

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES**

**VALLEY HEALTH SYSTEM LLC, 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**

**Cases 28-CA-184993  
28-CA-185013  
28-CA-189709  
28-CA-189730  
28-CA-192354  
28-CA-193581  
28-CA-194185  
28-CA-194194  
28-CA-194450  
28-CA-194471  
28-CA-194790  
28-CA-195235  
28-CA-197426  
28-CA-201519**

**GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION**

Service Employees International Union, Local 1107 (the Union) has represented certain employees of Desert Springs Hospital Medical Center (Respondent Desert) and Valley Hospital Medical Center (Respondent Valley) (collectively, Respondents) for decades. After the expiration of Respondents' most recent collective-bargaining agreements with the Union, and while the Union was attempting to negotiate successor agreements, Respondents set out to drive a wedge between their employees and their long-standing collective-bargaining representative.

Respondents began their campaign by unlawfully ceasing the deduction of dues for about 1,000 members of the Union. They then methodically cut off the Union's communications with employees, angrily confronting Union representatives visiting bargaining-unit employees in break rooms, ripping flyers from Union bulletin boards, barring Union representatives from speaking with more than one or two bargaining-unit employees at a time, barring Union representatives from speaking to bargaining-unit employees in the presence of non-bargaining unit employees, impeding the Union's ability to meet with new employees during their orientation, and refusing to provide the Union with requested contact information for bargaining-unit employees. Next, they broadcast to employees that the Union was standing in the way of them receiving substantial pay increases received by non-union employees at their hospitals and at other sister hospitals. As Respondents waged their campaign, decertification efforts swelled among their employees.

Seeking to capitalize this wave of generated discontent, Respondent Valley then withdrew recognition of the Union, although it has failed to establish that the Union actually lost majority support. Respondent Valley then granted its employees a wage increase. This move was publicized among employees of Respondent Desert, which then, after taking actions aimed

directly at furthering the decertification campaign, also withdrew recognition of the Union, although Respondent Desert has also failed to establish that the Union actually lost majority support. Respondent Desert then also granted its employees a wage increase. Respondents' withdrawals of recognition of the Union were unlawful not only because they were undertaken in the absence of evidence of loss of majority support, but also because: Respondents' unlawful conduct caused the disaffection on which they relied in withdrawing recognition; Respondent Desert engaged in conduct directly tainting the evidence of disaffection on which it relied in withdrawing recognition; and withdrawal of recognition in the absence of a Board election should no longer be permitted as a matter of public policy.

By their actions, Respondents violated Sections 8(a)(1) and (5) of the Act. Counsel for General Counsel (CGC), therefore, respectfully requests that the Administrative Law Judge (the ALJ) find that Respondents violated the Act as alleged and recommend an appropriate remedy to the Board, including requirements that Respondents cease and desist from their unlawful conduct, recognize and bargain with the Union, and, upon request of the Union, restore the *status quo ante*.

## **II. STATEMENT OF THE CASE**

A consolidated complaint issued in this matter on March 7, 2017, and a second consolidated complaint issued on June 5, 2017. GCX 1(y); 1(pp). The ALJ granted motions made at the hearing to amend the second consolidated complaint to allege that:

- on or about March 7, 2017, Respondent Desert Springs promised employees a wage increase if they no longer supported the Union (Tr. 26:24-27:13);
- on or about March 7, 2017, Respondent Desert Springs threatened to withhold benefits from employees unless they no longer supported the Union (Tr. 26:24-27:13);

- Respondents withdrew recognition from the Union although there was no evidence of actual loss of majority support among the employees it represented (Tr. 22:7-25; 23:1-23); and
- On or about October 11, 2016, Respondent Desert confiscated Union literature in the presence of employees at its facility (Tr. 576:6-579:10).

During a recess in the hearing, the ALJ also granted a motion to consolidate Case 28-CA-201519 with the cases that were the subject of the second consolidated complaint. GCX 1(ccc); CGX 1(fff). The hearing in this matter was held before the ALJ on 9 days between July 3, 2017, and September 26, 2017.

### **III. ANALYSIS OF THE FACTS**

#### **A. Respondents' Operations and Supervisory Hierarchy**

##### **1. Respondents' Operations**

Respondents operate two of six hospitals belonging to Valley Health System (VHS), an integrated system of acute care hospitals in the State of Nevada. Tr. 54:11-25; 135:1-16. VHS is operated by a subsidiary of Universal Health Services, Inc. (UHS), a holding corporation that owns and operates many systems like VHS throughout the United States and the United Kingdom. Tr. 54:7-10.

##### **2. Respondents' Supervisory Hierarchies**

The supervisory chain of command for both Respondent Valley and Respondent Desert are identical, with different individuals holding corresponding positions at each facility. Registered nurses report directly to charge nurses, some of whom are full-time charge nurses and some of whom act as relief charge nurses as needed. Tr. 58:3-24; 60:14-16. Above charge nurses is Respondents' leadership team, consisting generally of clinical and house supervisors, who report to nursing managers and/or directors, who, in turn, report to the Chief Nursing Officer (CNO), Victoria Barnthouse (Barnthouse) at Respondent' Valley's facility and Elena

McNutt (McNutt) at Respondent Desert's facility. Tr. 59:4-60:15; 60:6-19. Additionally, Respondents each have a Chief Executive Officer (CEO) and a Chief Operating Officer. Tr. 61:18-24; 165:14-19. Ryan Jensen (Jensen) is Respondent Desert's CEO. Tr. 165:18-20.

Jeanne Schmid (Schmid), the Vice President of Labor Relations for UHS, and Wayne Cassard (Cassard), the Assistant Director of Human Resources for VHS, who at times has acted as interim Human Resources Director for Respondent Desert, handle labor relations and human resources matters for Respondents and other entities affiliated with VHS and UHS. Tr. 53:18-22; 134:15-22; 584:22-25. Dana Thorne (Thorne) is Human Resources Director for Respondent Valley. Tr. 231:9-12.

**B. Respondents' Collective-Bargaining Relationship with the Union**

**1. The Union Represents Three Separate Bargaining Units**

The Union has represented three separate bargaining units at Respondents' hospitals since about 1994: a unit of registered nurses (RNs) employed by Respondent Valley (the Valley RN Unit), a unit of RNs employed by Respondent Desert (the Desert RN Unit), and a unit of technicians and licensed practical nurses employed by Respondent Desert (the Desert Technical Unit). GCX 12 at 1; 13 at 6; 14 at 5-6. The Valley RN Unit consisted of over 500 employees; the Desert RN Unit consisted of over 450 employees; and the Desert Technical Unit consisted of over 60 employees. RX 40. The most recent collective-bargaining agreements covering the Valley RN Unit and Desert Technical Unit each expired on May 31, 2016, and the most recent agreement covering the Desert RN Unit expired on April 30, 2016. GCX 12; 13; 14.

**2. Respondents and the Union Begin to Bargain for Successor Collective-Bargaining Agreements**

In about April or May 2016, upon the expiration of the three collective-bargaining agreements, the Union and Respondents began bargaining for successor agreements, collectively.

Representing Respondents at the bargaining table were Schmid, Cassard, Thorne, Nursing Director for Respondent Desert Springs Carol Dugan (Dugan), and Respondents' outside counsel, Tom Keim (Keim). Tr. 56:2-14. In bargaining, about July 26, 2016, the Union proposed for the employees it represented to receive an immediate across-the-board wage increase of seven percent. Tr. 61:25-62:8; GCX 2. Following that bargaining session, Respondents distributed to employees represented by the Union a flyer informing them of the Union's proposal and their reason for rejecting it. Tr. 85:9-16; GCX 15 at 2.

**C. Respondents Begin to Drive a Wedge between the Union and Its Members**

**1. Respondents Cease All Dues Deductions**

On September 23, 2016, while still negotiating over the terms of successor collective-bargaining agreements, Respondents abruptly stopped deducting dues for all members of the Union.

Respondents notified the Union on September 14, 2016, that they intended to cease deducting dues because they viewed language appearing on the Union's dues check-off authorizations as being unlawful. RX 22. Specifically, according to Cassard and Keim, Respondents reviewed a sampling of dues check-off authorizations submitted over the 6-month period prior to September 23, 2016, and found that sampling of authorizations included the following language, which Respondents considered unlawful:

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 10-15 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.

Tr. 150:8-22; 583:13-22; 586:15-587:3; RX 1; 22. Respondents did not check the language on dues check-off authorizations signed more than 6 months prior to September 23, 2016, including those that may have been signed as far back as 1994. Tr. 150:8-22; 583:13-22; 586:15-587:3.

Respondents warned the Union that, unless it provided new authorizations from every member, they would cease deducting dues in nine days. Tr. 152:6-9. The Union objected, stating that it did not agree that the language cited by Respondents was unlawful and that it would consider a cessation of dues deduction to be an unlawful unilateral change. RX 23. On September 19, 2016, Respondents responded to the Union's objections, disagreeing with its position. RX 24. The Union then explicitly demanded to bargain prior to any cessation of dues deductions. RX 25.

However, on September 20 and 21, 2016, Respondents sent all employees represented by the Union, regardless of whether they were members, letters stating that Respondents had "discovered" that employees dues check-off authorizations "lack[ed] specifically required language from the law" and that, effective September 23, 2016, Respondents would "not be deducting union dues unless [they] receive[d] valid dues deduction authorizations." Tr. 148:13-149:19; GCX 29. Then, on September 23, 2016, flatly rejecting the Union's request to bargain over the matter, Respondents ceased deducting dues for all members. RX 26.

## **2. Respondents Reject and Remove the Union's Flyers**

Shortly after Respondents ceased deducting dues for Union members in September 2016, they began systematically interfering with the Union's messaging to employees regarding bargaining for successor agreements by rejecting and removing the Union's flyers from certain areas of their facilities.

**a. Applicable Provisions of Expired Collective-Bargaining Agreements**

The expired collective-bargaining agreements each include provisions granting the Union the right to post materials on Union bulletin boards at Respondents' facilities after providing the materials to Respondents' Human Resources Director, or his designee, for review. GCX 12 at 24; GCX 13 at 12; GCX 14 at 11-12. The collective-bargaining agreements further provide that “[n]o 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.” GCX 12 at 24; GCX 13 at 12; GCX 14 at 11-12. The collective-bargaining agreements do not say Respondents have the right to determine unilaterally what materials violate this provision or to remove materials they unilaterally deem violative.

