

JONATHAN COHEN (CSB NO. 237965)  
ROTHNER, SEGALL & GREENSTONE  
510 South Marengo Avenue  
Pasadena, California 91101-3115  
Telephone: (626) 796-7555  
Facsimile: (626) 577-0124  
E-mail: jcohen@rsglabor.com

Attorneys for Service Employees International  
Union, Local 1107

**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**REGION 28**

VALLEY HEALTH SYSTEM LLC d/b/a NC-DSH,  
LLP d/b/a DESERT SPRINGS HOSPITAL MEDICAL  
CENTER and VALLEY HOSPITAL MEDICAL  
CENTER, INC. d/b/a VALLEY HOSPITAL MEDICAL  
CENTER,

and

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 1107,

Case Nos.: 28-CA-184993  
28-CA-185013  
28-CA-189709  
28-CA-189730  
28-CA-192354  
28-CA-193581  
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28-CA-194450  
28-CA-194471  
28-CA-194790  
28-CA-195235  
28-CA-197426

**POST-HEARING BRIEF OF CHARGING PARTY**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107**

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## **I. Introduction**

Between the Fall of 2016 and Spring of 2017, respondents Valley Health System LLC d/b/a NC-DSH, LLP d/b/a Desert Springs Hospital Medical Center (“Desert”) and Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center (“Valley”) (collectively, the “Hospitals”) waged a campaign to destabilize charging party Service Employees International Union, Local 1107 (“Local 1107” or the “Union”). That campaign culminated with the Hospitals’ unlawful withdrawal of recognition from the Union in three separate bargaining units.

The Hospitals’ campaign was far-reaching, and significantly undermined the Union’s ability to represent its members. Among other things, the Hospitals prevented the Union from posting literature in break rooms related to ongoing successor negotiations; ceased all dues deductions; imposed restrictions on the Union’s ability to meet with bargaining unit employees at their facilities; authorized a non-employee to solicit in support of decertification inside Desert’s cafeteria and lobby; held coercive captive audience meetings with nurses; and failed to provide the Union with bargaining unit contact information in response to the Union’s information request. Such conduct, aimed at eroding the Union’s ability to represent its members, clearly violated of the National Labor Relations Act (“Act.”).

Moreover, the Hospitals’ withdrawals of recognition, the culmination of its widespread campaign to weaken the Union, likewise violated the Act. First, the Hospitals lacked objective evidence that a majority of employees in each of the three bargaining units no longer wanted to be represented by the Union. Second, even if the Hospitals had such evidence, their persistent unfair labor practice conduct caused that loss of support. Third, with respect to Desert’s withdrawals of recognition, the Hospitals solicited support for the decertification through their

agent, Mark Smith. As a result, Desert’s solicitation in support of decertification rendered its subsequent withdrawals of recognition unlawful.

For these reasons and those that follow, the Union respectfully submits that the allegations in the Second Consolidated Complaint be sustained in full.

**II. Statement of Facts**

**A. The Parties**

Universal Health Services (“UHS”) owns and operates Valley Health System (“VHS”). Tr. 54:10. VHS, in turn, operates a group of six hospitals in Nevada, including Valley and Desert. Tr. 54:14-25. Local 1107 represented employees in three separate bargaining units composed of nurses at Valley, nurses at Desert and technical employees at Desert. Tr. 55:12-22; *see also* General Counsel (“GC”) Exs. 12-14 (excerpts of collective bargaining agreements). The Union was certified as the representative of Desert nurses and technical employees in October 1994, and Valley nurses in July 1999. *See* Hospitals’ Answer to Second Consolidated Complaint and Notice of Hearing, ¶¶ 5(b), (f) & (j).

Following the expiration of the parties collective bargaining agreements (“CBAs”) in April 2016, the parties began successor negotiations for all three bargaining units. Tr. 56:16. Various representatives of the hospitals attended bargaining, including their outside counsel Tom Keim (Tr. 56:10), UHS Vice-President of Labor Relations Jeanne Schmid (Tr. 52:22; 56:1), VHS System Human Resources Director Wayne Cassard (Tr. 56:11-12), and Carol Dugan, Director of Nursing at Desert (Tr. 56:12-13).

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**B. The Hospitals Prevented the Union From Distributing Various Fliers In Employee Break Rooms in Summer and Fall 2016**

The parties' expired CBAs included substantially identical articles permitting the Union to post literature in hospital break room bulletin boards. GC Ex. 12, p. 24 (Art. 16); GC Ex. 13, p. 12 (Art. 7); GC Ex. 14, p. 11-12 (Art. 7). The same articles included a provision stating that "a copy of the material being posted will be hand delivered to the Human Resources Administrator or his/her designee, prior to posting. No material which contains personal attacks upon any other member or any other employee or which is critical of the hospital, its management, or its policies or practices, will be posted." GC Ex. 13, p.12 (Art. 7); GC Ex. 14, p. 11-12 (Art. 7); *see also* GC Ex. 12, p. 24 (Art. 16).<sup>1</sup> Notably, none of the expired CBAs required the Hospitals to approve Union literature prior to posting.

**1. The Hospitals Prohibited the Union From Posting Various Fliers in August and October 2016**

Several times during the parties' successor negotiations, the Hospitals barred the Union from posting literature related to the ongoing negotiations, and notified the Union it would remove any such literature from the hospital.

For example, on August 9, 2016, the Union provided Cassard and Thorne with a flier it intended to post at both Desert and Valley. GC Ex. 17. Cassard wrote back the same day and asserted that the flier "violates the contract" and that the hospitals "will be removing any and all copies." *Id.*

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<sup>1</sup> Valley's expired CBA had slightly different language, providing that "a copy of the material being posted will be hand delivered to the Human Resources Administrator or his/her designee, *for review*, prior to posting." GC Ex. 12, p. 24 (Art. 16) (emphasis added).

Three similar exchanges occurred in October 2016. On October 3, 2016, the Union provided Cassard and Thorne with a flier it intended to post. GC Ex. 18. Cassard wrote back again asserting that the flier “violates the contract” and instructed the Union that it is “not to post [the flier] at the facilities.” *Id.* On October 7, 2016, the Union provided Cassard and Thorne with another flier it intended to post. GC Ex. 19. Cassard wrote back stating “[s]ame position as the last postings” and that the hospitals “do not authorize and will remove them.” *Id.* Last, on October 20, 2016, the Union provided Cassard and Thorne a flier the Union intended to post. GC Ex. 20. Cassard wrote back stating that “[t]his violates the CBA again” and that the hospitals “will remove any and all that are posted.” *Id.*

Cassard testified that he directed supervisors to remove any of the allegedly objectionable fliers from the hospitals. Tr. 157:13-158:3. He also acknowledged sending an email to all supervisors to be “on the lookout” for the allegedly objectionable fliers.<sup>2</sup> Tr. 158:25.

**2. On October 11, 2016, Desert Removed Union Fliers From the IMC Break Room**

On October 11, 2016, Union organizer Randall Peters and Union volunteer Amelia Gayton went to Desert to post Union fliers in break rooms, including the Intermediate Care

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<sup>2</sup> Each of the expired CBAs included a grievance and arbitration Article which permitted the Hospitals to file grievances and pursue them to arbitration. *See* GC Ex. 12, p. 16 (Art. 10(A)); GC Ex. 13, p. 35 (Art. 21); GC Ex. 14, p. 35 (Art. 21). It is undisputed that the Hospitals did not file or pursue any grievances related to the Union’s literature (Tr. 160:13; 616:16-20), choosing instead to bar the Union from posting allegedly objectionable literature and/or remove it.

(“IMC”) unit break room where two nurses were present.<sup>3</sup> Tr. 368:17-369:16; 374:5-11; 552:12-24; 554:4-8; 535:9.

After they posted fliers on the bulletin board in the IMC break room, a charge nurse named Bill entered the break room and asked them whether the fliers were approved.<sup>4</sup> Tr. 369:21-25; 555:25-556:5. Peters informed Bill that the fliers were approved. Tr. 370:2. Bill responded that “he would check” and then left. Tr. 370:4.

Soon after, Dugan<sup>5</sup> arrived and told Peters and Gayton that too many people were present in the break room and that they “shouldn’t be in here talking to them.” Tr. 370:6-13. Gayton testified that Dugan was “screaming” at them saying “‘I’m going to call security. You’re not allowed in here.’” Tr. 556:7-8; 565:10-12. Peters testified that Dugan also said that the fliers were not approved and that she was going to call someone else. Tr. 370:12-13. Peters described Dugan as “extremely loud” and “very agitated.” Tr. 373:25; 370:10.

Dugan, however, testified that she only asked them to “respect my clinical supervisor,” and informed them “that I was a little upset that, you know, they would not treat him with the same respect that we try and treat everybody else with.” Tr. 643:14-17. Dugan described her demeanor as “stern.” Tr. 664:20.

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<sup>3</sup> Gayton testified that “a couple” of employees were present, but she was not sure whether they were nurses. *See* Tr. 555:19-20; 558:14-18; 560:7-16.

<sup>4</sup> Gayton recalled that Bill was in the room already when they arrived. Tr. 561:8.

<sup>5</sup> Peters could not recall the last name of “Carol.” Tr. 370:8. It is clear, however, he was referring to Dugan, who did not dispute that she confronted Peters and Gayton in the IMC break room on October 11, 2016. *See* Tr. 642:1-647:9.

Five to ten minutes later, Cassard, Elena McNutt, the Chief Nursing Officer, and two security guards arrived. Tr. 370:15-25; 642:18-19. According to Peters and Gayton, Dugan removed the fliers they had just posted from the break room bulletin board, and also removed the Union's fliers from the break room table. Tr. 372:7-10; 556:2-5; 557:8-10; 568:8-16; 569:17. Dugan, however, denied entering the break room or removing any fliers. Tr. 645:10; 646:23-647:9. Cassard and the security guards then asked Peters and Gayton to step out of the break room, and they went to a room next door. Tr. 371:3-12. Meanwhile, Cassard and Dugan went into another nearby room. Tr. 371:14-17.

At some point, Cassard spoke to Peters and Gayton and informed them that he did not approve of them posting one of their fliers related to ongoing successor negotiations. Tr. 556:20-22; 558:1-2; 565:21-24; 614:12-15; *see* GC Ex. 19. After a short while, Peters and Gayton returned to the break room, and Cassard gave them back one of their fliers about a town hall meeting. Tr. 372:16-19. Peters and Gayton then posted the flier on the bulletin board. Tr. 373:3-5. Cassard did not return the bargaining update fliers. Tr. 373:17.

### **3. The Hospitals' Evidence Concerning the Union's Ability to Post Fliers**

In support of their position that they had the unilateral right to bar the Union from posting, and to remove, allegedly objectionable fliers, the Hospitals rely on the language of the expired CBAs, several predecessor CBAs (*see* Resp. Exs. 2-4), and various correspondence between the parties related to posting fliers in the facilities (*see* Resp. Exs. 5-12, 15-18).

Like the recently expired CBAs, none of the previous ones included language specifying that the Hospitals' approval was a precondition to posting Union literature in the facilities. Similarly, none of the correspondence reflects the Union's agreement that the Hospitals could

unilaterally bar the posting of, and remove, allegedly objectionable fliers. If anything, the Union made clear that the Hospitals *lacked* the right under the CBAs to require management’s approval prior to the Union posting fliers in the facilities. Tr. 623:6-13; *see, e.g.*, Resp. Exs. 10 (May 24, 2016 email from Troyano to Cassard: “To make sure you understand the Union’s position in this matter, the contract does not require your approval on this flyer or any other postings made by the Union. The contract only requires that we deliver a signed copy of the material being posted.”); Resp. Ex. 11 (Aug. 16, 2016 email from Troyano to Cassard: “Per the CBA the fliers are to be sent to you for review before we post them. It does not say we need your approval before we post them.”); GC Ex. 18 (Oct. 3, 2016 email from Troyano to Cassard: “We respectfully disagree and object to any removal of these flyers.”).

Other correspondence is solely internal hospital correspondence and therefore fails to establish the Union’s alleged acquiescence to the Hospitals’ view. *See* Resp. Exs. 7, 8, 12 & 18. Finally, that some correspondence shows that the Union asked the Hospital whether it approved a flier fails to establish that the Union believed the Hospitals could unilaterally disapprove and remove allegedly objectionable fliers. *See* Resp. Exs. 5 & 15.

**C. On September 23, 2016, the Hospitals Unilaterally Ceased Deducting and Remitting Union Dues**

The parties’ expired CBAs included a dues deduction provision requiring the Hospitals to deduct dues from employees authorizing such deductions. GC Ex. 12, p. 20 (Art. 13); GC Ex. 13, p. 9 (Art. 4); GC Ex. 14, p. 9 (Art. 4).

On September 14, 2016, Keim sent a letter to the Union informing it that the Hospitals had “reviewed a sampling of employee dues authorizations submitted over the last six months”

and concluded that none of the authorizations contained certain language that, according to the Hospitals, was required by Section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(4) (“LMRA”). Resp. Ex. 22; *see also* Tr. 150:19-22. The relevant language in the dues deduction authorization cards is as follows:

This authorization shall remain in effect and shall be irrevocable unless I revoke it by sending written notice to both the Employer and the Union by registered mail during a period from October 1-15 on each year of the agreement and shall be automatically renewed as an irrevocable check-off from year to year unless revoked as hereinabove provided, irrespective of whether I am a Union member.

Resp. Ex. 1.

According to Keim’s letter, LMRA Section 302(c)(4) required dues deduction authorizations to explicitly state that the authorization “shall not be irrevocable for a period of more than one year, or beyond the termination of the applicable collective bargaining agreement, whichever occurs sooner.” Resp. Ex. 22. Because the sampling of dues deduction authorization cards reviewed by the Hospitals did not contain this language, Keim claimed that the Hospitals were “not properly authorized” to deduct dues and would “cease any and all deductions based on the currently used authorizations on the pay date Friday, September 23, 2016.” *Id.* It is undisputed, however, that the Hospitals had been relying on the very same dues deduction authorizations for at least several years. Tr. 170:17-171:10.

The Union’s counsel responded to Keim’s letter on September 15, 2016. Resp. Ex. 23. In his letter, counsel for the Union asserted that LMRA Section 302(c)(4) did not require dues deduction authorization cards to include the language cited by Keim, and that the dues deduction authorization cards complied with LMRA Section 302(c)(4). *Id.* In addition, the Union’s

counsel advised Keim that the Hospitals' unilateral cessation of dues deduction would constitute an unlawful unilateral change. *Id.*

Keim responded on September 19, 2016, asserting that the Hospitals' cessation of dues deduction would not be unlawful since the underlying authorizations were invalid. Resp. Ex. 24. Keim's letter included dues deduction authorizations from other unions which, according to him, complied with LMRA Section 302(c)(4). *Id.*

The next day, Wayne Cassard, VHS Assistant Director Human Resources (Tr. 134:16), sent a letter to all Desert employees in both the nurse and technical bargaining units informing them that the hospital had "discovered that the [dues] authorization lacks specifically required language from the law," and that "effective with the September 23, 2016, pay date, we will not be deducting union dues unless we receive valid dues deduction authorizations." GC Ex. 16; Tr. 148:17-149:6; 585:5. Desert sent the letter to all bargaining unit employees, regardless of whether they had previously authorized dues deduction (Tr. 149:19), and even though Desert did not review each employee's dues deduction authorization to determine if it omitted the allegedly required language (Tr. 151:3; 615:18).

Dana Thorne, Valley Hospital Human Resources Director (Tr. 231:12), sent an identical letter to all bargaining unit nurses at Valley. *See* GC Ex. 29; Tr. 149:10-12; 233:14. She did so, despite knowing that not all nurses were having dues deducted from their paychecks. Tr. 233:24-234:4.

On September 22, 2016, the Union's counsel wrote to Keim. Resp. Ex. 25. The Union asserted that the Hospitals' unilateral cessation of dues deduction was unlawful, and demanded to bargain over the change. *Id.* Keim wrote back the next day. Resp. Ex. 26. He claimed that the

Hospitals were not making a unilateral change, that there was no duty to bargain, and that, while the Hospitals would agree to meet, they would not bargain. *Id.*

On September 23, 2016, the Hospitals ceased deducting dues for all bargaining unit members. Tr. 151:7-23. Neither hospital bargained with the Union prior to ceasing dues deductions. *Id.*

**D. On January 27, 2017, Valley Attempted to Bar the Union From Speaking With More Than Two Employees at a Time**

On January 27, 2017, former Union Organizer Romina Loreto visited Valley with another Union Organizer, Gloria Madrid, to post updates on Union bulletin boards inside the hospital. Tr. 278:6-8; 279:18-24. After receiving hospital badges, Loreto and Madrid went to the emergency department break room. Tr. 280:8. After briefly providing updates to several nurses in the break room, Loreto realized that nurses were preparing to do a shift-change briefing with their charge nurse. Tr. 280:11-23; Tr. 285:21; 296:17-22. She and Madrid left the break room to give the nurses privacy during their briefing.<sup>6</sup> Tr. 280:19-25.

