

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, <i>et al.</i>  and  NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), <i>et al.</i>	08-CA-117890, <i>et al.</i>
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**SURREPLY MEMORANDUM SUPPORTING CHSPSC, LLC AND COMMUNITY  
HEALTH SYSTEMS, INC.’S MOTION TO ADOPT CONSENT ORDER AND  
MODIFIED CONSENT ORDER**

None of the arguments presented by CGC in its Opposition Memorandum preclude adoption of a consent order in this case under *USPS*. The Modified Consent Order, which the Corporate Respondents remain willing to modify further, as explained below, should be adopted.

**A. Possible Future Findings of Fact Do Not Preclude Adoption of a *USPS*-Compliant Consent Order.**

Possible findings of fact, such as “single or joint employer” or “direct participation,” do not preclude adoption of the Modified Consent Order. CGC’s proposed barriers misapply *USPS*, as well as basic concepts of settlements and consent orders. If the possibility of securing specified findings of fact stood in the way of resolutions, consent orders could never be entered. Consent orders under *USPS* provide *remedies* to which a party concedes, accepting responsibility for such remedies, thus avoiding the necessity of fact finding. Moreover, Corporate Respondent remedies herein, whether CGC were to prove single employment, direct participation, or both, are identical. A corporate parent-type entity cannot fulfill its proper role of providing security for remedies by the site employer entity more than once.

Circumstances unique to this case also render CGC's quest for findings of fact superfluous. CGC would expend vast resources to attempt to secure a finding of fact that the Corporate Respondents were at one time, but are no longer, single or joint employers with Affinity, Barstow, Fallbrook, and Watsonville, and that CHPSC was at one time involved in three alleged unfair labor practices at Affinity, a hospital with which it no longer has a relationship. Meanwhile, CHSPSC and CHSI have submitted to the available remedies, consistent with their presence in the case as Corporate Respondents, thus satisfying *USPS* requirements.

Notwithstanding the foregoing, *in lieu* of spending several weeks of hearing in Nashville, followed by briefing, Board and court proceedings, the Corporate Respondents will continue to consider options acceptable to Your Honor. For example, CHSPSC could litigate the Affinity participation allegations, while having the remainder of the case resolved via the Modified Consent Order. Such an approach, leaving the litigation open for factual findings to have CHSPSC accept remedial responsibility twice, arguably exceeds *USPS's* exclusive focus on securing a remedy for "all of the violations alleged in the Complaint." *United States Postal Service and Branch 256*, 364 NLRB No. 116, at 4.

**B. The Absence of a Broad-Based, Corporate-Wide, Cease and Desist Order Does Not Preclude Adoption of the Modified Consent Order.**

CGC persists in arguing the Modified Consent Order fails because it lacks a corporate-wide, broad-based, nation-wide cease and desist order which would encompass relationships not pled in the Complaint, including hundreds of entities with no history of violating the Act. CGC again, incredulously, offers the reassurance that those employers and entities, were they to face wholly unrelated allegations, years into the future, could attempt to assert their rights in contempt proceedings. In doing so, CGC would have Your Honor set the stage for bypassing the Board's legally mandated administrative processes.

More specifically, such an approach exceeds the *USPS* directive that a respondent need only remedy “all of the *violations* alleged in the complaint.” *United States Postal Service and Branch 256*, 364 NLRB No. 116, at 4. The violations alleged in the complaint have occurred at a limited number of hospitals in specifically pled single/joint employer relationships. To avoid *USPS*’s restrictive language, CGC continues to misdirect by mischaracterizing the Corporate Respondents as recidivist offenders. CGC cites cases where single/joint employers violated orders issued in several prior decisions. *HTH Corporation*, 361 NLRB No. 65 (2014). CGC cites unrelated prior cases involving hospitals which may, at one time, have been indirectly owned by CHSI, but to which the Corporate Respondents were never named as parties. CGC cannot create recidivism *nunc pro tunc*. Nor can CGC rely on pending proceedings where no Board findings have occurred. The recidivist act of claiming recidivism, where none exists, does not advance the inquiry.

CGC cannot seek punitive, unavailable remedies, then cry foul when a proposed consent order does not include them. Never in the Board’s history has a broad-based, general, corporate-wide, cease and desist order been sustained in a first-time case against single or joint employer corporate respondents. Such an order would stretch to hundreds of different relationships at different locations across the country, impacting entities with no history of labor relations difficulties. As set forth in the Corporate Respondents’ prior memoranda, any such order would clearly violate the limiting remedial principles espoused repeatedly by the Supreme Court.<sup>1</sup>

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<sup>1</sup> *Communications Wks. of America AFL-CIO v. N.L.R.B.*, 362 U.S. 479, 480 (1960) (finding “neither justification nor necessity” for extending coverage of order to “any other employer” where union had not engaged in violations against employees of any other employer); *Carpenters Local 60 (Mechanical Handling) v. NLRB*, 365 U.S. 651, 655 (1961) (prohibiting punitive remedies under the Act and requiring remedies to be tailored to correcting specific alleged unfair labor practices).

