the record evidence would result in exceeding the 50-page limitation, the following examples of misrepresentation should cast doubt on any Employer statement about record evidence:

- Employer repeatedly claims UNAC called only three employee witnesses when UNAC presented testimony from six CRMC staff RNs [*Compare* ER Brief at 5, 8, 44 *with* Tr. 1565:16-1616:16 (Damaris Nugent); Tr. 1617:2-1649:5 (Evelyn Capacio); Tr. 1649:15-1682:23 (Beatriz Montoya); Tr. 1692:8-1754:15 (Jeannine Wakehouse); Tr. 1754:23-1779:7 (Floann Bautista); Tr. 1779:16-1805:20 (Kathy Conti)];
- Employer represents that "testimony established [Dr. Yvonne D'Sylva's comment to Supervisor Lisa Nagle that she would be fired if she did not vote for the union was] made in front of at least five (5) staff RNs" [ER Brief at 8]. Dr. D'Sylva testified no such conversation took place in the nurses' station and that she "took Lisa Nagle aside in the coffee room" in order to have a private conversation with Supervisor Nagle [Tr. 1136:1-2; Tr. 1150:24-1151:3]. Not a single staff RN testified to any such comment by Dr. D'Sylva; rather, staff RNs Damaris Nugent and Beatriz Montoya, who worked in Dr. D'Sylva's unit, both testified that Dr. D'Sylva never discussed the Union in their presence [Tr. 1595:18-23 (Nugent); Tr. 1672:11-21 (Montoya)].

[1] References to Employer's Brief in Support of Exceptions are as follows: "ER Brief at [page]." Citations to the transcripts are in the following format: "Tr. [page]:[line];" citations to exhibits are as follows: Board exhibit "BX [Exhibit number];" Joint exhibit "JX [Exhibit number];" Petitioner exhibit "PX [Exhibit number];" and Employer exhibit "EX [Exhibit number]." Unless specified, any mention of dates where the year is not indicated refers to 2012.

- Employer states, "Dr. Koning admitted that he told staff RNs, in the presence of multiple other staff RNs, that they should vote for the Union to keep their jobs" [ER Brief at 9]. In fact, Dr. Koning made no such admission and the transcript excerpt to which Employer cites [Tr. 1999:21-2000:9] provides no support for such a gross misstatement of the evidence. Instead, when Employer's counsel asked Dr. Koning if he told Manager Rachelle Cho, in the presence of one staff RN, "something to the effect that employees wanted the Union at the hospital and did they understand that they could all get fired," Dr. Koning responded he did not recall any such statement and that in any case, such a statement did not make any sense [Tr. 2000:15-2001:1].
- Employer contends, "Dr. Koning admitted he has conducted multiple interviews of staff RNs in recent years" [ER Brief at 24]. However, Employer counsel vaguely asked Dr. Koning, "it's my understanding that you participate in interviews of staff or **charge nurses or members of management in the hiring process**," and to this question, Dr. Koning replied, "I would say I've done that twice in the last five years . . . I'm not sure exactly what you mean, interview. [W]e meet some of the new candidates" [Tr. 1945:201946:3]. Employer presented no evidence supporting that Dr. Koning conducted interviews of staff RNs.
- Employer repeatedly claims staff RN Meriam Dumlao testified to objectionable conduct by Dr. Koning when she never once mentioned Dr. Koning in her testimony [*Compare* ER Brief at 11, 12 *with* Tr. 246:7-256:9 (Dumlao)];
- Employer incorrectly asserts, "Dr. Chopra stated he had asked voting RNs about the Union during the critical period" [ER Brief at 11]. Dr. Chopra, however, testified that the

only question he may have asked of an RN was the date of the union election [Tr. 2086:22-25)].

- Employer falsely claims it "gave its Physicians the same instructions that were given to managers and supervisors during the Election" [ER Brief at 28]. Record evidence showed Employer distributed written instructions titled "Voting Procedures for **Management**" in trainings with "all department management staff" within a week prior to the election [PX 29; Tr. 1541:20-1542:12]. Bowers defined "all department management staff" as managers employed as employees by CRMC; **no physicians were at the trainings where the written instructions were distributed and the written instructions were not independently distributed to physicians** [Tr. 1542:10-16; Tr. 2050:11-14].

Facts relevant to the Union's answering brief are discussed in the applicable part of the argument section, but the overall landscape is clear. Despite the Employer's vigorous and widespread antiunion campaign, the RNs overwhelming voted almost a year ago to join UNAC. To effectuate the purposes of the Act and the democratic election process, UNAC respectfully submits the record supports adoption of the ALJ's recommendations forthwith.

III. ARGUMENT

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

Even under the most conservative of the oscillating Board precedent in the areas of law controlling Employer's objections, Employer has failed to show that Union engaged in conduct interfering with employee free choice during the election. As will become obvious from the below discussion of Employer's exceptions and arguments, Employer has not raised any meritorious reasons to support its exceptions. Accordingly, the Union respectfully submits that the ALJ's Decision overruling all objections and recommending certification of the Union should be adopted forthwith in recognition of the RNs' democratic election of UNAC in January 2013 as its bargaining representative.

A. Applying the appropriate standard and distinguishing Employer's citation to inapposite cases, the ALJ properly found Physicians are not managers under the Act because they are not employed by CRMC.

Employer misleadingly asserts that the ALJ "ignored the proper legal standard to review physician conduct in hospitals" purportedly set forth in nine cases "which detail factors which are specific to physicians' role in hospitals" [ER Brief at 29-30]. Six of the nine cases cited by Employer do not even remotely involve physician conduct or "factors which are specific to physicians' role in hospitals." *See Madison Square Garden,* 350 NLRB 117, 121 (2007) (finding unlawful first-line supervisors' solicitation of authorization cards from *entertainment event staff* employees); *Millard Refrigerated Servs.*, 345 NLRB 1143 (2005) (involving election of *production and maintenance* employees); *Veritas Health Servs*., 2010 WL 3285363, *1, *10 (2010) (recommending overruling of all of employer's objections to election where registered nurses voted to join union and no conduct of any kind by physicians was alleged); *NLRB v. Davenport Lutheran Home,* 244 F.3d 660, 662-63 (8th Cir. 2001) (reviewing NLRB's denial of request for a hearing after an election where *registered nurses and licensed practice nurses* voted to join a union); *accord Harborside Healthcare,* 343 NLRB 906 (2004) (lacking any physician

conduct) and *Evergreen Healthcare, Inc.*, 104 F.3d 867 (6th Cir. 1997) (same). Of the three remaining cases Employer cites that relate to physicians, none set forth any unique "physician conduct" standard, and as discussed *infra* in Section III.B, one completely undermines Employer's position (*see Third Coast Emergency Physicians*) and the other two cited cases—*FHP* and *Idaho Falls*—are entirely distinguishable in meaningful ways from the instant case.

Instead, ALJ Cracraft applied the proper legal standard by analyzing whether the physicians who work for Employer are "managerial employees."[2] As the ALJ explained, the "managerial employee" designation has been developed through Board and court decisions dating back to 1943 [Decision at 8:5-10]. The Board and courts when describing and defining the managerial concept presuppose that the individual in question is an employee of the employer. For example, those who qualify for the exclusion are referred to as "managerial *employees*." *See NLRB v. Yeshiva Univ.*, 444 U.S. at 672, 682-83 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288-92 (1974); *Third Coast Emergency Physicians*, 330 NLRB

[2] Record evidence definitively established that Physicians are **not** employed by Employer and instead are organized as an independent California non-profit corporation distinct from Employer [Tr. 1342:17-19, 1343:6-13]. California's corporate practice of medicine doctrine is intended to ensure that physicians are loyal to their patients and not to a corporate employer by insulating physicians from the control of a layperson-managed corporation. *Conrad v. Med. Bd.*, 48 Cal. App. 4th 1038, 1042-43 (1996), *quoting People v. Pac. Health Corp.*, 12 Cal. 2d 156 (1938). California's corporate practice of medicine doctrine reflects its "basic policy against corporate practice of the learned professions" that "is intended to ameliorate 'the evils of divided loyalty and impaired confidence' which are thought to be created when a corporation solicits medical business from the general public and turns it over to a special group of doctors, who are thus under lay control." *Conrad*, 48 Cal. App. 4th at 1042-43, *quoting People v. Pac. Health Corp.*, 12 Cal. 2d 156 (1938). In contrast, as Supreme Court recognized in *Yeshiva*, both the supervisor and managerial employee exemption "grew out of the same concern: That an employer is entitled to the undivided loyalty of its representatives." *Yeshiva*, 444 U.S. at 682. Thus, Board law envisions that supervisors and managerial employees are under the control of, and undividedly loyal to, their employer. California law prohibits the type of loyalty that marks a supervisor or managerial employee under Board law and therefore militates against a finding that doctors, like those here, are supervisors or managerial employees of an employer by whom they are prohibited from being employed.