While waiting outside, charge nurse Shawn Melly asked Loreto and Madrid if they were from the Union. Tr. 281:8-12; 256:9. Holding a piece of paper, he informed Loreto and Madrid that “according to this piece of paper, . . . you can only talk to one or two nurses at a time.” Tr. 281:15-18. Loreto disputed his claim, asserting that the collective bargaining agreement included no such restriction. Tr. 281:18-22.

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<sup>6</sup> According to Rose McDonald, a Valley charge nurse, she and Melley were walking from the charge desk to the break room for a “huddle” on an unspecified date in January when they saw two Union organizers present. Tr. 1004:20-1005:2. McDonald testified that Melley asked the Union organizers to leave. Tr. 1005:12. McDonald testified that the Union organizers cooperated. Tr. 1007:15. It is not clear whether this was the same incident described by Loreto.

Loreto and Madrid then left the hospital and spoke to fellow Union Organizer Lanita Troyano, who was leafleting outside. Tr. 281:24-282:5. Troyano suggested they return and ask Melly for the piece of paper on which he was relying. Tr. 282:13-14.

Loreto returned to the hospital, found Melly, and asked for his last name and a copy of the piece of paper he had moments earlier. Tr. 282:15-19. He did not provide his last name, and informed Loreto that he had thrown the paper away, but that it was an email from human resources to all hospital managers informing them that organizers could only speak to one or two nurses at a time. Tr. 282:19-23. Indeed, an email dated October 25, 2016, from Cassard to various hospital managers, instructed that the “Union should not have any more than 2 collective bargaining unit employees with them at a time in the break room, cafeteria, lobby and other outdoor break areas.” Resp. Ex. 12. Cassard’s email further advised managers that “[i]f you see more than 2 collective bargaining employees with the Union, you can disrupt the meeting and ask the employees to return to work or if not on break, to return to their unit.” *Id.* Thorne acknowledged providing the same instruction to Valley supervisors, including Melly. Tr. 256:4.

**E. On February 2, 2017, Valley Prevented the Union From Meeting With New Employees**

The expired collective bargaining agreement covering Valley nurses included a provision entitling the Union to attend new employee orientations. GC Ex. 12, p. 23 (Art. 14(F)). In relevant part, the CBA provided that the “Union will be granted access to new employee orientations for the purpose of a fifteen (15) minute talk regarding the Union and the distribution of a Union information packet to all bargaining unit eligible employees.” *Id.*

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On February 2, 2017, Loreto, with Union Organizer Natalie Hernandez, visited Valley in order to make a presentation on behalf of the Union at the new employee orientation. Tr. 283:8-16; 318:4-6. Loreto and Hernandez arrived at about noon, and went to the room where the orientation was being held. Tr. 283:20-21; 318:21-319:5. Upon arrival, they informed Kim Crocker, a Nursing Project Manager at Valley (Tr. 258:10; 284:16-19), that they were there on behalf of the Union to make a presentation to new employees (Tr. 814:3-4). Crocker told them that the Union's presentation time slot began at 2:15. Tr. 814:5-6; *see also* Resp. Ex. 14 (email informing Union that orientation will be at 2:15 p.m.). Loreto and Hernandez then waited outside in the hallway until their time slot. Tr. 284:3-8; 320:1-8.

Crocker dismissed the orientation attendees at 2:10 p.m. Tr. 814:16. She informed two nurses attending the orientation that the Union had a presentation for them starting at 2:15. Tr. 814:16-19. When one of the nurses asked Crocker whether he had to stay, Crocker informed him that it was up to him, and that she could not "force [him] to stay." Tr. 814:19-22. According to Crocker, the other nurse then told her, "I don't want to stay either." Tr. 814:24-25.

Loreto and Hernandez, who were still in the hallway, saw about ten people leaving the orientation room. Tr. 284:10-12; 285:15; 320:11-17; 321:20. Loreto asked some of the orientation attendees whether they were on a break, but was informed that the orientation had finished. Tr. 284:15-16; 321:5-7. Loreto returned to the orientation room and asked Crocker why she released the orientation attendees. Tr. 284:17-21; 321:815. Crocker responded that the two new nurses at the orientation did not want to stay for the Union's presentation. Tr. 284:23-24; 290:21-24; 321:11-15; 815:16-17.

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**F. Valley Failed to Furnish Bargaining Unit Contact Information to the Union in Response to its January 31, 2017 Information Request**

On January 31, 2017, the same day that a decertification petition involving Valley nurses was filed in case number 28-RD-192131, Tr. 627:22; 896:6; 1039:3-5, the Union made an information request to both Desert and Valley for the following information: “An updated list of all current employees in each bargaining unit at [Desert] and [Valley]. The list must contain the employee job classification, name, address, telephone number(s), email or other electronic address and the department where the employee works.” GC Ex. 21; Tr. 160:25-161:11. The information request asked the hospital to “provide this updated information no later than February 6, 2017.” *Id.*

On February 6, 2017, Keim notified the Union that the Hospitals would not be able to meet the deadline of February 6, 2017, which he characterized as “unreasonable.” GC Ex. 34; Tr. 1029:19-22. Keim testified that because an earlier Union information request requested that similar information be produced in 23 days, he treated 23 days as the appropriate “timetable” to respond. Tr. 1025-1026:24; 1033:10-13.

The Union responded to the email shortly thereafter asking the Hospitals when they intended to produce the information. GC Ex. 34. The Hospitals never responded to the Union’s question. Tr. 1089:13-17. In fact, Cassard, the recipient of the Union’s request, never asked Thorne to respond to the Union’s request, even though she was normally made aware of information requests related to Valley. Tr. 694:10-14; 702:17-25.

Contrary to Keim’s claim that seven days was insufficient time to provide the requested information, Cassard testified that most of the information sought by the Union could be

collected from Lawson, the hospital's human resources computer database, within a few hours. Tr. 623:25-625:18; 627:10. Thorne testified that she could collect the same data from Lawson within "five minutes." Tr. 701:5. Indeed, the Hospitals responded to the Union's identical bargaining unit information request in December 2016 based solely on information obtained from Lawson. Tr. 1067:17-1068:20.

Moreover, it is clear that Valley had the very same information, and more, compiled by the first week of February 2017. Thorne testified that counsel for the Hospitals requested her to collect contact information – including nurses' names, departments, shifts, home addresses, phone numbers (both home and cellular), and email addresses – for Valley nurses in response to the decertification petition.<sup>7</sup> Tr. 681:23-682:10. According to Thorne, she was told by counsel for the Hospitals to compile the information "right away" after the petition was filed. Tr. 695:15-19; *see also* Tr. 1032:24-1033:3; 1035:6-13. Thorne testified that she and her staff compiled all the information within four to five days of when counsel for the Hospitals first requested it. Tr. 686:24-25; 696:2-18. Despite that, Keim testified that it took "weeks" to compile the information. Tr. 1038:14.

The Hospitals presented evidence that Lawson did not include all of the information they compiled in response to the decertification petition. For example, because Lawson did not have an email address on file for every employee, and did not distinguish between a home phone number and cell phone number, Thorne and her staff also used Shift Hound and HR Smart,

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<sup>7</sup> Keim interpreted the Union's information request as seeking the same information that the Board requires from an employer following the filing of a representation petition. Tr. 1069:18-20. He acknowledged, however, that the Union never asked for anything other than what it identified in its written information request. Tr. 1069:13-18; 1105:13-14.

different computer databases, to compile some of the information related to the then-pending decertification petition.<sup>8</sup> Tr. 682:13-685:11; 685:14-18; 700:4. Because none of the databases had email addresses or cell phone numbers for a handful of employees, Thorne and her staff also contacted six to seven department managers to collect the information. Tr. 687:6-14; 701:22-23.

By February 17, 2017, nearly three weeks after the Union's information request, and the date on which Valley withdrew recognition from the Union (*see* GC Ex. 24), Valley had not responded to the Union's information request (Tr. 162:1; 611:17). It is undisputed, however, that on that same date Valley had a comprehensive list with the information sought by the Union. *See* Resp. Ex. 48. Indeed, it used that list on February 17, 2017, during its efforts to verify employee support for its withdrawal of recognition, discussed *infra*. Tr. 1050:1-2; 1066:21-24. Even so, Keim testified that the Valley information was not ready before February 17, 2017. Tr. 1031:16.

On February 23, 2017, the Hospitals provided a response for the Desert bargaining units. Tr. 1030:13. It did not provide any information related to the Valley bargaining unit, because by February 23, 2017, it had withdrawn recognition. Tr. 1030:13-24.

#### **G. Valley Coerced Nurses During a Captive Audience Meeting**

Sometime in mid-January or early February 2017, after the Valley nurse decertification petition was filed, Schmid began holding mandatory meetings with Valley nurses. Tr. 78:18; 711:1-15. Although Schmid could not recall the number of meetings she held, she acknowledged it was more than five. Tr. 749:8; Tr. 82:23; 717:2.

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<sup>8</sup> It was not clear whether the hospital went through this same process when it responded to the Union's information request related to Desert employees. Indeed, Cassard was not sure whether the hospital relied on anything other than Lawson when it compiled its response related to Desert employees. Tr. 633:25-634:1.

As Schmid testified, “the petition had been filed and, in our view, we were in a campaign and we were communicating with staff about unionization, collective bargaining, all the things that we would talk about in any campaign.” Tr. 83:9-12. When pressed about the goal of the campaign, Schmid conceded that it was to let employees know that Desert preferred “the opportunity to have a direct relationship with [nurses],” a euphemism for decertification. *See* Tr. 748:11-12; 717:20-21 (“And then, you know, talk about, you know, giving us an opportunity. Obviously, we hoped that they would vote no.”); 747:22-25 (“Q: And the goal of the campaign was to convince employees to vote against the Union, right? A: Well, yeah, I mean we were going to communicate our side of the, you know, our side of the story.”).

Wendy Reyes, a nurse manager from Corona Regional Medical Center (“Corona Regional”) in Corona, California, which is a UHS hospital, also attended some of the meetings on behalf of Valley. Tr. 78:22-24; 79:14-20. Schmid invited Reyes to attend the meetings and assist with Valley’s “campaign.” Tr. 735:20-22. Corona Regional had withdrawn recognition from a nurse union, and Reyes discussed what happened there following the withdrawal of recognition. Tr. 82:13-15; 123:25-124:3.<sup>9</sup>

#### **1. Komenda’s Testimony Established a Series of Coercive Statements**

Sue Komenda, a Valley nurse, attended one of the meetings. Tr. 522:23-523:4. Sometime in late January or early February 2017, Komenda’s manager informed her that she was required to attend a meeting with the administration. Tr. 523:11-22. When Komenda arrived at

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<sup>9</sup> The transcript mistakenly states “And when she spoke to employees, the nurses, did she talk about what happened at Corona Regional Medical Center after that hospital *went through a recognition.*” Tr. 82:13-15 (emphasis added). The italicized language should read “withdrew recognition.”

the meeting, ten or eleven nurses from other units were there along with Schmid and Reyes. Tr. 524:8-12. When Komenda arrived, she signed in along with the other nurses. Tr. 524:18-20.

Komenda testified that Schmid conducted the meeting, which lasted about an hour and a half. Tr. 524:15-22. Komenda testified that Schmid “talked about how the administration did not want the Union in the Hospital anymore and that bargaining was going on and that bargaining would go on and on and that while bargaining was going on, they would stretch it out to a long length of time and during that time, we would not get any raises.” Tr. 525:7-12; 546:10.

Indeed, during the meeting Schmid referred to a UHS hospital in Philadelphia where contract bargaining lasted three years, during which time there were no raises. Tr. 526:15-527:7. According to Komenda, Schmid emphasized that there would be no raises at Valley while the parties were bargaining. Tr. 528:1. In fact, in about July 2016, the Hospitals had rejected the Union’s wage proposal and took the position that economic matters would not be considered at that stage of bargaining. Tr. 62:2-8; GC Ex. 2; 63:4-7.

At the same time that Schmid emphasized Valley would not provide any raises during bargaining, she also emphasized that nonunion UHS hospitals in Las Vegas received “market value” raises, and that if Valley was nonunion, nurses would receive market value raises too. Tr. 528:1-529:20. Schmid explained that “market value” raises were intended to bring nurses in line with the area-wide wage scale for nurses. Tr. 529:3-7. Schmid further highlighted that Desert and Valley were the only two UHS facilities that did not receive market raises. Tr. 529:17-20.

Schmid also informed the nurses that she did not like one of the members of the Union’s bargaining team, Valley nurse Linda Wilcox. Tr. 531:11-17. According to Schmid, the Union’s “agenda” was different from “the other nurses’ agendas in the hospital”, and that Valley’s

emergency room nurses “did not have the same priorities as the nurses in the SEIU had . . . .” Tr. 531:19-20.

Last, according to Komenda, Schmid informed the nurses that decertification cards were being circulated at Valley, and that the cards “were being offered to sign if you wanted to dump the Union . . . .” Tr. 531:22.

Komenda testified that during the same meeting Reyes discussed her experience with decertification. Tr. 520:3-14. According to Komenda, Reyes explained that once nurses decertified, “they got better administration because better administrators only go to nonunion hospital - - yeah, only go to nonunion hospitals, that union hospitals were restricted in getting good administrators because those administrators could not do what they wanted to do.” Tr. 530:9-13.

## **2. Schmid’s Testimony Corroborated Much of Komenda’s Testimony**

Schmid testified that she conducted meetings with Valley staff in February 2017. Tr. 711:1-15. During her meetings, she used a NLRB publication entitled “Basic Guide to the National Labor Relations Act.” Tr. 712:21-713:1; *see* Resp. Ex. 20. She also used a whiteboard during the meeting. Tr. 713:24. Schmid required meeting attendees to sign a sign-in sheet to verify their attendance. Tr. 716:13-22.

According to Schmid, she addressed the pending decertification petition and the process of an election, and provided background about the NLRA and collective bargaining. Tr. 717:13-23. She also informed attendees that Valley wanted them to “giv[e] us an opportunity. Obviously, we hoped that they would vote no.” Tr. 717:20-21; 719:3-6 (“Q: Did you express the

hospital's preference to how the election would turn out? A: I mean I certainly said that we hoped that we would have an opportunity to work directly with the staff.”).

With respect to bargaining, Schmid testified that she “discussed the process of bargaining,” including impasse. Tr. 719:22; 728:21-729:9. In fact, Schmid addressed impasse, even though no attendees had questions about it, and even though she agreed that the Hospitals and Union were not “anywhere near” impasse. Tr. 734:8-23. She also addressed the ongoing bargaining between Valley and the Union; according to Schmid, “people had a lot of questions about why it was taking so long.” Tr. 721:21-722:3. Schmid informed nurses that “you can’t tell how long it’s going to take,” and described one UHS facility where bargaining took three years to reach agreement, and another facility where it took three days. Tr. 722:5-9; 723:24-724:17. According to Schmid, she informed attendees that the Union was to blame for the slow pace of bargaining, and accused the Union of not being prepared for bargaining. Tr. 722:11-17. Schmid denied informing nurses that Valley wanted to “stretch out” bargaining. Tr. 728:2-3.

Schmid testified that she also addressed the topic of wages. She testified that nurses had questions about pay, and why the Hospital had not agreed to the Union’s wage proposal. Tr. 724:25-725:13. Schmid testified that nurses also had questions about why their wages were lower than non-union VHS hospitals. Tr. 725:16-24; 741:8-12. According to Schmid, she addressed the “pros and cons to both” settings. Tr. 726:5-12. With respect to the non-union setting, she explained that VHS does a periodic “market adjustment,” a wage adjustment for everyone regardless of performance, based on the market and a hospital’s annual performance. Tr. 727:5-10. Schmid informed employees that VHS did not have a set schedule for making market adjustment raises at non-union hospitals, but that VHS had recently provided raises to its

non-union facilities in Las Vegas.<sup>10</sup> Tr. 750:20-23; 751:18-25. Schmid explained that in the union setting, the parties have to reach agreement before there can be a wage increase. Tr. 742:20-21.

