



TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE AND ISSUES PRESENTED .....	1
STATEMENT OF THE FACTS .....	2
A.    Karykeion’s Bankruptcy And Conversion Of Full-Time RNs To Per Diem Status To Cut Costs.....	2
B.    Karykeion’s Proposed Sale Of Community Hospital. ....	3
C.    The Bankruptcy Court Rejects Karykeion’s CBA With the Union to Facilitate the Sale of Community. ....	4
D.    CHHP Management’s Hiring Of Registered Nurses Prior to the Purchase of Community.....	5
E.    A Strike and Picketing Was Announced Immediately Prior To The Sale of Community. ....	7
F.    CHHP Management Conducts a Burns Employee Count On The Day It Took Over Operations In Response To the Union’s Letter Demanding Recognition.....	8
G.    CHHP Management Had To Take A Number of Drastic Measures After Its Takeover of Community To Ensure It Had Adequate Staffing. ....	9
H.    CHHP Management Employs Non-Supervisory RNs In Other Job Classifications.....	11
LEGAL ARGUMENT.....	12
A.    The ALJ Incorrectly Found That Avanti Is A Proper Party To This Proceeding As The Record Lacks Any Evidence That Avanti Controls the Day-To-Day Employment Decisions Affecting Community. ....	12
B.    The ALJ Erred In Determining That The Union Enjoyed A Majority Status In An Appropriate Bargaining Unit . ....	14
1.    The ALJ Applied A Simple “Mathematical Formula” To Determine That March 26, 2010 Was the Appropriate Date to Determine the Union’s Majority Status And Failed To Consider That The Inordinate Number of Former Karykeion Per Diems Amongst the Incumbent Complement Makes It “Unrepresentative” .....	15
2.    The ALJ Improperly Excluded Several RNs Working In Different Job Classifications From the Burns Analysis .....	17

3. The ALJ Should Have Excluded Ki Kim and Lillian Pascua As Incumbents Since They Were Promoted to Clinical Supervisors .....20

CONCLUSION.....21

TABLE OF AUTHORITIES

	Page(s)
<u>Federal Cases</u>	
<i>Crittenon Hosp.</i> 328 NLRB 879 (1999) .....	12
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> 482 U.S. 27 (1984).....	14, 17
<i>Frank v. U.S. West, Inc.</i> 3 F. 3d 1357 (10th Cir. 1993) .....	13
<i>Myers Custom Products, Inc.</i> 278 NLRB 636 (1986) .....	15
<i>NLRB v. Al Bryant, Inc.</i> 711 F. 2d 543 (3d Cir. 1983).....	12
<i>NLRB v. Burns Int'l Sec. Serv., Inc.</i> 406 U.S. 272 (1972).....	1, 8, 9, 14, 15, 16, 17, 18, 19, 21
<i>Pacific Hide &amp; Fur Depot, Inc. v. NLRB</i> 553 F.2d 609 (9th Cir. 1977) .....	15
<i>Salem Hospital</i> 333 NLRB 560 (2001) .....	19
<u>State Cases</u>	
<i>Laird v. Capital Cities/ABC, Inc.</i> 68 Cal. App. 4th 727 (1998) .....	13
<u>Federal: Statutes, Rules, Regulations, Constitutional Provisions</u>	
11 U.S.C. § 1113.....	5
<u>State: Statutes, Rules, Regulations, Constitutional Provisions</u>	
Cal. Code Regs. 22 § 70217 (2008).....	5

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondents Avanti Health Systems, LLC, CHHP Holdings II, LLC, and CHHP Management, LLC (collectively, "Respondents") submit this brief in support of their exceptions to the recommended decision and order of Administrative Law Judge Gerald A. Wacknov ("ALJ"), issued on June 14, 2011, in the above-captioned matter.

### **STATEMENT OF THE CASE AND ISSUES PRESENTED**

This is a simple case involving dueling *Burns* "headcounts." It arises from the purchase of a small acute-care hospital in Huntington Park, California at a bankruptcy auction in March 2010. The issue is whether the purchaser has an obligation to bargain with the union which represented the seller's registered nurses. To determine whether such an obligation exists, the Administrative Law Judge ("ALJ") had to decide whether the General Counsel had established by a preponderance of the evidence that Respondents employed more than 50% union incumbents in an appropriate bargaining unit at a time when it employed a "substantial and representative complement of its employees."

After a four-day hearing, the ALJ determined that the "Union has represented a majority of unit employees beginning on March 26 and continuing thereafter . . . and that Respondents have violated and are violating Section 8(a)(5) and (1) of the Act as alleged by failing and refusing to bargain with the Union as representative of the unit RNs on and after March 26." As explained more fully below, the ALJ incorrectly found that Respondents are a "successor employer" under *Burns* and its progeny. Specifically, Respondents except to the ALJ's findings that (a) Avanti is a property party to this unfair labor practice proceeding (Exception No. 1); (b) March 26 was the appropriate date to conduct the *Burns* analysis (Exception No. 2); and (c) that the Union enjoyed majority status on April 15, 2010—the date of the hospital's first full payroll.

(Exception Nos. 3-5.) Accordingly, the unfair labor practice charge should be dismissed in its entirety.