756, 756 (2000); *Boston Med. Ctr.*, 330 NLRB 152, 165 n.30, 203-204 (1999); *Sutter Cmty. Hosps.*, 227 NLRB 181, 193 (1976). "Managerial *employees* are those who 'formulate and effectuate management policies by expressing and making operative the decisions of *their employer*, and those who have discretion in the performance of their jobs independent of *their employer's* established policy." *Sutter Cmty. Hosps.*, 227 NLRB at 193 (emphasis added); *see also Conn. Humane Soc'y.*, 358 NLRB No. 31, slip op. at 23 (2012); *accord Yeshiva*, 444 U.S. at 682. As ALJ Cracraft noted, the definition makes clear that individuals can only serve as managers of their own employer [Decision at 8:28-33].

ALJ Cracraft aptly concluded: "Employer offers no authority to support a finding that a non-employee may qualify as a 'managerial employee.' Moreover, my review of precedent reveals that the Board has never held a non-employee to constitute a 'managerial employee'" [Decision at 8:27-34]. Specifically, in all cases that have analyzed whether physicians qualified as managers of an employer, the physicians were directly employed by that employer. *See Montefiore Hosp. & Med. Ctr.*, 261 NLRB 569, 569 (1982); *Third Coast*, 330 NLRB at 759; *Idaho Falls Consol. Hosps.*, 257 NLRB 1045, 1045 n.5, 1051, 1053-54 (1981); *Boston Med. Ctr.*, 330 NLRB at 152 (finding that the doctors in issue are "employed by BMC"); *FHP, Inc.*, 274 NLRB 1141, 1141 (1985) (finding that doctors and dentists at issue were "employed by the Employer"); *Jt. Diseases, N. Gen. Hosp.*, 288 NLRB 291, 292 (1988) ("Respondent employs attending physicians," whose alleged managerial status was at issue.); *see also ALJ Decision* in *N. Gen. Hosp.*, Case No. 2-CA-26824, *et al.*, 1996 NLRB LEXIS 313 at *1-2, 8 (May 9, 1996) (considering the *employment* contracts that the hospital provided its physicians); *see also N. Gen. Hosp.*, 314 NLRB 14, 14, 18 (1994) (in the analysis of the election petition at the root of the dispute in the subsequent ALJ decision at 1996 NLRB LEXIS 313 cited *supra*, the Board noted

that the physicians were "employed by the Hospital"). Since the Physicians here are not CRMC employees, they *a fortiori* cannot be CRMC's managers.

Nonetheless, Employer asserts that the "ALJ bases her conclusion on the erroneous reasoning that the Board has never found managerial/supervisory status absent a direct employment relationship" and cites eight cases which purportedly "find physicians to be managers/supervisors with no discussion of the import or necessity of an actual 'employment' Relationship" [ER Brief at 30-31]. Again, of all the cases cited by Employer, only three involve physicians and in all three, the Board made clear the managers or supervisors at issue were employees of the employer and the ALJ properly considered but distinguished those case in the Decision [Decision at 8:36-41 (distinguishing *FHP, Inc.*, 274 NLRB at 1141 (noting that doctors and dentists at issue were "employed by the Employer") and *Idaho Falls Consol. Hosps.*, 257 NLRB at 1045 n.5, 1051, 1053-54 (finding that in addition to being practitioners on the hospital staff, the physicians in issue were directly employed by the employer in issue))]; *see also Third Coast*, 330 NLRB at 759 (referring to physicians as "physician *employees*" and "these *employees*" (emphasis supplied)). Additionally, none of the other five non-physician cases cited by Employer—where the supervisors or managers at issue were also employed by the employer—even remotely suggest managerial or supervisory status can be found where the purported manager or supervisor is not employed by the respondent employer. *See Madison Square Garden*, 350 NLRB at 121, *Veritas*, 2010 WL 3285363 at *11 n.12; *NLRB v. Davenport Lutheran Home*, 244 F.3d at 662-63; *Evergreen Healthcare*, 104 F.3d at 874; *Millard Refrigerated Servs*., 345 NLRB at 1146. Employer's cited cases in no way undermine, but are consistent with, the ALJ's ruling that the Physicians are not managerial employees under the Act.

B. Even if no employment relationship were required under the Act, the record evidence does not support that Physicians who work at CRMC are Employer's supervisors or managers.

Employer misleadingly conflates supervisory and managerial status, and argues that Physicians, despite the lack of an employment relationship with Employer, are "Managers/Supervisors" because of Physicians' participation in the development of patient-care related policies, Physicians' ability to reward and punish staff RNs, Physicians' direction of work to staff RNs through the issuance of patient care orders, Physicians' involvement in business development, marketing, and Hospital expansion, Physicians' training of staff RNs, and Physicians' input in hiring [ER Brief at 31-34]. But, as ALJ Cracraft properly explained in the Decision that Employer did not even argue that Physicians are supervisors under the Act:

> Employer discusses numerous physician indicia of supervisory authority but does not argue specifically that the physicians are supervisors. Specifically, the Employer asserts that physicians responsibly direct nurses, provide feedback about nurses, interview nurses, make requests for specific nurses, and provide nurse training. Except for responsibly directing nurses in providing medical care, I find insufficient evidence to prove the physicians have any other indicia of supervisory authority.

[Decision at 9 n.6]. By failing to argue Physicians possessed supervisory authority in its objections and at the hearing, Employer has waived this argument. Even if it had not waived it, Employer's contentions fail based on ALJ Cracraft's findings that they are not supervisors which are supported by substantial evidence. Physicians uniformly testified that they have no authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline, or responsibly direct any CRMC staff RNs [Tr. 1363:16-1365:6 (Dr. Molinari); Tr. 1872:5-19, 1888:8-1889:11, 1889:22-24 (Dr. Maheshwari); Tr. 2023:3-2025:7 (Dr. Koning); Tr. 2099:11-2101:22 (Dr. Chopra); Tr. 2129:17-2131:15 (Dr. Sujan); Tr. 1092:19-1093:20 (Dr. Roy)]. Those decisions are instead made by CRMC charges nurses, managers, or directors of Employer's nursing departments [Tr. 1568:7-1573:2, 1573:13-18, 1575:5-1578:8 (Nurse Nugent); Tr.

1651:25-1658:11 (Nurse Montoya); Tr. 1695:16-1701:20, 1702:10-1706:22 (Nurse Jeanine Wakehouse); Tr. 1756:20-1761:21 (Nurse Flo Ann Bautista); Tr. 1782:7-1789:15 (Nurse Kathy Conti)].

ALJ Cracraft also properly found that Physicians are not managers and correctly analyzed the two distinct statuses despite Employer's unsupported conflation of them.

1. The ALJ properly found Physicians' involvement in CRMC policies through committee meetings did not support managerial or supervisory status.

Employer excepts to the ALJ's finding that Physicians are not managers because Physicians are required to participate in committees which play a role in the development of patient-care policies at CRMC under Title 22 of the California Code of Regulations [ER Brief at 31]. The ALJ's finding, however, is well supported by Board precedent, recognizing that physicians' managerial status may not be based on decisionmaking that is part of the routine discharge of their professional duties. *Montefiore Hosp.*, 261 NLRB at 570; *Jt. Diseases*, 288 NLRB at 297. Physicians' activities must "fall outside the scope of the duties routinely performed by similarly situated professionals." *See id*.; *see also Boston Med. Ctr.*, 330 NLRB at 203. Duties that are merely incidental to physicians' treatment of patients cannot be the basis for the determination that a physician is a managerial employee. *See Montefiore Hosp.*, 261 NLRB at 570; *Jt. Diseases*, 288 NLRB at 297.

Employer buttresses its exception by highlighting Physicians' participation in committee meetings as evidence of their managerial authority. While Employer's presentation of evidence on this issue was largely muddled at the hearing—frequently failing to distinguish between CRMC meetings and Medical Staff meetings, referring to committees by various different names so it is unclear which committee is which, and describing the functions of the committees in vague and summary fashion—it was nonetheless clear that the Medical Staff committees focus

on patient care matters, and Board precedent is clear that those patient care activities incidental to ensuring quality patient care cannot serve as a basis for finding that Physicians are managerial employees. *See Montefiore Hosp.*, 261 NLRB at 570; *Jt. Diseases*, 288 NLRB at 297.