Schmid also discussed Linda Wilcox, a Union bargaining team member. Tr. 733:3-20. According to Schmid, she told attendees that “Linda was focused on her unit, which is the SICU unit and was not focused on what nurses outside of the SICU unit might want.” Tr. 733:5-11.

According to Schmid, Reyes attended two or three of the meetings that Schmid led. Tr. 731:13-15; 735:12. Schmid testified that Reyes “would sometimes speak” during the meetings. Tr. 731:18. Reyes also held her own meetings with nurses. Tr. 735:15. Schmid denied making any comments regarding “dumping” the Union. Tr. 733:18-20.

**H. On February 15, 2017, Desert Attempted to Bar the Union From Speaking to Bargaining Unit Employees in the Presence of Non-Bargaining Unit Employees**

The expired Desert CBA covering nurses included a provision granting the Union access to the hospital. GC Ex. 13, p. 8 (Art. 13(C)). Included in the provision is the following limitation on access: “The above access rights shall be limited to official union business related to the bargaining unit and shall not be used to engage in union organizing activity, solicit, or distribute literature to non-bargaining unit employees.” *Id.*

On February 15, 2017, Union organizer Hernandez and Union volunteer Katrina Alvarez, a former Desert nurse (Tr. 342:18-21), visited Desert to distribute fliers in break rooms (Tr.

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<sup>10</sup> Almost immediately after providing such testimony, Schmid backtracked and testified “I don’t know. I don’t know whether I talked about timing [of market adjustments for non-union facilities] or not.” Tr. 752:4-5.

323:15-324:4; 343:14-21). After checking in with security, Hernandez and Alvarez went to various break rooms, including the 2 East break room. Tr. 324:12-13; 344:12-345:6. Upon arrival at the 2 East break room, three nurses and at least one other individual were present.<sup>11</sup> Tr. 324:16-22; 334:10-16; 345:14-16. While Hernandez posted fliers on the bulletin board, Alvarez and the nurses discussed the Union and the ongoing bargaining. Tr. 324:25-326:12; 337:2-10; 345:19-23; 348:16-20. According to Hernandez, the other employee appeared to be doing paperwork while Alvarez was speaking to the nurses. Tr. 336:3-7.

Soon after Hernandez and Alvarez arrived at the 2 East break room, Carol Dugan, a Unit Manager (Tr. 636:23-24), entered the break room and immediately told Hernandez and Alvarez they were not permitted to be in the break room speaking to nurses while non-bargaining unit employees were present, and that they had to leave. Tr. 325:12-25; 345:24-346:8; 360:22-24; 365:14-15. Hernandez described Dugan's demeanor as "aggressive[]." Tr. 325:22. Alvarez recalled that Dugan had a "raised voice." Tr. 345:25. Two of the three nurses left as soon as Dugan confronted Hernandez and Alvarez. Tr. 326:1-2; 346:5-7; 348:8-12.

Dugan similarly testified that while walking past the break room, she saw Alvarez, whom she knew to be a former employee, standing in the break room while a certified nursing assistant ("CNA") was present. Tr. 648:7-10. According to Dugan, she "poked" her head into the break room and said, "Excuse me. There are nonrepresented employees here. I request that you stop[]" until she [the CNA] has a chance to finish her break and leave." Tr. 648:12-14. Dugan did not

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<sup>11</sup> Although Hernandez and Alvarez could not recall the names of the nurses present, each of them recalled that the nurses had distinctive badges identifying them as nurses. Tr. 324:22; 346:21; 351:25-352:1. Hernandez recalled that three nurses and one other employee were present in the break room. Tr. 3234:16-20. Alvarez recalled that three nurses and two other employees were present in the break room. Tr. 345:14-16.

see Alvarez speaking to the CNA; instead, she saw Alvarez speaking in a break room to nurses and believed the CNA was “engaged.” Tr. 663:1-14; 666:7-667:7.

Hernandez testified that Alvarez informed Dugan that they had a right under the expired CBA to be present and speak with nurses.<sup>12</sup> Tr. 326:4-8. Alvarez testified that she informed Dugan that “I have the right to speak to my union members.” Tr. 347:11. According to Alvarez, Dugan replied, “You’re not allowed to be in here. You need to get out. I’m going to go call security.” Tr. 326:9-10; 346:1-3. Dugan then left. Tr. 326:10. Hernandez and Alvarez continued speaking to the third nurse, a Union member, who remained in the break room. Tr. 327:6-8; 346:7-8.

#### **I. Valley Withdrew Recognition From the Union**

On the afternoon of February 17, 2017, Valley withdrew recognition from the Union as the exclusive bargaining representative of nurses. Tr. 57:2; 184:19-25; 185:5-15; *see* GC Ex. 24.

##### **1. Burog and Yant Gave Barnthouse Various Decertification Materials**

At about 9:00 a.m. that same day, a Valley nurse named Rachelle Burog<sup>13</sup> contacted Victoria Barnthouse, Chief Nursing Office at Valley (Tr. 173:18), and asked to meet with her. Tr. 175:5-7; 765:13-21. Burog did not inform Barnthouse why she wanted to meet. Tr. 803:14-22. Burog and another Valley nurse, Jennifer Yant, met with Barnthouse in her office shortly thereafter and presented Barnthouse with signed cards (Resp. Ex. 27) and emails (Resp. Ex. 28)

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<sup>12</sup> Alvarez had been involved in a campaign to organize CNAs in 2014. Tr. 358:9; 652:15-18. According to Dugan, that was her “concern,” Tr. 652:18, but Dugan did not testify that she saw Alvarez speaking to the CNA.

<sup>13</sup> The transcript identifies the employee as “Rachelle Burog.” *See, e.g.*, Tr. 70:16. Burog’s email address, however, identifies her as “Richel Burog.” *See* Resp. Ex. 28. In any event, it is clear this is the same individual.

purporting to show that a majority of Valley nurses no longer wished to be represented by the Union. Tr. 175:16-176:9; 765:13-18.

The cards included language stating that “I am an RN at Valley Hospital Medical Center and No longer wish to be Represented by SEIU (SERVICE EMPLOYEES INTERNATIONAL UNION) local 1107 for the purpose of collective bargaining with my employer.” Resp. Ex. 27-A. Although some of the cards were photocopies of originals, *e.g.*, Tr. 779:19-23, Barnthouse could not recall whether she saw any photocopied cards when she received the materials from Burog, Tr. 792:7.

The emails were all form emails received by Burog at her email address “richel.burog@gmail.com” from “notifications@typeform.com.” Resp. Ex. 28; Tr. 785:25-786:21. The emails each included a space for the employee name; email address; phone number; employer; date of submission; and a confirmation that the employee agreed “that [he or she] no longer wish to be represented by Service Employees International Union Local 1107 (SEIU 1107) for the purpose of collective bargaining.” *Id.* With respect to the space for the employee’s email address, the form asked, “What is your email address? (Required to receive confirmation.)” *Id.* Barnthouse never asked Burog or Yant any questions about the emails; never visited Typeform.com; and did not actually know whether any of the employees who purportedly submitted the emails *actually* submitted them.<sup>14</sup> Tr. 797:4-798:11.

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<sup>14</sup> Desert nurse Courtney Farese set up an online petition on Typeform.com, a corresponding QR scanner, and a Facebook page, for the Valley nurse decertification effort. Tr. 877:14-20. Farese set up the online petition so that the email confirmations would be sent to Burog. Tr. 878:6-10.

## **2. Valley Withdrew Recognition Based on Emails and Authorization Cards**

After receiving the decertification materials, Barnthouse contacted Schmid, who was in Las Vegas that day, and informed her that she had received decertification materials. Tr. 63:21-64:1; 68:14-22; 177:6-9. Either Barnthouse or Schmid also contacted Keim, the Hospitals' outside counsel. Tr. 1040:5-11.

Keim met Schmid and Barnthouse in a conference room at Valley sometime after 9:00 a.m., and they then sorted the cards alphabetically. Tr. 65:14-20; 178:17-24; 768:1-4; Tr. 1041:5-13. They also sorted duplicates. Tr. 179:8-19. Barnthouse could not recall whether any of the duplicate cards had different dates. Tr. 794:15. Keim testified that when they found a duplicate card, they kept and relied on the card with the better signature. Tr. 1044:5-7.

Sometime prior to arriving, Keim asked Thorne to prepare a list of current employees as of that same day. Tr. 1040:22-24; 1047:6-9; *see* Resp. Exs. 29 & 31. At some point that same day, Keim counted the emails and highlighted names on the list in pink for those who allegedly subscribed to the online decertification petition. Tr. 1043:5-22. Also, after the cards were alphabetized, Keim highlighted the names on the list in yellow of those who allegedly signed cards. Tr. 1044:19-23.

Keim, Schmid and Barnthouse then brought the materials to the Human Resources office to begin validating signatures. Tr. 182:14-24; Tr. 183:15-17. Keim then took the cards from Barnthouse and went to Thorne's office. Tr. 1047:16-18. There, Annette Litton, Manager of Respiratory, EKG and Voluntary Services at Valley (Tr. 829:17-18), and Kim Crocker verified

the signatures on the decertification cards against three signatures from the employees' personnel files.<sup>15</sup> Tr. 184:6-7; 239:7-18; 243:17; 265:5-16; 817:6-19; 832:15-833:1; 1048:6-25.

Using copies of the employee list prepared earlier by Thorne, Litton and Crawford placed a red check mark next to an employee's name indicating that the signature on the card matched the employee's signatures on file. Tr. 250:4; 817:21-23; 833:9-17; 835:14. They also counted the number of verified signatures on each page of the list and placed the total number per page at the bottom of each page. Tr. 268:17-23; 270:5-7; 821:19-20; *see* Resp. Exs. 29-31. In all, Crawford concluded that there were 154 verified cards from "K" through "Z," as well as names highlighted in pink. Tr. 822:13-14; 825:19; Resp. Ex. 30. Litton concluded that there were 133 verified cards from "A" through "J," as well as names highlighted in pink, but later discounted one of the cards relating to Robert Jacobs, who was not employed at Valley as of the date of her count. Tr. 837:24; 838:4-7; 841:2-23. Keim signed and dated both Crawford's and Litton's count sheet.<sup>16</sup> Tr. 1050:18-24.

While Crawford and Litton verified signatures, Keim reviewed the emails. Tr. 1049:18-24. In all, he verified 30 of the 38 emails – one email lacked a last name and seven were

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<sup>15</sup> Earlier that morning, Keim instructed Thorne to identify two individuals who did not have any nurses reporting to them, and to secure their help for a project. Tr. 1047:20-24. When Keim learned that there were allegedly 533 decertification submissions, he informed Thorne to have Crocker and Litton join them. Tr. 1047:24-1048:3.

Neither Crocker nor Litton was a handwriting expert. Tr. 826:1; 844:23. Likewise, neither Crocker nor Litton had any familiarity with any of the signatures prior to doing their comparisons. Tr. 826:11; 845:18-21.

<sup>16</sup> Litton and Crawford segregated those cards with signatures that could not be verified. Tr. 269:15-17. Crawford was unable to verify the signature on two of the cards, but could not recall whether those cards were included in the final total. Tr. 272:16-273:8. Litton and Crawford did not verify or otherwise consider the dates on the cards. Tr. 269:24.

duplicates of cards. Tr. 1049:18-24. Where there were duplicate emails, Keim admitted that he failed to check if the duplicate emails each subscribed to the online petition, or if one was an opt-out. *See* Tr. 1080:18-1081:12. Notably, no one from Valley or UHS management investigated how Typeform.com, the online petition platform used by Burog, functioned. Tr. 71:9-15; 72:3-18.

To verify the emails, Keim used a list containing bargaining unit contact information, including name, department, shift, title, home address, home phone, cell phone, and email address. Tr. 1050:1-2; *see* Resp. Ex. 48. Keim verified an email if the name and telephone number *or* email address matched what was listed on the bargaining unit contact information list. Tr. 1092:7. He did not require both the telephone number *and* email address to match the hospital's records in order to consider the email verified. Tr. 1092:7; 1093:16-19. Schmid, however, testified that the hospital verified the emails simply by comparing the name on the emails with names on the employee roster. Tr. 74:20-23-75:1; 76:11; 192:7-9.

Keim testified that the total number of employees in the Valley nurse unit was 533. Tr. 1073:5. The employee list used by Keim, Crawford and Litton, however, identified 534 employees. Tr. 1073:17-17; Resp. Ex. 31. Although Keim asked Thorne to provide him with a list that was current, he testified that one employee on that list, Gloria Kent-Waweru, had been terminated that same day. Tr. 1073:19-1074:13; 1075:9-17. Keim was not sure how he learned that Kent-Waweru had been terminated. Tr. 1076:19-1077:2.

Following this process, Keim took the decertification materials to the Las Vegas office of the law firm Hall Prangle, which stored the materials. Tr. 1063:14-1064:17. They remained stored there unless Keim was in possession of them. Tr. 1064:16-19.

**J. Immediately Following its Withdrawal of Recognition, Valley Increased Nurse Wages, and Publicized Those Raises to Desert Employees**

Just as Schmid indicated during her captive audience meetings, on February 23, 2017, Valley announced “an immediate wage adjustment for all Valley staff RNs” of between 2% and 9%, retroactive to February 19, 2017. GC Ex. 11; Tr. 77:14; 121:15-18; 190:3-16. The raises were based on what nurses would have received if they had been hired at one of VHS’s non-union hospitals based on their years of experience. Tr. 77:24-25; *see also* Tr. 536:11-527:7; 752:22-24.

Desert made sure to publicize the Valley pay raise to Desert employees. On March 7, 2017, it distributed a flier titled “Bargaining Brief.” *See* GC Ex. 4. The flier claimed to address “rumors [the Union] is circulating,” and stated the following about the recent raises at Valley: “Pay increases were not ‘just 50 cents’ but rather *ranged from 2-9%*, and no nurse received less than a 2% adjustment. These adjustments were made to put Valley nurses into the VHS non-collectively bargaining pay ranges. The union has filed an unfair labor practice charge opposing the Valley adjustments.” GC Ex. 4 (emphasis in original). Desert posted the “Bargaining Brief” in break rooms and bulletin boards throughout Desert, and circulated it in face-to-face communications with Desert managers. Tr. 86:11-25; 456:5-23.

Around the same time, nurse Courtney Farese distributed a flier at Desert which similarly promoted the recent pay increases at Valley. Tr. 454:12-24; 902:5-8; GC Ex. 32.

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**K. VHS Permitted Mark Smith, a Non-Employee, to Solicit for Decertification Despite its Policy Barring Non-Employees From Soliciting**

VHS has a solicitation policy barring non-employees of VHS from solicitation or distribution on VHS property. GC Ex. 22 (§ IV.B.1); Tr. 163:4-7; 165:8; 312:5-14. That prohibition, however, is subject to an exception where the “CEO, or his/her designee” approves non-employee solicitation or distribution. GC Ex. 22 (§ IV.B.1); Tr. 313:1-8.

Desert’s CEO allowed such an exception for Mark Smith, an employee of Corona Regional in Corona, California, who came to Desert to solicit in support of decertification. Tr. 163:9-14; Tr. 315:3-11; 495:10-17; 503:2-16. Smith was a “non-employee” under the VHS policy and, without that special permission from the CEO or his designee, would not have been permitted to solicit at any of the six VHS hospitals in Nevada. *See* Tr. 162:11-14; 163:4-7; 314:2; 745:8-11.

According to Schmid, Desert management contacted her about Smith and asked for guidance about his ability to solicit at the facility. Tr. 737:14-18. Schmid testified that Desert decided to permit Smith to solicit based on an unfair labor practice settlement from late 2015 between UHS and the Pennsylvania Association of Staff Nurses and Allied Professionals (“PASNAP”). Tr. 708:3-22; *see* Resp. Ex. 19. Pursuant to that ULP settlement, UHS agreed it would not deny “off-duty employees, regardless of which facilities the employees are assigned to work at, *access to our parking lots and other outside non-work areas* at our facilities to engage in solicitation and/or distribution on behalf of [PASNAP].” Resp. Ex. 19 (emphasis added). As described below, however, Smith solicited inside Desert’s facilities.