CGC's zeal for unavailable remedies evinces a clear desire to punish – the specific result prohibited by the Supreme Court. The Corporate Respondents, present before Your Honor in their first case as alleged single/joint employers, must be “held accountable for the legacy of unfair labor practices plaguing” employee lives. (Opposition Memo at 10). To advance this argument, CGC chose to rely on a Second Circuit Court of Appeals case *reversing* a Board order relating to a corporate-wide remedy. (Opposition Memo at 13, citing *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580 (2nd Cir. 1994)). The efficacy of a consent order under *USPS*, in this first time single/joint case for the parties, turns on joint/single remedies and the relationships pled, not desperation and vitriol.

Similarly, CGC objects to the absence of a commitment to post with respect to policy violations at hospitals which *never* adopted the challenged policies. Once again, CGC prefers punitive, unavailable measures rather than legitimate remedies. Notices communicate to “those affected by a respondent’s unfair labor practices....” *Pottsville Bleaching Co.*, 301 N.L.R.B. 1095 (1991), at 2. Confusion and redundancy should be avoided, with specific notices to be tailored to violations found at specific locations. *California Saw and Knife Works*, 320 N.L.R.B. 224, 344 (1995). Once again, however, if Your Honor perceives notice issues as a barrier to adoption of the Amended Consent Order, the Corporate Respondents welcome Your Honor’s efforts to fashion language which constitutes a full, appropriate remedial order with respect to posting.

**C. The Role CHSI Plays Regarding the Consent Order, Consistent with its Publicly Traded Stock Company Status, Warrants Entry of the Modified Consent Order**

In its Response, CGC asserts that in the Modified Consent Order, CHSI undertakes no affirmative obligations nor incurs any liability, which CGC interprets as an effort to “shield” CHSI. (Opposition Memo, at 6-7, 9). This stance ignores both the language of the Modified Consent Order and the reality of what a publicly traded stock company like CHSI can actually effectuate.

Of course, this approach is typical of the litigation strategy CGC has adopted in this proceeding. We need look no further than the recitation of testimony from the Affinity proceeding, in which CGC again conflates the use of a branded trade name, “CHS,” with the actual corporate identity of CHSI. (*Id.* at 9-10).

In the Modified Consent Order, CHSI sought to confirm its involvement in the terms of settlement, explain its relationship to the Respondent Hospitals, and effectively delegate implementation of the terms of the Consent Order. The Modified Consent Order currently provides:

Community Health Systems, Inc. (“CHSI”), as a holding company, is (1) an indirect, remote owner of CHSPSC; (2) a former indirect, remote owner of Affinity, Barstow and Watsonville; and (3) an indirect, remote owner of Fallbrook, Bluefield and Greenbrier. CHSI accepts the above settlement, without admitting to being a single/joint employer, and that CHSPSC will effectuate any and all compliance with the above items. The remainder of the Complaint against CHSI shall be dismissed.

CHSI did not seek to shield itself of liability, only to reflect the fact of its operations.

CHSI has no employees. The Board of Directors does not undertake day to day operations of CHSI or any affiliated entity, it serves in the same capacity as the board of any publicly traded stock company—it enters into listing agreements with the New York Stock Exchange; assures registration and compliance with the United States Securities and Exchange Commission; and undertakes traditional board action such as evaluating and paying dividends, taking a position on major corporate transactions (*i.e.*, stock splits and mergers/acquisitions), and approving the company’s financial statements. Hence, to accomplish *any* task, the CHSI Board delegates responsibility for undertaking specific action. In this case, because CHSPSC is involved in this litigation and possesses an infrastructure relevant to implementing the proffered remedies, it may best effectuate the Modified Consent Order.

In the event Your Honor considers this offer insufficient to bind CHSI to the terms of settlement proffered, CHSI offers the following alternative, provided in ~~strikeout~~ for the sake of clarity:

Community Health Systems, Inc. (“CHSI”), as a holding company, is (1) an indirect, remote owner of CHSPSC; (2) a former indirect, remote owner of Affinity, Barstow and Watsonville; and (3) an indirect, remote owner of Fallbrook, Bluefield and Greenbrier. CHSI accepts and adopts the above settlement, without admitting to being a single/joint employer, to promote compliance with the National Labor Relations Act. Because CHSI lacks any employees who may act to implement the terms of the Consent Order, CHSI appoints ~~and that~~ CHSPSC will to effectuate any and all compliance with the above items. The remainder of the Complaint against CHSI shall be dismissed.

The Corporate Respondents seek, in good faith, to avoid unnecessary litigation regarding the single and/or joint employer issue, the integrated enterprise issue, and the corporate wide remedy sought. As such, Corporate Respondents have tendered settlement terms that surpass the requirements of *USPS*. As stated above, neither the General Counsel nor the Charging Party are entitled to admissions of ultimate issues of law or punitive remedies that would merely confuse employees at unnamed facilities affiliated with one or both Corporate Respondents. By this Reply, the Corporate Respondents affirm their commitment to further revisions to the Modified Consent Order if Your Honor considers such changes necessary to provide full relief for the violations alleged.

**Respectfully submitted,**

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## CERTIFICATE OF SERVICE

I hereby certify that, on November 2, 2016, a true and accurate copy of the foregoing was served upon the following via electronic mail:

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