Moreover, many of the functions Employer highlights as managerial are mandated by state law and thus do not "fall outside the scope of the duties routinely performed by similarly situated professionals," since they are required of all physicians in the state. *Montefiore Hosp.*, 261 NLRB at 570; *Jt. Diseases*, 288 NLRB at 297; *Boston Med. Ctr.*, 330 NLRB at 203; *see also* Tr. 1906:13-24 (Dr. Maheshwari testifying that in all of the seven other for-profit acute-care hospitals in which he works, physicians are engaged same types of functions as in CRMC).

Rejecting a similar argument by an employer asserting its employee physicians were supervisors, the *Third Coast* Board opined physicians ensuring hospital staff comply with federal or state law requirements does not transform physicians into Section 2(11) supervisors:

> Employer argues emergency physicians responsibly direct midlevel providers regarding compliance with hospital protocols, standing orders, and Federal requirements regarding the preparation of patient charts. Notwithstanding these arguments, it is well established that restrictions imposed by government regulations do not constitute actual control or supervision by a putative employer. . . . Such mandated accountability by the State of Texas does not establish emergency physicians are supervisors. Similarly, the fact emergency physicians are responsible for overseeing that Federal requirements are met in patient chart preparation does not establish their supervisory status.

Third Coast, 330 NLRB at 758-59. As in *Third Coast*, Employer's reliance upon state-mandated accountability by the State of California does not establish Physicians who work at CRMC are supervisors or, by reasonable extension, managers.

Finally, Board law is clear that managers must not only formulate or express the policies of their employer, but they must also effectuate or make operative those policies. *Sutter Cmty. Hosps.*, 227 NLRB at 193 ("[m]anagerial employees are those who 'formulate ***and*** effectuate

management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy'") (emphasis supplied); *see also Conn. Humane Soc'y.*, 358 NLRB No. 31, slip op. at 23; *accord Yeshiva*, 444 U.S. at 682. *See also Third Coast,* 330 NLRB at 756, 760 (finding that where physicians participated in the formulation of patient care policies, it was insufficient to show physicians were managerial because they took no direct action to effectuate recommended policies or instructed others to take direct action, and the employer failed to establish the extent to which the recommendations were followed). Here, the evidence indicates that, after a policy is adopted, it is left for CRMC's administrators, and particularly the directors of the nursing departments, *and not the physicians*, to effectuate it by ensuring that nurses and other CRMC employees abide by the policy.[3] Accordingly, the Physicians cannot be said to exercise managerial authority over Employer's employees. Nothing in Employer's cited cases undermines the ALJ's finding.

In assuming, *arguendo,* that physician involvement in policies through committees could convey managerial authority, ALJ Cracraft also considered the second part of the analysis and found, "[t]he record, however, further indicates that physicians do not effectuate these policies. An entire hierarchy of Employer administrators, managers and charge nurses effectuate these policies as far as the registered nurses performance is concerned" [Decision at 9:40-104].

2. The ALJ correctly found Employer offered insufficient evidence to prove that Physicians reward or punish staff RNs.

Employer incorrectly cites to the Board's decision in *Third Coast* for the proposition that "the Board found that a physician's ability to reward and punish nurses demonstrated managerial

[3] *See, e.g.*, Tr. 1269:18-1270:8 (Dr. Molinari); Tr. 1270:16-23 (Dr. Molinari); Tr. 2040:13-21 (Dr. Koning); Tr. 2041:4-18 (Dr. Koning).

authority." Not only did the *Third Coast* Board not address physicians' ability to reward and punish *nurses*—the case addressed supervisory or managerial authority over other *physicians*—but its analysis of physicians' managerial status completely undermines Employer's argument. In *Third Coast*, where petitioner sought to represent all emergency physicians employed by the employer, the Board rejected employer's claim that the physicians were managers even where they had: "provide[d] feedback to medical directors regarding the work performance of mid-level providers and the medical director **use[d] that information to determine how many shifts to give the mid-level provider, what monetary rewards to give these employees, and whether to continue the mid-level provider on a part-time or full-time basis;**" as well as been present during employee hiring interviews, asked questions, and filled out recommendation forms after completion of the interviews; provided input for employee evaluations; formulated a policy where discipline would result for not completing patient charts; recommended changes to night-shift hours; made recommendations concerning meeting times and **pay**; and reviewed and analyzed data concerning the practice and test-ordering patterns of emergency physicians and instructed doctors to reevaluate protocols when pattern differences were found. 330 NLRB at 756-58 (emphasis supplied). The *Third Coast* Board found such participation was insufficient to show physicians were managerial: The physicians' recommendations with regard to hiring, discipline, or evaluations were not "effective" in determining particular action where ultimate decisionmaking authority in these areas was retained by the medical directors, and even if recommendations were followed, there was no evidence the actions were taken without independent investigation by superiors. *Id*. at 756, 760.

Despite reliance on a case that squarely undercuts its argument, Employer nonetheless argues that Physicians exercised the ability to reward or punish staff RNs by effectively

recommending discipline of nurses by completing MIDAS incident reports or providing "feedback" concerning a nurse's performance.[4] However, the evidence was clear that in cases in which someone would act on a MIDAS report or physician complaint concerning a nurse, the nurse's superiors would conduct an independent investigation.[5] This is fatal to Employer's theory because, as noted above, in order for a recommendation to be *effective*, the recommended action must be taken *without independent investigation*; it is not simply that the recommendation is ultimately followed. *Third Coast*, 330 NLRB at 760; *see also DirecTV U.S DirecTV Holdings, LLC*, 357 NLRB No. 149, slip op. at 3 (2011). Employer had the burden to produce this evidence to demonstrate an action was taken without any independent investigation, but the record lacks any direct or even circumstantial evidence that actions were taken without independent investigation.

[4] There was no evidence that physicians have authority to discipline nurses directly. In fact, the evidence showed that physicians do not have authority to discipline nurses at all [*See* Tr. 2023:3-14 (Dr. Koning); Tr. 1298:7-21 (Dr. Molinari); Tr. 1872:16-19, 1888:8-20 (Dr. Maheshwari); Tr. 2129:17-2130:25 (Dr. Sujan); Tr. 1092:22-24 (Dr. Roy)].

[5] *See*, *e.g.* Tr. 811:14-18 (Director of Critical Care Nurses Reita Greene testified that whenever a physician approaches her with a problem, she will conduct her *own investigation* of the alleged problem.); Tr. 804:19-805:4 (Director Greene testified that if she receives a complaint about a nurse from a physician, she follows up with the nurse to find out what happened.); Tr. 925:15-926:4, 945:11-18 (Director of Surgical Services Nurses Jim Napolitano testified that he conducts his own investigation of the situation after receiving a MIDAS report or other complaint about a nurse.); Tr. 596:10-15 (Charge nurse Martha Carr testified that she will conduct an investigation if she gets a MIDAS report about a nurse.); Tr. 324:13-16, 333:6-334:4 (Charge Nurse Patti Fisher testified not to any particular examples, but speculated that if a physician were to make a complaint that a nurse is unsafe, she would investigate it, take it to the manager of the nursing department, and then to the director of the nursing department.); Tr. 1441:12-25 (CNO Norene Bowers testified that nursing management investigates MIDAS reports about nurse conduct); Tr. 359:11-360:5 (Charge Nurse Peggy Werner testified to an instance of "patient anomaly" involving a staff RN that Dr. D'Sylva had discussed with her, and then the staff RN was investigated by Werner's nursing director and manager—not by the physician.); Tr. 630:23-631:10 (Maternal Child Health Nursing Manager Sarah Schrier testified that she followed up on Dr. Koning's concerns by talking to the head of anesthesia about them.); Tr. 1445:2-20 (CNO Bowers testified that she conducted a lengthy investigation in response to complaint from Dr. Sujan that a nurse wasn't accurately recording telephone orders.).

More fundamentally, the evidence did not demonstrate that when Physicians would complete a MIDAS report or complain about a nurse's performance, that they would make any recommendation concerning discipline at all [Tr. 1974:9-1975:2 (Dr. Koning denied he requested that a nurse be "written up.")]. Rather, the evidence indicates that the reports merely served to memorialize an incident rather than advocate for a particular form of discipline.[6] The Board recognizes that "[r]eporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). The record contains numerous examples where Physicians' incident reports of RN misconduct did not lead to discipline or contain disciplinary recommendations, supporting the ALJ's factual finding that Physicians do not punish staff RNs.