### **STATEMENT OF THE FACTS**

**A. Karykeion's Bankruptcy And Conversion Of Full-Time RNs To Per Diem Status To Cut Costs.**

Community Hospital ("Community") is located in Huntington Park, California. (Tr. 33:14-18.) Community is a very small 81-bed acute-care hospital that provides medical services, including 24-Hour Emergency Services, in one of Los Angeles' most densely populated and underserved areas. (Tr. 33:14-21, 405:8-406:1, 408:16-22, 692:7-13.) In late 2009, Karykeion, Inc. ("Karykeion"), at the time the owner of Community, filed for bankruptcy protection and sought to sell Community as part of the bankruptcy proceedings. (Tr. 33:22-24, 409:3-13.)

Karykeion was a party to a collective bargaining agreement (the "CBA") with the California Nurses Association ("Union" or "CNA"), which represented Karykeion's non-supervisory registered nurses ("RN"). (Tr. 35:19-21, 36:1-2, 42:15-43:12, 46:15-18, 47:1-6, 47:19-25, 71:6-15; 224:10-16 and 228:8-11; C.P. Ex. 1.) Licensed RNs working in other non-supervisory classifications (such as utilization review coordinator) were included in the contract unit. (Tr. 228:8-11, 17-23.) The Union's CBA with the bankrupt hospital at least partially contributed to its downfall. It provided much higher wages than those prevailing in the local market and, much higher than to the wages at CHHP Management's nearby sister facility, East Los Angeles Doctors' Hospital ("ELADH"). (Tr. 404:18-22.) The Union's CBA with Karykeion provided for annual step increases for each year of service and across-the-board wage increases in excess of six percent each year. (C.P. Ex. 1, pp. 20.)

In July 2009, as part of a last-ditch effort to save the hospital from certain bankruptcy, Karykeion announced a reduction in force. (Tr. 63:7-15, 65:16-26.) To cut costs, Karykeion

presented a number of its full-time RNs with an ultimatum—either convert to “per diem” status or be permanently laid off. (Tr. 63:20-65:4, Resp. Ex. 1(b).) Faced with this “Hobson’s Choice,” a number of full-time RNs agreed to switch to per diem status. (Tr. 66:1-12, 82:20-1.)

Pursuant to Karykeion’s per diem agreement, and under the CBA, per diem RNs had different methods of compensation, hours of work and benefits than either full-time or part-time RNs. Per diems were paid a different and higher set wage rate than full-time and part-time RNs. Per diems did not receive any insurance, retirement, or other fringe benefits. They were not entitled to seniority, that “lifeblood” of a CBA, which determined everything from layoff, to vacation, to shift preference, to promotion, and much more. (Tr. 52:2-4, 85:11-20; C.P. Ex. 1; Resp. Ex. 1(c).) Per diems worked for Karykeion on a sporadic basis; all held full-time nursing jobs at other hospitals. (Tr. 53:18-54:6.) Significantly, per diems at Karykeion did not have to commit to work a certain amount of shifts and Karykeion was not obligated to schedule them. (Tr. 77:2-9.) They only had to be “available” to work at least one day per week and a minimum of one weekend per month. (Tr. 53:10-12, 54:9-12, 695:12-24; Resp. Ex. 1(c).) Because per diems did not work regular hours, and were simply eligible to work shifts at Community, they did not have a true “employment relationship” with Karykeion. As Chief Reorganizing Officer Dan Ansel testified, “the relationship with a per diem is . . . **I didn’t really consider it to be an employment relationship.** It was more like a registry relationship without, you know, a third party, you know, collecting a fee for providing nurses for us.” (Tr. 76:9-77:1) (emphasis added) Per diems only remained on Karykeion’s payroll as a negotiated alternative to permanent layoff. (Tr. 77:2-79:8.)

**B. Karykeion’s Proposed Sale Of Community Hospital.**

Since the pending bankruptcy and the threat of Community shutting its doors potentially impacted thousands of individuals, in late 2009, Respondent Avanti, a healthcare investment

company, began pursuing the possibility of acquiring Community. (Tr. 61:5-17, 132:5-12, 240:17-19, 243:24-247:6.) Unfortunately, Avanti's senior lender barred it from purchasing the bankrupt hospital. It could therefore not proceed with the transaction. (Tr. 260:14-261:25, 263:12-264:9, 308:23-309:13, 346:8-19.) However, some of the Avanti investors were still interested in acquiring Community and, therefore, formed CHHP Holdings, a distinct and unrelated company from Avanti, to purchase Community with alternative financing. CHHP Holdings subsequently engaged in negotiations with Karykeion to acquire the Community assets. (Tr. 269: 23-270:1, 308:23-309:13, 309:24-310:11.) Although Avanti and CHHP Holdings have some common ownership, their ownership is not identical and the two companies remain functionally and legally distinct. (Tr. 203:3-6, 269:23-270:1, 353:25-354:9.) CHHP Holdings is comprised of a different group of investors. It exists as a holding company to "hold assets" and has no employees. (Tr. 251:25-252:15, 318:2-8; G.C. Ex. 14.) CHHP Holdings' investors also formed CHHP Management at this time in order to manage the facility and be the employer of the employees at Community in the event the purchase was approved. (Tr. 142:9-11; 257:19-25, 307:20-25, 308:23-309:13, 318:8-12, 353:14-20; G.C. Ex. 15.)