**b. Respondent Desert Removes Materials from Union Bulletin Board**

On October 11, 2016, in the presence of Charge Nurse Bill Healy (Healy) and three employees, Union representatives Randall Peters (Peters) and Amelia Gayton (Gayton) posted flyers related to bargaining and an upcoming fall festival on the Union's bulletin board in a break room at Respondent Desert's facility, and Gayton placed additional flyers on a table next to the employees. Tr. 367:20-369:14; 555:15-23; 560:20-561:4; 564:6-15.

Healy asked Peters whether the flyers were approved, and Peters said that they were. Tr. 369:23-370:2. However, Healy then called Nursing Director Dugan, who was in a meeting with the CNO McNutt at the time. Tr. 642:3-19. According to Dugan (on cross-examination), Healy was upset because Peters and Gayton “were laying a bunch of stuff on the table” and did not comply when he asked them not to do that. Tr. 656:7-16. Dugan testified that she thought the

Union representatives were disrespecting the leadership team, giving Healy a “bad time.” Tr. 642:3-6; 656:3-16; 664:18-23.

Dugan and McNutt then went to the break room. Tr. 642:16-19. According to Gayton and Peters, Dugan began “yanking the flyers off the bulletin [board]” and, with flyers still within arms’ reach of employees at the table, began picking up the flyers from the table, saying they were “not supposed to be in the break room.” Tr. 372:6-10; 555:24-556:3; 565:8-12; 568:6-24.

Throughout this incident, Dugan was yelling that Peters and Gayton were not allowed in the break room, that there were too many people in the break room to be talking to them, and that she was going to call security. Tr. 370:9-13; 556:6-9; 565:8-12. At one point, to de-escalate the situation, Gayton contacted the Union’s lead representative, Lanita Troyano (Troyano), to reason with Dugan, but Dugan persisted. Tr. 556:7-15; 566:16-557:13; 643:4-9.

Security guards and Cassard then arrived. Tr. 370:15-17; 556:16-17. Peters and Gayton were escorted to an office to wait while Cassard and Dugan discussed the flyers with each other. Then, Cassard told the Union representatives that the flyer about bargaining could not be posted, but the one about the fall festival could. Tr. 371:1-372:3; 556:17-558:5; 663:21-664:2; 916:4-917:2.

Respondents’ witnesses’ testimony about this incident was inconsistent and lacking in detail. Although Dugan denied ever going into the break room or removing flyers “that day,” she admitted, on cross-examination, that she went up to the break room after learning that the Union was leaving flyers on the table (presumably without knowing anything of about their content) and admitted that she was “stern,” though she denied raising her voice. Tr. 656:25-657:5; 664:2-23. Further, although McNutt testified, in response to questioning by Respondent’s Counsel, that she “did not believe [Dugan] went into the room,” McNutt initially testified that

when she and Dugan arrived at the break room, Healy had paperwork in his hand and gave it to Dugan, and Dugan “had engaged – there were two Union representatives in the room and she engaged them.” Tr. 915:19-916:3; 919:1-11. Healy did not testify about the incident, although he was apparently there from beginning to end.

### **3. Respondents Interfere with the Union’s Contact with Employees**

The Union, having heard rumors of a decertification effort, enlisted the help of its organizers and volunteers to ensure the messages it could not communicate through bulletin board postings reached employees. Tr. 279:6-12; 323:7-11. However, Respondents restricted the Union’s in-person communications with employees as well.

#### **a. Applicable Provisions of Expired Collective-Bargaining Agreements**

The expired collective-bargaining agreements each include the following provision concerning Union access:

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. . . . In addition, no more than two Union representatives may meet with individual nurses<sup>1</sup> in employee break rooms regularly utilized by bargaining unit employees[.] . . . If the Union representatives fail to abide by the provisions of this Article, the hospital shall notify the Union and the representative of the date and nature of the violation. If the Union disputes the claim of the violation, at the Union’s request, the parties will meet within forty-eight (48) hours to attempt to discuss and resolve the issue in good faith.

GCX 12 at 22; GCX 13 at 8; GCX 14 at 7-8.

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<sup>1</sup> The collective-bargaining agreement covering the Desert Technical Unit says “employee” rather than “nurses.” GCX 14 at 7.

The expired collective-bargaining agreement for the Valley RN Unit also affords the Union the right to give new employees a 15-minute presentation during the orientation process. GCX 12 at 23.

**b. Union Barred From Speaking with More than One or Two Nurses at a Time**

On January 27, 2017, Union representative Romina Loreto (Loreto) and organizer Gloria Madrid (Madrid) visited to Respondent Valley's facility. Tr. 279:16-20. When they arrived at emergency room break room just before the shift change at 7:00 p.m., Loreto began discussing the latest bargaining update with the two or three nurses who were sitting at a table, and then a couple of other nurses entered the break room. Tr. 280:9-23. Loreto asked a nurse if it was time for a briefing (a meeting between nurses at shift change to discuss patient needs), and, when she learned it was, she and Madrid stepped outside the break room and waited. Tr. 280:9-23. After the briefing, as nurses were filing out of the break room and Loreto and Madrid were leaving, Charge Nurse Shawn Melley (Melley), who had conducted the briefing, caught up with Loreto and Madrid and asked Loreto whether she was with the Union and what her name was. Tr. 201:3-13. Loreto gave Melley her name and asked him what his name was and whether he was a nurse. Tr. 201:3-13. Melley said he was a charge nurse and gave his first name, and then started to wave a piece of paper and say that according to the paper, they could only talk to one or two nurses at a time. Tr. 281:14-18. Loreto said that was not true according to the collective-bargaining agreement, and, after some back and forth, went with Madrid to an area outside the hospital where the Union's lead representative Troyano was leafleting. Tr. 281:18-282:10. Loreto then reentered the hospital and asked Melley for a copy of the piece of paper he had been waving. Tr. 282:13-19; 282:24-284:2. Melley said he had thrown it away, but that it was an

email from Human Resources telling all managers that the Union could only talk to one or two RNs at a time. Tr. 282:19-23.

Respondents did not call Melley as a witness and otherwise offered incomplete and imprecise testimony about this incident. Clinical Supervisor Rose McDonald (McDonald) testified that on an unknown date in January 2017, she encountered Union representatives, whom she did not identify or describe, in the emergency room break room with Melley, and Melley simply informed the Union representatives that he did not think they should be there during a briefing. Tr. 1004:18-1005:19. McDonald admitted, however, that she did not see whether or not Melley spoke with the Union representatives in the hallway after the briefing. Tr. 1006:3-5.

Despite the lack of complete and precise testimony from Respondent's witnesses about this particular incident, Respondent Valley's Director of Human Resources Thorne admitted that, throughout January 2017, when Union representatives were frequenting the facility, she sent Melley and other supervisors emails instructing them to make sure that Union representatives were not talking to more than two RNs at a time. Tr. 255:23-256:12.

**c. Union Prevented from Speaking to New Employees at Orientation**

On February 2, 2017, Union representatives Loreto and Natalie Hernandez (Hernandez) arrived at Respondent Valley's facility just before noon to attend new employee orientation, but were met at the door of the orientation room Nursing Project Manager Kimberly Crocker (Crocker), who told them to come back between 2:00 and 2:30 p.m. for their presentation. Tr. 284; 289; 319:23; 814. Loreto and Hernandez waited, within eyesight of the orientation room, 15 to 50 feet away, and, when they noticed about ten people exiting the room between 12:30 and 1:30 p.m. and wondered if they were leaving for a lunch break, approached the exiting employees and asked them why they were leaving. Tr. 284:3-13; 330:9-23. After learning that

the orientation was finished, Loreto approached Crocker and asked her why everyone was going home when Crocker said the Union presentation would happen between 2:00 and 2:30 p.m. Tr. 284:16-21. Crocker said there were only two RNs in the class and neither of them wanted to wait until 2:00 p.m. Tr. 284:22-24. Loreto asked who would want to wait if they were allowed to leave earlier. Tr. 284:22-285:4; 320:18-321:4. Crocker said there was nothing she could do. Tr. 284:22-285:4; 320:18-321:4. Loreto and Hernandez then left. Tr. 285:2-10; 321:4-322:15.

Crocker essentially admitted that she frustrated the Union's ability to meet with new RNs. Although Crocker testified that the end times for orientations "could vary wildly," she testified that she recalled that, on the particular date in question, she dismissed the new employees from their orientation at 2:10 p.m. Tr. 814:16-815:1. Despite her disputing the time when she dismissed employees, however, she admitted that she approached the two RNs in the class and let them know that the Union was scheduled to present at 2:15 p.m, but informed them they did not have to stay, and then walked out of the orientation room with them. Tr. 814:16-815:1. Crocker testified the Union representatives approached as the two RNs left and asked for the RNs' names, and then, after she gave them, said they had already spoken to one of the RNs she had named and then left. Tr. 815:15-22. Thus, even by Crocker's account, by the time Loreto approached her, the RNs had already been dismissed.

**d. Union Prevented from Speaking to Employees in the Presence of Unrepresented Employees**

Respondent Desert also impeded the Union's access to employees. On February 15, 2017, Union representative Hernandez and Union volunteer and former employee Katrina Alvarez (Alvarez) visited several break rooms including the 2-East break room, where several employees, including a few RNs, a certified nursing assistant, and a unit secretary were present. Tr. 323:12-324:4; 343:11-19. While Hernandez posted the latest flyer on the bulletin board,

Alvarez began talking with the RNs about several issues, including why she was a dues-paying member of the Union, updates on bargaining, current legislative issues, and the process to object to unsafe working conditions. Tr. 324:14-325:12; 337:6:25-337:10; 345:7-23; 364:13-25. It is undisputed that Alvarez was speaking to the RNs, although the certified nursing assistant and the unit secretary may or may not have been listening. Tr. 325:2-3; 335:24-336:9; 339:19-20; 346:17-347:10; 361:12-15; 365:1-3; 666:22-667:16. Then, within a few minutes, Nursing Director Dugan entered. Tr. 325:12-23; 345:24-346:16. Admittedly, and consistent with Hernandez and Alvarez' testimony, Dugan told Hernandez and Alvarez they could not speak in the break room because a non-represented employee was present and told them to stop and wait until the employee was finished with her break. Tr. 325:21-25; 345:24-326:1; 648:11-16.