Furthermore, the evidence did not show that, in all, if any, cases, the MIDAS reports or "feedback," actually led to discipline.[7] Resulting discipline is a requirement for this indicium of

[6] *See*, *e.g.*, Tr. 1975:14-23 (Dr. Koning testified that MIDAS is "a way to document," and according to the administration, it is not a "negative thing" or "punitive thing."); Tr. 1040:19-2041:19, 1071:20-1072:9, 1074:11-25 (Dr. Roy (same)); Tr. 1873:12-17 (Dr. Maheshwari testified "[t]here may have been some instances where something has gone very significantly wrong and I may have said write it up," "[b]ut I've not directed any nurse to put in any specific complaint against any specific person."); Tr. 584:19-585:19 (Charge Nurse Carr (same)).

[7] *See*, *e.g.*, Tr. 2027:16-2028:5 (Dr. Koning: "I would say the majority of MIDAS' are not responded, nothing much really gets – at least I don't hear about anything."); Tr. 359:23-360:5 (Charge nurse Werner testified that no discipline resulted for nurse whom Dr. D'Sylva had discussed with Werner in connection with "patient anomaly."); Tr. 503:8-10 (Charge Nurse Lisa Nagle testified that Nurse Amy Nassereddin was not disciplined after Dr. Koning complained about her.); *see also* Tr. 1300:22-1301:20 (Dr. Molinari testified that his voiced concerns about nurses went unaddressed.); Tr. 696:9-12, 701:5-8 (Staff RN Jessica Steyers-Lucens testified that no discipline resulted from any of Dr. Koning's complaints about her); Tr. 1959:10-20 (Dr. Koning testified that his submitted MIDAS reports and complaints about Nurse Steyers-Lucens didn't "change anything."); Tr. 1968:22-1970:2 (Dr. Koning testified that he gave up complaining about CRMC staff/nurses on the anesthesia team because his complaints had no effect).

supervisory status. *Id*. ("[r]eporting on incidents of employee misconduct is not supervisory if the reports do not **always** lead to discipline, and do not contain disciplinary recommendations" (emphasis supplied)). In *Franklin Home Health Agency*, the Board found that the nurses in issue did not have authority to discipline because the reports they had submitted about staff aide misconduct did not result in discipline and did not contain any disciplinary recommendations. *Id*. The Board required that "[t]o confer 2(11) status, the exercise of disciplinary authority **must lead** to personnel action, without the independent investigation or review of other management personnel." *Id*. (emphasis supplied).

More generally, the Board has held that "the power to 'point out and correct deficiencies' in the job performance of other employees 'does not establish the authority to discipline.'" *Id*., *quoting Crittenton Hosp.*, 328 NLRB 879 (1999). The type of activity here, then, especially when it was not shown to always lead to discipline, is not evidence of supervisory authority.

Finally, MIDAS reports can be completed, or initiated, by anyone, including staff nurses and patients, so this activity, *a fortiori*, cannot be said to constitute a supervisory duty for Physicians.[8] *See Middletown Hosp.*, 282 NLRB 541, 548 n.3 (1986) (rejecting claim that physicians were supervisors where they had ability to initiate internal incident report to identify abnormal event for risk management because *anybody* could initiate the report and there was no substantial evidence that physicians used or threatened to use such reports as a disciplinary device). Similarly, nursing supervisors will get oral complaints from patients or other staff

[8] Tr. 470:8-10 (Charge Nurse Nagle); Tr. 334:5-17 (Charge Nurse Fisher); Tr. 1439:7-20 (CNO Bowers) (anybody can enter a MIDAS report, even a patient, though usually a patient would make a complaint by phone that the nurse would then enter into MIDAS); Tr. 2026:4-22 (Dr. Koning).

nurses that they investigate just like a complaint they might get from physicians.[9] Accordingly, the ALJ correctly found insufficient evidence of reward or punishment indicia of supervisory authority [Decision at 9 n.6].

3. Physicians do not responsibly direct CRMC staff RNs.

The ALJ's discussion of responsibly directs is somewhat confusing and better word choice likely would have avoided confusion. In footnote 6, the ALJ notes that Employer does not specifically argue that the physicians are supervisors, but the ALJ nevertheless considers the indicia of Section 2(11) supervisory authority, concluding: "Except for responsibly directing nurses in providing medical care, I find insufficient evidence to prove that physicians have any other indicia of supervisory authority" [Decision at 9 n.6]. The next sentence clarifies that the ALJ did not find that Employer proved Physicians are supervisors based on responsible direction because the next sentence explicitly states: "But regardless of this finding, the Employer does not provide any basis for finding the non-employee physicians are supervisors." To reconcile the seemingly inconsistent statements as supported by the record, the Union submits that the ALJ meant to acknowledge that some evidence had been produced relating to the responsible direction indicia (unlike all of the other indicia where Employer failed to produce any evidence), but the evidence was insufficient to support a supervisory status finding. This interpretation is supported by the ALJ's express conclusion that Employer failed to meet its burden of proof that Physicians possess any Section 2(11) supervisory status indicia, and this would necessarily include that staff RNs are responsibly directed by Physicians [Decision at 9:28 ("the physicians are not supervisors.")]. The Union's reading is further buttressed by the absence of any legal

[9] Tr. 642:22-643:2 (Nursing Manager Schrier); Tr. 944:16-945:18 (Nursing Director Napolitano); Tr. 554:10-17 (Charge Nurse Graham).

authority cited in footnote 6 to support that the limited evidence would be legally sufficient to make a responsible direction finding.

Under Board precedent, for direction *as a matter of law* to be *responsible*, the putative supervisor must be subject to adverse consequences if the direction is not properly followed. *Oakwood Healthcare*, 348 NLRB 686, 691-92 (2006). Although Employer argues it elicited testimony which demonstrated Physicians directed staff RNs' work [ER Brief at 32], Employer failed to present—and in fact successfully objected to the presentation of—any evidence that Physicians are subject to any adverse consequences if a nurse fails to properly follow a Physician's direction [Tr. 1141:4-1142:9; Tr. 1364:20-1365:1; Tr. 1890:9-16]. Additionally, "showing other employees the correct way to perform a task does not confer supervisory status." *Franklin Home Health Agency*, 337 NLRB at 831. Thus, Physicians guiding RNs in the performance of patient care in no way renders them responsible directors or correspondingly, statutory supervisors as consistent with the ALJ's Decision.

Without a preponderance of record evidence to prove Physicians will be subject to adverse consequences from CRMC if the direction is not properly followed, the ALJ could not properly find that Physicians responsibly direct Employer's nurses. Moreover, the Decision does not distinguish *Oakwood*. Even if the ALJ had found Physicians responsibly direct nurses, the ultimate recommendation to overrule all objections would have been the same because the ALJ made the subsequent finding that even if Physicians were supervisors, the evidence would not support a finding that their conduct interfered with the election outcome [Decision at 12:26-29].

4. Employer's citation to a catchall "other indicia" of managerial authority is too vague to support a finding of managerial status, particularly where the ALJ expressly credited Physicians' testimony on their involvement in Employer's business affairs over Employer's non-physician managers' testimony about Physicians' involvement.

Employer inaccurately claims "[t]he ALJ ignored evidence of multiple other indicia of managerial authority," specifically the physicians' involvement in business development, marketing, and expansion of the Hospital, relying on *FHP*, 274 NLRB at 1141 and *Idaho Falls*, 257 NLRB at 1054-1055 [ER Brief at 33]. The ALJ considered Employer's proffered evidence of Physician's "other indicia of managerial authority," but simply credited Physicians' testimony about their lack of involvement in Employer's business planning operations over the vague testimony given by Employer's management witnesses. Moreover, Employer's claim is not supported by *FHP*, in which there was no discussion of physicians' role in business development, marketing, and hospital expansion.[10]

Employer's repeated and significant reliance on *Idaho Falls* is also misplaced. In *Idaho Falls*, the Board concluded that two physicians qualified as managerial employees based on their *employment as department directors* even though the ALJ made no express finding that the physicians were managerial. 257 NLRB at 1046. Both physicians had an employment contract with the employer that provided that they were responsible for, among other things: preparing budgets for equipment and personnel needs; providing teaching for nursing staff and physicians;

[10] Despite Employer's repeated citation to it, *FHP* is distinguishable from the instant case. The physicians in *FHP* served on committees vested with authority to take direct action on personnel matters requiring retraining, more intense monitoring, or discipline of physicians, and committee recommendations concerning employee compensation were regularly followed. 274 NLRB at 1143. The Board found that decisions made at the committee level, such as "setting its medicinal prescription policy, reviewing and modifying the benefits and working conditions of its staff, establishing procedures and staff training for medical emergencies, and minimizing the institution's risk of medical malpractice liability," were at the core of its operations and that the full-time physicians, by serving on these committees, effectively formulated and effectuated the policies and therefore qualified as managerial employees. *Id*.

providing overall administration of their respective departments; and accepting the responsibility for the quality of services offered in their respective departments. *Id*. at 1046 & n.8. They were legally liable for the quality of services provided in their departments by both physicians and departmental employees, which included nurses. *Id*. at 1054. Both physicians were also responsible for providing policies and procedures for their departments and augmenting and developing programs that they considered important to their departments. *Id*. at 1054. The Board held that both were managerial employees because, through their job duties, they independently recommended, formulated, and effectuated their employer's management policy, and because, as directors of two of the employer's departments, they were closely aligned with management. *Id* at 1046.