**C. The Bankruptcy Court Rejects Karykeion's CBA With the Union to Facilitate the Sale of Community.**

During negotiations for the sale, CHHP Holdings clearly indicated to Karykeion that it was not willing to assume a number of its contracts, including its CBA with the Union, which it believed was partially responsible for Karykeion's bankruptcy in the first place. (Tr. 59:15-22.) The CBA contained a "successorship clause," at Article XX, which required any purchaser to adopt the suffocating contract and bargain with the Union. (C.P. Ex. 1, at pp. 35.) Under the purchase agreement, Karykeion was obligated to secure a bankruptcy court order rejecting the CBA as a condition precedent to the sale. Accordingly, Karykeion moved on February 12, 2010,

pursuant to 11 U.S.C. § 1113, to reject the CBA. (Tr. 59:9-14.) On March 15, after hours of oral argument, Judge Tighes granted Karykeion's motion and rejected the CBA. (Tr. 59:23-60:2; Resp. Ex. 27.) In her extensive written decision, Judge Tighe explained that because CHHP Holdings' purchase of Community "increase[d] the likelihood of a return to unsecured creditors, ke[pt] a needed hospital in the community, and help[ed] some employees to retain their jobs, the balance of equities favor[ed] rejection of the agreements." *In re: Karykeion, Inc.*, Case No.: 1:08-bk-17254-MT (Bankr. C.D. Cal. Mar. 15, 2010) (Resp. Ex. 27, pp. 30.). Soon thereafter, on March 23, Judge Tighe approved the sale of Community to CHHP Holdings at a public bankruptcy auction. (Tr. 34:16-22, 144:15-18, 154:22-155:11, 344:20-346:2, 353:21-24, G.C. Ex. 6) CHHP Holdings was the only bidder. (Resp. Ex. 27.)

**D. CHHP Management's Hiring Of Registered Nurses Prior to the Purchase of Community.**

When negotiations progressed to a point that CHHP Holdings believed that it would acquire Community, CHHP Management began to take steps to hire nurses (and other employees) to work at the hospital, contingent upon bankruptcy court approval of the sale. (Tr. 364:19-365:11, 410:1-411:12.) Prior to making any hiring decisions, CHHP Management first had to determine the "core" nursing staff levels in each of Community's five departments: Emergency/UMS, Medical/Surgery, Telemetry, Pediatrics, Operating Room, and Intensive Care Unit. (Tr. 588:25-589:11.) CHHP Management undertook this staffing analysis based on an assessment of patient needs and in compliance with California state law, which mandates minimum nurse-to-patient ratios by hospital unit.<sup>1</sup> (Tr. 589:9-19.) Based on Community's average daily patient census of 24, and the required minimum nurse-to-patient ratios, Carmelo

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<sup>1</sup> See Cal. Code Regs. 22 § 70217 (2008), which sets forth the minimum numerical licensed nurse-to-patient ratios by hospital unit.

James, Chief Nursing Officer of ELADH, determined that CHHP management needed to hire a “bare minimum” of 66 RNs to operate the hospital. (Tr. 147:14-15, 558:2-19, 587:19-25, 589:22-592:24, 594:15-598:20, 653:22-654:6, 696:15-697:25; Resp. Ex. 6.) At no time in this process did Mr. James, or any other official of CHHP Management, ever anticipate staffing Community with just 47 RNs. The hospital could not function with so few RNs and would be “understaffed” as a matter of law. (Tr. 465:15-22, 599:4-16.)

After developing this “core” staffing level, Mr. James and three managers under his direction, conducted interviews of all of the applicants for nursing positions at Community. (Tr. 61:18-62:2, 67:1-7.) CHHP Management first conducted job interviews at Community on February 26 and 27, 2010, during which it interviewed any and all interested Karykeion employees. (Tr. 68:6-17, 362:22-364:6, 411:17-24, 421:1-11; G.C. Ex. 4.) CHHP Management subsequently held a job fair from March 1 to March 5, 2010, during which it interviewed hundreds of applicants, including Karykeion employees and members of the general public. (Tr. 69:1-14, 362:22-364:6, 412:2-6, 413:25-416:1; G.C. Exs. 3-4.)

After conducting these interviews, Mr. James and his managers made CHHP Management’s hiring decisions on March 15, 16 and 17, 2010, respectively. (Tr. 154:4-14, 365:25-367:18, 369:1-9, 422:15-423:1, 423:18-21, 509:21-24.) However, CHHP Management could not actually hire any employees until the bankruptcy auction on March 23, 2010—a very genuine contingency. (Tr. 369:13-370:1, 423:22-424:11.) CHHP Management was forced to hire its employees incredibly quickly when it learned during the bankruptcy auction that Karykeion would be completely out of money, and unable to pay employees or keep the hospital open after 11:59 p.m. on March 25, 2010 – two days after the bankruptcy court approved the sale. (Tr. 60:3-20, 346:21-347:6, 369:13-370:5.) Accordingly, on the night of the auction,

