UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC D/B/A DANBURY HEALTH CARE CENTER; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC D/B/A WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC D/B/A WETHERSFIELD HEALTH CARE CENTER	Case Nos.	34-CA-12715 34-CA-12732 34-CA-12765 34-CA-12766 34-CA-12767 34-CA-12768 34-CA-12769 34-CA-12770 34-CA-12771

And

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU, AFL-CIO

RESPONDENTS' ANSWERING BRIEF TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S LIMITED CROSS EXCEPTION TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Respondents submit the following Answering Brief to Counsel for the Acting General Counsel's Limited Cross Exception to the Decision of the Administrative Law Judge ("Cross Exception").

I. Introduction

Counsel for the Acting General Counsel ("AGC") filed one exception to the Administrative Law Judge's ("ALJ") Decision and Order, excepting to the ALJ's failure to order "special remedies" in this matter. However, the AGC did not request special remedies in the Consolidated Complaint or at any time during the eight-day trial of this case. As the AGC admits in his Brief in Support of his Cross Exception ("AGC Brief"), he did not request special remedies until his post-trial brief. (AGC Brief at 3). Accordingly, the AGC waived his claim for special remedies.

Also noted by the AGC in his Brief was that the ALJ did not address the AGC's belated request in the Decision and Order. (AGC Brief at 3; ALJD 66-67). The ALJ acted appropriately in failing to order special remedies because this issue was not fully or fairly litigated before him. The Board similarly should refuse to address this issue. In the alternative, the Board should conclude that this matter does not warrant the award of special remedies.

II. Respondents Did Not Have Sufficient Notice of the AGC's Request for Special Remedies and the Board Should Decline to Address the Issue

The AGC argues that the ALJ "erred" by failing to consider the request in his post-trial brief that this case warranted "special remedies." (AGC Brief at 3). Without citing any legal support, the AGC erroneously argues that raising the issue of special remedies in his post-trial brief was timely. (AGC Brief at 3). However, raising the issue at that late juncture deprived Respondents of a full and fair opportunity to defend on this issue. Respondents had no notice that the AGC was seeking special remedies until the AGC filed his post-trial brief. They had no opportunity to present any evidence or argument related to the issue at trial, and no opportunity to argue the issue in their post-trial brief. Moreover, after the AGC raised the issue in his post-

trial brief, Respondents had no ability to respond under the Board's Rules and Regulations. Accordingly, the AGC has waived this issue, and the Board should not address it. *TLI, Inc.*, 271 NLRB 798, 805-06 (1984) (affirming ALJ's rejection of remedy not alleged in complaint or raised until close of hearing and in post-hearing brief, where ALJ found the "fundamental question" is "whether in fairness it can be said that the Respondents had sufficient notice of this matter to prepare an adequate defense"), *enf'd* 772 F.2d 894 (3d Cir. 1985); *Met West Agribusiness, Inc.*, 334 NLRB 84, 88 (2001) (affirming ALJ who stated determining an issue "raised for the first time as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense" where General Counsel sought to amend the complaint in his post-hearing brief); *see Camay Drilling Co., Inc.*, 254 NLRB 239, 240 n. 9 (1981) (where counsel for the General Counsel did not allege particular violation of the Act in the complaint, but raised it in his brief to the Board, Board declined to make findings, concluding, "to determine an issue of this magnitude when it is raised for the first time as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense"); *see generally ATC/Forsythe & Assocs., Inc.*, 341 NLRB 501, 501 n. 1 (2004) (granting motion to strike arguments in charging parties' exceptions that went beyond the General Counsel's theory of the case).

III. This Case Does Not Warrant the Award of Special Remedies

Notwithstanding the untimeliness of the AGC's request for special remedies, such remedies are not warranted here. Thus, the AGC argues that the special remedy of "the reading aloud of the individual Notices to Employees by Respondent Healthbridge's Ed Remillard" is justified. (AGC Brief at 5). However, as stated in a decision cited by the AGC, extraordinary remedies may be ordered only when the unfair labor practices are "so numerous, pervasive, and outrageous" that they are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Federated Logistics and Operations*, 340 NLRB 255, 256 (2003), citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995).

Even under the AGC's characterization of Respondents' alleged unfair labor practices (AGC Brief at 2-3), it is clear special remedies are not warranted here. The alleged violations are not "numerous, pervasive and outrageous." Instead, they primarily involve discrete business decisions, wholly unrelated to union activity, reasonable interpretations of the collective bargaining agreements, and one isolated threat by an Administrator. Additionally, the Union pursued grievances for the same conduct, and while the arbitration of those grievances was stayed pending resolution of this matter, nothing suggests that any normal remedies ordered would not redress the alleged wrongdoing by the Respondents. In that regard, it is undisputed that the Center involved in the layoff, pursuant to the normal grievance process invoked by the Union at that time, reversed the layoff, reinstated employee hours, and made the affected employees whole for any losses. Thus, traditional remedies are adequate to dissipate any coercive effects of the alleged unfair practices.