While the Board concluded that the managerial employees committed unfair labor practices that were attributable to the employer when, during a meeting, the physicians encouraged employees to form an independent union and impliedly threatened to close the hospital, the Ninth Circuit refused to enforce this portion of the Board's decision. *Id*. at 1047; *Idaho Falls Consol. Hosps. v. NLRB*, 731 F.2d 1384, 1387 (9th Cir. 1984). Importantly, the Ninth Circuit concluded that *because the physicians made clear during the meeting that they were expressing their personal views*, the employees did not have reasonable cause to believe that the physicians were speaking for management. 731 F.2d at 1387 ("[W]e find no substantial evidence in the record to support the Board's findings that the doctors' statements were made on behalf of the employer. We agree with the ALJ that the evidence 'strongly supports' the conclusion that the physicians were expressing their personal preferences rather than the administration's. The employees did not have reasonable cause to believe otherwise[.]").

The Board's decision in *Idaho Falls* is easily distinguishable from the instant case because there are no physicians here that were selected by Employer to serve as a department director with an express contractual commitment to the Hospital to be responsible for preparing budgets for equipment and personnel needs, teaching nursing staff and physicians, providing overall administration of their department, and accepting responsibility for quality of services provided in their department. *Compare with* 257 NLRB at 1046. By contrast, the physicians in *Idaho Falls* expressly agreed—in employment contracts to be department directors—to assume express responsibility over the nursing staff (*e.g.* teaching the nursing staff) and other non-physician employees of their departments, which is entirely absent here. *Id*.

The *Idaho Falls* physicians were even legally liable for the quality of care that the non-physician employees in their departments, who were the subject of the organizing campaign, provided. *Id*. at 1054. There is no record evidence that Physicians here would be liable for the care provided by the CRMC staff in the departments in which the Physicians treat patients. Additionally, there was no evidence at the hearing that physicians are responsible for training nurses or that they have any responsibility for preparing Employer's budgets [s*ee* Tr. 1100:6-10 (Dr. Roy); Tr. 2101:23-2102:6 (Dr. Chopra); Tr. 2023:21-2033:2 (Dr. Koning); Tr. 2128:21-2129:5 (Dr. Sujan)]. Similarly, the evidence does not support Employer's claim that Physicians are involved in business development, marketing, and Hospital expansion [*See e.g.* Tr. 1091:13-16; 1059:16-22; 1064:9-1065:1 (Dr. Roy denying involvement in Hospital expansion and strategic planning); Tr. 1862:21-1863:2 (Dr. Maheshwari denying same); Tr. 2128:21-2129:5 (Dr. Sujan testified he was not involved in strategic planning for Hospital expansion)].

Accordingly, the ALJ properly found that Employer failed to prove Physicians possess managerial or supervisory status over staff RNs. But all of the above analysis does not need to

be reached or addressed by the Board because of the ALJ's additional findings that even if Physicians "were the non-employee physicians managers or supervisors of the Employer, . . . the evidence would not support a finding of interference with the election [even] [v]iewing the evidence about physician statements in a light most favorable to the Employer" [Decision at 12:26-29].

C. The ALJ properly found that the Physicians are not agents of Employer.

Employer challenges that the ALJ's "decision incorrectly claimed the Hospital never argued the Physicians are agents of Corona" [ER Brief at 35]. Without citing to any specific text in Employer's more than 100 page post-hearing brief or any evidence from the lengthy hearing transcript, Employer nevertheless claims the ALJ ignored the argument set forth in its objections and evidence showing Physicians' apparent authority to act for Employer [*id.*]. It does not cite to its post-hearing brief or the voluminous record because until filing its exceptions, Employer never argued Physicians had "apparent authority" to act for Employer. Instead, as its post-hearing brief shows, Employer focused its agency theory on asserting Physicians were agents of the *Union*. Thus, Employer has waived the argument that Physicians are Employer's agents based on apparent authority.

Even if Employer's broadly asserted objectionable conduct by "managers, supervisors, and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer" could be construed as putting the Union on notice that it believed Physicians were the "*others* with apparent authority" in objections specifying physicians,[11] Employer failed to

[11] UNAC strenuously objects to Employer raising for the first time in its exceptions the theory that Physicians have apparent authority to qualify as Employer's agents. It would violate our due process rights to wait until after the hearing and post-hearing briefing to raise a new argument as

preserve that argument by not presenting any evidence at the multi-week hearing to support them. Thus, the ALJ properly found, "the record contains no evidence that the physicians are . . . agents of the Employer [and] Employer does not argue that the non-employee physicians are its agents" [Decision at 5:20-23, 5:45-46 n.3].

Even if Employer had not waived this argument, the argument clearly fails on its merits. The test for whether an individual possesses apparent authority is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *See, e.g.*, *Facchina Construction Co.*, 343 NLRB 886, 887 (2004). Here, no staff RN could reasonably have believed that Physicians were speaking for management when engaging in the alleged prounion conduct because Employer was conspicuously and vehemently antiunion. It would be unreasonable for a staff RN to presume, in light of the widespread opposition Employer had repeatedly expressed through CEO Kevan Metcalfe and other high-ranking managers, that, when these Physicians engaged in prounion conduct, they were doing so on behalf of the Hospital [*see e.g.* Tr. 1593:3-1594:6 (Staff RN Nugent testified to CEO Metcalfe's antiunion comments at a staff meeting); Tr. 1671:5-15 (Staff RN Montoya testified to CEO Metcalfe's antiunion comments at a staff meeting); Tr. 1771:11-1772:23 (Staff RN Bautista testified about a staff meeting where CEO Metcalfe encouraged RNs to vote against the Union); Tr. 170:11-13 (Staff RN Wuest testified to a meeting where CEO Metcalfe "voiced his opinion to vote no"); Tr. 1551:20-1552:20 (CNO Bowers testified that at six "Town Hall" meetings less than two weeks before the election, CEO Metcalfe and other top officials from the corporate owner, UHS, discussed "the corporation's viewpoint

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the Union is now precluded from introducing countervailing evidence and we lacked notice that it was necessary to do so.

that matches [CRMC's] that staff did not need representation" by a union"); *see also* PX 1-10, 20-23, 29, 32 (CRMC's official antiunion flyers and videos)].

Finally, although Employer cites to CRMC newsletters "which reach the entire community" to demonstrate that "Physicians play a vital role at the Hospital," Employer publicly disclaims any connotation of an agency relationship on these newsletters, each of which provides:

> **Physicians** mentioned in this publication **are independent practitioners** who are **not employees or agents** of Corona Regional Medical Center. The hospital shall not be liable for actions or treatments provided by physicians.

[EX 8-12 (*see* back cover, p.8, of all five newsletters) (emphasis supplied)]. Employer not only distributes these newsletters within CRMC but also, it mails them to 55- to 58,000 members of the community [Tr. 2159:22-2160:24 (CEO Metcalfe); Tr. 762:22-763:3 (CRMC Marketing Director Linda Pearson)]. Staff RNs are also familiar with them [*see e.g.* Tr. 1614:16-1615:13 (Nurse Nugent)].

Employer made a similar admission in at least two advertisements that it placed in the local newspaper, *The Press Enterprise*, which is both a print and online publication [PX 48; PX 49]. One ad ran in the Sunday paper on September 23, 2012 [PX 48; Tr. 1835:9-1836:1]. The online version of the other ad indicates that it ran between November 4, 2012, and November 11, 2012 [PX 49; Tr. 1839:6-1841:11]. Both contain the following message:

> **Physicians are independent practitioners who are not employees or agents** of Corona Regional Medical Center. The hospital shall not be liable for actions or treatments provided by physicians

[PX 48-PX 49 (emphasis supplied)]. Employer subscribes to *The Press Enterprise* and print copies are available in its lobby and in the nursing units [Tr. 2156:14-24; Tr. 1891:15-1892:1; Tr. 1832:21].