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Despite the Hospitals' change in policy to allow Smith to solicit, they failed to inform either the Union or any employees, other than Smith, of their change in policy. Tr. 746:8-15. In fact, Schmid was unaware whether, following the ULP settlement, VHS had made any effort to change its written policy to allow employees of other UHS facilities to solicit at VHS facilities.<sup>17</sup> Tr. 745:17-25.

In all, Smith was present for seven days inside Desert soliciting on behalf of the decertification effort. Tr. 502:12.

**1. On March 6, 2017, Desert Instructed the Union Not To Solicit Near Smith**

At about 10:00 a.m. on March 6, 2017, Union organizer John Archer went to Desert to set up an informational table in the hospital cafeteria. Tr. 406:16; 407:11-17. After arriving, Archer noticed an individual, later identified as Smith, soliciting support for decertification and distributing anti-union literature. Tr. 408:6-15. Smith testified that he was collecting decertification cards from nurses and distributing anti-union fliers. Tr. 507:8-509:6.

Shortly prior to Archer's arrival, former Desert nurse Meghan Bell arrived in the cafeteria to meet Archer and help solicit support for the Union, and noticed Smith soliciting support for decertification. TR. 442:12-443:8; 469:14-22. Bell spoke to Smith, who was wearing a nurse uniform and badge indicating he was a nurse at Corona Hospital. Tr. 442:20-21. Smith told Bell

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<sup>17</sup> In fact, VHS managers continued to understand that non-VHS employees were barred from soliciting anywhere in the hospital. Tr. 189:6-24 (agreeing that "nonemployees are not able to solicit in the cafeteria" pursuant to VHS solicitation policy); GC Ex. 25 (February 20, 2017 memo from Valley CNO to management providing that "non-employees should not be on our private property", without clarifying that employees of other UHS facilities must be treated the same as all off-duty employees).

that he was a nurse at a UHS hospital in Corona, California, was there to “get the Union out of this hospital,” and was “here for UHS.” Tr. 443:1-6. Smith testified he came to Desert to “get rid of the union.” Tr. 498:17.

Bell then said hello to Archer, who had just arrived, and got into line to purchase food. Tr. 444:16-20. While she was in line, she could see Archer and Smith talking, and then saw Smith pick up his materials from his portable table and move to another cafeteria table. Tr. 445:7-12.

A short while later, Archer bought his lunch from the cafeteria and sat down at the table where Smith was seated. Tr. 409:5-10. Bell also sat down at the table with Archer and Smith. Tr. 474:6-13. Smith asked Archer what he was doing; Archer replied, “I’m eating my lunch.” Tr. 409:12-14. Smith then accused Archer of “stalking” him, and he left the cafeteria. Tr. 409:16-17; *see also* 445:17-20.

Smith returned a few minutes later with Schmid, Dugan, Elena McNutt, Desert’s Chief Nursing Officer (Tr. 194:13), and Hank Castro, a security guard. Tr. 409:19-20; 445:22-24; 446:21-25; 197:20. According to Schmid, she had received a report from managers who were in the cafeteria that Archer and Smith were “both being bothered by each other.” Tr. 89:14-25.

According to Archer, Schmid told Archer, who was with Bell, that he could not sit at that table. Tr. 410:18-19. Bell testified that Schmid told Archer he was “harassing [Smith] by following him around the cafeteria.” Tr. 446:4-6. Smith testified that Schmid told them to stay apart and instructed Archer and Bell “not to bother [Smith] . . . .” Tr. 504: Schmid admitted that she told both Archer and Smith “to separate,” but denied saying that Archer was harassing Smith. Tr. 92:12-13; 93:5-7.

Archer then got up to get his notepad from the Union's table. Tr. 410:24-25. Upon returning, Archer asked Schmid if she knew what Smith was doing in the hospital. Tr. 411:2. Schmid replied that she did not know what Smith was doing, and that it was none of her business. Tr. 411:4-5; 446:15. In fact, Schmid repeatedly claimed she did not know what Smith was doing at the hospital. Tr. 99:18-25; 100:22-23; 101:10-11. Nevertheless, Smith testified that he informed Schmid moments before she came to the cafeteria that he was there soliciting support for decertification. Tr. 503:12-14. Moreover, Schmid acknowledged that she saw Smith sitting at a table in the hospital lobby with fliers, Tr. 101:13-25; and Smith's table had signs on it stating "Vote" and "Decert now", GC Ex. 6; Tr. 507:9-508:2. Not surprisingly, despite her repeated denials, Schmid ultimately conceded she "[g]enerally" understood that Smith was soliciting support for a decertification effort at Desert. Tr. 102:11.

Archer asked Schmid if Smith had permission to be at the hospital, and Schmid replied that Smith "did not need her permission because he was an employee." Tr. 411:10-11; 446:15-17. Schmid then instructed Archer that "in the future you will not sit at the same table, you will not sit near Mark Smith." Tr. 411:13-14; 430:7-8. The security guard then leaned in and asked, "Am I going to have to babysit you two?" Tr. 411:16-17; 447:5.

Following this interaction, Smith got up and took his papers to a different table. Tr. 447:10-12.

## **2. Bell Observed Smith Sign For a Free Meal from Desert**

Bell observed Smith soliciting several more times at Desert after March 6, 2017. Tr. 448:22-3. On one such occasion, Bell observed Smith sign the free lunch log, a log next to the cash register in the hospital cafeteria where employees and others sign to receive free lunches.

448:13-16; 448:5-8. Bell explained that the hospital sometimes gave out free meal tokens, and that when an employee collects the free meal, he or she signs the log. Tr. 448:23-449:24; *see also* GC Ex. 31. The free meal log is the only such paper log Bell has seen next to the cash register. Tr. 450:23.

**3. Smith Solicited For Decertification at Desert Springs Again on March 7, 2017, and Videotaped the Union and Employees**

Archer returned to the Desert cafeteria on the following morning, March 7, 2017, and set up a Union table. Tr. 411:24-412:10. Upon arrival, Archer noticed Smith seated at a nearby folding table with a camera pointed at the Union's table. Tr. 412:18-25. Smith admitted recording Archer and other "Union representatives." Tr. 509:10-25. Smith also admitted that employees were speaking to Archer, so he necessarily recorded them too. *See* Tr. 510:24-511:1.

Archer asked Smith to stop recording, but Smith replied something like, "get over it." Tr. 413:6-7. Archer did not want a confrontation, so he moved to the other side of his table. Tr. 413:6-8. Smith then moved the camera so that it was once again facing Archer. Tr. 413:10-11. Archer spoke to bargaining unit employees while Smith recorded him. Tr. 412:25; 413:15-16.

At about 6 p.m. on March 7, 2017, Service Employees International Union ("SEIU") organizer Barry Roberts and Archer returned to Desert to speak with bargaining unit members. Tr. 383:12-15; 384:20-385:8; 414:2-4. They set up a table in the lobby of the hospital in order to meet with bargaining unit employees. Tr. 385:10-14; 414:9-11.

When they arrived, they noticed Smith sitting at a folding table in the foyer, which abuts the lobby, giving out decertification information. Tr. 385:19-21; 414:13-25 *see* GC Ex. 6. Smith's table was about 20 to 25 feet from the Union's table. Tr. 386:13. Roberts and Archer

noticed almost immediately that Smith had a camera with a flashing light that was pointed at the Union's table and appeared to be recording them. Tr. 386:15-24; 414:22-25. Smith appeared to be recording even when Roberts and Archer were meeting with bargaining unit employees. Tr. 387:2; 388:16-19. Archer then informed Smith that Smith needed Archer's permission to film him, but Smith disagreed, and Archer returned to the Union's table. Tr. 415:2-8.

Some time after arriving, Roberts and Archer informed hospital security that Smith appeared to be recording them and bargaining unit employees. Tr. 388:21-25; 415:10-14. Security then approached Smith, and moments later the light on Smith's camera ceased flashing. Tr. 388:21-25; 415:17-22. As they were leaving the hospital, Roberts and Archer noticed that Keim and Schmid were standing in the lobby. Tr. 389:2-12.

**4. Smith Solicited for Decertification at Desert A Third Time on March 8, 2017, and Once Again Recorded the Union and Employees**

Roberts returned to Desert around 6 a.m. on the morning of March 8, 2017, to set up a table in the hospital lobby to speak with bargaining unit employees. Tr. 390:6. About five or ten minutes after setting up his table, Roberts again noticed Smith at a folding table in the foyer with a camera once again pointed at the Union's table. Tr. 390:22-391:8. Once again, Smith appeared to be recording while the Union was meeting with bargaining unit employees. Tr. 390:25-391:20.

About two hours later, Roberts moved to the hospital cafeteria to set up the Union's table there. Tr. 391:25-392:3. Smith followed Roberts to the cafeteria, and once again set up his camera facing the Union table. Tr. 392:5-7. Roberts left at about 9:15 a.m. Tr. 392:21.

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## **5. Valley Barred the Union From Soliciting on March 9, 2017**

On March 9, 2017, one day later, Valley CEO Elaine Glaser denied the Union's request to place a table in the hospital's lobby and cafeteria, asserting that "[n]on employees are prohibited from solicitation and distribution of literature at the Hospital." GC Ex. 23.

### **L. Desert Withdrew Recognition From the Union in the Nurse Bargaining Unit**

On March 12, 2017, Desert withdrew recognition from the Union as the exclusive bargaining representative of nurses. Tr. 113:23-114:1; 215:9-15; 931:23; GC Ex. 27.

#### **1. Courtney Farese Set Up an Online Petition at Typeform.com**

Courtney Farese, a nurse at Desert Springs, learned that a decertification effort was underway at Desert, but believed the circulation of a written petition and cards was outdated. Tr. 853:1-8; 858:10-13. Hence, in September 2016, Farese set up an online petition for Desert nurses using Typeform.com, an online platform. Tr. 861:3-15; 864:10-12. She publicized the online petition on a Facebook page, and distributed fliers with a link to the Facebook page and a QR scanner code that linked directly to the online petition. Tr. 861:22-862:16. Typeform.com sent her emails at her personal email address, courtneyfarese@gmail.com, when someone allegedly subscribed to her online petition. Tr. 861:6-8. Later, Farese also set up an online petition for the purpose of decertifying the Desert technical bargaining unit. Tr. 869:13-872:3; 874:18-20.

Farese admitted that anyone had access to her online petitions, and that anyone could have filled them out. Tr. 864:24-865:14; 874:22-875:1. She also acknowledged that she had no personal familiarity with any of the individual email addresses listed on the emails she received from the online petitions. Tr. 865:21; 875:5. She also admitted that she did not actually know

who subscribed to the online petition, or whether the same person may have subscribed to it using different names. Tr. 866:1-8. Last, Farese testified that she received between two and five email opt-outs from individuals who had allegedly previously subscribed to the online petition. Tr. 896:21; 899:12.

**2. Farese Contacted McNutt on March 11, 2017, To Schedule a Meeting For the Following Day**

On Saturday, March 11, 2017, Farese contacted Elena McNutt, Desert's Chief Nursing Officer, and set up a meeting for the following day. Tr. 194:13; 195:22. The next day, Sunday, March 12, 2017, Farese and two other nurses met with McNutt in her office and presented McNutt with alleged proof of support for decertification. Tr. 196:1-12; 202:15-203:7; 863:2-14; 876:2-3.

According to McNutt, Sunday, March 12, 2017, was the first time she spoke to anyone in the bargaining unit about the decertification effort. Tr. 223:19-21; 225:1. Similarly, Farese testified that she never discussed the decertification cards with McNutt prior to when they met in person. Tr. 904:4. This aspect of McNutt's testimony, however, was sharply contradicted. Keim testified that one day before Farese called McNutt, McNutt called him and told him that Farese asked to meet with her. Tr. 1051:22-24; 1097:12-15. Keim's "assumption" was that Farese wanted to meet with McNutt to provide her with decertification materials, so he instructed McNutt to find two people available for another "project." Tr. 1051:24-1052:6. On Friday, Keim also contacted Cindy Scruggs, head of payroll at Desert, and asked her to prepare a list of then-current Desert nurses. Tr. 1053:18-19; 1055:15; *see* Resp. Ex. 38. Keim recalled that he

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received the list that same Friday. Tr. 1077:22-1078:2. The employee list identified a total of 439 nurses in the bargaining unit. *See* Resp. Ex. 38.

Crawford and Forsythe also testified that McNutt contacted them on Friday evening at around 6 p.m., two days before McNutt claimed to first be aware of the cards, and asked them if they were available to come into work on Sunday for an undisclosed assignment. Tr. 954:25-955:20; 973:2-23. Then, on Saturday, McNutt contacted Crawford again and informed her that “it looks like we’ll be on. We’ll let you know in the morning for sure that you need to show up.” Tr. 956:10-12.

**3. Farese Met With McNutt on March 12, 2017 and Gave McNutt  
Alleged Proof of Support For Decertification**

On Sunday, March 12, 2017, Farese provided McNutt signed cards (Resp. Ex. 35), emails (Resp. Ex. 33), and a four-page petition<sup>18</sup> (Resp. Ex. 37; GC Ex. 7). Tr. 202:25-203:7; 107:3-5; 878:16-18; 889:14; 909:23-24; 911:5-6. The emails Farese presented to McNutt were emails received by Farese at “courtneyfarese@gmail.com” from “notifications@typeform.com,” but were otherwise identical to those submitted to Valley. *Compare* Resp. Ex. 33 (Desert RNs), *with* Resp. Ex. 28 (Valley RNs). Similar to Valley, Desert relied on Farese’s claim that Typeform.com “followed the Board’s regulations on electronic signatures.” Tr. 110:25-111:3. Schmid admitted that nobody from Desert “verified what kind of safeguards were in place to make sure that the person purportedly filling out the form was actually the person who did.” Tr. 111:13-21.

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<sup>18</sup> Schmid testified that Farese provided the petition to McNutt (Tr. 107:3-5), but McNutt did not recall Farese presenting her with a petition (Tr. 213:6-9; 910:14; 925:15; 928:2).

Farese did not collect the signatures on the written petition. Tr. 890:9. The written petition did not include any writing on the second, third or fourth pages; those pages contained only signature lines. *See* Resp. Ex. 37. Farese was not aware whether page one of the petition – which included the language the signers subscribed to – was with the petition when pages two or three were signed. Tr. 890:13-17. Similarly, Farese did not know the circumstances under which the petition was signed; who signed it; when they signed it; or what was said to those who signed it. Tr. 891:1-9. Desert did not verify with any of the individuals who signed the petition whether they knew what they were signing, or if they were presented with the first page of the petition when they signed the petition. Tr. 108:25-109:14. While some of the nurses who signed the petition also signed cards, not all of them did. Tr. 113:5-8.

Vanessa Carroll, an IMC nurse at Desert, testified that a charge nurse, Megan Nardies, solicited her to sign the written petition. Tr. 1011:19-21; 1017:8-17. Carroll said that Nardies also “work[ed] on the floor,” but she could not clearly recall whether Nardies was working as a charge nurse when she solicited Carroll to sign the petition. *See* Tr. 1018:2-7. According to Carroll, whose signature was on the second page of the petition, the first page of the petition was with the second page when she signed it. Tr. 1012:12-1013:8. She could not recall whether the pages were stapled together or not. Tr. 1015:20.

Finally, Farese solicited some, but not all, of the decertification cards that she presented to McNutt. Tr. 881:10; 900:4-5. For those cards she did solicit, Farese discussed with employees that the bargaining unit had not had a raise for over two years, and that the Valley nurses received a raise within days of Valley’s withdrawal of recognition. Tr. 901:6-902:2; 902:22-903:1. Farese also circulated a flier to Desert nurses shortly after Valley’s withdrawal of

recognition that publicized the increase in wages that followed immediately after Valley's withdrawal of recognition. GC Ex. 32; 905:13.

For those cards that she did not solicit, she acknowledged that she did not know under what circumstances the cards were signed; did not know what was said during the solicitation; and did not know whether the employee whose name is on the card actually signed it. Tr. 881:15-882:8. Farese testified that there were approximately ten people soliciting decertification cards, and that they gave the signed cards to Farese. Tr. 882:10-14.

#### **4. Desert Withdrew Recognition Based on Emails, Authorization Cards and a Written Petition**

After her meeting with Farese, McNutt contacted Keim, and then met with both Keim and Schmid in a hospital conference room and sorted the cards and emails alphabetically. Tr. 203:14-204:3; 205:22; 106:16-18; 913:24-25; 1052:15-1053:7. Keim asked Schmid to review whether there were any duplicates among the emails. Tr. 1080:18-1081:12. During that process, Keim did not review any of the emails, and instead relied entirely on Schmid. Tr. 1081:3-12. Where there were duplicate emails, Keim admitted that he failed to check if the duplicate emails each subscribed to the online petition, or if one was an opt-out. *See* Tr. 1080:18-1081:12.