Dugan asserts that Hernandez and Alvarez reacted to her directive by putting a hand up to her face and saying, "We have the right to talk to whoever we want," and that, in response, she simply closed the door and went on to meet with the clinical supervisor in her department, and then later reported the incident to Cassard.<sup>2</sup> Tr. 648:14-21. Dugan's testimony about her non-confrontational approach to this incident, juxtaposed against her outsized reaction to her perception that Union representatives were disrespecting a low-level supervisor when distributing flyers on October 11, 2016, is telling.

Alvarez and Hernandez, however, paint a different picture, a picture more consistent with Dugan's reaction to the Union's distribution of flyers on October 11, 2016. Alvarez and Hernandez testified, consistently, that, in response to Alvarez explaining that she could talk to the bargaining-unit members, Dugan got upset and threatened to call security, leading employees

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<sup>2</sup> Cassard never corroborated this fact.

to leave the break room to escape her expression of aggravation. Tr. 325:21-326:10; 338:15-17; 345:24-346:8; 348:5-12.

#### **4. Respondent Valley Refuses to Provide Contact Information for Unit Employees**

On about January 31, 2017, the Union the following information from Respondents:

An updated list of all current employees in each bargaining unit at Desert Springs Hospital and Valley Medical Center. 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. Please provide this updated information no later than February 6, 2017.

GCX 21. On February 6, 2017, Respondents' counsel, Keim, responded by letter, transmitted by his assistant via email, stating that that the request was received and that Respondents were concerned about the February 6, 2017, deadline. GCX 34 at 2. Keim stated that Respondents "will work on providing the information, but will not meet the deadline which we believe is unreasonable." GCX 34 at 2. Keim acknowledged that the request was similar to a previous request from the Union made on December 7, 2016, but claimed that the instant request "seek[s] additional information including employees' cell telephone numbers and personal e-mail addresses." GCX 34 at 2. The Union responded on February 6, 2017, by asking, "What date do you propose to get us the requested information?" GCX 34 at 1. Respondent Valley did not further respond to the Union's request before withdrawing recognition of the Union on February 17, 2017. Tr. 1089:9-17.

As referenced above, the Union requested the same information from Respondent Valley on December 7, 2016. RX 46. However, contrary to Keim's assertion in response to the January 31, 2017, request, the latter request did not seek "additional" information. Rather, the December 7, 2016, request was far more expansive, seeking:

1. A list of current employees including their names, dates of hire, rates pay, job classification, last known address, phone number, email address, date of completion of any probationary, and Social Security number.
2. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal service, child care or any other plans which relate to the employees.
3. Copies of all current job descriptions.

RX 46 at 4.

Keim admitted on cross-examination that each category of information that was requested by the Union on January 31, 2017, was a category of information that was also requested on December 7, 2016. Tr. 1066:23-1067:2. Keim testified that Respondent Valley provided information that was available to it in its payroll software, Lawson, in responding to the request of December 7, 2016, and provided the requested information on December 30, 2016. Tr. 1067:11-1068:17. Cassard testified that someone with experience with Lawson could run a report including the requested information within a matter of hours. Tr. 625:2-18.

Notwithstanding that Respondent Valley would have only had to update the information it had provided the Union on December 30, 2016, Respondent Valley never did so. Keim gave several explanations as to why. First, Keim said that he had a “hard deadline” of “February 23” in his mind because the Union set a 23 day time table in its more expansive request of December 7, 2016. Tr. 1032:22-1033:13. However, this self-imposed deadline was not the deadline set by the Union in its request, and Respondent has provided no adequate explanation as to why it could not meet the Union’s reasonable deadline. Next, Keim claimed that he understood the Union’s request to be seeking the same information employers must provide in voter lists for Board elections, so that Respondent Valley would need to root through a second computer system to collect employee email addresses and would need to track down individual employees to request

their cell phone numbers and email addresses. Tr. 1032: 8-1033:1; 1066:23-1067:4; 1069:15-20; 1085:3-1086:3. However, the Union did not request that Respondent Valley take these steps, and Keim admitted that the Union did not request that Respondent Valley do anything differently from when it provided information generated through Lawson in response to the Union's request of December 7, 2016. Tr. 1069:7-14. Thus, Keim asserts that Respondent Valley was unable to gather the requested information before it withdrew recognition of the Union. Tr. 1030:18-1031:16.

Despite Respondent's asserted inability to compile the information requested by the Union over the course of more than 2 weeks, Keim asserted that, in a different context, when provided with purported evidence of employee disaffection with the Union, he was able to use a list (RX 48) containing the information similar to that requested by the Union on January 31, 2017, to "verify" email notifications allegedly evidencing employee disaffection for purposes of determining whether there had been an actual loss of majority support that would warrant a withdrawal of recognition. Tr. 1065:18-1067:22; 1087:16-1088:2. Keim testified that in order to verify the information contained in those documents (namely, email addresses and phone numbers), he used a voter list that was created at his direction after a decertification petition was filed with the Board, on either January 27 or 31, 2017. Tr. 1049:15-1050:8. Keim admitted that although the election was blocked, the voter list was "substantially complete." Tr. 1087:23-2. However, Keim hedged at times, stating that the voter list was not complete when he used it. Tr. 1066:19-22. Regardless, Respondent Valley would have the ALJ believe that, although the voter list (RX 48) was complete enough that Keim's check against that list warranted a withdrawal of recognition from the Union, it was insufficient to satisfy the Union's information request.

A peculiar gap in the record should also be noted. Although Respondents entered into evidence the emails they sent to the Union responding to its initial request for information on December 30, 2016, they did not offer the attachment, including the actual information provided. RX 46. Surely, Respondents still have access to that attachment, and yet, it remains unavailable to compare against the voter list (RX 48), raising questions as to whether Respondent Valley could support its contention that the list provided on December 30, 2016, was so drastically different from the information requested on January 31, 2017, that it would need to take the laborious steps Keim claims impeded its ability to respond prior to its withdrawal of recognition of the Union.

**D. Decertification Efforts at Respondents' Facilities and Respondents' Conduct in Furtherance of Those Efforts**

At some point in 2016, Respondents' employees initiated decertification campaign. Petitions to decertify the Union as the representative of the Valley RN Unit were filed with the Board on January 27 and 31, 2017.<sup>3</sup>

**1. Respondents' Employees' Decertification Efforts**

Although there is little evidence concerning when the decertification efforts began, Respondents presented cards purporting to express disaffection with the Union that were dated September 20, 2015, February 27, 2015, and February 8, 2016. RX 27 at 9, 29, 44. However, any decertification efforts did not garner significant support until near the end of September 2016, around the time when Respondents unilaterally ceased deducting dues for Union members, when employee Courtney Farese (Farese) became involved in efforts to decertify. Tr. 858:8-861:15; Appendix A (graphs summarizing RX 27, RX 28, RX 33, RX 34, RX 35, RX 36, and RX 37). Of the evidence on which Respondent relied in withdrawing recognition, only 43 cards

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<sup>3</sup> Valley Hospital Medical Center, Inc., Cases 28-RD-191978 and 28-RD-192131.

purportedly signed by employees belonging to the three units of employees represented by the Union were dated before the end of September 2016, with 41 of those cards listing the names of employees belonging the Desert RN Unit, none listing the names of employees belonging to the Desert Technical Unit, and 13 listing dates after Respondent began initiating its plan to cease dues deduction for Union members.

When Farese became involved in soliciting employees to decertify, in order to bypass the “ancient” decertification process of “a piece of paper being passed around,” she set up an account on Typeform.com and created two online forms: one form specific to Respondent Valley, and one form specific to Respondent Desert. Tr. 858:8-12; 859:2-4. Each of the forms was available to the general public, as long as the individual knew the website associated with the forms.<sup>4</sup> Farese created flyers with QR codes and publicized the addresses of her online forms on Facebook. Tr. 860:18-862:3. Each form allowed individuals who visited the site to enter a name, email address, telephone number, and employer name, and then allowed the individuals to indicate, by selecting “Yes” or “No” whether they wished to be represented by the Union. Tr. 865:2-14; *see also* RX 28; RX 33.

Farese received email notifications of forms completed by individuals representing themselves as being employed by Respondent Desert, and the email address richel.burog@gmail.com received email notifications of forms completed by individuals representing themselves as being employed by Respondent Valley.<sup>5</sup> Farese testified that her understanding was that separate notifications were sent to the email addresses entered into the

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<sup>4</sup>Keim testified that even he accessed the form via Facebook, and former employee Meghan Bell, who accessed the form while employed by Respondent Desert, testified that she was concerned that there was no way to know who completed the forms, so that falsification was “too easy.” Tr. 452:6-453:21.

<sup>5</sup> Presumably, the email address richel.burog@gmail.com belongs to employee Richel Burog. However, there is no testimony that this is actually the case, as Burog did not testify.

form itself, and that such notifications gave recipients the ability to “opt-out.” Tr. 861:3-12; 869:10-873:24. However, the record is completely devoid of any evidence showing the contents or verbiage of any such “opt-out” email notifications. Farese testified that, if an individual opted out, she would receive an email notification, and, in fact, she received between one and five such notifications. Tr. 860:15-17; 878:3-12; 896:15-897:3. However, the record does not reflect the names of those who opted out, except for two individuals named by Farese (Tr. 896:21-23); the date when Farese received the opt-out notifications; or the bargaining-unit to which those who purportedly opted out belonged. Burog did not testify at the hearing, and the record does not reflect how many opt-out notifications Burog received of employees belonging to the Valley RN Unit, the names of such employees, or the dates when such employees opted out.

Farese admitted that, despite the email notifications and opt-out option, there was no way to determine who actually completed her online forms. Tr. 865:22-866:6; 875:9-11. She also admitted that, aside from the opt-out notifications she received, there was no way to determine whether an email was, in fact, sent to the email addresses entered into the forms. Tr. 899:10-15. The record also does not reflect whether or how often email notifications generated by Farese’s online forms could have been, or, in fact, were, diverted to spam email folders. Thus, the record does not establish that individuals whose email addresses were input into Farese’s online forms actually received email notifications with opt-out options.