Because Employer presented no evidence at the hearing to the contrary—that Physicians are agents of CRMC—and failed to raise the argument in its post-hearing brief, the ALJ properly concluded that there was no support for the theory that Physicians are agents of Employer. And, as the ALJ further noted, "were there evidence of apparent authority, the evidence would not support a finding of interference with the election [even] [v]iewing the evidence about physician statements in a light most favorable to the Employer" [Decision at 12:26-29].

D. The ALJ properly found that the Physicians are not agents of the Union.

Employer takes issue with the ALJ's finding that Physicians are not agents of the Union. The ALJ, however, did not reach a finding on whether Physicians had apparent authority of the Union, determining it was irrelevant:

> Although the record clearly reflects that the Union did not ask physicians to engage in pro-Union activity, the Employer argues alternatively that the physicians are apparent agents of the Union . . . .Whether physician pro-Union conduct was undertaken with or without the apparent authority of the Union is totally irrelevant because the only physician pro-Union conduct litigated was speaking in favor of unionization or interrogating employees about how they would vote. No electioneering, misrepresentation, promise of benefit, waiver of initiation fees, or videotaping by physicians has been alleged [Decision at 12:12-25].

Employer seizes on the last sentence and, while failing to identify any specific witnesses, asserts, "This is completely incorrect and ignores credible testimony from multiple witnesses" [ER Brief at 37]. Employer cannot prevail on an exception where it fails to support its argument without providing any specific record citations, and the Union submits that is particularly true where, as here, such record evidence does not exist.

Employer goes on to claim that the Union's circulation of Dr. Chopra's photograph constitutes "electioneering" [ER Brief at 37]. Circulation of Dr. Chopra's photograph is not *unlawful* electioneering because Board precedent allows Employer's supervisors and managers

to send and/or display to voting unit employees pictures of certain managers, supervisors, or other Employer agents "wearing or carrying prounion slogans, insignia or stickers" during the critical period without interfering with the election. *See, e.g.*, *Harborside*, 343 NLRB at 908-11 (finding that a prounion supervisor who "wore a prounion pin" did not reasonably tend to coerce or interfere with employees' free choice). Using a photograph of an alleged supervisor wearing union insignia is similar to supervisory prounion speech, which, is permissible, and therefore cannot be objectionable. The *Harborside* Board ruled "permissible expressions of opinion about the union" are not objectionable because supervisory prounion speech, without more, is not objectionable. 343 NLRB at 911. While the Board found problematic a supervisor "repeatedly pressur[ing] at least one employee to wear a union pin," it emphasized the repeated pressuring occurred in the overall context of continuous active harassment as opposed to the passive conduct of posting prounion signs and wearing a prounion pin, which were not found to tend to interfere or coerce employees. *Id*. at 908-11.

Regardless of the ALJ's apt finding that Physicians were not Union agents, the ALJ negated Employer's exception by nonetheless analyzing, *arguendo*, that Physicians were Union agents: "were there evidence of apparent authority, the evidence would not support a finding of interference with the election. Viewing the evidence about physician statements in a light most favorable to the Employer, the physician questions about how employees felt about the Union, how employees were going to vote and statements that the employees needed someone to represent them and maybe they would get a pay raise if the Union were elected would not interfere with the election even if made by a Union agent [Decision at 12:25-35 (citing *J.C. Penney Food Dep't*, 195 NLRB 921, 921 n.4 (1972) and *Am. Beef Packers*, 180 NLRB 634, 635 (1970)].

E. Although unnecessary because Physicians are so clearly not CRMC managers, the ALJ thoroughly considered the objections as if Physicians were managers and concluded that Physicians' conduct did not interfere with employee free choice.

The ALJ correctly found that Physicians who work at CRMC are not managerial employees, supervisors, or agents, but even if the Board disagreed, the ALJ's recommendations should still be adopted because the ALJ went on to analyze the allegedly objectionable conduct assuming, for purposes of analyzing alleged objectionable conduct only, that the Physicians were managers. In doing so, the ALJ found that even "[a]ccording to the Employer's evidence, which I will accept for purposes of this analysis," no interference with employee free choice was proven [Decision at 9:5-6, 10:5-9].

The ALJ properly analyzed alleged non-employee Physician conduct under the standard set forth in *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001), outlining nine factors to evaluate whether the conduct has a "tendency to interfere with the employees' freedom of choice." [Decision at 7:18-31]. Employer excepts to the ALJ's analysis of two factors: (1) severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; and (2) the extent of dissemination of the misconduct among the bargaining unit employees.

1. The ALJ properly analyzed conflicting evidence of the five incidents Employer claims are severe.

Employer argues the ALJ "ignored or disregarded several of the most severe incidents of [o]bjectionable conduct" related to threats of job loss or discharge [ER Brief at 38]. In support of its theory, Employer cites *Lowndes County Health Services*, 325 NLRB 250, 251 (1997) and *Waste Management, Inc.*, 330 NLRB 634 (2000), which both opine, "a threat of discharge is highly coercive and one of the most serious forms of employer misconduct" [*id.*]. Although

Employer claims, "[t]he ALJ did not consider any of these authorities in disregarding the evidence even though they were cited for that proposition in Corona's Brief" [*id.*], the cases are distinguishable because in both, a statutory supervisor—with authority to discharge—directly threatened discharge of a specific prounion employee. *Lowndes*, 325 NLRB at 250-51; *Waste Management*, 330 NLRB at 634.

Here, not only were there no threats of discharge—an action which Physicians do not have the power to effectuate—but no threats were made against any specific bargaining unit employee and in most cases, the isolated statements were not even directed at bargaining unit employees. Instead, Employer cites five alleged statements by Physicians vaguely relating to job loss over which Employer presented conflicting and vague testimony.

a. Contrary to Employer's contention, alleged statements by Dr. D'Sylva were directly considered by the ALJ.

The first two statements which Employer incorrectly claims were ignored by the ALJ are those it attributes to Dr. Yvonne D'Sylva [ER Brief at 8, 38]. Notably, no staff RNs testified about any objectionable conduct by Dr. D'Sylva; rather, staff RNs Nugent and Montoya both testified that Dr. D'Sylva never discussed the Union in their presence [Tr. 1595:18-23 (Mai Nugent); Tr. 1672:11-21 (Beatriz Montoya)]. Instead, Supervisor Peggy Werner accused Dr. D'Sylva of saying "if the Union went through that the hospital had a chance of closing and then we would lose our jobs" [Tr. 346:5-22]. This comment was directed at a supervisor and possibly one Staff RN Robyn Gerome, who was not called by Employer to corroborate [Tr. 346:24-347:1]. Moreover, the statement links firings to the Union winning the election, thus it could hardly be viewed as a threat or intimidation to vote **for** the Union.

Evidence of the second statement also came from Employer's supervisor: Charge Nurse Lisa Nagle testified that Dr. D'Sylva, who is "very anti-Union," warned her that she would be

fired if she did not vote for the Union because the Union was coming [Tr. 493:14-495:13]. Although Nagle claimed that other staff RNs were present, her response when questioned about the RNs' identity was quite troubling. Nagle stated: "[A]m I allowed to say when they interviewed me, I knew who they were, but I can't remember today?" [Tr. 494:8-11]. Because of this new memory lapse, the Union was prevented from calling other witnesses to contradict Nagle's account even where Employer knew their identities from its earlier interviews. In any event, Dr. D'Sylva did not corroborate Nagle's testimony, stating no such conversation took place in the nurses' station—rather, Dr. D'Sylva "took Lisa Nagle aside in the coffee room," which is also referred to as "the kitchen" in order to have a private conversation with Nagle [Tr. 1136:1-2; Tr. 1150:24-1151:3]. Dr. D'Sylva made clear that the Union was a "hot topic" of discussion between November 8, 2012 and January 4, 2013 because "everybody was talking about it" [Tr. 1148:20-24]. She did not initiate conversations about the Union with nurses, but rather joined in on conversations where nurses openly volunteered their views and opinions about the Union and they asked Dr. D'Sylva for hers [Tr. 1148:25-1149:2, 1150:8-12]. In this context, Dr. D'Sylva reciprocated by asking nurses how they felt about the Union and expressed her feelings too [Tr. 1137:25-1138:1]. For example, Dr. D'Sylva expressed her personal opinion to nurses that spending money on union dues would be a waste [Tr. 1150:20-23].