Keim highlighted names on the list in yellow and pink corresponding to a card or electronic submission, respectively. Tr. 1053:20. Keim also reviewed the names on the petition, determined that three names were not duplicates of other materials, and placed an asterisk next to those names on the written petition to indicate that they needed to be verified. Tr. 1054:5-12. He highlighted those names – Cato, Carroll, and Petrinca – in orange on the employee list. Tr. 1054:12-17; 1055:15-17; *see* Resp. Ex. 38.

After that, Keim, Schmid and McNutt brought the decertification materials to the Human Resources office for verification. Tr. 211:9; 929:8-930:8; 1053:23-25. In all, the verification process, which followed the same process that occurred earlier at Valley, took several hours. Tr. 114:4. Michele Crawford, Director of Business Development, and Kent Forsythe, Director of Biomedical Engineering, verified the signatures on the decertification cards.<sup>19</sup> Tr. 940:18-20; 959:7-960:17; 960:13-17. Keim instructed them about how to verify the signatures, and remained present during the verification process. Tr. 948:16-21; 1057:2-19.

Crawford and Forsythe received a list with certain names highlighted in yellow, and they compared the signature on the cards with three signatures from employees' personnel files. Tr. 943:13-15; 940:23-24; 961:6-12; 966:23-967:2. Forsythe verified the names in the first half of the alphabet, and Crawford verified the names in the second half. Tr. 943:18-20; 962:14. If they verified a signature, they put a red check mark on the list. Tr. 943:15; 962:17; *see* Resp. Ex. 38. They also attempted to verify the three non-duplicate names from the written petition, but two of the three names were not verified. Tr. 1058:1-6; 1102:22-1103:15. Last, they counted the verified signatures, wrote down the total number on a count sheet, then signed and dated it. Tr. 944:22-25; *see* Resp. Exs. 39 & 42. Crawford counted 62 total verified cards (Resp. Ex. 39), and Forsythe counted 84 total verified cards, not including the four names later identified by Keim (Resp. Ex. 42). Keim also signed the count sheet. Tr. 1058:16-23.

Forsythe testified that there were four signatures he could not verify. Tr. 964:14-15; 968:7-24; *see* Resp. Ex. 42. After identifying them as not matching, he set them aside and

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<sup>19</sup> Neither Crawford nor Forsythe was a handwriting expert. Tr. 951:12; 972:17. Crawford had never received training in comparing signatures, and had no prior familiarity with any of the employee signatures she was checking. Tr. 951:15; 952:11; 972:23.

notified Keim. Tr. 971:21-972:5. Keim, however, recalled something different. He testified that those four names corresponded to individuals whose personnel files could not initially be found. Tr. 1059:3-11. Keim testified that the personnel files for those four individuals were eventually located, and that each of their signatures were verified by Forsythe. Tr. 1059:3-11; 1104:11. Keim wrote each of those four names – Gonzaga, Donnahie, Farjado and Labre-Go – on the count sheet to identify that their verification occurred after Forsythe filled out the count sheet. Tr. 1058:20-23; 1059:3-11. Each of those four names were identified with a red check mark indicating the signatures had been verified. *See* Resp. Ex. 39.

At the same time, Keim verified the emails by comparing them to the same bargaining unit list that Desert provided to the Union on February 23, 2017, in response to its information request. Tr. 1057:16-19; *see* Resp. Ex. 49. As before, Keim verified an electronic submission if the name and telephone number *or* email address matched what was listed on the bargaining unit contact information list. Tr. 1092:7. Keim did not require both the telephone number *and* email address to match the hospital's records in order to consider the submission verified. Tr. 1092:7; 1093:16-19. According to the highlights on the employee list prepared by Scruggs, there were 77 electronic submissions that were not duplicates of cards. *See* Resp. Ex. 38.

Keim identified three electronic submissions with names that were not on that bargaining unit list. Tr. 1070:10-1071:3. He asked McNutt to contact Desert's scheduling center to verify that the three employees were working as of that date. Tr. 1070:10-1071:3. According to Keim, McNutt determined that all three employees were current employees, and obtained their email addresses and phone numbers. Tr. 1070:10-1071:3.

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After the verification process, Keim collected the materials in an envelope, returned to Schmid and McNutt in the conference room, informed them that the signatures had been verified, and that the Union had lost majority status. Tr. 931:16-17; 1059:15-21. Later that same day, Desert announced to nurses and the Union that it had withdrawn recognition from the Union. Tr. 113:23-114:1; 215:9-15; 931:23; GC Ex. 27.

Keim then took the decertification materials and stored them in his hotel safe. Tr. 1064:7-10. The following day, he brought the materials to the law office of Hall Prangle where they remained stored, other than when Keim had possession of them . Tr. 1064:9-19.

**M. Immediately Following its Withdrawal of Recognition, Desert Increased Nurse Wages**

On March 14, 2017, Desert announced “an immediate wage adjustment for all Desert Springs staff RNs” of between 2% and 9%, effective on March 19, 2017. GC Ex. 9; *see also* Tr. 116:3; 215:25-216:2. As with Valley, the raises were intended to bring employees to the same scale as VHS’s non-union hospitals. Tr. 116:15-17.

Bell testified that, in addition to receiving the March 14, 2017 letter from the hospital, she also received a second letter from her director that identified her specific wage increase. Tr. 458:18-21; *see* GC Ex. 33. Bell’s director presented the letter to her in person during a one-on-one meeting, which appeared to be a meeting the director was also having with Bell’s fellow nurses. Tr. 458:24-459:22.

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**N. Desert Withdrew Recognition From the Union in the Technical Bargaining Unit**

On March 18, 2017, Desert withdrew recognition from the Union as the exclusive representative of technical employees. Tr. 120:2; 219:2-24; GC Ex. 28.

**1. Farese and Ormonata Gave McNutt Various Decertification Materials**

On Friday, March 17, 2017, Desert respiratory therapist Andrea Ormonata contacted McNutt and asked to meet with her the next day. Tr. 216:6-8; 221:5-7. McNutt then called Keim and informed him about the meeting. Tr. 1060:10-12. Keim, who was at home, emailed Cassard and asked for a list of employees as of that same day. Tr. 1060:12-15. Keim then flew to Las Vegas. Tr. 1060:15-16. Keim recalled that he received the employee list from Cassard that same day. Tr. 1078:7; 1078:7-9.

On March 18, 2017, Ormonata and Farese met with McNutt and gave her decertification cards (Resp. Ex. 36) and emails (Resp. Ex. 34) related to the technical bargaining unit. Tr. 216:21-217:4; 884:8-13; 911:14-913:6; 1062:14-16. The emails, each received by Farese at “courtneyfarese@gmail.com” were identical in all material respects to the ones submitted to Desert and Valley for the nurse bargaining units. Tr. 119:18-21; *compare* Resp. Ex. 34 with Resp. Exs. 28 & 33. The cards were also similar to the ones submitted in the Desert and Valley nurse bargaining units. *Compare* Resp. Ex. 35 with Resp. Ex. 36.

Like the Desert nurse decertification cards, Farese solicited only a few of them. Tr. 885:11-15. Other than four cards she recalled collecting, she did not know the circumstances under which the cards were collected; who collected the signatures; what was said when the cards were solicited; or who actually signed them. Tr. 885:9-24.

## **2. Desert Withdrew Recognition Based on Emails and Authorization Cards**

McNutt then met with both Keim and Schmid to sort and alphabetize the cards, and eliminate duplicates. Tr. 118:14-16; 217:18-218:1; 914:11-12; 10611-19. While McNutt and Schmid alphabetized the cards, Keim verified the emails by comparing them against a bargaining unit list. Tr. 1061:9-12; *see* Resp. Ex. 50. While doing so, Keim identified one email with a name that was not on his bargaining unit list. Tr. 1071:5-12. As before, he asked McNutt to contact the scheduling office to verify the employee's status. Tr. 1071:10-12.

Once the cards and emails were sorted, Keim highlighted names on the employee list he received from Cassard in yellow and pink to indicate a card or email, respectively. Tr. 1061:12-14. Keim, McNutt and Schmid then brought the materials to the Human Resources office. Tr. 119:9-11; 218:4; 1061:19-20.

Crawford and Jim Tran,<sup>20</sup> Director of Pharmacy, verified the signatures on the technical unit cards. Tr. 945:10-946:14; 990:15-991:2; 1061:23-1062:4. Keim was present during the verification process. Tr. 949:7-13; 991:5. Again, for each name on a list that was highlighted in yellow, Crawford and Tran compared signatures on the cards to signatures in employee personnel files. Tr. 946:4-947:1; 993:16-17; 998:13-14. If they verified the signature, they placed a red check mark on the list. Tr. 993:7. Then, like before, they totaled the number of verified

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<sup>20</sup> Tran was not a handwriting expert and was not personally familiar with any of the signatures he reviewed. Tr. 998:6-10; 999:11.

signatures and pink highlights, listed the number on a count sheet, and signed and dated it.<sup>21</sup> Tr. 947:7-14; 993:24-994:1; *see Resp. Exs. 41 & 43.*

Keim then informed McNutt and Schmid that the submissions were verified and that a majority of bargaining unit employees allegedly no longer wanted the Union to represent them. Tr. 1063:1-7. Later that same day, Desert withdrew recognition from the technical bargaining unit. Tr. 120:2; 219:2-24; *see also* GC Ex. 28.

Keim then took the decertification materials and stored them for two days in his hotel safe. Tr. 1064:10-12. On Monday he took the materials to Hall Prangle where they remained stored, other than when Keim had possession of them. Tr. 1064:19.

**O. Immediately Following its Withdrawal of Recognition, Desert Increased Technical Employees' Wages**

On March 21, 2017, Desert announced “an immediate wage adjustment for all Desert Springs staff Technical Employees” of between 2% and 10.9%, effective on March 19, 2017. GC Ex. 10; *see also* Tr. 120:19. As before, the raises were intended to bring employees to the same scale as VHS’s non-union hospitals. Tr. 120:25.

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<sup>21</sup> Crawford verified the cards for the first half of the alphabet, and Tran verified cards for the second half. *See* Tr. 953:23.

### **III. Argument**

#### **A. The Hospitals Violated the Act by Requiring Management Approval Prior to Distribution of Union Literature, and By Removing Union Literature From Their Facilities**

The Board has held that an employer violates Section 8(a)(1) by requiring management approval prior to the distribution of union literature in the workplace. *See Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1138-39 (2003); *The Mead Corp.*, 331 NLRB 509, 510 (2000). The Board has also held that an employer violates Section 8(a)(1) of the Act by removing union literature from employee bulletin boards and breaks rooms. *See, e.g., Venture Indus.*, 330 NLRB 1133, 1134 (2000); *Vemco Inc.*, 304 NLRB 911, 927 (1991).

The Hospitals violated the Act in both respects. On several occasions, the Hospitals informed the Union that it was not permitted to post literature related to ongoing successor bargaining in the facilities because the literature was not approved by management, and that the Hospitals would remove any unapproved Union fliers from their break rooms and bulletin boards. *See GC Exs. 17, 19-20.* Likewise, the Hospitals instructed supervisors to remove such Union fliers from break rooms and bulletin boards. *See Resp. Exs. 12 & 18; Tr. 157:13-158:3; 158:25.* Moreover, Peters and Gayton witnessed Dugan remove Union fliers from the IMC break room on October 11, 2016. *Tr. 372:7-10.*

The Hospitals contend that the expired CBAs permitted them unilaterally to decide whether the Union could post fliers, and permitted them to remove allegedly objectionable fliers. There are two reasons to reject that argument. First, the expired CBAs do not support the Hospitals' argument. At most, the expired CBAs required the Union to provide fliers to the

Hospitals in advance of posting them. *See* GC Ex. 12, p. 24 (Art. 16); GC Ex. 13, p. 12 (Art. 7); GC Ex. 14, p. 12 (Art. 7). Conspicuously absent from the expired CBAs, however, is any language requiring the Hospitals’ *approval* for posting fliers. Also absent is any language permitting the Hospitals to engage in self-help by removing allegedly objectionable Union fliers. Indeed, the Hospitals’ position is at odds with the grievance and arbitration provisions of the expired CBAs, the agreed-upon dispute resolution mechanism in the expired CBAs which permitted the Hospitals to file and pursue grievances.

Nor does the Hospitals’ evidence of past practice support their interpretation of the expired CBAs. If anything, the evidence demonstrates that during the relevant time period the Union *repeatedly objected* in writing to the Hospitals’ claim that the Union needed their permission to post fliers in the hospitals. *See* Resp. Exs. 10 & 11; GC Ex. 18.

The second basis for rejecting the Hospitals’ interpretation of the expired CBAs – that their approval was required prior to the distribution of union literature in their facilities – is the Supreme Court’s decision in *NLRB v. Magnavox*, 415 U.S. 322 (1974). There, the parties’ collective bargaining agreement provided “that bulletin boards would be available for the posting of union notices, subject to the company’s right to reject ‘controversial’ notices.” *Id.* at 323. Reversing the court of appeals’ holding that the union waived any objection to the provision, the Court held that the provision was unenforceable. *Id.* at 325-26. The Court emphasized that while a union can waive the right to strike as the quid pro quo for grievance and arbitration, “a different rule should obtain where the right of employees to exercise their choice of a bargaining representative is involved, whether to have no bargaining representative, or to retain the present one, or to obtain a new one.” *Id.* at 325.

Based on *Magnavox*, the Board has held that a rule requiring union literature to be approved by an employer prior to being posted in the workplace violates Section 8(a)(1), irrespective of the union's agreement to the rule. See *Diamond Walnut Growers, Inc.*, 340 NLRB at 1138-39; *The Mead Corp.*, 331 NLRB at 510. Thus, even assuming *arguendo* that the Hospitals' interpretation of the expired CBAs was correct, by requiring management approval prior to the posting of Union literature in the workplace, the Hospitals violated Section 8(a)(1).

In sum, the Hospitals' attempts to bar the Union from posting fliers in the facilities, and their repeated removal of such literature from the facilities, violated the Act as alleged in paragraphs 6(a) through 6(a), 7(e) and 8 of the Second Consolidated Complaint ("Complaint").<sup>22</sup> See *Venture Indus.*, 330 NLRB at 1134; *Vemco Inc.*, 304 NLRB at 927; *Diamond Walnut Growers, Inc.*, 340 NLRB at 1138-39; *The Mead Corp.*, 331 NLRB at 510.

#### **B. The Hospitals Violated the Act by Unilaterally Ceasing Dues Deductions**

There is no dispute that dues deductions are a mandatory subject of bargaining and that an employer violates the Act by unilaterally ceasing dues deductions. See *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at \*3 (2015). The Hospitals' unilateral cessation of dues deduction therefore violated Sections 8(a)(1) and (5) of the Act.

The Hospitals contend that the Union's dues deduction authorization cards were unenforceable, and that its unilateral conduct was therefore lawful, because the authorization cards did not recite verbatim the language of Section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(4), regarding revocation periods. See Resp. Exs. 23, 24 & 26.

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<sup>22</sup> Counsel for the General Counsel's motion to amend the complaint to add an allegation regarding the October 11, 2017 confiscation of Union literature was granted. Tr. 576:14-579:20.

No Board case, however, requires a dues deduction authorization card to recite verbatim the language in Section 302(c)(4).

To the contrary, Board precedent supports the conclusion that an ambiguity regarding the window period for revocation of a dues deduction authorization does not, standing alone, render the authorization invalid. In *Miller Brewing Co.*, 193 NLRB 528 (1971), several dues deduction authorizations were undated, rendering ambiguous the timing of the annual revocation periods. The Board ruled that the union did not violate the Act by construing the period of irrevocability based on the date the union received the cards. *Id.* Relevant here, the Board concluded that “it will not effectuate the policies of the Act for the Board to impose upon the parties its interpretation of the meaning of ambiguous contract checkoff provisions as implemented by employees’ authorization cards where, as here, a respondent acted reasonably and in good faith.” *Id.*

The Board applied similar reasoning in *American Smelting & Refining Co.*, 200 NLRB 1004 (1972), which concerned a dispute between several employees and their union regarding the window period for revocation set forth in their dues deduction authorizations. In concluding that the union did not commit an unfair labor practice by enforcing its interpretation of the revocation window period and rejecting the employees’ alternate interpretation, the Board concluded that the union acted “reasonably and in good faith in construing the authorizations,” and that the union’s interpretation “did not infringe upon employees’ exercise of Section 7 rights.” *Id.* at 1004.