Some employees also circulated decertification cards for signatures. Tr. 858. According to the dates on those cards, these efforts were, for the most part, underway from September 2016 through the time that Respondents’ withdrawals of recognition. The attached charts (Appendix A), show the progression of the decertification efforts relative to each of the bargaining units,

according to the dates available on decertification cards and the email notifications of completion of Farese's online forms to Farese and Burog.

## **2. Respondent Valley Promises a Wage Increase**

After the petitions to decertify of the Union as the representative of employees belonging to the Valley RN Unit were filed on January 27 and 31, 2017, UHS Vice President of Labor Relations Schmid and Wendi Reyes (Reyes), a Unit Director who presided during a decertification campaign at UHS-affiliated hospital Corona Regional Medical Center in Corona, California (Corona Regional), began meeting with RNs employed by Respondent Valley in small groups for "Act training." Tr. 80:14-19; 82:10-16; 83:16-84:12; 530:1-14; 710:24-711:12; 712:1-6; 735:10-736:22. Although their goal was to meet with all RNs, Schmid testified that she was uncertain whether meetings were held with all, or even a majority, of RNs. Tr. 81:9-16; 84:5-12. Although CGC subpoenaed records showing which individuals attended the "Act training" conducted by Schmid and Reyes, Respondent failed to provide such records. Tr. 1115-1116.

Sue Komenda (Komenda), a current and long-term RN for Respondent Valley, who attended one of the "Act trainings" along with 10 to 12 other RNs in either late January or early February 2017, testified that Schmid used a dry-erase board to explain bargaining. Tr. 523:5-12; 524:3-525:2. Specifically, Schmid drew a line with arrows going in both directions with the word "Impasse" next to it and explained that the lines represented each side of the bargaining table proposing or "giving" what they wanted and that the parties would then talk about it throughout the process. Tr. 525:24-526:11. Schmid then explained that UHS "was not going to give anything unless they got something and they certainly weren't going to give anything unless they got *everything* that they wanted." Tr. 526:11-14 (emphasis added).

Schmid told employees that the administration “would extend this bargaining.” Tr. 526:13-14. To illustrate, Schmid provided examples of other UHS hospitals that were in contract negotiations with unions for years. In particular, Schmid mentioned a UHS hospital in Philadelphia where bargaining went on for three years and said UHS “would just bargain until impasse and they [i.e., UHS administration] would eventually get what they wanted, which was to have no union.” Tr. 527:15-22. Then, Schmid told employees that UHS was just “going to drag it out until the union relented.” Tr. 527:4-22.

Komenda also testified that Schmid explained that there would be no wage increases while bargaining was going on, which could be years. Tr. 527:23-528:5. Schmid used the UHS hospital in Philadelphia as an example of employees not receiving wage increase for years during bargaining.<sup>6</sup> Tr. 526:15-19. Then, Schmid talked about market value and merit wage increases that are offered by UHS at non-union hospitals. Schmid explained that market value raises are separate from merit raises in that merit raises are based on employee performance appraisals and market value raises are based on the level of wages in the city or locality at other area hospitals. Tr. 528:5-529:11. Schmid finished this discussion by telling employees that “if [they] didn’t have a union, [they] would get them.” Tr. 529:10-12.

According to Komenda, during the meeting, Reyes explained that, at Corona Regional, the nurses were unhappy after they voted in a union, and she told them that they could vote the union out, which they did. Reyes explained that, as a result of voting the union out, the nurses enjoyed a better administration “because better administrators only go to nonunion hospital[s].” Tr. 530:1-11. Reyes explained, “[U]nion hospitals were restricted in getting good administrators

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<sup>6</sup> In its post-hearing brief to the ALJ, Respondents argue that Komenda should not be credited, in part because it is not, in fact, true that employees in Philadelphia did not receive a raise during bargaining. However, even if employees received a raise in Philadelphia during bargaining, it does not mean that Schmid informed Respondents Valley’s employees of that. Schmid could have, and likely did, misinform Respondent Valley employees of the circumstances of UHS employees in Philadelphia.

because those administrators could not do what they wanted to do. They had to go through the union.” Tr. 530:11-14.

Komenda asked the only question, asking what the point of the meeting was. Tr. 532:3-6. Schmid said the point was to inform the RNs “on how to get rid of the union” and “what benefits [employees] would receive from getting rid of the union.” Tr. 532:7-11.

Schmid testified about what she said during meetings she held with RNs during this timeframe, but did not provide specific testimony about what she said at the meeting Komenda attended. Tr. 710-712; 713:9-24; 717:10-733:20. Schmid was unable to estimate how many meetings she held with Respondent Valley’s RNs (Tr. 81:9-16; 84:5-12), so it is unclear whether her testimony was intended to generalize what was said in dozens of meetings, or describe what was said in just a couple.

In general, Schmid testified that she opened the meetings by telling employees that she was holding the meeting to inform them that a decertification petition was filed and to give them information about the process for the upcoming election. She then explained the voting process and emphasized that it would be a secret ballot election.<sup>7</sup> Tr. 717-718. Schmid also testified that, during the meetings, she discussed the nature of good-faith bargaining, the concept of impasse, the idea of exclusive representation, the Union’s conduct at the bargaining table, and non-union wage increases. Tr. 710-712; 713:9-24; 717:10-733:20. On direct, Schmid testified that she raised the topic of non-union wage increases in response to questions from employees about that topic. Tr. 725:18-726:3. However, on cross-examination, Schmid admitted that the topic came up in the “vast majority” of meetings, regardless of whether a question was raised by employees on the topic. Schmid also testified that she often heard questions about non-union market

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<sup>7</sup> Despite this claim, Komenda was completely dumbfounded by Respondents’ counsel’s questions on cross-examination about whether she knew about a decertification election, thus evidencing that she was never informed about the Board’s election process, as Schmid contends. Tr. 544:10-16.

adjustment wage increases, “understandably so,” because the Union had recently made a bargaining proposal tied to market value wage increases. Tr. 740:15-741:16.

There are notable omissions from Schmid’s testimony. First, Schmid never directly denied telling employees they would receive wage increases if they did not have a union. The closest testimony she offered was in response to Respondents’ counsel’s question about whether she was aware of limitations on an employer with regard to “things like promises or threats.” Tr. 730:17-19. Schmid replied that she was familiar with “TIPS.” Tr. 730:20. Respondents’ counsel followed up by asking what her understanding was as to whether an employer can make promises or threats, and Schmid responded that an employer could not do either. Tr. 703:23-731:5. Then, Respondents’ counsel asked Schmid whether, when making her presentations, she took “that into account.” Tr. 731:6-7. Schmid’s answer was simply, “Of course. . . . I’ve been doing this for 20 plus years.” Tr. 8-10. Thus, Schmid was never asked if she told that they would receive a wage increase if they did not have a union, nor did she ever deny making such a statement.

The second notable omission from Schmid’s testimony is that she never denied that Reyes told Respondent Valley’s RNs about how she suggested to nurses at Corona Regional that they could vote their union out because those nurses were unhappy. Similarly, Schmid never denied that Reyes told the RNs that after the nurses voted the union out at Corona Regional, those nurses enjoyed better administrators because non-union hospitals can attract a better administration.

Third, Schmid never denied that she told employees that Respondent Valley was not going to give up anything in bargaining, unless it got everything it wanted. Similarly, Schmid never denied telling employees that the hospital was going to drag out bargaining until the Union

relented. The closest testimony on this point was Schmid saying that she “would never use the word stretch” and that she, in fact, did not want to extend bargaining. Tr. 727:24-728:6.

Although at one point Komenda initially used the word, “stretch,” she also described what Schmid said in terms of “extending” bargaining. Tr. 527:4-22. Thus, the message Schmid sent was that bargaining would be stalled until the Union gave Respondent Valley everything it wanted. Schmid never denied saying this or spreading that message.

Although CGC was unable to call employees who attended Schmid’s meetings, CGC’s ability to do so was hampered by CGC’s lack of control over the employees, the natural tendency of current employees to want to avoid testifying against their employer for fear of retaliation (especially in the wake of withdrawal of recognition of their union), Komenda’s inability to recall the names of the other RNs who attended her meetings (who did not typically work with her), and Respondent’s failure to provide the sign-in sheets it had employees sign at the meetings. Tr. 530:15-22; 538:8-21; 714:20-715:14. In contrast, Respondents failed to call Reyes although she is apparently within the control of UHS and would be predisposed to testify favorably for Respondents.

### **3. Respondent Valley Withdraws Recognition from the Union**

Schmid continued to have meetings with employees, as described above, until Respondent Valley was presented with documents purportedly showing that the Union lost support from a majority of bargaining unit members on February 17, 2017. Tr. 56:23-57:1. As detailed below, Respondent Valley, in haste, reviewed the documents and announced that it was withdrawing recognition from the Union that same day.

**a. Respondent Valley Receives Purported Showing of Loss of Majority Support**

On about February 17, 2017, employee Burog and employee Jennifer Yant met with Respondent Valley's CNO Barnhardt, said "they believed that they had collected enough signatures with cards to support no longer being represented by the Union," and handed her a manila envelope with decertification cards and email notifications that were purportedly printed from Burog's email address. 775:19-781:25; 786:10-788:14; RX 27; 28.<sup>8</sup> Because Respondents' Exhibit 27, which consists of the photocopied cards and the cards with original, inked signatures, is not in CGC's possession, it is unclear how many of the cards presented to Barnthouse were photocopies, but the evidence establishes that 38 email notifications were presented to Barnthouse, though no opt-out notifications were submitted. RX 28. Burog and Yant did not tell Barnthouse how the cards or emails were obtained, and Barnthouse did not inquire. Tr. 175:14-176:14; 765:7-766:5.