CHHP Management rushed to telephone the applicants who had been selected to verbally offer them positions at Community immediately after the purchase of Community was approved. (Tr. 370:3-11, 427:24-429:14, 431:23-442:3.) CHHP Management asked these individuals to come to the Embassy Suites in Downey on March 24 and 25 in order to sign their offers and complete their hiring paperwork. (Tr. 370:3-372:11, 421:22-422:8, 447:20-450:2.) Through extraordinary efforts, CHHP Management was able to take control of Community and keep it operational as of midnight on March 26, 2010. (Tr. 34:16-35:18, 155:14-156:3, 453:20-.) Araceli Lonergan, CHHP Management's CEO, coordinated with officials at Karykeion to ensure that nurses working at midnight on this date could remain at work after the takeover so there would not be any scheduling gaps. (Tr. 445:17-446:13.) Other RNs were not scheduled to work until the following week. (Tr. 446:14-19.) Since that difficult time, Community has been open on a continuous basis, has been immeasurably improved, and has provided quality health care, including 24-hour emergency services, to one of Los Angeles' most densely populated and underserved areas. (Tr. 375:16-378:5, 417:17-418:3, 485:10-487:1.) In the one year following the takeover, Community provided acute care to over 28,000 walk-in patients. (Tr. 458:24-459:7.)

**E. A Strike and Picketing Was Announced Immediately Prior To The Sale of Community.**

Adding to the chaotic circumstances surrounding the takeover, and just prior to the sale of the hospital, CHHP Management learned that a union strike and picketing was announced against the struggling hospital on its very first day under new ownership. Some hospital employees either resigned their memberships in the Union or indicated a desire to withdraw from the Union during the 10-day Section 8(g) notice period which followed. The strike was

subsequently called off at the last minute. (Tr. 55:16-25, 56:23-57:7, 74:12-14, 443:5-444:7, 456:7-21, 457:7-19, 502:10-503:1, 543:2-20.)

**F. CHHP Management Conducts a Burns Employee Count On The Day It Took Over Operations In Response To the Union's Letter Demanding Recognition.**

During the time that CHHP Management was interviewing—but before it purchased Community or hired any employees—it became aware that the Union sent a letter claiming that Avanti<sup>2</sup> was a successor employer to Karykeion. (Tr. 390:20-391:3, G.C. Ex. 26.) The Union demanded that Avanti recognize the Union as the RNs' bargaining representative and bargain with it over the terms and conditions of their employment. (G.C. Ex. 26.) Aware of this demand for recognition, after taking control of Community, CHHP Management made efforts to determine whether or not it had hired a majority of incumbent bargaining-unit nurses and thus whether it was a successor employer obligated to bargain with the Union.

CHHP Management conducted this analysis on March 26, 2010—its first day of operations—when CFO Steve Lopez met with counsel to review the employee count. (Tr. 131:9-10, 131:10-4, 158:17-24, 165:10-14, 462:25-463:5.) In order to facilitate this review, CHHP Management compiled a list, organized by department, which contained the name of each employee who had accepted a job offer, the department in which he worked, the employee's rate of pay, and whether or not the employee was part-time or full-time. (Tr. 550:22-553:1; Resp. Ex. 2 and exhibits attached thereto.)

Mr. Lopez then reviewed this list with counsel, and highlighted all of the nursing positions which would fall within the Union bargaining unit, as defined by Karykeion's CBA

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<sup>2</sup> The Union was apparently under the mistaken belief that Avanti, and not CHHP Management, would be the employer of the nurses at Community. In referring to Avanti, the CHHP Respondents understood the CNA to be referring to the employer, which in fact was CHHP Management.

with the Union. (Tr. 553:10-23.) After these positions were highlighted, Mr. Lopez went back through the list with counsel and denoted which of the employees were former Karykeion employees. (*Id.*) Mr. Lopez based this determination on each employee's application and resume, as well as other indicia of work history provided to CHHP Management during the hiring process.<sup>3</sup> (Tr. 554:15-556:1.) Mr. Lopez and counsel next divided the number of former Karykeion employees hired by the total number of employees hired within the putative bargaining unit, to determine the percentage of legacy Karykeion employees. (Tr. 553:10-23, 556:6-557:7.) At the conclusion of this exercise, Mr. Lopez and counsel determined that 30 out of 65, or 46%, of the non-supervisory registered nurses who had accepted offers were former Karykeion bargaining unit employees. (Tr. 511:21-24, 556:6-557:7, 598:25-599:3; Resp. Ex. 2 and exhibits attached thereto.) Consequently, CHHP Management believed that the Union did not have a majority and, therefore, that it was under no obligation to bargain with the Union. (G.C. Ex. 27.)

**G. CHHP Management Had To Take A Number of Drastic Measures After Its Takeover of Community To Ensure It Had Adequate Staffing.**

CHHP Management made this initial count on March 26, 2010—the date upon which it took over operations at Community—because it believed it had completed its hiring efforts on that date. (Tr. 178:14-180:9, 465:23-467:18.) Indeed, CHHP Management's hiring of 65 registered nurses comports very nearly with Mr. James' "core" staffing objective to hire 66 RNs prior to the sale. (Tr. 512:3-7, 524:20-525:7.) Unbeknownst to CHHP Management, it "jumped the gun" in attempting a reliable *Burns* analysis on the date of the takeover. Many of the 65 RNs

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<sup>3</sup> Neither Mr. Lopez nor anyone else at CHHP Management knew prior to this review whether or not the majority of employees hired to work at Community were from Karykeion. Mr. Lopez did not have access to the Karykeion personnel files or payroll records. (Tr. 54:20-25, 419:21-420:19, 553:2-9.)