As in both *Miller Brewing Co.* and *American Smelting & Refining Co.*, an arguable ambiguity in the Union’s dues deduction authorizations regarding the applicable revocation

period did not render them unenforceable, nor privilege the Hospitals' unilateral action. Critically, the Hospitals offered no evidence whatsoever that the Union had ever construed its dues deduction authorization cards as prohibiting revocation following expiration of the parties' CBAs. Indeed, the Hospitals based their unilateral cessation of dues deduction entirely on the language of the authorization cards themselves. Thus, as in *Miller Brewing Co.* and *American Smelting & Refining Co.*, there is no evidence that the Union had ever construed its dues deduction authorization cards in an unreasonable manner, let alone infringed on employees' Section 7 right to revoke their dues deduction authorizations.

Moreover, even assuming *arguendo* that the Union's dues deduction authorizations were ambiguous regarding the applicable revocation periods, no Board case holds that an employer can unilaterally cease dues deductions simply because the underlying authorizations are ambiguous with respect to the applicable revocation periods. Nor would such a rule make sense, given that dues deduction is a mandatory subject of bargaining. See *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at \*3.

Finally, the Hospitals' haste in ceasing dues deductions for each of the three bargaining units is especially suspect for two particular reasons. First, the Hospitals ceased dues deduction for everyone in the three bargaining units, even though they admittedly did not review the authorization cards for each employee to determine if the cards omitted the allegedly necessary revocation provision. Rather, after reviewing an unidentified sampling of such cards from the previous six months, Tr. 150:22, the Hospitals ceased dues deduction for everyone in the three bargaining units. Second, it is undisputed that for several years the Hospitals had deducted dues based on the same authorizations cards they now insisted were unenforceable. Tr. 170:17-171:3.

As a result, their sudden rush unilaterally to cease dues deductions, based on the very same authorization cards that they had long since relied on, appears to have been part and parcel of a systematic effort to undermine the Union.

In sum, the Hospitals were required to bargain with the Union prior to taking the drastic step of unilaterally ceasing all dues deductions. Their undisputed failure to bargain (Resp. Ex. 26), despite the Union's request to bargain (Resp. Ex. 25), constituted a clear violation of Sections 8(a)(1) and (5) of the Act as, alleged in paragraphs 7(a), (d), (e), 9(a) and (b) of the Complaint.

Moreover, as requested in paragraph 10 of the Complaint, the Hospitals' conduct, tantamount to a wholesale repudiation of the dues deduction provisions of the expired CBAs, warrants an order requiring them to make the Union whole for all dues they should have remitted to the Union, with interest, without deducting such amounts from employees' pay. *See A.W. Farrel & Son, Inc.*, 361 NLRB No. 162, at \*1 & n.3 (Dec. 16, 2014); *see also Gadsen Tool, Inc.*, 340 NLRB 29 (2003).

**C. Valley Violated the Act By Attempting to Restrict the Union From Speaking to More than Two Nurses at a Time**

"A contractual union access provision is a term and condition of employment that survives the [collective bargaining] agreement's expiration." *S. Bakeries, LLC*, 364 NLRB No. 64 (Aug. 4, 2016), *enforced in relevant part, S. Bakeries, LLC v. NLRB*, 871 F.3d 811, 826 (8th Cir. 2017). An employer violates Section 8(a)(5) and (1) of the Act by unilaterally restricting access by union agents to the employer's facility, contrary to the terms of the parties' expired

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collective bargaining agreement. *See id.*; *T.L.C. St. Petersburg, Inc.*, 307 NLRB 605, 610 (1992); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995).

Valley clearly attempted to restrict the Union's access to employees on January 27, 2017, when Melly, consistent with Cassard's October 25, 2016 email (Resp. Ex. 12), instructed Loreto and Madrid that they could not speak to more than two nurses at a time. The parties' expired CBA imposed no such restriction. Rather, Article 14, Section C of the expired CBA provided as follows:

The Hospital shall allow duly authorized representatives of the Union to visit the hospital to ascertain whether a provision of the Agreement is being observed, to assist in adjusting grievances, to confer with individual bargaining unit employees, to participate in committees and to facilitate patient care and staffing committee studies.

GC Ex. 12, p. 22 (Art. 14(C)).

Moreover, the evidence supports the conclusion that the Hospitals' interpretation of the expired CBAs was a newly minted, unilateral one. As Loreto testified, other than one other occasion in January 2017 (Tr. 301:2-13), the Hospitals had not previously limited Union representatives to speaking with no more than two nurses at a time (Tr. 302:4-303:1). In fact, even the Hospitals' cross-examination of Loreto acknowledged as much. Counsel for the Hospitals asked Loreto, "But in any event, you knew that that was not actually the rule, right?" Tr. 301:18-19; *see also* Tr. 301:21-22 ("Q. You knew that it was not actually the rule that you were prohibited from speaking with more than two RNs at a time.").

Independent of whether Melly's conduct constituted a unilateral change in violation of Section 8(a)(5), it had a tendency to interfere with the free exercise of employee rights under the Act, and therefore separately violated Section 8(a)(1). An employer violates Section 8(a)(1) by engaging in conduct "which reasonably tends to interfere with the free exercise of employee

rights under the Act.” *Tyson Foods, Inc.*, 311 NLRB 552 (1993) (holding that employer violated Section 8(a)(1) where supervisor’s interference with union meeting was “an obvious and indeed, admitted attempt to restrict [an employee] from receiving information about the Union.”). By attempting to unduly restrict employees’ ability to meet with the Union, Melly’s conduct clearly violated Section 8(a)(1). That is particularly so, given that his conduct was based directly on Cassard’s October 25, 2016 email instructing supervisors to “disrupt” Union meetings involving more than two bargaining unit employees. *See id.* (holding that single instance of interference with union meeting by a supervisors violated Section 8(a)(1) where it was consistent with instruction from corporate personnel to “scare off” union stewards).

In short, Valley unlawfully restricted Union representative access to bargaining unit members in violation of Sections 8(a)(1) and (5) of the Act, as alleged in paragraphs 6(f), 8(b), and 9(b) of the Complaint.

**D. Valley Violated the Act by Preventing the Union from Meeting With New Hires During Orientation**

Valley violated Sections 8(a)(5) and (1) of the Act on February 2, 2017, when it prevented the Union from accessing new employee orientation pursuant to the parties’ expired CBA, as alleged in paragraphs 6(g), 8(b), and 9(b) of the Complaint. *See S. Bakeries, LLC*, 364 NLRB No. 64; *T.L.C. St. Petersburg, Inc.*, 307 NLRB at 610; *Unbelievable, Inc.*, 71 F.3d at 1438; *Tyson Foods, Inc.*, 311 NLRB at 552.

Article 14, section F of the parties’ expired CBA provides, in relevant part, that “[t]he Union will be granted access to new employee orientations for the purpose of a fifteen (15)

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minute talk regarding the Union and the distribution of a Union information packet to all bargaining unit eligible employees.” GC Ex. 12, at 23.

In violation of the Act, Valley allowed nurses to leave the new employee orientation on February 2, 2017, prior to any opportunity for the Union to access the orientation. Tr. 814:19-22. Crocker knew Loreto and Hernandez were waiting to access the orientation (Tr. 814:3-11), informed them their time slot was at 2:15 p.m. (Tr. 814:5-6), knew they intended to return at 2:15 p.m. (Tr. 814:10-11), and yet let the new nurses leave at 2:10 p.m. (Tr. 814:16-815:1).

Valley appears to argue that the Union’s right under the expired CBA was contingent on whether new nurses wanted to attend the Union’s presentation. Indeed, Crocker testified that she asked the new nurses if they wanted to stay for the Union’s presentation, but they declined. Tr. 814:21-815:1. That argument should be rejected. Put simply, the Union’s right under the expired CBA to access new employee orientations would be rendered utterly meaningless if Valley could simply dismiss nurses from the orientation before allowing the Union access.

**E. Valley Violated the Act by Failing to Furnish Contact Information In Response to the Union’s January 31, 2017 Information Request**

Valley violated Sections 8(a)(5) and (1) of the Act by failing to furnish the Union with bargaining unit contact information in response to the Union’s January 31, 2017 information request, as alleged in paragraphs 7(I) and 9(b) of the Complaint.

“The Board has held that the names and addresses of unit employees . . . are presumptively relevant to a union’s role as bargaining agent.” *Harco Laboratories, Inc.*, 271 NLRB 1397 (1984). And for obvious reason. “Such information is ‘so basically related to the proper performance of [a union’s] statutory duties [that] any special showing of specific

relevance would be superfluous.” *Id.* at 1398 (quoting *Prudential Ins. Co. of Am. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969)); *Urban Shelters and Healthcare Systems, Inc.*, 313 NLRB 1330, 1338 (1994); *Autoprod, Inc.*, 223 NLRB 773 (1976); *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114 (5th Cir. 1996).

There is no dispute that Valley failed to furnish information in response to the Union’s January 31, 2017 information request by February 17, 2017, when it withdrew recognition. Tr. 1030:13-24. Hence, the only question concerns whether Valley’s failure to furnish the information before February 17, 2017, violated the Act.<sup>23</sup> It clearly did.

First, Valley had the information compiled as of February 17, 2017, since it used a comprehensive list of contact information – which included all the categories of information sought by the Union – on that same day to verify the electronic submissions provided to Barnhouse. Tr. 1050:1-2; 1066:21-24; Resp. Ex. 48. That fact alone is sufficient to establish that Valley could have, but failed, to furnish the information prior to its withdrawal of recognition.

Second, it was undisputed that the information was easy to compile. Both Cassard and Thorne admitted that they could compile most of the information sought by the Union from Lawson in anywhere from a few minutes to a few hours. Tr. 623:25-625:18; 627:10; 701:5. Notably, such testimony directly contradicts Keim’s response to the Union’s information request, which claimed that the Union’s February 6, 2017 deadline for the Hospitals’ response was “unreasonable.” GC Ex. 34. *See Capitol Steel and Iron Co.*, 317 NLRB 809, 813 (1995)

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<sup>23</sup> As discussed *infra*, Valley’s subsequent withdrawal of recognition was unlawful. Hence, its continuing failure to furnish such information likewise establishes a violation of Section 8(a)(5).

(holding that employer's failure to furnish information two weeks after union's request violated the Act where information sought was "simple" and "close at hand").

Third, even if Valley had to compile information from sources other than Lawson in order to respond to the Union's request, it is clear that Valley had completed that compilation well before February 17, 2017. Thorne testified without contradiction that such information was prepared within four to five days of when the Hospitals' outside counsel first requested it, which was in late January or early February. Tr. 686:24-25; 696:2-18.

Fourth, despite how readily available the contact information was, Valley appears to have made no effort whatsoever to respond to the Union's information request. Cassard, the recipient of the Union's request, never asked Thorne to compile anything in response to the request, even though she was normally made aware of information requests related to Valley. Tr. 694:10-14; 702:17-25. It is likewise undisputed that Valley failed to respond to the Union's follow up request to Valley to identify when it would produce the information. *See* GC 34; Tr. 1089:13-17.

Last, Valley's evasiveness is particularly suspect given that it knew a decertification effort was underway in the hospital. By refusing to provide the Union with up-to-date contact information for bargaining unit employees, despite its ready availability, Valley intentionally undercut the Union's ability to communicate with bargaining unit employees at a critical juncture.

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**F. Valley Violated the Act During Its Captive Audience Meetings with Nurses**

Valley violated Section 8(a)(1) of the Act in several respects during the captive audience meetings it held following the filing of the decertification petition, as alleged in paragraphs 5 and 6 of the Complaint in case number 28-CA-201519.<sup>24</sup>

**1. Valley Unlawfully Implied That Employees Would Receive Market Raises if They Decertified the Union**

First, Schmid's statements unlawfully implied that Valley would provide nurses with wage increases if they decertified the Union. *See Westminster Comm'ty Hosp., Inc.*, 221 NLRB 185 (1975) (holding that employer violated Section 8(a)(1) by implying, *inter alia*, that "benefits would be increased in the future if the employees voted against the Union"); *NTN Bower Corp.*, 2014 WL 7149610, Case No. 10-RD-105644 (Dec. 15, 2014) (setting aside election where employer impliedly promised a raise to employees if they decertified the union); *Lutheran Home of Northwest Indiana, Inc.*, 315 NLRB 103 (1994); *Grede Plastics*, 219 NLRB 592 (1975).

"Determining whether a statement is an implied promise of benefits involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise that benefits would be adjusted if the union were voted out." *NTN Bower Corp.*, 2014 WL 7149610, at \*1.

Schmid's statements to Komenda and others during the captive-audience meeting clearly implied that if nurses decertified the Union they would receive the same "market value" raises VHS provided to its Las Vegas area non-union hospitals. According to Komenda, Schmid

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<sup>24</sup> By order dated July 15, 2017, the Complaint in case number 28-CA-201519 was consolidated with the other unfair labor practice allegations.

explained that Valley and Desert were the only two VHS hospitals in the Las Vegas area not to receive “market value” raises, and assured the nurses they would receive such raises if they decertified the Union. Tr. 528:1-529:20. That promise of benefits undoubtedly violated Section 8(a)(1). *See Westminster Comm’ty Hosp., Inc.*, 221 NLRB at 185-86. Moreover, because Komenda is a current employee at Valley, her description of the captive audience meeting is entitled to significant weight. *See Flexsteel Indus.*, 316 NLRB 745 (1995) (noting that “the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.”).

However, even Schmid’s testimony supports the conclusion that her captive audience statements violated Section 8(a)(1) by implying that decertification would result in wage increases. First, Schmid left no doubt that Valley preferred “a direct relationship” with nurses, a euphemism for becoming a non-union facility. Tr. 748:11; 717:20-21; 747:22-25. In the same meeting, she informed employees that VHS periodically provided nurses at its non-union hospitals in the Las Vegas area with “market adjustment” raises (Tr. 727:5-10); and that it had recently done so (750:2-23; 751:18-25). By contrast, the Hospitals had rejected the Union’s July 2016 wage increase proposal, and took the position that they would even not consider the Union’s economic proposals at that stage of bargaining. *See GC Ex. 2*; Tr. 63:4-7. Indeed, Schmid acknowledged informing nurses that Valley could not provide raises until it reached an agreement with the Union, which was to blame for the allegedly slow pace of bargaining (Tr. 742:20-21; 722:11-17).

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In light of Schmid's stated desire that employees decertify the Union, her statements about "market adjustment" raises unmistakably implied to employees that they would be rewarded with such raises if they decertified the Union.

**2. Valley Unlawfully Implied That It Would Not Increase Wages Because Employees Were Represented by the Union**

Second, Schmid's statements unlawfully implied that Valley would not provide wage increases because employees were represented by the Union.

According to Komenda, Schmid told employees that bargaining over a successor agreement would "go on and on," during which time employees would not receive any raises (Tr. 525:7-12; 546:10); that one UHS facility in Philadelphia bargained with a union for three years without providing any raises (Tr. 526:15-527:7); and that the Union's bargaining goals were different from those of Valley nurses (Tr. 531:19-20). Indeed, Schmid acknowledged making the latter two statements (Tr. 722:5-9; 723:24-724:17; 733:5-11), and further admitted blaming the Union for the allegedly slow pace of bargaining (Tr. 722:11-17).

Coupled with Schmid's stated preference that Valley become non-union and her statements that VHS recently provided "market raises" at nearby non-union hospitals, employees would reasonably interpret Schmid's statements as conveying that their continued support for the Union stood between them and timely wage increases.

**3. Valley Unlawfully Conveyed That Collective Bargaining Was Futile By Informing Employees Bargaining Would Continue Interminably**

Third, Schmid's statements unlawfully conveyed that collective bargaining would be futile. *See Atlas Microfilming*, 267 NLRB 682, 685-86 (1983) (holding that employer violated

Section 8(a)(1) by indicating to employees that collective bargaining would be futile where it informed employees that “you can win the election, you bargain one year, two years, three years, we’re not going to agree to anything.”); *Kona 60 Minute Photo*, 277 NLRB 867, 868-89 (1985) (holding that employer violated Section 8(a)(1) by indicating that collective bargaining would be futile where it informed employee that company “would refuse any bargaining requests the Union made”).