**b. Respondent Valley "Verifies" Purported Showing of Loss of Majority Support**

After Barnthouse received the manila envelope, Schmid, Barnthouse, and Keim met in a conference room to alphabetize, sort, and count the materials it contained, folding and setting aside duplicate cards. Tr. 179:18-180:13; 789:3-25; 796:15-20. Then, they delivered the sorted cards and email notifications to Thorne in the Human Resource Department. Tr. 769:11-23; 788:16-789:2; 1042:12-25. Next, Nursing Project Manager Crocker (Crocker) and Annette Litton (Litton) split the cards and compared the signatures on their respective sets of cards to a few

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<sup>8</sup> RX 28 was admitted over CGC's authentication and hearsay objections, even after Respondents' counsel clarified that they were offering the statements contained in the emails for the truth of the matter asserted. Respondents' counsel argued that the documents should be admitted under FRE 901(b)(1)(4) and (9). While that response addresses authentication, it does not provide an exception to the rule of hearsay (See Federal Rules of Evidence, Article VIII, Hearsay). CGC pointed this out in response to Respondents' counsel's argument, (Tr. 787:13-788:3), but the documents were admitted over objection. CGC, respectfully, moves for a finding that RX 28 contains inadmissible hearsay statements, as with the other email notification exhibits admitted over CGC's objections.

signatures in employees' personnel files. Tr. 816:23-821:18; 832:14-835:18. Neither of them had any prior experience with hand-writing comparison or personal familiarity with the signatures they were tasked with comparing. Tr. 825:25-826:11; 844:18-845:20.

During this process, Crocker and Litton were each given a list, RX 29 and RX 31, which was supposed to show the current number and names of employees in the bargaining unit. However, it is questionable when the list was generated or last updated, and the list was shown to be inaccurate. The inaccuracy of the list first became evident when Keim was asked, on cross-examination, why he testified that there were 533 RNs in the unit, when the list showed 534. Tr. 1073:3-17; 1047:19-1048:3. Keim explained he learned that employee Kent-Wawer,<sup>9</sup> whose name appeared on a card and on the list, had "just" been terminated. Tr. 1073:18-22. When pressed on the matter, Keim was evasive, at best, as illustrated by the following exchange.

Q: And when you say, just, when was she terminated?

A: Well, I mean, since, -- I mean the list hadn't been updated. So that was why that would have been -- would have been marked or should have been marked. That's why -- I mean, that's my writing on there.

Tr. 1073:23-1074:2. Later, when pressed further about the accuracy of the list, Keim obfuscated, stating that the list was "supposed to [be] updated nightly" and then saying his understanding was that the employee had been terminated that same day. Tr. 1074:3-13. Keim then said "somebody" in Human Resources told him that, which "would have been Diane."<sup>10</sup> Tr. 1074:12-15. Keim explained that he was trying to find out why certain personnel files were missing and was asking whether any one was terminated because he was "trying to find out what the number" was. Tr. 1074:15-21.

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<sup>9</sup> RX 27(a) at K1 contains the card signed by this individual, and RX 21 at 124 contains comparator signatures for this individual, which indicates that Respondent Valley relied on this employees' showing of disaffection even though she was no longer employed by Respondent Valley at the time of the withdrawal.

<sup>10</sup> This may be a reference to Dana Thorne, but it is unclear.

Aside from Keim’s hearsay testimony about what he heard from Human Resources about when an employee on the list was terminated, Respondent Valley did not offer evidence to establish when the list was generated or to otherwise established that it accurately listed all employees in the Valley RN Unit at the time when Respondent used it to verify the Union’s purported loss of majority support.<sup>11</sup> Indeed, although Respondents’ counsel called Thorne as a witness during its case-in-chief, they did not question her about the role she played in this process. Tr. 669-704. And, in fact, when questioned by CGC, Thorne testified, at one point, that she generated the list “on the date it was . . . requested,” seemingly avoiding the issue of when the list was generated in relation to when it was used to verify the purported loss of majority support. Tr. 249:15-19. Respondent also failed to provide personnel documents showing when the employee mentioned by Keim was actually terminated. Thus, there is an open question about when the list was first generated and last updated. This is particularly troubling because, although Keim testified about how he accounted for terminated employees (i.e., by asking whether anyone had been terminated recently), it appears that the process did not account for recently hired employees. Notably, Respondent Valley held a new employee orientation the day before it withdrew recognition – February 16, 2017. RX 14. Thus, if registered nurses were hired one day prior, and the list had not been updated since then, there is no telling whether the unit included more than 533 as of February 17, 2017. In short, the only list purportedly showing the number of employees represented by the Union on February 17, 2017, is admittedly inaccurate to an unknown degree.

With regard to the email notifications that were presented to Respondent Valley in the showing of loss of majority support, very little verification could be, or was, done. The extent of

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<sup>11</sup> As CGC’s 611(c) witness, Thorne testified, at one point, that she generated the list “on the date it was . . . requested.” Tr. 249:15-19.

review by Respondent Valley consisted of Keim comparing the information on each of the email notifications sent to Burog (i.e., name, email address, phone, etc.), with a voter list that had been generated during the processing of the decertification petition that had been filed on January 31, 2016. Keim testified that the hospital counted an email notification for the purposes of verifying the showing of loss of majority support as long as either the phone number or email address (along with the name of the employee) on the voter list matched the information contained on Burog's email. Tr. 1049:12-1050:8; 1092:1-1094:22. Keim testified that he only counted 30 of 38 email notifications because eight of the notifications showed the names of employees who had also signed decertification cards. Tr. 1049:20-23. Based on CGC's review of RX 48 and RX 28, Respondent counted 7 email notifications for which the listed email addresses did not match the email addresses listed on Respondent Valley's voter list.

Later that day, on February 17, 2017, after comparing the signatures on the cards and cross-referencing the information contained in the emails with the voter list, Respondent Valley decided to withdraw recognition from the Union. Respondent Valley sent the Union a letter notifying it of the withdrawal of recognition, and distributed a flyer notifying its RNs of the withdrawal the same day.

**c. Respondent Valley Fulfills Its Promise of Wage Increase**

Within a week of Respondent Valley withdrawing recognition of the Union, it implemented the wage increase Schmid told employee Komenda and others they would receive. According to Komenda, she and other RNs were called individually into supervisors' offices. Komenda was informed that she would be receiving a bonus, but that others received a wage increase. Komenda also testified that announcements from Respondent Valley about the wage increase were posted in all the break rooms. Tr. 536:5-537:7.

On February 23, 2017, Respondent Valley sent all of its RNs a letter informing them that Respondent Valley was “implementing an immediate wage adjustment,” which was based on “market adjustments to put . . . nurses on the VHS RN non-union market scale.” Tr. 121:1-18; GCX 11. Respondent Valley’s letter also informed employees that they would be eligible for merit wage increases in July, “[a]s with all VHS non-union hospitals.” GCX 11. The wage increase ranged from 2 to 9 percent, and was effective retroactively to February 19, 2017, 2 days after Respondent Valley withdrew recognition of the Union. Tr. 78:5-11; GCX 11. The letter concludes with a reminder as to why the increase was given: “Thank you again – for giving us a chance to work together to make this the best Hospital in Las Vegas.” GCX 11.

**4. Respondent Desert Seizes on Respondent Valley’s Wage Increase and Provides Assistance to the Decertification Effort**

News of the wage increase implemented by Respondent Valley spread quickly among employees of Respondent Desert. Employees used the wage increase announcement Respondent Valley sent to its RNs to promote decertification. Tr. 454:7-24; GCX 32. Respondent Desert also latched on to the wage increase granted to the Valley RN Unit by issuing its own flyer and offering support to an employee employed at a different UHS-affiliated hospital who was soliciting support for the decertification campaign.

**a. Mark Smith is Allowed on Hospital Property to Aid the Decertification Campaign**

Sometime in March 2017, Mark Smith (Smith), an RN from Corona Regional, came to Respondent Desert’s facility to solicit employees to sign decertification cards. He set up a portable table with visible anti-Union propaganda in the lobby and cafeteria over a span of several days and succeeded collected signed decertification cards from employees. Tr. 501-502. While it is highly suspicious that Smith: (1) works at the same hospital as Reyes, who was an

integral part in Respondent Valley's "communication" campaign (Tr. 103); (2) is required to provide notice at Corona Regional Medical Center – a UHS affiliated hospital – months in advance before taking leave, but did not do so in relation to his visit to Respondent Desert's facility (Tr. 496:9-25); (3) had a lawyer call him out of the blue offering representation in this matter without any fees attached (Tr. 498:4-10; 511:17-25); and (4) was seen using the free lunch log at Respondent Desert Springs's facility (Tr. 447-450, 475-476), there is no non-circumstantial evidence that Respondents were actively involved in Smith's coming to Respondent Desert's facility.

However, Respondent Desert took steps, outside of its own policies, and in favor of Smith's efforts, thus unmistakably advancing the decertification campaign. First, Respondent Desert allowed Smith on its property to solicit, admittedly in violation of the VHS solicitation and distribution policy. Tr. 162:23-165:25; GCX 22.

Schmid testified that Respondent Desert allowed Smith to do so to comply with a settlement agreement signed by UHS and approved by the Regional Director for Region 4 on November 3, 2015. Tr. 708:2-7. The agreement provides that UHS will not deny off-duty employees access to its parking lots and other outside non-working areas at its facilities to engage in solicitation and/or distribution on behalf of a named union or any other union, and will permit off-duty employees to engage in such conduct. RX 19 at 3. The Notice to Employees attached to the agreement was to be posted at just UHS-affiliated hospitals in Pennsylvania. RX 19 at 1.

Despite this testimony about the reason for permitting Smith's solicitation, Schmid evaded the question of whether she knew Smith was soliciting employees of Respondent Desert Springs to decertify. For example, when first questioned by CGC, Schmid testified as follows:

Q: And Mark Smith was in the cafeteria that day soliciting on behalf of the decertification campaign; is that correct?

A: I think so. I don't know for sure what he was doing.

Q: You don't know what he was doing?

A: No. I don't know exactly what he was doing. I wasn't there observing him.

Q: You may not know exactly what he was doing but you do know that he was there soliciting on behalf of the decertification campaign, correct?

A: I don't know what he was doing that day. Tr. 99:16-25.

Schmid's reluctance to admit she knew Smith was at the hospital soliciting for the decertification campaign continued for several rounds of questioning until she was forced to admit she had talked with Smith and she saw Smith sitting at his table in the lobby. Tr. 99:16-102:8. She finally admitted she "generally" understood Smith was soliciting support for the decertification campaign, just before being confronted with a picture of Smith, set up in the lobby with a large "VOTE" sign attached to the front of it. Tr. 102:9-103:2; GCX 6.

**b. Respondent Desert Protects and Condones Mark Smith's Efforts**

On March 6, 2017, Smith set up a portable table and folding chair in the cafeteria at Respondent Desert's facility, sat behind the table, passed out flyers advocating decertification of the Union, and encouraged employees to sign decertification cards. Tr. 442:1-14.