Accordingly, rather than ignoring or failing to credit evidence of Dr. D'Sylva's statements as Employer asserts, the ALJ properly considered Employer's evidence and addressed these statements in her Decision: "Employer also presented the testimony of a physician who admitted stating that the hospital might close if the Union won the election and, somewhat inconsistently, that nurses should vote for the Union or they might lose their jobs. These statements were made to charge nurses in the presence of staff nurses. Such statements can only

be added to the general mix of conversations occurring during the critical period" [Decision at 10:35-39]. Next, the ALJ appropriately pointed to the isolated nature of alleged Physician statements in the context of Employer's vigorous antiunion campaign: "Further, while the record strongly reflects (although the Employer denies the relevance) that the Employer campaigned vigorously against unionization, only five physicians were involved in making statements in support of the Union" [Decision at 10:39-11:4].

b. Contrary to Employer's contention, the alleged statement by Dr. Koning was specifically addressed by the ALJ.

Although the ALJ specifically addressed it, Employer unabashedly cites evidence presented by its manager, Rachelle Cho, of a statement related to job loss by Dr. Koning as an example of evidence not considered by the ALJ [ER Brief at 9]. Manager Cho claimed Dr. Koning asked her "What's going to happen to the staff who want the Union at the facility? Are they all going to get fired? [Tr. 433:18-20; 451:20]." Manager Cho testified that she immediately disavowed the statement in the presence of the one staff RN who was in the vicinity [Tr. 434:7-20; 452:10-15]. Again, no staff RNs testified about the statement. Nonetheless, if credited, this comment would hardly intimidate RNs to support a union if they could face termination for their support, and thus could not have helped the Union win the election, and it therefore cannot serve as a basis to set aside a Union election victory.

The ALJ properly addressed the alleged statement by Dr. Koning by noting, that even if credited, the statement was properly disavowed by Employer and was a single, isolated incident that did not reasonably tend to coerce or interfere with employee free choice [Decision at 11 n.8].

c. The alleged statement by Dr. Chopra was irrelevant to the Union election and was clearly non-coercive.

Employer argues the ALJ ignored credible evidence "that Dr. Chopra told voting RNs he had to lay off his own staff and connected this with the nurses needing protection from the Union" [ER Brief at 39]. Now-Supervisor Wendy Reyes testified that one-time Dr. Chopra, who personally does not believe in unions, stated that he may have to "lay off half of his staff because of [Obamacare and] . . . You guys should want a . . . safeguard in place" [Tr. 672:11-23]. This layoff comment was linked a layoff to changes in the health care industry resulting from new federal legislation and not to the outcome of the Union election. Dr. Chopra credibly denied making the statement, explaining he was antiunion and, when asked, told staff RNs he did not personally believe in unions [Tr. 2084:4-2085:3]. Regardless, the evidence does not support Employer's objection that Physicians were falsely claiming unit employees "would be fired if the Union lost the Election" and the alleged comment is not objectionable on its face. Thus, the ALJ did not err by declining to address this individual comment specifically in the Decision, particularly when its irrelevance and non-coerciveness are so readily apparent on its face.

d. Contrary to Employer's claim, the ALJ properly declined to rely on the statement allegedly made by Dr. Maheshwari when credible evidence supported that it was made outside of the critical period.

Employer argues the ALJ "dismissed Sanchez's testimony that Dr. Maheshwari commented that he was pulling patients from the hospital until it unionized because Sanchez could not remember if the statement was made during the critical period. The ALJ ignores that Dr. Maheshwari admitted that he was continuing to send his patients away from Corona even at the time of trial" [ER Brief at 39]. One nursing director accused Dr. Maheshwari of saying if the nurses "get a union, you'll see the patients come back" [Tr. 724:6-13]. Again, no bargaining unit

members testified to this comment, which was allegedly made to Director Chriss Ross-Sanchez without *any* identified unit employees hearing it.

As explained in detail in Union's Post-Hearing Brief [at 31-32], Director Ross-Sanchez was remarkably evasive about when the conversation occurred. When asked by the ALJ about the timing of the conversation, Ross-Sanchez first recalled that it was "right before and then during that initial push for unionization (which began in August)" and after much prompting from her counsel, later recalled it occurred sometimes between September to November [Tr. 723:1-2; 727:8-17].

Dr. Maheshwari testified unequivocally that he never told anyone, including Director Ross-Sanchez, that he was pulling his patients from CRMC but would bring them back if the RNs voted for the Union; rather, he had taken his patients to other hospitals for years due to the Medical Staff's unrelated dispute with CEO Kevan Metcalfe [Tr. 1874:13-1875:16; 1903:6-18]. Employer witness and top manager CNO Bowers corroborated Dr. Maheshwari's account in that she heard him make a comment at the nurses' station related to census, but he was not relating census to the Union; rather, he was relating census to the physicians' dissatisfaction with the CEO [Tr. 1449:2-12]. Bowers' testimony suggested the comment was made in September [Tr. 1452:8-9]—well before the critical period began on November 8.

Accordingly, rather than ignoring credible evidence, the ALJ properly rejected Sanchez's testimony because Employer did not meet its burden of proving the alleged objectionable conduct occurred during the critical period which did not begin until November 8, 2012 [Decision at 10 n.7].

2. Contrary to Employer's contention, the ALJ properly analyzed the dissemination factor to find Physicians' statements could not have affected the outcome of the election.

Although Employer contends the ALJ conducted a flawed analysis of the dissemination factor, the ALJ properly found that even assuming, *arguendo*, that Physicians' statements had a tendency to coerce or interfere, the statements did not affect the outcome of the election:

> The testimony is vague regarding how many voting employees heard these alleged statements and how frequently such alleged statements were made and I resolve this against the Employer as the bearer of the burden of proof by finding that these statements, if made, were generally not heard by those nearby and were not repeated day to day. There is no evidence of dissemination.

[Decision at 11:5-10].

As discussed above, most of Employer's evidence about the conduct it alleges as "severe" was presented by Employer's supervisors or managers—not bargaining unit members—without corroboration and without identifying how many or which staff RNs, if any, were present to hear the alleged statements. Employer disagrees, arguing "[t]he ALJ gave no consideration to Bowers' credible testimony that she received complaints from between 50-75 staff nurses about the objectionable conduct" [ER Brief at 39].

The ALJ expressly considered CNO Bowers' testimony to which Employer refers, and her description of it demonstrates how it undermines Employer's argument about dissemination. While it is true that Bowers testified that 50-75 staff RNs approached her with concerns that certain physicians were making prounion statements, Bowers told each and every one of those RNs that Employer did not support the Union and that it "was not a helpful vehicle for them to get their issues handled" [Tr. 1487:14-16]. Rather than giving no consideration to this fact, the ALJ considered it when she noted, "The Chief Nursing Officer met with groups of eligible voters urging them to vote no and consistently told them that her experience with the Union was a very negative one and she did not feel a union was needed" [Decision at 10:25-30].

F. The ALJ properly found no evidence to support Union harassment or intimidation alleged by Employer's Objection No. 8.

Employer argues that by concluding the Union did not threaten, harass, or coerce staff RNs, the ALJ "ignored credible evidence" [ER Brief at 40], but it fails to cite what evidence it contends was ignored. In fact, the ALJ described the same testimony of staff RN Kelly Flores which Employer inaccurately summarizes in its brief [ER Brief at 16, 40], appropriately distinguished Employer's citation to *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 346 (8th Cir. 1986), and reasonably found no evidence was presented by Employer that UNAC was responsible for the phone messages about which Flores testified, particularly when Flores did not even remember if the callers identified themselves as being from UNAC [Decision at 13:20-34].

G. The ALJ adequately considered and rejected Employer's meritless evidence offered to support alleged appeals to race by the Union.

Although Employer again asserts that the ALJ did not consider credible evidence of the Union's alleged appeals to racial prejudice, it fails to explain what evidence was not considered and instead simply disagrees with the ALJ's finding. Employer claims the ALJ's "decision does not acknowledge the fundamental principle that appealing to racial solidarity can destroy laboratory conditions" [ER Brief at 41]. But, Employer neither cites to any authority whatsoever nor distinguishes the cases cited in the ALJ's Decision [ER Brief at 41; Decision at 14:20-28]. Accordingly, the ALJ correctly recommended that Employer Objection Nos. 9-10 be overruled.