who had accepted offers failed to show up for their scheduled shifts or resigned during the week immediately following the purchase. Several found alternative employment. CHHP Management's salary offers imposed substantial wage reductions for the incumbent nurses. (Tr. 426:7-12, 446:14-447:19, 462:25-463:3, 473:9-11, 477:16-478:21.) Ms. Lonergan testified about this unstable and uncertain early period:

[I]t was ongoing – I would say for awhile of who was going to show up and who wasn't going to show up. People showed up for one shift and then didn't show up for anymore shifts, you know. . . . [I]t was a moving target . . . because some people came in as part-time, decide[d] to go per diem . . . it was changing all the time for I would say at least the first month to two months. *It was really chaotic.*

(Tr. 447:15-19, 450:3-23) (emphasis added.) Accordingly, Community's first partial payroll abstract on March 26, 2010 only reflects the 47 RNs who were actually entered on Community's payroll at that time. (G.C. Ex. 8.)

In reality, as soon as the takeover was complete, CHHP Management was forced to undertake a number of emergency stop-gap measures to adequately staff the hospital in order to meet patient needs and comply with the applicable minimum nurse-to-patient ratios. First, CHHP Management temporarily assigned eleven (11) RNs on the ELADH payroll to "migrate" to, and work shifts at Community during the last days of March and throughout April 2010 (Tr. 432:17-18, 470:16-472:20, 475:3-25, 498:9-499:8, 608:16-614:4; Resp. Ex. 7.)<sup>4</sup> Second, CHHP Management resorted to the use of costly registry nurses to augment its nursing staff. (Tr. 525:9-13, 623:2-626:24; Resp. Ex. 8.) During March and April 2010, CHHP Management utilized 1,863.5 hours of registry RNs. (Resp. Ex. 8.) Finally, CHHP Management had to hire a

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<sup>4</sup> These RNs include: Ellen Abarca, Eleanor Ang, Edna Baldovino, Louella Garcia, Jae Kim, Kyong Lee, Chung Park, Ronan Patononona, Bell Suarez, and Richard Yoon. (See Resp. Ex. 7.) Because these individuals were employed by ELADH, they remained on ELADH's payroll. (Tr. 560:6-561:1.)

substantial number of additional RNs (and other staff) almost as soon as it took over operations at Community. (Tr. 451:6-19, 461:17-462:13.) Indeed, the number of non-supervisory RNs on CHHP Management's payroll swelled from 47 on March 26, 2010 to 58 on April 15, 2010, less than three weeks after the takeover. (Tr. 558:25-560:5, G.C. Ex. 7; Resp. Ex. 4.) CHHP Management's hiring did not stop then. Only one month later, on May 16, 2010, the number of RNs on CHHP Management's payroll had increased to 68. (G.C. Ex. 7.) Because CHHP Management was able to hire additional RNs in the months following its takeover of Community, the registry nurse hours diminished from its peak of 1,679 hours in April to 1,084 hours in May. (Resp. Ex. 8.)

**H. CHHP Management Employs Non-Supervisory RNs In Other Job Classifications.**

After assuming control of the operations of Community, CHHP Management hired six (6) licensed RNs working in different job classifications, including the following: Jeremias Azuela (RN in PIRM Department) (Tr. 634:11-635:14; Resp. Ex. 4.); Barbara Edmonds (RN Infection Control) (Tr. 636:6-637:1, 705:15-706:24; Resp. Ex. 4.); Arturo Ponce (RN Case Manager) (Tr. 630:3-631:2, 633:5-6, 634:9-10; Resp. Ex. 4.); Magdalena Vargas (RN Utilization Review / Case Manager) (Tr. 630:2-631:2, 633:5-16, 634:9-10; Resp. Ex. 4.); Erika Ramirez (RN Utilization Review Coordinator) (Resp. Ex. 4.); and Suzanne Zemer (RN Educator) (Tr. 635:15-636:5; Resp. Ex. 4.) As Juliet Miranda, Karykeion's Chief Nursing Officer, testified, any Karykeion employee who was a licensed RN, even in a non-nursing classification, would be included in the contract unit. (Tr. 213:18-214:7, 227:3-22, 228:8-13.) None of these individuals previously worked for Karykeion. (Tr. 225:19-227:2; 593:25-594:14; 634:9-10, 637:2-9; G.C. Ex. 2.)

## LEGAL ARGUMENT

### **A. The ALJ Incorrectly Found That Avanti Is A Proper Party To This Proceeding As The Record Lacks Any Evidence That Avanti Controls the Day-To-Day Employment Decisions Affecting Community.**

“The Board applies four criteria in determining whether separate entities constitute a single employer. These criteria are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. Not one of the four criteria is controlling nor need all be present to warrant a single-employer finding.” *NLRB v. Al Bryant, Inc.*, 711 F. 2d 543, 551 (3d Cir. 1983). The Board has stressed that the first three criteria are more critical than common ownership, with particular emphasis on whether control of labor relations is centralized, as these tend to show ‘operational integration.’” *Id.*; see also *Crittenon Hosp.*, 328 NLRB 879 (1999) (“The most critical factor is centralized control of labor relations.”).