Around noon, Respondent Desert's employee Meghan Bell (Bell) arrived at the cafeteria to meet up with Union representative John Archer (Archer). Archer was not there yet, so Bell set her lunch down, approached Smith at his table, and asked him why he was there. Smith explained that he was there for UHS and that he had helped get rid of a union at his hospital and was doing the same thing at Respondent Desert's facility. Tr. 442:5-443:19.

Bell then went through the lunch line to pick up some extra items, and, while in line, noticed Archer arriving and setting some papers on a cafeteria table. About that same time, Smith left his portable table and moved to a cafeteria table. Archer picked up his papers and moved to the same cafeteria table where Smith was seated. Archer motioned for Bell to come sit with him and she did. Tr. 444:14-445:19.

At that point, Smith got on his cell phone and left the cafeteria. Smith called Farese and told her that he was being harassed. Tr. 410; 446; 504:3-10. Moments later, Smith came back to the cafeteria. Schmid, CNO McNutt, Security Guard Hank Castro, and Dugan soon followed and approached the table where Bell, Archer, and Smith were. Tr. 445:19-446:2.

Schmid, addressing Archer, said, "You're harassing [Smith] by . . . following him around the cafeteria." Tr. 446:2-6. Schmid told Archer not to bother Smith and said, "You can't sit here." Tr. 410:16-25; 446:5. Then, Archer asked Schmid if she knew whether Smith was allowed to be there or had permission to be there. Tr. 441:7-11; 446:7-18. Smith also asked if he allowed to be there.<sup>12</sup> Tr. 503:8-25. Schmid said that Smith was allowed to be there and so was Archer. Then Archer asked specifically whether Smith was allowed to be doing what he was doing at the hospital. Schmid said that he was because he was an employee. She then said they needed to separate. Tr. 411:1-14; 446:8-18; 504:17-505:9.

During the above interaction with Schmid, Castro was standing at the end of the cafeteria table. When Schmid was done talking, Castro leaned in and said, "Do I need to babysit you?" Tr. 446:19-447:14; 411:15-19. Around this same time, Smith grabbed his belongings and moved to a different table. Tr. 447:10-13.

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<sup>12</sup> Smith testified that he asked a man during this incident, who he thought was the CEO, whether he could be there after explaining what he was doing, and the response was yes. Tr. 503:8-25.

Although Schmid, who testified about the incident, denied ever Archer or Bell to stop harassing Smith and emphasized that she did not take sides and even-handedly told everyone to stop bothering each other, a video recording corroborates Bell's account. Tr. 92-93. Although the video recording is sideways and the audio is difficult to decipher at times, Schmid can be seen addressing Archer and Bell as Smith walked behind her and heard saying, "You are harassing him. Yeah. By moving next to him every single time." GCX 5 at 0:08-0:14. Someone can also be heard in the background saying, "He's not even allowed to be here," suggesting that Schmid was protecting Smith from the presence of the Union and its supporters in and around the areas he had staked out inside Respondent Desert's facility. GCX 5 at 0:10-0:16.

**c. Respondent Desert Issues Bargaining Brief Targeting Valley Wage Increase**

A day later, on March 7, 2017, Respondent Desert distributed another "Bargaining Brief" to employees. Typically, Respondents would distribute these types of flyers after a bargaining session, but not this time because it served a different purpose. Respondent Desert wanted to address "some rumors that were rampant in the hospital." Tr. 86:21-87:2. The flyer begins, in relevant part, by stating:

As many of you know on March 7<sup>th</sup>, the union made an offer regarding a wage increase similar to the wage increase just implemented for nurses at Valley Hospital. As you also may know, the union no longer represented the nurses at Valley. As we have done to date, we will continue to bargain in good faith with the union over wages, hours, and other terms and conditions of employment of bargaining unit employees at Desert Springs.

GCX 4. Then, the flyer goes on to inform employees, in detail, about the withdrawal of recognition at Valley. Further, in relevant part, the flyer states:

Pay increases [at Valley] 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 bargained pay ranges. The union has filed an unfair labor practice charge opposing the Valley adjustment.

GCX 4 (emphasis in original). The flyer continues, in relevant part, as an apparent nod to Smith's activity at the hospital:

The union has claimed that nurses opposing the union are doing so unlawfully and are violating the Hospital's solicitation policy. *To be clear, all nurses have a federally protected right to express their views on unionization and unions and to solicit co-workers to support their position, so long as it is on non-work time.* . . . We would hope that all parties involved would treat each other appropriately and with courtesy. *Bullying and intimidation have no place at Desert Springs and will not be tolerated.* GCX 4 (emphasis in original).

Bell described seeing 10-15 copies of this flyer in the break rooms. She testified how some of her co-workers were excited by it, saying, "Oh, look, they [i.e., Valley nurses] got a raise. We want to get a raise also." Tr. 456:1-23. Others reacted with skepticism. Tr. 456:20-23.

**d. Mark Smith Records Employees Speaking with the Union**

Smith made additional visits to Respondent Desert's facility on March 7 and 8, 2017, setting up his table in the entry way or foyer to the main entrance of the facility, adjacent to the main lobby, or in the cafeteria. Tr. 502; 515.

On the morning of March 7, 2017, Union representative Archer went to the cafeteria and set up at a table with information about the Union and talked to employees as they passed by or approached his table. Archer noticed that Smith, who was his own portable table nearby, had a camera on his table, pointed directly at Archer, with a red light. Archer approached Smith and asked him to turn off the camera because Archer did not want to be filmed. Archer went back to his table, but moved to the other side of it. Then, Smith moved his camera and directed it where Archer was now seated. Tr. 411:20-413:18.

Later that evening, at about 6:00 p.m. on March 7, 2017, Archer returned to Respondent Desert's facility with Union representative Barry Roberts (Roberts), and Archer and Roberts sat on two stools in the main lobby and spoke to employees about the Union as they passed by during the shift change. Smith, who was in the foyer about 20 to 30 feet away, between glass sliding doors, admittedly, began to record Archer and Roberts as they spoke with employees. At some point, Archer notified a pair of security guards that Smith was recording, and the guards approached Smith, who stopped recording for the time being. Tr. 384:14-388:25; 413:18-415:22.

The following morning, on March 8, 2017, Roberts set up a table in the lobby of Respondent Desert's facility, and Smith then arrived and set up his table in the foyer. Again, Smith aimed his camera at Roberts and recorded him as employees approached him, leading some employees who met with Roberts over the course of almost 2 hours to ask if Smith was recording them. Tr. 390:2-391:20. At 8:00 a.m., Roberts moved to the cafeteria to talk to employees, and Smith followed him and continued to aim his camera at him as he spoke with employees. Tr. 392.

## **5. Respondent Desert Withdraws Recognition of the Union**

In March 2017, Respondent Desert withdrew recognition of the Union as the representative of the Desert RN Unit and the Desert Technical Unit. Tr. 57:3-16. As discussed below, Respondent Desert was anticipating the withdrawals and immediately granted wage increases, just as Respondent Valley did one month prior.

**a. Withdrawal of Recognition of the Union as the Representative of the Desert RN Unit**

**i. Respondent Desert Receives Purported Showing of Loss of Majority Support**

On March 12, 2017, CNO McNutt met with Farese and two other employees in her office and presented McNutt with a folder containing what purportedly showed that the Union lost the support of the majority of Respondent Desert's RNs. Tr. 195:19-196:16. McNutt cried when she got the folder. Tr. 203. They did not discuss how the contents of the folder were obtained. Tr. 204-205.

McNutt testified that she was surprised during this meeting, not because of what she was presented with, but because "it was that day." Tr. 196:18-197:3. McNutt's version of events, and, particular, her testimony about her surprise, directly contradicted by testimony from Respondents' witnesses Michele Crawford (Crawford) and Kent Forsythe (Forsythe), who each testified that they were contacted by McNutt on Friday, March 10, 2017, and asked if they were available for a special project on Sunday morning, March 12, 2017, but refused to say what the project was. Tr. 955-956; 972-974. Clearly, for unexplained reasons, and contrary to her testimony, McNutt anticipated Farese's delivery of the documents on March 12, 2017, and could not have been surprised, as she claimed.

The folder that Farese gave McNutt contained 154 decertification cards (RX 35), 122 email notifications that printed from Farese's email address (RX 33), and a 4-page petition showing 2 signatures that Respondent ultimately counted (RX 37).

**ii. Respondent Desert "Verifies" Showing and Withdraws Recognition**

After Farese gave McNutt the folder, Schmid and McNutt alphabetized the decertification cards and the email notifications, folding up and setting aside duplicates. Tr. 208:13-214:10;

1051:10- 1053:15. Keim, who was present during this process, had a roster of bargaining-unit members he had received on March 10, 2017. Tr. 1053:17-19 (“I got the list Friday, a hardcopy from Cindy Scruggs who’s head of payroll for the whole Valley system.”); RX 39. As the cards and email notifications were sorted and the duplicates were set aside, Keim used a yellow highlighter to mark on the roster the names of the employees whose signatures needed to be compared against other signatures kept in Respondent Desert’s personnel files. Keim concluded during this process that there were three signatures on the petition that were not found on other documents such as decertification cards or email notifications. Tr. 1054:1-1058:6.

Forsythe and Crawford, who were on standby for McNutt’s secret project, were each assigned signatures to signatures in employees’ personnel files. Tr. 1057:1-19. Although Forsythe was unable to verify four employee signatures, Keim stepped in and made sure they were counted for the final count.<sup>13</sup> Tr. 964:10-23; 967:10-972:5.

Keim reviewed the email notifications against a list of bargaining-unit employees that had been given to the Union in response to an information request on December 30, 2016, counting all notifications for which the listed telephone number or email address matched one on the list. Tr. 1057:14-19; RX 49. Based on CGC’s review of RX 33 and RX 49, Keim counted 42 email notifications that listed email addresses not matching those on Keim’s list in purportedly verifying the Union’s actual loss of majority support. .

Although Keim testified that the list he used to verify the Union’s purported loss of majority status was *received* by him on March 10, 2017, the record does not establish when the list was generated, and, although the list is dated March 9, 2017, neither Keim nor any other witness explained why. Tr. 1053:17-19; 1077:6-18; RX 38. Thus, although the list indicates that

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<sup>13</sup> Keim testified that the four names on the count sheet were notated, not because they could not be verified, but because the correlating personnel file could not be found initially. Tr. 1058:20-159:11.

there were 439 bargaining-unit employees, Respondent has not established the precise date when it employed that complement of 439 employees, failed to submit payroll records and other documents verifying the list, and failed to call Scruggs, the payroll administrator tasked with generating the list, to testify concerning when and how the list was generated and last updated.