According to Komenda, Schmid informed employees that Valley would “stretch” out bargaining interminably, during which time there would not be any raises. Tr. 525:7-12; 546:10. Schmid amplified that message further by referring to another UHS hospital in Philadelphia where bargaining continued for three years without raises. Tr. 526:15-527:7. She also enforced that message by discussing impasse, even though Schmid admitted that the parties were not “anywhere near” impasse and that no nurses had questions about impasse. Tr. 734:8-23. Finally, Schmid’s message had particular force when considered alongside Valley’s rejection of the Union’s earlier wage proposal, which nurses questioned Schmid about during the same meeting. Tr. 724:25-725:13; *see* GC Ex. 2. In the context of Schmid’s references to recent raises at VHS’s nearby non-union hospitals, Schmid’s comments unlawfully conveyed to employees the futility of collective bargaining as a means to increase their wages. *See Atlas Microfilming*, 267 NLRB at 685-86; *Kona 60 Minute Photo*, 277 NLRB at 868-89. (Valley’s implied message about the futility of collective bargaining was echoed further when, immediately after decertification, Valley increased nurses’ wages.)

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**4. Valley Unlawfully Coerced Employees By Stating That Union Facilities Did Not Attract Good Administrators**

Fourth, Reyes' statement unlawfully conveyed that employee's continued support for the Union resulted in having inferior administrators.

Komenda testified, without contradiction, that Reyes, Schmid's invited guest, discussed her recent experience with decertification at Corona Hospital, told the assembled nurses that good administrators only go to non-union hospitals, and that they got better hospital administrators at Corona Hospital once they decertified the union. Tr. 520:3-14; 530:9-13. Again, such statements unlawfully implied that nurses' continued support for the Union stood between them and better working conditions.

**G. Desert Violated the Act By Barring Union Representatives From Speaking to Bargaining Unit Members in the Presence of Non-Bargaining Unit Members**

Desert violated Sections 8(a)(5) and (1) of the Act on February 15, 2017, by preventing the Union from speaking to bargaining unit members in the presence of non-bargaining unit employees, contrary to the terms of the expired CBA, as alleged in paragraphs 6(h), 8(a) and 9(a) of the Complaint. *See S. Bakeries, LLC*, 364 NLRB No. 64; *T.L.C. St. Petersburg, Inc.*, 307 NLRB at 610; *Unbelievable, Inc.*, 71 F.3d at 1438.

Article 13(C) of the parties' expired CBA permitted the Union to access Desert so long as it did not "engage in union organizing activity, solicit, or distribute literature to non-bargaining unit employees." GC Ex. 13, p. 8. Presumably relying on this provision, Dugan, in the presence of bargaining unit employees, informed Union representatives Alvarez and Hernandez that they could not speak to nurses while non-bargaining unit employees were present, and instructed them

to leave the break room. Tr. 325:12-25; 345:24-346:8; 360:22-24; 365:14-15. Two nurses immediately left in response to Dugan's confrontation with Alvarez and Hernandez. Tr. 326:1-2; 346:5-7; 348:8-12.

Desert utterly failed, however, to prove that Alvarez and Hernandez were soliciting non-bargaining unit employees. At most, Dugan momentarily saw Alvarez speaking to nurses in a break room while a CNA was present. Tr. 663:1-14; 666:7-667:7. That hardly demonstrates that the Union was soliciting non-bargaining unit employees. To the contrary, it reflects Desert's rash attempt to thwart, yet again, the Union's ability to communicate with bargaining unit employees at a critical time period.

Moreover, even if Alvarez and Hernandez were soliciting the CNA, that hardly forfeited their right to be present and speak to bargaining unit employees in the break room. Thus, Dugan's aggressive directive, in the presence of bargaining unit employees, that Alvarez and Hernandez had to leave the break room violated Section 8(a)(1). *See Tyson Foods, Inc.*, 311 NLRB at 552.

#### **H. Valley Unlawfully Withdrew Recognition From the Union**

Valley violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, as alleged in paragraphs 7(k) through (n) and 9(b) of the Complaint.

##### **1. Valley Lacked Objective Evidence of Loss of Majority Support**

In *Levitz Furniture of the Pacific*, 333 NLRB 717 (2001), the Board held that an employer may unilaterally withdraw recognition from an incumbent union where it has objective evidence that the union lost majority support. *Id.* at 717. The Board emphasized, however, that “an employer with objective evidence that the union has lost majority support—for example, a

petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril.” *Id.* at 725. Thus, if “the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.” *Id.* “[A]n employer who withdraws recognition from an incumbent union, in the honest but mistaken belief that the union has lost majority support, should be found to violate Section 8(a)(5).”

**a. The Emails Were Inherently Unreliable Evidence of Employee Desires**

Valley failed to prove by a preponderance of evidence that the union had lost majority support. Most notably, it failed to establish that the emails upon which it relied in withdrawing recognition were objective evidence of employees’ representational desires.

It is undisputed that Valley had no reliable or credible evidence that the employees listed in the emails actually filled out the online petition. It never polled employees to determine if they, in fact, subscribed to the online petition. Nor could it verify the authenticity of the emails by comparing them to employee signatures on file, as it did with the decertification cards, since the emails lacked signatures. Finally, it failed to present testimony from the decertification proponents, Burog and Yant, attesting that they personally witnessed each and every employee subscribe to the online petition.

Rather, Valley’s sole and exclusive basis for verifying the emails was to check that a name and *either* the phone number, *or* the email address, listed in the emails matched Valley’s records. That method of verification was inherently unreliable. Unlike a signature, which cannot

be easily forged and can be compared against others on file, an employee's email address and phone number is widely accessible to co-workers and can easily be entered on an online petition by *anyone*. Farese, the main proponent of the online petition, readily admitted as much.

Making the emails even more unreliable, Keim admitted that where there were two emails from the same individual, Valley weeded out one of the two emails without verifying whether the duplicate emails both subscribed to the online petition, or if one of the two emails *opted out* of the online petition. Tr. 1080:18-1081:12. That fact alone undermines Valley's reliance on the emails, particularly since Valley had in its possession, but failed to produce, the duplicate emails pursuant to Counsel for the General Counsel's subpoena. *See* Tr. 1080:1-13.

Furthermore, many of the emails from Typeform.com included employee contact information that did not match Valley's records. For example, at least 10 of the emails from Typeform.com listed an employee email address that either did not match the email address in Valley's records, or corresponded to someone who had no email address on file. *Compare* Resp. Ex. 28 *with* Resp. Ex. 48. Another 2 of the emails from Typeform.com included an employee phone number that did not match Valley's records. *Compare* Resp. Ex. 28 *with* Resp. Ex. 48. These discrepancies call into question the identity of the individuals who allegedly subscribed to the online petition.

In addition, without a verifiably accurate email address, there is no method to ensure bargaining unit employees received the confirmation email sent by Typeform.com alerting them that they (or someone else) subscribed to an online petition, and providing them an opportunity to opt out. Hence, even if, as a general matter, the emails from Typeform.com could suffice to establish employee desires in this context, these emails failed to conform to the General

Counsel's guidance concerning an electronic showing of interest, which requires that a confirming email be sent to the alleged subscriber of the electronic petition. *See* Gen. Counsel Memorandum 15-08, at 6 (October 26, 2015) ("Moreover, the Confirmation Transmission will allow an employee, who receives the notification but did not actually intend to sign the document, with the means to alert the Agency, the employer, a union, or others that he or she did not, in fact, electronically sign a showing of interest.").

Last, relying on emails to withdraw recognition is materially different from relying on them for the showing of interest necessary to secure a representation election, as the Board's General Counsel currently allows. *See* Gen. Counsel Memorandum 15-08 (October 26, 2015). The purpose of a showing of interest is to determine whether a secret ballot election is warranted, not to measure whether employees in fact want to be represented by a union. *See Gaylord Bag Co.*, 313 NLRB 306, 307 (1993). As a result, the General Counsel's guidance concerning sufficient evidence for an electronic showing of interest is inapplicable to this context, where Valley used the alleged electronic showing of interest as evidence of employees' representational desires.

**b. Valley Failed to Prove That Its Bargaining Unit List Was Up-To-Date**

In order for Valley to have objective evidence that a majority of employees no longer wish to be represented by the Union, it had to prove the exact number of employees that constituted a majority on the day it withdrew recognition. It failed to provide such evidence.

Valley presented evidence that Keim asked Thorne for a bargaining unit list as of February 17, 2017. It did not, however, present evidence about how Thorne prepared that list;

what documentary evidence she relied on to prepare it; exactly when she prepared it; or what she did to ensure it was up-to-date. Indeed, it is undisputed that at least one employee on the list had been terminated prior to the withdrawal of recognition. Tr. 1073:19-1074:13; 1075:9-17. Such evidence undermines the accuracy of the list, and suggests that the list failed to accurately identify employees in the bargaining unit on the day Valley withdrew recognition.

**c. Valley Relied on Illegible Photocopies of Authorization Cards**

It is undisputed that a significant number of authorization cards that Valley relied on were not original authorization cards, but instead photocopies of the original cards.<sup>25</sup> See Resp. Ex.

27. Those photocopies are inherently unreliable, since, as with any reproduction, they are subject to manipulation. Moreover, in many cases the photocopies that Valley relied upon were practically illegible. See Resp. Ex. 27-A, at A-1, A-2, B-1, B-2, B-3, B-4, C-1, C-2, C-7, D-1, D-2, D-3, F-2, G-4, H-2, H-3, J-1, J-2, L-2, N-1, P-1, R-1, S-2, S-5, V-1, W-1, W-2.

**2. Valley Should Not Be Permitted to Rely on Disaffection Created by Its Own Unfair Labor Practices**

Even assuming *arguendo* that Valley had sufficient evidence that a majority of employees in the bargaining unit no longer wanted to be represented by Local 1107, its withdrawal of recognition was nonetheless unlawful because employee disaffection was caused by Valley's unfair labor practice conduct, as alleged in paragraph 7(m) of the Complaint.

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<sup>25</sup> According to counsel for the Hospitals, the original cards corresponding to the photocopies included in Respondents's Exhibit 27 were submitted to Region 28 of the Board in support of the showing of interest for the decertification petition in case number 28-RD-192131. Tr. 1110:6-16.

“The Board has long held that an employer may not withdraw recognition based on employee disaffection if there is a causal nexus between the disaffection and unremedied unfair labor practices.” *AT Sys. W, Inc.*, 341 NLRB 57, 59 (2004). “The unremedied unfair labor practices must be of a character as to either affect the union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself.” *Id.* at 59-60. The Board analyzes several factors in making such a determination, including “(1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on the employees’ morale, their organizational activities, and membership in the union.” *Id.* at 60; *see also Master Slack Corp.*, 271 NLRB 78 (1984).

First, all of the unfair labor practices were close in time to Valley’s withdrawal of recognition. Valley’s efforts to restrict Union literature in its facilities began in Fall 2016; Valley ceased dues deductions in late September 2016; Valley’s efforts to stifle Union representative access to its facility occurred in January and February 2017; its refusal to provide bargaining unit contact information occurred the same month as its withdrawal of recognition; and it held its captive audience meetings in the same month as its withdrawal of recognition. All of this conduct occurred shortly before Valley’s withdrawal of recognition, and the impact of such conduct did not dissipate by the February 17, 2017 withdrawal of recognition. *See AT Sys. West, Inc.*, 341 NLRB at 60 (holding that 9 months was not sufficient time to dissipate the effects of employer’s unfair labor practice conduct).

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Second, Valley's unfair labor practices clearly had a detrimental and lasting effect on employees. Concerning Valley's unilateral cessation of dues deductions, the impact was widespread, necessarily impacting everyone in the bargaining unit; long lasting, continuing through the date Valley withdrew recognition; and undeniably severe. As the Board observed in *Lincoln Lutheran of Racine*, "[a]n employer's unilateral cancellation of dues checkoff when a collective-bargaining agreement expires both undermines the union's status as the employees' collective-bargaining representative and creates administrative hurdles that can undermine employee participation in the collective-bargaining process." 362 NLRB No. 188, slip op. at \*3. Additionally, "an employer that unilaterally cancels dues checkoff sends a powerful message to employees: namely, that the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them." *Id.* Indeed, Valley ensured that message was delivered to each and every employee, by informing all bargaining unit employees of its decision to cease dues deductions regardless of whether the employee had even authorized dues deduction.

Valley's other unfair labor practices had a similar detrimental and lasting effect on employees. Valley's persistent efforts to stifle the Union's ability to communicate with bargaining unit employees – by barring the posting of certain Union literature in its facility, removing certain Union literature from its facility, attempting to restrict Union representatives' access to employees at its facility, and withholding current bargaining unit contact information from the Union – sent the message to employees that the Union was powerless to communicate with them at their work site. Equally important, such conduct hampered the Union's ability to maintain organizational support at a critical time, first during successor bargaining, and later

during the decertification campaign. *See S. Bakeries, LLC*, 364 NLRB No. 64 (citing employer's interference with plant access in support of conclusion that its unfair labor practices caused employee loss of support and rendered subsequent withdrawal of recognition unlawful), *enforced in relevant part* 871 F.3d at 827; *Wire Prods. Mfg. Corp.*, 326 NLRB 625, 626 (1998) (citing unlawful maintenance and enforcement of "a rule restricting the distribution and posting of union literature and the conduct of union business on company premises" as support for conclusion that employer's unfair labor practices contributed to employee disaffection).

Likewise, Valley's statements during captive audience meetings surely left a lasting impression on employees that their Union was unable to secure a wage increase for them through collective bargaining, and that decertifying the Union would result in immediate "market value" raises. *See Kentucky Fried Chicken*, 341 NLRB 69, 69-70 (2004) (holding that employer unlawfully withdrew recognition where, among other things, its statements blaming union for lack of wage increase caused employee disaffection); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001) (holding withdrawal of recognition unlawful and finding that "[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear."); *Scott Bros. Dairy*, 332 NLRB 1542 (2000) (holding that employer's withdraw of recognition was unlawful where it was preceded by, among other unremedied unfair labor practices, statements about "the futility of bargaining if [employees] continued to support the Union").

Finally, for all of the reasons identified above, Valley's unfair labor practice conduct had a significant impact on employee morale and their organizational activities, and had a direct and

clear tendency to cause employee disaffection from the Union. *AT Sys. West, Inc.*, 341 NLRB at 60 (“The final two *Master Slack* factors focus on the effect of the unlawful conduct on employees’ morale, their organizational activities, and the possible tendency of the unfair labor practices to cause employee disaffection from the Union.”); see *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at \*3 (describing impact of unilateral cessation of dues deductions on employee morale and their organizational activities); *Wire Prods. Mfg. Corp.*, 326 NLRB at 626 (holding that impeding union access to workplace contributed to loss of employee support for union); *Kentucky Fried Chicken*, 341 NLRB at 69-70 (holding that employer’s coercive statements related to wage increases contributed to loss of employee support for union); *NTN Bower Corp.*, 2014 WL 7149601, at \*1-\*2 (same); *Westminster Comm’ty Hosp., Inc.*, 221 NLRB at 185-86 (same); *Scott Bros. Dairy*, 332 NLRB 1542 (holding that employer’s statements concerning futility of bargaining contributed to loss of employee support for union).

**I. Valley’s Unilateral Wage Increase Following Its Unlawful Withdrawal of Recognition Violated the Act**

Because Valley’s withdrawal of recognition was unlawful, so too was its unilateral, post-withdrawal wage increase, as alleged in paragraphs 7(b) and 9(b) of the Complaint. See *S. Bakeries, LLC*, 364 NLRB No. 64 (“Given that the Company unlawfully withdrew recognition from the Union, its subsequent unilateral changes regarding wages . . . were unlawful.”), enforced in relevant part 871 F.3d at 825 n.4; *Narricot Indus., L.P.*, 353 NLRB 775, 776 n.11 (2009) (affirming ALJ’s finding that employer’s “postwithdrawal unilateral changes in unit employees terms and conditions of employment” – including wage increases – “violated Sec. 8(a)(5).”).

**J. Desert Violated the Act By Implying that Decertification Would Result in Wage Increases**

Desert violated Section 8(a)(1) of the Act by impliedly promising wage increases to employees if they decertified the Union. *See* Tr. 27:4-13 (describing Counsel for General Counsel’s proposed amendment to Complaint); 31:25 (granting amendment to Complaint).