Here, although it is undisputed that there is some common ownership between the investors of Avanti and CHHP Holdings, there is no evidence that Avanti’s operations are interrelated with those of the CHHP Respondents. Avanti and the CHHP Respondents are independent entities organized as separate limited liability companies at different times and each have separate corporate headquarters. (Tr. 269: 23-270:1.) Specifically, Avanti was formed on February 11, 2008 in the State of Nevada and its principal office is located at 444 S. Flower Street, Suite 1675, Los Angeles, CA 90071. (See G.C. Ex. 11(a)). CHHP Holdings and CHHP Management were formed on March 4, 2010 and their principal offices are located at 111 N. Sepulveda Blvd., Suite 230, Manhattan Beach, CA 90266, respectively. (See G.C. Exs. 10(a)-(b).) CHHP Management has its own operating agreement and is a separate party to all vendor contracts entered into at Community, pays its own debts, and receives all payments for services rendered to patients at the hospital. (Tr. 307:20-308:22, 318:15-20; G.C. Ex. 13.)

In reaching his conclusion that Avanti is a single or joint employer with the two CHHP Respondents, the ALJ disregarded this evidence and instead pointed to the fact that (1) Avanti's website, [www.avantihospitals.com](http://www.avantihospitals.com), states that Avanti owns and operates Community; (2) the employment policies utilized at ELADH were implemented at Community upon CHHP Holdings' acquisition of the hospital; and (3) certain officers of ELADH (which is owned by Avanti) also serve as officers of CHHP Management. (ALJ 3:9-26.) None of these facts demonstrate that Avanti exercises day-to-day control over CHHP Management's routine employment decisions.

First, an unsubstantiated (and incorrect) statement on Avanti's website is not sufficient evidence to disregard the clear and distinct corporate lines between the separate entities as noted above. Second, as a matter of law, the use of shared human resources policies between two separate entities does not undermine the presumption of corporate separateness. *See Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 739 (1998) (explaining that the shared use of employment policies is insufficient to establish that parent corporation exercised day-to-day control over subsidiary's employment decisions); *see also Frank v. U.S. West, Inc.*, 3 F. 3d 1357, 1363 (10th Cir. 1993) (“[a] parent's broad general policy statements regarding employment matters” is not proof of control over subsidiary's employment practices). Finally, the officers of CHHP Management were appointed to serve in such capacity pursuant to a written consent agreement adopted by the members of CHHP Management. (G.C. Ex. 10(c).) The fact that the same individuals are officers of ELADH has no bearing on whether Avanti exerts control over CHHP Management's day-to-day operations.

Simply put, it remains undisputed that CHHP Management maintains day-to-day control over Community's routine employment/personnel decisions, such as hiring, performance

evaluations, terminations, or work assignments. (Tr. 154:15-21, 259:19-260:5, 313:25-317:2, 380:24-381:4.). Accordingly, the ALJ incorrectly determined that Avanti is a joint or single employer with the CHHP Respondents so as to impose a bargaining obligation (to the extent any exists) on Avanti.

**B. The ALJ Erred In Determining That The Union Enjoyed A Majority Status In An Appropriate Bargaining Unit .**

In *NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 294-95 (1972), the Supreme Court held that a “successor employer” inherits a seller’s duty to bargain with its union if a majority of its employees in an appropriate bargaining unit were employed by the “predecessor” employer. However, a union’s majority status—and thus a successor employer’s obligation to bargain—is determined at the time the putative successor has hired a “substantial and representative complement of its employees.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 47 (1984). “If, at this particular moment, a majority of the successor’s employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented these employees.” *Id.* “In a successorship situation, the bargaining obligation can normally be determined at the time of transfer or when operations begin. In other instances, however, such as when an employer is rebuilding a collapsed business or is operating at a substantially reduced capacity, a delay in making the determination may be appropriate.” *Id.*

In determining the presence of a substantial and representative complement, the Board must consider several factors: “whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production . . . [and] the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer’s expected expansion.” *Fall River Dyeing*, 482 U.S. at 49 (internal quotations

omitted). Indeed, “[w]hen a new employer expects, with reasonable certainty, to increase its employee complement substantially within a relatively short period of time, it is appropriate to delay determining the bargaining obligations for that short period.” *Myers Custom Products, Inc.*, 278 NLRB 636, 637 (1986) (holding that the alleged successor employer was found to have justifiably waited determining whether it had a bargaining obligation until after the anticipated expansion of its workforce). Moreover, it is clear that the point at which a successor employer has hired a sufficient complement of workers for determining the employer’s bargaining obligation will vary from case to case and “cannot be done by the application of a mathematical formula but only by considering the facts of each case in light of the general goal which is sought to assure majority rule within the new employer’s unit as to whether and if so with what union there must be collective bargaining.” *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 613 (9th Cir. 1977).

Here, the ALJ incorrectly concluded that March 26, 2010 was the appropriate date to conduct the *Burns* analysis. In addition, the ALJ erroneously found that the Union enjoyed majority status even if the *Burns* count is conducted on April 15, 2010.