Notwithstanding the above, Respondent Desert decided to withdraw recognition from the Union as the representative of the Desert RN Unit later that same day, on March 12, 2017. The Union was notified, and an announcement was made available to registered nurses. Tr. 104:24-105:5; 457:2-13; GCX 27.

### **iii. Respondent Desert Implements Immediate Wage Increase**

Two days after Respondent Desert withdrew recognition of the Union as the representative of the Desert RN Unit, it announced that it would be implementing a wage increase. On March 14, 2017, Respondent Desert issued a letter to all RNs stating, essentially, the same thing Respondent Valley had announced to its employees. Tr. 121:19-122:5; GCX 9. After thanking the nurses for the opportunity to “move forward, together,” the letter informed employees that it was “implementing an immediate wage adjustment” for all registered nurses. The wage increase was based on “market adjustments to put . . . nurses on the VHS RN non-union market scale.” GCX 9. The range for the wage increase was 2 to 9 percent. Employees were also informed that they would be eligible for merit wage increases in July, “[a]s with all VHS non-union hospitals.” GCX 9. The letter concludes with a reminder as to why the increase was given: “Thank you again – for giving us a chance to work together to make this the best Hospital in Las Vegas.” GCX 9.

The wage increase was implemented at the outset of the next payroll period, March 19, 2017. GCX 9. About this time, employees met individually with their supervisors to discuss

their wage increases. For example, employee Bell met with her supervisor and was notified that she received a 6.23 percent wage increase. Tr. 458:15-460:15; GCX 33.

**b. Withdrawal of Recognition of the Union as the Representative of the Desert Technical Unit**

**i. Respondent Desert Recieves Purported Showing of Loss of Majority Support**

On March 18, 2017, McNutt again met with Farese, who, this time, gave her a folder containing 42 signed decertification cards and 10 email notifications printed from Farese's email address purportedly showing that a majority of employees in the Desert Technical Unit no longer wished to be represented by the Union. Tr. 216:15-217:13; RX 34; RX 36.

**ii. Respondent Desert "Verifies" Showing and Withdraws Recognition**

After Farese gave McNutt the folder, Respondent Desert sorted the decertification cards and email notifications alphabetically, set aside the duplicates aside, and compared the signatures against signatures in employees' personnel files. Tr. 208:13-214:10; 1060:2-1061:11; 1060:12-1062:4. Keim compared the information in the email notifications and against a list of bargaining-unit employees provided to the Union about December 30, 2016, in response to a request for information, and counted the email notifications if the telephone numbers or email addresses appearing on the notifications matched those listed for the named employees on the list. Tr. 1030:2-8; 1060:10-12; RX 47; RX 50.

As with the other rosters Respondents used to determine whether there was an actual loss of majority support, the date when the roster of employees used for the Desert Technical Unit is not established in the record. Keim testified that he received the list on March 17, 2017. Tr. 1078:5-15. Keim admitted though, that he did not know when the list was generated. Tr. 1078:16-20. Respondent failed to otherwise provide payroll records showing the number of

employees employed by Respondent on March 18, 2017, and did not call Scruggs as a witness to shore up the accuracy of the list or when it was generated or last updated. Respondent Desert notified the Union and employees that it was withdrawing recognition of the Union on March 18, 2017. Tr. 1063:1-9; GCX 28.

**iii. Respondent Desert Implements Immediate Wage Increase**

Just as with the other bargaining units, employees in the Desert Technical Unit received a wage increase following the final withdrawal of recognition. On March 21, 2017, Respondent Desert issued letter announcing the wage increase that was nearly identical to the one it sent to employees when it withdrew recognition of the Union as representative of the Desert RN Unit. Respondent Desert implemented the wage increase retroactively to March 19, 2017. Tr. 120:6-25; GC X 10.

**IV. LEGAL ANALYSIS**

**A. Respondents' Conduct Violated Section 8(a)(5) of the Act**

As discussed below, and throughout, Respondents' engaged in a course of conduct designed to undermine the Union as its employees' exclusive bargaining representative. When an employer engages in a course of conduct designed to undermine a union's status as its employees' collective-bargaining representative, such conduct both independently violates Section 8(a)(1) of the Act and amounts to a refusal to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act. *Berbiglia, Inc.*, 233 NLRB 1476, 1476, 1493 (1977); *Wahoo Packing Company*, 161 NLRB 174, 179 (1966). Thus, by their entire course of conduct aimed at undermining the Union, Respondents also violated Section 8(a)(1) and (5) of the Act. The ALJ should accordingly, find so, in addition to the allegations addressed below.

## 1. Respondents' Dues Cessation Violated the Act

When Respondents ceased deducting dues for employees of all three bargaining units on September 23, 2016, Respondents violated the Act.

“It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees’ wages, hours, and other terms and condition of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes.” *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (Aug. 27, 2015) (citing *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962)).

It is also settled law that “dues checkoff is a matter related to wages, hours, and other terms and conditions of employment . . . and is therefore a mandatory subject of bargaining.” *Lincoln Lutheran of Racine*, 362 NLRB slip op. at 2 (citing *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), *enfd.* 564 F.3d 1330 (D.C. Cir. 2009)). In *Lincoln Lutheran of Racine*, the Board held that, as with most contractually established terms and conditions of employment, “an employer’s obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement.” *Id.* slip op. at 1.

However, the Board has considered an employer’s obligation to comply with the requirements of Section 302 of the Labor Management Relations Act (LMRA) to be a limited defense to an employer’s obligation to make unilateral changes to dues check-off. *See BASF Wyandotte Corp.*, 274 NLRB 978, 978-979 (1985). .

Section 302(c)(4) of the LMRA states that an employer may deduct membership dues from an employee’s wages and remit those funds to a union provided “the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the

applicable collective agreement, whichever occurs sooner[.]” The Board reads that language to guarantee employees two distinct opportunities to revoke a dues checkoff authorization, i.e., at least once a year and upon termination of the collective-bargaining agreement. *See Atlanta Printing Specialties*, 215 NLRB 237, 237 (1974), *enfd.* 523 F.2d 783 (5th Cir. 1975). Any limitation that a union seeks to impose on the right of employees to revoke beyond those two broad parameters, such as limited window periods for revocation, must be expressed in the checkoff authorization itself, and not in any related contract. *See Trico Products Corp.*, 238 NLRB 1306, 1309 (1978), followed in relevant part by *Food & Commercial Workers Local One (Big V Supermarkets)*, 304 NLRB 952, 952 n.1 (1991), *enfd.* 975 F.2d 40 (2d Cir. 1992); *Frito-Lay*, 243 NLRB 137, 138 (1979). Thus, absent limiting language in the checkoff authorization, employees remain free to revoke them at-will in whole or in part consistent with the language of Section 302(c)(4). *See, e.g., Big V Supermarkets*, 304 NLRB at 953 (where authorizations did not limit revocability, union violated Section 8(b)(1)(A) by not honoring employees’ partial revocation that was limited to new organizing fund); *Trico Products Corp.*, 238 NLRB at 1309 & n.11 (“we hold that authorizations which do not provide for any limitation of their revocability are revocable at will”); *Chemical Workers Local 143 (Lederle Laboratories)*, 188 NLRB 705, 706 n.1, 707 (1971) (noting that “all the authorizations became terminable at will after the contract expired” where the great majority of authorizations specified no duration or escape period).

There can be no question that the Union did not waive its statutory right to bargain over the mandatory subject of Respondents’ cessation of dues checkoff, as the Union’s counsel unequivocally demanded to bargain over the move, and Respondents ignored that request,

instead announcing the cessation of dues deduction to all of its employees and then implementing it without bargaining.

Although Respondents may argue that their cessation of dues deduction for Union members was necessary to avoid violating Section 302 of the LMRA, Respondents admittedly did not review all Union members' dues check-off authorizations to determine whether they all used the allegedly unlawful language before ceasing dues deduction, and, even at the time of the hearing, failed to introduce dues check-off authorization cards showing whether all Union members' authorizations included the alleged offending language. Moreover, even if Respondent had established that all Union members' dues check-off authorizations incorporated the language, that language did not render the deduction of dues in reliance on those authorizations unlawful. Rather, since the authorizations allow revocation during an annual window period but are silent as to revocation upon expiration of the applicable collective-bargaining agreement, under *Big V Supermarkets*, 304 NLRB at 953; *Trico Products Corp.*, 238 NLRB at 1309 & n.11, and *Lederle Laboratories*, 188 NLRB at 706 n.1, the authorizations simply became revocable at-will upon expiration of the applicable collective-bargaining agreements, but they were not facially unlawful, and the deduction of dues in the absence of any request to revoke upon expiration of the applicable collective-bargaining agreements was not unlawful. In sum, Respondents cannot meet its burden of establishing that its cessation of dues deduction was necessary for it to ensure that it was in compliance with Section 302 of the LMRA, and their unilateral cessation of dues deduction was therefore unlawful.

## **2. Respondents' Bulletin Board Related Conduct Violated the Act**

Union access to bulletin boards at an employer's facility is a mandatory subject of collective bargaining. *See, e.g., NLRB v. Proof Co.*, 242 F.2d 560 (7th Cir. 1957), cert. denied

355 U.S. 831 (1957), enfg. 115 NLRB 309 (1956); *Ariz. Portland Cement Co.*, 302 NLRB 36, 44 (1991), and the cases cited therein at footnote 28. Provisions of collective bargaining agreements granting access to union bulletin boards are terms and conditions of employment that employers are obligated to maintain following the expiration of the agreements. *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB at 654 (2001). Thus, an employer violates Sections 8(a)(1) and (5) of the Act by unilaterally changing a contractually-established practice of granting access to bulletin boards, even after expiration of a collective bargaining agreement. *Id.*; *Formosa Plastics Corp., Louisiana*, 320 NLRB 631, 651-52 (1996); *Ariz. Portland Cement Co.*, 302 NLRB at 44, *Pioneer Press*, 297 NLRB 972, 987-88 (1990).