This case is distinguishable from the cases cited by the AGC in which special remedies were awarded. For example, in *Federated Logistics and Operations*, the Board found extraordinary remedies were warranted because respondent reacted to a union organizing campaign by engaging in "extensive and serious unfair labor practices," including:

> maintaining and enforcing an overly broad no-distribution/no-solicitation policy, interrogating employees, creating the impression of surveillance, soliciting employees to conduct surveillance, soliciting employee grievances, promising unspecified benefits, threatening employees that selecting the Union would be futile, threatening the loss of benefits, threatening that wages would be frozen or reduced, and threatening employees that the Union would strike and that Respondent would react by moving its operation to another facility.

340 NLRB 255, 257 (2003). Additionally, the Board found that the remedies were justified by respondent's "withholding a wage increase, suspending employees for engaging in protected activity, and [] issuing discriminatory warnings." *Id.* The Board also found that some of the unlawful conduct "pervaded the unit," that some unfair labor practices "tended to have a long-term coercive impact on the unit," and that many violations were "committed by high-level management officials." *Id.* Under all of these circumstances, the Board found that reading the

notice in the presence of the respondent's official to be appropriate. *Id.* at 258 and n. 11 (suggesting requiring respondent's official to read the notice would be punitive rather than remedial). The alleged violations here were not in the context of an organizing drive but, rather, at Centers with a history of union representation and collective bargaining, and they do not approach the level of severity and pervasiveness of those in *Federated Logistics and Operations*.

Respondents also did not engage in conduct similar to that of the respondent in *OS Transport LLC*, 358 NLRB No. 117, 2012 NLRB LEXIS 559 (2012). There, the Board upheld the special remedy of reading aloud the Board's notice to employees in the presence of the respondent's owner because: "the employees' protected, concerted activity was prompted by the Respondent's coercing its employees to sign sham independent-contractor agreements that purported to strip them of their employee status and their concomitant rights under the Act;" "the Respondent responded swiftly to that protected activity with a series of escalating unfair labor practices: it made unlawful threats, including closure of operations, job loss, and taking away lucrative work assignments; it reduced union supporters' work opportunities, resulting in a drop in their pay; and, ultimately, it discharged two prounion employees;" "the Respondent's most senior officials . . . were directly involved in the commission of the unfair labor practices;" and "the impact and awareness of the unfair labor practices was unit wide among the Respondent's relatively small complement of 14 drivers." *Id.* at *8-9. Again, the alleged conduct of Respondents does not come close to this conduct.

As the Board stated in *Ishikawa Gasket Am., Inc.*, 337 NLRB 175 (2001), another case discussed by the AGC, "[i]n cases where the Board has granted the remedy of notice-reading by a respondent or its representative, the conduct has been egregious." The AGC neglects to point out that, in addition to the General Counsel not arguing that the conduct in *Ishikawa* was egregious, **the Board expressly found that *Ishikawa* was not an egregious case**. *Id.* at 176.

That was so, even though the Board found the respondent "interfered with, restrained and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act" by:

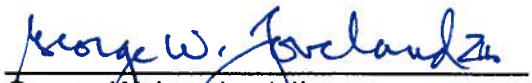
> telling employees that their union activities were a threat to the company and that their annual bonuses would be reduced, by promising benefits, by interrogating employees and soliciting and resolving employee grievances, by soliciting employees to engage in surveillance, by promising to pay them for such surveillance, and by engaging in surveillance of employees' union activities, by discouraging the distribution of union literature, by distributing racially inflammatory literature, and by conditioning an employee's receipt of a monetary separation settlement on her future forbearance of protected concerted . . ..

Id. at 175. Under these circumstances, the Board "decline[d] to order the Respondent to read the notice to employees to its assembled work force." *Id.* at 176. Respondents' conduct in this matter, which was not of the same or similar severity as that in *Ishikawa*, also does not justify the remedy of reading of the notice.

IV. Conclusion

The AGC waived the ability to request special remedies by waiting until his post-trial brief to do so. The ALJ, therefore, correctly refused to address the issue in his Decision and Order, and such refusal should be affirmed by the Board. In the alternative, for the reasons stated above, special remedies are not warranted in this matter, and the Board should not order them.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing pleading were served on November 5, 2012, in the manner set forth below:

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