**1. The ALJ Applied A Simple “Mathematical Formula” To Determine That March 26, 2010 Was the Appropriate Date to Determine the Union’s Majority Status And Failed To Consider That The Inordinate Number of Former Karykeion Per Diems Amongst the Incumbent Complement Makes It “Unrepresentative”**

In their post-hearing brief, Respondents took the position that CHHP Management did not employ a “substantial and representative complement of its employees” until at least April 15, 2010—the hospital’s first full payroll—when it employed 63 non-supervisory RNs to staff Community. Without offering any reasoning or analysis, the ALJ simply applied a rigid and “mathematical formula” to conclude that March 26, 2010 was the appropriate date to determine the Union’s majority status. Specifically, the ALJ concluded that because Respondents agreed

that 63 RNs comprised a substantial and representative complement of RNs necessary to run the hospital and that 47 RNs were entered on Community's first partial payroll abstract on March 26, 2010, 74.6 (47/63) percent of the RN employee complement needed to run the hospital constituted a substantial and representative complement of employees under *Burns*. (ALJ 7, fn, 6.)

However, by applying this rigid and "mathematical formula" to determine the appropriate date to conduct the applicable *Burns* analysis, the ALJ did not consider several factors that impact that analysis. As an initial matter, the ALJ's finding is completely untenable because Community could not legally function with only 47 RNs. As Mr. James testified, it is inconceivable that Community could function with a mere 47 nurses as it would result in the hospital being severely understaffed and not in compliance with California's mandated minimum nurse-to-patient ratios. (Tr. 599:4-16.) It cannot be argued that a complement of 47 RNs is "substantial and representative" if the hospital could not legally function with such a low number of nurses. Given the severe understaffing of Community at the time of the takeover, CHHP Management was forced to assign eleven (11) different and identified ELADH "floaters" and costly registry nurses until it could hire additional RNs. (*See* Resp. Ex. 7.)

Further, among the 31 purported "incumbents" hired by CHHP, nearly half were "per diem" nurses for Karykeion. For at least 14 of the 31 incumbents, there are either entries in Karykeion's final payroll print-out (G.C. Ex. 2) or authenticated documents from their Karykeion personnel files (Resp. Exs. 1(a), 1(c), 14, 15, 16, 17, 18, 19, 21, 22, 26), which designate "per diem" status. Many of them signed so-called "per diem agreements," which clearly indicate that their per diem status was an express alternative to permanent layoff.

Dinorah Williams, the Union representative, recalled how the Union was able to negotiate for their continued employment eligibility as per diems. (Tr. 755:11-757:17.) Whether a per diem by choice, or as an alternative to layoffs, per diems under Karykeion had no benefits, no seniority, no job security and no scheduled hours. (Tr. 52:2-4, 85:11-20; C.P. Ex. 1; Resp. Ex. 1(c).) To Dan Ansel, they simply were not “real employees.” (Tr. 76:9-77:1)

Under these circumstances, the nearly half of the Karykeion incumbents who were per diems there make the 31-nurse complement distinctly “unrepresentative” under *Fall River*. These nurses were at best peripheral to the CNA bargaining unit. They held full-time nursing jobs at other hospitals and worked only on a sporadic basis. By including Karykeion per diems as “incumbents,” the ALJ elevated payroll “form” over substance.<sup>5</sup>

Accordingly, Community’s workforce could not possibly be considered “stabilized” until April 15, 2010—the hospital’s first full payroll. Thus, the ALJ erred in determining that Community employed a “substantial and representative complement” of RNs on March 26, 2010.

**2. The ALJ Improperly Excluded Several RNs Working In Different Job Classifications From the *Burns* Analysis**

Despite finding that March 26 was the appropriate to date conduct the *Burns* analysis, the ALJ still concluded that the Union enjoyed majority status on April 15. To reach his conclusion, the ALJ excluded the following six (6) licensed RNs working in different job classifications that CHHP Management hired after assuming control of the operations of Community from the *Burns* analysis, none of whom previously worked for Karykeion: Jeremias Azuela (RN in PIRM

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<sup>5</sup> The ALJ mistakenly stated in his decision that Respondents argued that per-diem RNs should be excluded from the *Burns* count altogether because they have an insufficient community of interest with the full-time RNs. Respondents never made such an argument in their post-hearing brief.

Department) (Tr. 634:11-635:14; Resp. Ex. 4.); Barbara Edmonds (RN Infection Control) (Tr. 636:6-637:1, 705:15-706:24; Resp. Ex. 4); Arturo Ponce (RN Case Manager) (Tr. 630:3-631:2, 633:5-6, 634:9-10; Resp. Ex. 4.); Magdalena Vargas (RN Utilization Review / Case Manager) (Tr. 630:2-631:2, 633:5-16, 634:9-10; Resp. Ex. 4.); Erika Ramirez (RN Utilization Review Coordinator) (Resp. Ex. 4.); and Suzanne Zemer (RN Educator) (Tr. 635:15-636:5; Resp. Ex. 4.) (ALJ 7:9-9:22.)

By reaching his conclusion, the ALJ discounted the testimony of Juliet Miranda, Karykeion's Chief Nursing Officer, who testified under oath that any Karykeion employee who was a licensed RN, even in a non-nursing classification, would be included in the contract unit:

Q: If you had an individual who was a licensed RN working in another non-supervisory classification, they would have been included in the unit?

A: Yes.