H. The ALJ properly found the Union's photography of a challenged ballot list after polls closed to be nonobjectionable.

Employer claims the "ALJ's conclusion regarding Causing's conduct in photographing the polling room is incorrect and ignores critical credibility issues" [ER Brief at 42]. In fact, the ALJ properly considered critical credibility issues in drawing an adverse inference against

Employer's attorney Matthew Bennett based on undisputed testimony that Organizer Thor Causing photographed the challenged ballot list in the presence of Bennett, who was simultaneously reviewing and copying down on paper the challenged ballot list [Decision at 15:8-13]. Remarkably, Employer argues Union organizer Causing's testimony concerning the photograph and the photograph itself should have been found discredited despite the fact that Employer's witnesses Human Resources Director Ruth Battles and Nurse Rina Pimpanit provided no evidence contrary to Causing [ER Brief at 42]. Employer cites no authority or evidence to support its position and does not distinguish the cases cited by the ALJ in the Decision [ER Brief at 42; Decision at 15:18-25]. As the ALJ noted, "[t]here can be no doubt that the fairness and validity of the election was not impaired;" therefore the ALJ's correctly recommended that Objection No. 15 be overruled.

I. The ALJ correctly recommended dismissal of Employer's unfounded objection that a Union organizer escorted an observer to the polling room while polls were open.

Employer asserts that "ALJ rejected Battles' credible testimony that Causing entered the Magnolia Campus and escorted an observer to the polling area" [ER Brief at 42]. As it does repeatedly throughout its brief, Employer misstates the evidence. None of Employer's observers or any other eligible voter testified that they saw Organizer Causing accompany a Union observer into the polling area while polls were open. Instead, Director Battles vaguely testified, without being able to identify a time or polling session, that Causing briefly went past a main corridor of Magnolia (while she herself was sitting in an office of Magnolia) that was not in or in the close proximity of the polling area [Tr. 520:10-17]. Director Battles eventually admitted she did not see Causing going to the polling area while polls were open [Tr. 520:25-521:8]. Called as a witness by Employer, Organizer Causing consistently testified that he never escorted any

observers to the polling room once polls were open [Tr. 1219:17-22]. On one occasion, because a Union observer was not present before the start of one of the polling sessions, he accompanied an observer to the Magnolia lobby and asked the lobby security guard to escort the observer to the polling place because the polling room designated by Employer was far away from the lobby and difficult to find [Tr. 1211:21-1212:14; 1218:19-1219:7]. The ALJ properly credited this testimony; indeed, Employer presented no evidence to the contrary which the ALJ could have credited.

Alternatively, Employer asserts that "[e]ven if the ALJ properly credited Causing's testimony, she relied on the wrong legal standard to address his conduct . . . the legal standard for observation of a polling area states that representatives may not be within eyesight of the polling area." Employer, however, fails to cite any authority to support its asserted legal standard in its exceptions, supporting brief, or even in its post-hearing brief to the ALJ. In any event, Employer waived the argument as its Objection No. 19 does not allege that the union agent was within eyesight of a polling area, but instead states "a Union agent . . . escorted a Union observer to the polling room while the polls were open." Moreover, the record does not support that Causing was within eyesight of the polling area as he only went to the lobby when the polls were open and the lobby was far away from the polling area. Accordingly, the ALJ correctly recommended that Objection No. 19 be overruled.

J. The ALJ carefully analyzed the evidence presented about the alleged observer pin-swap and correctly recommended Employer's objection be overruled.

Employer charges that the ALJ "ignores all of Hubbard's credible testimony." Not so. As Employer Observer Shanda Hubbard testified, Board Agent Liz Valtierra did not pin an observer button on her person, but rather, passed "a button across the table," which Hubbard

would have had to pick up, pin on herself, and then unpin at the close of the session—giving her multiple opportunities to read the button—yet Hubbard admitted she never actually read the button [Tr. 137:3-11]. Thus, as the ALJ properly noted, "[t]he Employer's evidence relies on unsupported hearsay: that after the polls closed, an unidentified woman told [Hubbard] that she had on a Union observer button" [Decision at 17:13-15]. The ALJ also properly drew an adverse inference because although Employer witness Nurse Rina Pimpanit testified to observing at the same session and location as Hubbard—January 4 between 2:30-4:00 p.m. at Magnolia—she did not corroborate Hubbard's testimony, even though she testified one day *after* Hubbard [Decision at 17:4-6]. Nonetheless, assuming *arguendo* that Employer proved Hubbard wore a Union observer pin, the ALJ concluded, "even if she pinned a Union observer button on herself, I find this button error could not reasonably have affected the outcome of the election" [Decision at 17:19-21]. Employer offers no authority or evidence to invalidate the ALJ's sound reasoning.

K. The ALJ correctly declined to draw an adverse inference against the Union.

Employer—with the burden of proof—disingenuously asserts that the Union—who did not have the burden of proof—should have an adverse inference drawn against it for not calling witnesses when Employer designed its witnesses' testimony to evade identifying other witnesses, who the Union could not contact to see if they would support or refute the testimony. Employer complains that the ALJ erred by not drawing an adverse inference against the Union for not calling bargaining unit witnesses to refute testimony, largely from its supervisors and managers, alleging objectionable statements by Physicians [ER Brief at 44]. But almost without fail, Employer's witnesses could not remember which staff RNs were present and often even how many were present when an alleged prounion statement was made.

Charge Nurse Nagle's testimony concerning Dr. D'Sylva's comment is illustrative. Although Nagle claimed that staff RNs were present when the comment was made, her response when questioned about the RNs' identity was quite troubling. Nagle stated: "[A]m I allowed to say when they interviewed me, I knew who they were, but I can't remember today?" [Tr. 494:8-11]. Because of this *suspiciously* new memory lapse, the Union was prevented from calling other witnesses to contradict Nagle's account. Moreover, Employer knew their identities from its earlier interviews but nonetheless failed to call these other RNs. Any failure to call relevant witnesses should be construed against the party with the burden of proof—here Employer, *Seda Specialty Packaging Corp.*, 324 NLRB 350, 351 (1997); *Grimmway Farms*, 314 NLRB 73, 76 n.2 (1994), and against the party with the knowledge about whom heard these alleged statements, *Roosevelt Mem'l Med. Ctr.*, 348 NLRB 1016, 1022 (2006) ("When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.").

Although in a few instances, Employer's witnesses named specific bargaining unit witnesses who were present during allegedly objectionable conduct, it does not follow that those employees "may reasonably be assumed to be favorably disposed to the" Union. *Id.* at 1022. Finally, as Employer bears the burden of proof, and the Union successfully argued that Employer did not meet its burden by proving objectionable conduct sufficient to affect employee free choice in the election, the Union had no need to refute the vague testimony presented by Employer. Accordingly, the ALJ properly declined to draw an adverse inference against the Union.

L. The ALJ disregarded and therefore was not prejudiced by post-hearing conduct.

Employer cries prejudice based on a post-hearing submission by counsel for the Physicians. Any contention of prejudice on this basis is meritless as the ALJ expressly rejected the Physician's submission in the Decision: "The Medical Staff filed a post-hearing letter in the nature of a brief reiterating their concerns. The existence of other procedural venues for addressing disruptive physician behavior is irrelevant to this proceeding and thus I reject the Medical Staff letter" [Decision at 5 n.4].

M. The ALJ's credibility resolutions are reasonable and should be adopted by the Board.

"Credibility determinations by the ALJ are given great deference, and are upheld unless they are inherently incredible or patently unreasonable." *Healthcare Employees Union v. NLRB*, 441 F.3d 670, 675 (9th Cir. 2006) (quoting *Retlaw Broadcasting Co. v. NLRB*, 55 F.3d 1002, 1006 (9th Cir. 1995). Great deference is given to the ALJ "[b]ecause the ALJ is in a unique position to evaluate the credibility and demeanor of the witnesses" and thus reviewing bodies defer to the ALJ's "plausible inferences . . . even where [they] might reach a contrary result if [they] were to decide the case *de novo*." *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 563 (5th Cir. 2003). "Moreover, where two versions of the same incident materially conflict, an ALJ's credibility determinations are entitled to deference." *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363, 370 (7th Cir. 2001). While Employer excepts to the ALJ's credibility resolutions, it provide no basis upon which to reverse them.

IV. CONCLUSION

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

Dated: December 6, 2013

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

By _____
RICHA AMAR

Re: ***Corona Regional Medical Center –and- UNAC/UHCP; Case No. 21-RC-094258***

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013, I caused the foregoing **ANSWERING BRIEF TO THE EMPLOYER'S EXCEPTIONS TO ALJ'S RECOMMENDED DECISION ON OBJECTIONS** to be filed with Division of Judges, of the National Labor Relations Board, using the NLRB E-filing system.

I hereby further certify that a copy of the foregoing document was duly served upon the parties, via e-mail:

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[X] **(By Electronic Mail)**
Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused such documents described herein to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful. Executed on December 6, 2013.

[X] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

RICHA AMAR