Just like Schmid’s statements to nurses during the captive audience meetings at Valley, the March 7, 2017 “Bargaining Brief,” which Desert circulated widely through postings and one-on-one meetings with employees, implied that Desert would increase employee wages if they decertified the Union. *See Westminster Comm’ty Hosp., Inc.*, 221 NLRB 185; *NTN Bower Corp.*, 2014 WL 7149610, Case No. 10-RD-105644 (Dec. 15, 2014); *Lutheran Home of Northwest Indiana, Inc.*, 315 NLRB 103; *Grede Plastics*, 219 NLRB 592.

That message is the unmistakable inference of Valley’s immediate wage increase for nurses following decertification, and Desert’s widespread publication of that fact to Desert bargaining unit employees. Amplifying that message further, Desert contrasted the immediate wage increase at Valley with the uncertainty of bargaining at Desert: The very next bullet point in the Bargaining Brief following the description of the wage increases at Valley included the statement, emphasized in bold and italics, that “[i]n good faith bargaining there is no guarantee of retro pay or any other particular term or condition of a contract.” GC Ex. 4.

In short, “employees would reasonably interpret the [March 7, 2017 Bargaining Brief] as a promise that benefits would be adjusted if the union were voted out.” *NTN Bower Corp.*, 2014 WL 7149610, at \*1.

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**K. Desert, Acting Through its Agent Smith, Videotaped Employees and the Union and Solicited Support For Decertification**

An employer violates Section 8(a)(1) by videotaping employees engaged in protected union activities. *F.W. Woolworth Co.*, 310 NLRB 1197 (1993). Likewise, an employer violates Section 8(a)(1) by soliciting employees to sign a decertification petition. *Demtech Corp.*, 294 NLRB 924 (1989).

It is undisputed that on Smith repeatedly videotaped employees speaking to Union representatives inside Desert's facilities, and solicited employees to sign decertification cards. As discussed below, because Smith was acting as Desert's agent at all times relevant herein, Desert violated the Act by Smith's conduct, as alleged in paragraphs 7(k) through (m) of the Complaint.

**1. Smith Was Desert's Actual Agent for Purposes of Solicitation**

By authorizing Smith to solicit for decertification on its premises contrary to the written policy barring non-employee solicitation, Desert made Smith an actual agent for the purpose of card solicitation. *Cf. Gaylord Bag Co.*, 313 NLRB 306 n.2 (1993) (holding that employees were agents of union for purposes of soliciting authorization cards where union provided cards to employees and identified them as members of union organizing committee). Nevertheless, even if Desert did not actually authorize Smith to act on its behalf, as discussed below, it surely vested him with apparent authority.

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## 2. Desert Was Responsible For Smith's Activity Under the Doctrine of Apparent Authority

Section 2(13) of the Act provides as follows: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In *Demtech Corp.*, the Board addressed the principles governing apparent authority:

[T]he Board has long held that where an employer places a rank-and-file employee in a position where employees could reasonably believe that the employee spoke on behalf of management, the employer has vested the employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer.

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Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 696 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency § 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* at § 8.

294 NLRB at 925-26. Applying these principles, the Board has held on several occasions that an employee was an apparent agent of the employer in connection with solicitation for decertification. See, e.g., *id.*; *Narricot Indus., L.P.*, 353 NLRB 775 (2009); *Shen Auto. Dealership Group*, 321 NLRB 586 (1996).

Several factors support the conclusion that Desert vested Smith with apparent authority to acts as its agent in soliciting support of the decertification effort. First, Desert expressly authorized Smith to solicit for decertification on its premises, both in the lobby and cafeteria,

despite its written policy prohibiting solicitation by non-employees. Indeed, although all of the Hospitals' witnesses agreed that VHS's written policy barred solicitation by non-employees, and that Smith was considered a non-employee under that policy, Desert's CEO nonetheless expressly authorized Smith's solicitation activity at Desert.<sup>26</sup> Under these circumstances, a reasonable employee would understand that Desert's special grant of access to Smith, contrary to its written policy, was an implicit approval of Smith's message.

Second, Desert granted Smith special access to its facility in the context of the Hospitals' widespread unfair labor practices and avowed support for decertification. The Hospitals had unilaterally ceased dues deductions in all three bargaining units several months earlier; the Hospitals had systematically interfered with the Union's access to, and ability to distribute literature at, both facilities; Valley had recently held captive audience meetings where Schmid expressed UHS's preference for decertification, a point that employees likely disseminated throughout both hospitals; Valley had recently withdrawn recognition from the Union, something Desert employees surely took notice of; and Valley had recently increased wages for the purportedly non-union nurses, something Desert made sure to publicize to Desert employees. In

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<sup>26</sup> Schmid's testimony that Desert permitted Smith to solicit pursuant to an unfair labor practice charge settlement lacked credibility. First, by its terms, the settlement applied only to "access to . . . *parking lots and other outside non-work areas at our facilities* . . ." Resp. Ex. 19, at 3 (emphasis added). Thus, even assuming that UHS sought to comply with the settlement, providing Smith access to the *interior* of its facilities clearly went beyond the settlement's terms. Second, other than permitting Smith to solicit for decertification inside Desert, VHS made no effort to revise its solicitation policy in accordance with the settlement, and never announced the alleged change in its solicitation policy to the Union or any employees. Schmid's testimony therefore suggested that Desert's reliance on the settlement was merely an opportunistic, but unconvincing, attempt to hide its support for Smith's activity.

that context, employees at Desert almost certainly understood Smith's special access to Desert as yet another implicit, if not explicit, expression of UHS's preference for decertification.

Third, beyond providing Smith special access to its facility for soliciting support for decertification, Desert actively aided Smith's decertification activity. On March 6, 2017, Schmid, Dugan, McNutt and a security guard came to the hospital cafeteria during lunch time and admonished Archer, in the presence of Bell and others, to stay away from Smith, who had been openly soliciting support for decertification in the cafeteria.<sup>27</sup> Surely, a reasonable employee – and presumably many employees other than Bell were present in the hospital cafeteria at lunch time – would have interpreted the presence of so many high-ranking managers directly intervening on Smith's behalf, despite the fact that he was a non-employee otherwise barred from soliciting in the hospital, as yet a further clear endorsement of his decertification activity.

Similarly, Bell saw Smith in the Desert cafeteria signing for a free meal. Tr. 448:5-8. Again, Bell, as well other employees who likely witnessed Smith receiving free meals in the Desert cafeteria, would surely have understood this as additional evidence of Desert's direct support for Smith's decertification activities inside the hospital.

Last, on March 6, 2017, Smith, who was at the time in the cafeteria dressed in a nurse's uniform and wearing his Corona Hospital badge, told Bell that he was "here for UHS." Tr. 442:20-21; 443:1-6. Even if UHS did not specifically authorize Smith to say that he was there

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<sup>27</sup> As alleged in paragraphs 6(j) and 8(a) of the Complaint, Desert violated Section 8(a)(1) by promulgating an overly-broad directive prohibiting the Union from soliciting near Smith. Likewise, Desert violated Section 8(a)(1) by implying that the Union's activities would be under surveillance when, during this same interaction, its security guard rhetorically asked Archer whether he needed to "babysit" him. Tr. 411:16-17; 447:5.

“for UHS,” Smith’s statement simply made explicit what Desert’s conduct had already implied, namely, that Smith was there on its behalf to support the decertification effort. *See Narricot Indus., L.P.*, 353 NLRB at 789 (“While Respondent argues that it cannot be responsible for what Baumann told employees about her agency status, Respondent cannot dispute that Potter provided her with the documents and the information that she needed to make these promises.”).

In short, Desert vested Smith with apparent authority to speak on its behalf, and thereby violated Section 8(a)(1) of the Act by soliciting support, through Smith, for the decertification effort. *See, e.g., Narricot Indus., L.P.*, 353 NLRB 775; *Shen Auto. Dealership Group*, 321 NLRB 586; *Demtech Corp.*, 294 NLRB at 925-26. Further, Desert, through Smith, violated Section 8(a)(1) of the Act by videotaping employees as they met with Union representatives. *See F.W. Woolworth Co.*, 310 NLRB 1197.

**L. Desert Unlawfully Withdrew Recognition from the Union**

**1. Desert Lacked Objective Evidence of Loss of Majority Support**

Desert’s withdrawal of recognition from both the nurse and technical bargaining units violated Sections 8(a)(5) and (1) of the Act, as alleged in paragraphs 7(o) through (x), 8(a) and 9(a) of the Complaint.

For the same reasons identified in section H(1)(a) of this brief, *supra*, the emails from Typeform.com upon which Desert relied in withdrawing recognition did not constitute reliable, verifiable evidence of employee support for decertification.

Additionally, as with Valley, a substantial number of the emails from Typeform.com included contact information that did not match Desert’s records. For example, 51 of the emails from Typeform.com for the nurse bargaining unit had an email address that either did not match

the email address in Desert's records, or corresponded to someone who had no email address on file. *Compare* Resp. Ex. 33 *with* Resp. Ex. 49. Likewise, 11 of the emails included a phone number that did not match Desert's records. *Compare* Resp. Ex. 33 *with* Resp. Ex. 49. For the technical unit, 4 of the emails from Typeform.com corresponded to someone who had no email address on file. *Compare* Resp. Ex. 34 *with* Resp. Ex. 50. Similarly, 3 of the emails included a phone number that did not match Desert's records. *Compare* Resp. Ex. 34 *with* Resp. Ex. 50. Such evidence is significant for all of the reasons described in section H(1)(a) of this brief, *supra*.

Moreover, for the same reasons identified in section H(1)(b) of this brief, *supra*, Desert failed to prove that the bargaining unit lists it used to verify the showing of support were accurate. For Desert's nurse unit, Keim admitted that Desert used a list generated *two days prior* to Desert's verification. Tr. 1077:22-1078:9. For Desert's technical unit, Keim admitted that Desert used a list generated *one day prior* to Desert's verification. Tr. 1078:8-9. Hence, Desert failed to prove by a preponderance of evidence that the lists it used to verify majority status were up-to-date when it withdrew recognition.

Finally, for two of the three signatures on the four-page petition relied on by Desert for the nurse unit, Desert failed to prove that the employees subscribed to the first page of the petition, the only page of the petition with the decertification language. *See* Resp. Ex. 37. Indeed, of the three names on the list, only Vanessa Carroll testified that she knew what she was signing. Tr. 1012:12-1013:8. Desert's failure to provide the testimony of the other two employees whose petition signatures it relied on renders those signatures clearly unreliable.

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## **2. Desert Cannot Rely on Disaffection Created By Its Own Unfair Labor Practices**

Even if Desert had objective evidence of loss of employee support for the Union in both the nurse and technical units, for the reasons identified in section H(2) of this brief, *supra*, Desert cannot rely on evidence of employee disaffection that it created through its unfair labor practice conduct. *See AT Sys. W, Inc.*, 341 NLRB at 59.

As with Valley, Desert stifled the Union's efforts to communicate with bargaining unit members by barring and/or removing allegedly objectionable literature from its facilities; it interfered with Union representatives' ability to meet with bargaining unit employees in break rooms; and it unilaterally ceased dues deduction bargaining unit-wide. Such conduct undoubtedly fomented employee disaffection with the Union. *See S. Bakeries, LLC*, 364 NLRB No. 64; *Wire Prods. Mfg. Corp.*, 326 NLRB at 626; *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at \*3.

Moreover, unlike Valley's withdrawal of recognition, Desert's withdrawal of recognition followed close on the heels of Valley's unilateral wage increases, which were publicized to the Desert bargaining units both by Desert and Farese. GC Ex. 4; 86:11-25; 456:5-23; GC Ex. 32; 454:12-24; 902:5-8. Those wage increases, which violated Section 8(a)(5), were the equivalent of Schmid's implied promise of wage increases to Valley nurses during the captive audience meetings – they sent the unmistakable message that Desert employees would be rewarded with immediate wage increases if they decertified the Union. *Cf. Penn Tank Lines, Inc.*, 336 NLRB at 1067 (holding withdrawal of recognition unlawful and finding that “[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages,

the possibility of a detrimental or long-lasting effect on employee support for the union is clear.”).

**3. Desert’s Solicitation, By Smith, Tainted Its Withdrawal of Recognition**

Regardless of whether Desert’s unremedied unfair labor practices contributed to employee disaffection, its decertification solicitation, by Smith, tainted the evidence upon which it relied in withdrawing recognition, and therefore rendered the subsequent withdrawals unlawful.

“[A]n employer cannot lawfully withdraw recognition from a union where it has committed unfair labor practices that directly relate to the employee decertification effort, such as actively soliciting, promotion or assisting the effort.” *S. Bakeries, LLC*, 364 NLRB No. 64 (citing *Hearst Corp.*, 281 NLRB 764 (1986); see also *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008) (holding that employer unlawfully withdrew recognition where it unlawfully assisted in solicitation of anti-union petition upon which withdrawal was based), *enforced* 700 F.3d 1 (D.C. Cir. 2012).

For all of the reasons identified in section J(1), *supra*, Desert vested Smith with apparent authority to solicit for decertification on its behalf. See, e.g., *Narricot Indus., L.P.*, 353 NLRB 775; *Shen Auto. Dealership Group*, 321 NLRB 586; *Demtech Corp.*, 294 NLRB at 925-26. As a result, Desert’s active involvement in soliciting for decertification precludes it from relying on

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any of the decertification cards solicited by Smith as a basis for withdrawing recognition.<sup>28</sup> *See SFO Good-Nite Inn, LLC*, 352 NLRB at 270-71.

Furthermore, even assuming *arguendo* that Desert did not vest Smith with apparent authority to solicit for decertification on its behalf, it nonetheless actively promoted his efforts by granting him special permission, contrary to its written solicitation policy, to solicit for decertification inside the hospital for a week. Such active assistance exceeded the “ministerial aid” of a decertification petition permitted by the Act, and thereby tainted the corresponding showing of interest. *See id.* at 270; *Tyson Foods*, 311 NLRB at 556 (“The Act requires that an employer not give assistance to or control a decertification drive or risk tainting the resulting decertification petition.”).

**M. Desert’s Unilateral Wage Increase Following Its Unlawful Withdrawals of Recognition Violated the Act**

Because Desert’s withdrawal of recognition in both the nurse and technical bargaining units was unlawful, so too was its unilateral, post-withdrawal wage increases in both units. *See S. Bakeries, LLC*, 364 NLRB No. 64; *Narricot Indus., L.P.*, 353 NLRB at 776 n.11.

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<sup>28</sup> The record fails to establish which cards Smith solicited, and which were solicited by others. However, it was Desert’s burden to establish that the Union lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB at 725. Because Desert failed to establish which specific cards were *not* solicited by Smith, it has failed to meet its burden under *Levitz*.

**III. Conclusion**

For the foregoing reasons, the Union respectfully requests that the allegations in the Complaint be sustained in full. Moreover, given the widespread and significant unfair labor practice conduct at issue here, the Union respectfully requests that the Hospitals be ordered to comply with each of the specific remedies sought in the Complaint.

DATED: November 28, 2017 JONATHAN COHEN  
ROTHNER, SEGALL & GREENSTONE

By  \_\_\_\_\_  
JONATHAN COHEN  
Attorneys for Service Employees International Union,  
Local 1107

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on November 28, 2017, the foregoing **Post-Hearing Brief of Charging Party Service Employees International Union, Local 1107** was filed electronically with the National Labor Relations Board at *www.nlr.gov* and duly served upon the following named individuals of record by U.S. Mail and electronic mail:

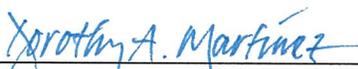
Sara Demirok, Counsel for the General Counsel  
National Labor Relations Board, Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Email: Sara.demirok@nlrb.gov

Stephen Kopstein, Counsel for the General Counsel  
National Labor Relations Board  
Las Vegas Resident Office  
Foley Federal Building  
300 Las Vegas Blvd. S., Suite 2-901  
Las Vegas, NV 89101  
Email: Stephen.kopstein@nlrb.gov

Thomas H. Keim, Jr.  
Ford & Harrison, LLP  
100 Dunbar Street, Suite 300  
Spartanburg, South Carolina 29306  
Email: tkeim@fordharrison.com

Henry F. Warnock  
Ford & Harrison, LLP  
271 17<sup>th</sup> Street, NW, Suite 1900  
Atlanta, GA 30363  
Email: hwarnock@fordharrison.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 28, 2017, in Pasadena, California.

  
\_\_\_\_\_  
DOROTHY A. MARTINEZ