(Tr. 213:18-214:7, 227:3-22, 228:8-13.) The ALJ surmises that Ms. Miranda's testimony on this point is "mere speculation." Yet, Ms. Miranda testified that as Chief Nursing Officer for Karykeion, she was the person directly involved with the CNA, was "part of the negotiation for doing collective bargaining," and knew which RNs were included and excluded from the contract unit. (Tr. 215:22-217:9.) Thus, her testimony that these individuals would have been part of the bargaining unit should have been credited by the ALJ. The fact that CBA excluded registry RNs and physicians who were also licensed RNs does not change the analysis.

In addition to not crediting the testimony of Ms. Miranda, the ALJ also excluded Ponce and Vargas from the *Burns* denominator on the ground that Respondents "have not demonstrated that individuals occupying the case manager position are required to be licensed RNs." (ALJ 8:

13-15.)<sup>6</sup> However, in *Salem Hospital*, the Board held that it is appropriate to include such “non-nursing” RNs in an all-RN unit regardless of function to extent that the employer “*effectively* requires RN licensing for the job.” *See Salem Hospital*, 333 NLRB 560 (2001) (emphasis added). Mr. James testified that he hired Ponce and Vargas to work as case managers because their RN education and training allowed them, unlike LVN’s, “to assess and make the decision what’s needed for the patient” and to “discuss the cases of the patients” directly with the physicians to cut out the “middleman.” (Tr. 630:19-631:21.). Accordingly, it cannot be disputed that Community “effectively” required their utilization review case managers to be licensed RNs.

Further, the ALJ excluded Azuela because there is “no documentary evidence that Azuela was in fact an RN.” (ALJ 8:42.) Yet, James specifically testified that he was in fact a RN:

Q: Okay. So as of March the 27th of 2010, Jermias Azuela was working [at Community]?

A: Yes.

Q: And he was a PIRM.

A: Yes.

Q: And he is a registered nurse?

A: That’s correct.

(Tr. 635:3-9.) Because none of these individuals previously worked for Karykeion, they must be included in the denominator of the *Burns* analysis. (Tr. 225:19-227:2; 593:25-594:14; 634:9-10, 637:2-9; G.C. Ex. 2.)

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<sup>6</sup> The ALJ also excluded Vargas on the ground that her name is not reflected on Community’s April 15 payroll. Yet, Mr. James testified that Vargas was working at Community from the time that CHHP Management took over operations of Community. (Tr. 632:20-633:16.)

**3. The ALJ Should Have Excluded Ki Kim and Lillian Pascua As Incumbents Since They Were Promoted to Clinical Supervisors**

Respondents maintained that both Ki Kim and Lillian Pascua were promoted to clinical supervisors and, therefore, are not Union incumbents. Specifically, authenticated documents from their personnel files conclusively demonstrated that they were promoted from RNs to clinical supervisors on January 1 and March 5, 2006, respectively. (*See* Resp. Exs. 9 and 13.) Despite the introduction of these records into evidence, the ALJ found that they should be included in the RN unit because Karykeion's payroll document reflects that they were listed as non-supervisory RNs. (ALJ 9:29-44.) By discounting authenticated personnel change notice forms over a summary of payroll information, the ALJ again improperly elevates payroll "form" over substance. The ALJ should have given more weight to the authenticated personnel file documents over a simple summary of payroll information. Accordingly, the number of incumbents should be 31 and not 33 as the ALJ found.

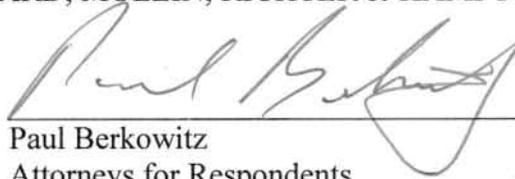
**CONCLUSION**

For the foregoing reasons, the ALJ incorrectly found that a Respondent is a “successor employer” under *Burns* and its progeny. A “substantial and representative complement” was not secured until at least April 15, 2010—the date of the hospital’s first full payroll. At that time, CHHP Management employed a total of **31** bargaining unit incumbents out of **65** total non-supervisory registered nurses and RNs in other capacities, less than a majority.<sup>7</sup>

Dated: July 26, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



Paul Berkowitz  
Attorneys for Respondents  
CHHP MANAGEMENT, LLC, CHHP HOLDINGS II,  
LLC, and AVANTI HEALTH SYSTEMS, LLC

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<sup>7</sup> The ALJ correctly found that Community’s two charge nurses, Judith Morgan and Bozena Owens, are not statutory supervisors and that their names must be added to the “denominator” in the *Burns* “count” increasing it by two. (ALJ 9:24-27.)

PROOF OF SERVICE

UNITED STATES GOVERNMENT NATIONAL LABOR RELATIONS BOARD

REGION 21

Case No. 21-CA-39264 & 21-CA-39268

I am employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1901 Avenue of the Stars, Suite 1600, Los Angeles, California 90067-6017.

On **July 26, 2011**, I served the following document(s) described as **RESPONDENTS' BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

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Via Federal Express

**BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

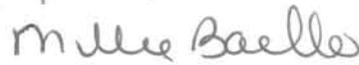
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**☒BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed above. The electronic notification address from which I served the documents(s) is mbaello@sheppardmullin.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **July 26, 2011**, at Los Angeles, California.



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Millie Baello