The Board has therefore found that an employer violates Section 8(a)(1) and (5) when it undertakes self-help measures by unilaterally removing flyers from a bulletin board when it believes their posting to violate contractual language concerning postings, in the absence of contractual language permitting such unilateral action. *Healthbridge Management, LLC*, 360 NLRB 937, 937 (2014) (employer violated Section 8(a)(1) and (5) by unilaterally removing flyers from a union's bulletin board based on contractual language permitting only "proper union notices," where employer "provided no evidence that it had the right under the contract unilaterally to determine which union notices were proper and to remove any notices or flyers it deemed improper"), *enfd.* 796 F.3d 1059, 1075 (D. C. Cir. 2015)

Respondent Desert's Nursing Director Dugan removed all postings on a Union bulletin board in a break room at Respondent Desert's facility on October 11, 2016. Although Respondent may argue that she did so based on restrictions in the collective-bargaining agreements concerning the content of postings, Dugan stormed into the break room and confronted the Union representatives posting and distributing the flyers before she knew

anything of their content. Moreover, as in *Healthbridge Management*, even if Dugan believed in good faith that the procedure followed in posting the flyers or the content of the flyers was in violation of the collective-bargaining agreements, the agreements do not state that Respondent Desert has the right to unilaterally determine which flyers are improperly posted and remove them. If anything, the contractual grievance procedure established to resolve contractual disputes was the appropriate avenue for Dugan to raise the issue of whether the posting of the flyers violated the collective-bargaining agreements. Accordingly, Dugan's removal of the flyers on October 11, 2016, violated Sections 8(a)(1) and (5) of the Act.

### **3. Respondents Violated the Act with Regard to Union Access**

Respondents unlawfully restricted the Union's access to employees during the months leading up to the withdrawal of recognition.

Union access to employer facilities is a mandatory subject of bargaining, and, when a union has been granted a contractual right of access, that right is a term and condition of employment that survives the expiration of the collective bargaining agreement. *Frontier Hotel & Casino*, 309 NLRB at 766; *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 777 (1982), *enfd.* as modified 740 F.2d 398 (5th Cir. 1984); *Am. Commercial Lines*, 291 NLRB 1066, 1072 (1988). Thus, an employer's depriving its employees of their contractually-established right of access to their bargaining representative violates Sections 8(a)(1) and (5) of the Act, both because it amounts to a unilateral change to a material term and condition of employment, and because it "tend[s] to interfere the representational process." *Frontier Hotel & Casino*, 309 NLRB at 766.

On January 27, 2017, Respondent Valley, through Charge Nurse Melley, informed Union representatives Loreto and Madrid they could not speak to more than one or two nurses at a time.

At around that time, Respondent Valley Human Resources Director Thorne had sent emails to Melley and other supervisors instructing them “to make sure that union representatives were not talking to more than two nurses at a time.” The Union access provision in the collective-bargaining agreement covering the Valley RN Unit includes no such restriction on the number of bargaining-unit members with whom the Union can communicate at one time. Thus, the imposition of this new, extra-contractual requirement violated Sections 8(a)(1) and (5) of the Act.

On February 2, 2017, Respondent Valley’s Nursing Project Manager Crocker effectively denied the Union’s contractual right to meet with new employees at their orientation. Crocker sent two Union representatives away, telling them to return later during the presentation portion of orientation. However, instead of having the new bargaining-unit RNs remain at the orientation, so that the Union could address them, as permitted in the collective-bargaining agreement, Dugan gave the RNs the option to leave and allowed them to physically leave without notifying the Union, thus depriving the Union of the ability to address the RNs. Although Dugan disclaims responsibility for the RNs’ decision to leave, Dugan orchestrated the orientation, she knew that the Union representatives were waiting to meet with the new RNs, and she chose to give the RNs the option to leave without waiting for the Union representatives to exercise their contractual right to address them. By effectively denying the Union’s request to address new bargaining-unit employees at their orientation, Respondent violated Sections 8(a)(1) and (5) of the Act.

On February 15, 2017, Respondent Desert, through Dugan, combatively told two Union representatives that they could not speak to bargaining-unit RNs in the break room while a non-represented employee was present, predictably leading the RNs to leave the break room. The

collective-bargaining agreement between Respondent Desert and the Union does not include a restriction on Union representatives speaking with bargaining-unit employees in the presence of non-bargaining-unit employees. Thus, by imposing this extra-contractual restriction, Respondent violated Sections 8(a)(1) and (5) of the Act.

To the extent Respondents contend that they interrupted the Union representatives' access because the Union representatives were somehow failing to comply with the access provisions of the collective-bargaining agreements, Respondents could and should have addressed these disputes through the "Enforcement of Access Provision" of the collective-bargaining agreements, which sets forth a specific procedure for addressing disputes about access. Instead, Respondent again undertook unilateral self-help measures, in violation of Sections 8(a)(1) and (5) of the Act.

#### **4. Respondent Valley Violated the Act by Refusing to Furnish the Union with the Information Requested on January 31, 2017**

An employer is obligated to furnish its employees' collective-bargaining representative information that is relevant to its performance of its duties as collective bargaining representative. *NLRB v. Acme Ind. Co.*, 385 U.S. 432, 436 (1967). The test for relevance is a liberal "discovery-type standard." *Id.* at 437. Information about bargaining-unit employees is presumptively relevant. *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

"The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow." *Woodland Clinic*, 331 NLRB 735, 737 (2000). In evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Med. Ctr.*, 319 NLRB 392, 398 (1995). The burden of establishing that replying to a request for information would be overly burdensome or that requested information is not readily available

rests with the party receiving the request for information. *Id.* Where an employer has lawfully withdrawn recognition of a union subsequent to an information request, it has no duty to furnish the information requested prior to the withdrawal of recognition. *Champion Home Builders Co.*, 350 NLRB 788, 793 (2007).

The Union requested on January 31, 2017, that Respondents provide the names and certain contact information for Unit employees by February 6, 2017. This information about Unit employees is presumptively relevant. Although Respondent Desert provided the requested information to the Union on February 23, 2017, Respondent Valley never provided the information.

Respondent Valley failed to provide the Union with the information it requested “as promptly as circumstances allowed.” VHS Assistant Director of Human Resources Cassard admitted that he could not recall if he ever even asked anyone to collect the requested information information requested by the Union, and also admitted that it would take a only few hours for staff to retrieve the information. Moreover, Respondent Valley’s Human Resources Director Thorne was able to compile a list of bargaining-unit employees and their names, departments, addresses, cell phone numbers, hours and shifts within about 16 to 18 hours, over the course of 4 to 5 days when Respondent wanted to have that information in aid of decertification efforts. Accordingly, Respondent Valley’s failure to provide the requested information for over 2 weeks, instead of providing it within the reasonable 1-week timeframe set by the Union amounted to an unlawful failure to provide the information “as promptly as circumstances allowed.” Respondent Valley’s dilatory conduct in responding to the request for information appears to have had no justification save for further interfering with the Union’s ability to communicate with bargaining-unit employees at a time when Respondent Valley knew

decertification efforts were underway. Moreover, since Respondent Valley's withdrawal of recognition of the Union was unlawful, as discussed below, its failure to provide the Union with the requested information following the withdrawal of recognition was also unlawful.

**B. Respondents' Statements and Conduct Violated Section 8(a)(1) of the Act**

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Am. Tissue Corp.*, 336 NLRB 435, 441 (2001); *Overnight Transp. Corp.*, 296 NLRB 669, 685-687 (1989), *enfd.*, 938 F.2d 815 (7th Cir. 1991); *Southwire Co.*, 282 NLRB 916 (1987) (quoting *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975)); *Fairleigh Dickinson Univ.*, 264 NLRB 725 (1982), *enforced mem.*, 732 F.2d 146 (3d Cir. 1984); *Am. Freightways Co.*, 124 NLRB 146 (1959). In determining whether particular statements violate Section 8(a)(1), "the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees." *Am. Tissue Corp.*, 336 NLRB at 441-42.

There are many types of employer statements or conduct that violate Section 8(a)(1) of the Act, including communicating the futility of a union, threatening employees, and promising better working conditions. Here, Respondents' supervisors and agents made such unlawful statements, as discussed below.

## **1. Respondent Valley's Statements Violated the Act**

Several statements made by Schmid and Reyes at the communication campaign meeting with Komenda violated Section 8(a)(1) of the Act. Each is discussed, in turn, below.

### **a. Schmid Promised a Wage Increase While Threatening to Withhold One**

Komenda testified that Schmid, after emphasizing that there would be no wage increases during bargaining, which could take years, and that market and merit wage increases were given to employees at non-union hospitals, Schmid told employees if they did not have the Union they would get a raise.

It is not per se unlawful for an employer to compare wages at a non-union facility to that of a union facility. Rather, the Board considers the precise content and context of Employer statements about wages to determine whether the Employer has conveyed an implied promise of benefits. *See e.g., Grede Plastics*, 219 NLRB 592, 593 (1975); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 185 (1975), *enfd. mem.* 566 F.2d 1186 (9th Cir. 1977). For example, in *Westminster Community Hospital, Inc.*, the Board found statements comparing an employer's wage rates with the higher rates at other hospitals it operated without union representation to amount to an implied promise of higher wages if employees decertified the union. *Id.* at 185. The Board considered, among other things, the fact that the employer also told employees that it would negotiate a lousy contract, and made other statements implying that but-for the union it would have granted additional benefits. *Id.*

Here, the context is similar, though far more explicit. Schmid not only emphasized the wage increases that were available at non-union facilities, but directly told employees that they would receive a wage increase if they got rid of the Union. Any reasonable employee would

hear the message – that they would be rewarded for voting out the Union – loud and clear. The ALJ should find Schmid’s explicit promise unlawful.

Implicit in Schmid’s direct promise that, if employees got rid of the Union, they would get a wage increase is that it was because of their Union representation that were not getting an increase. An employer violates Section 8(a)(1) when it makes statements that place the onus on its “delay in implementing new benefits squarely on the Union by linking the delay to [union activity].” *Grouse Mountain Assoc.*, 333 NLRB 1322, 1324 (2001). *See also Kentucky Fried Chicken*, 341 NLRB 69, 78 (2004) (finding violation where employer blamed the union’s opposition for lack of wage increase).

Here, Schmid expressly blamed the RNs’ Union representation for their not receiving the market increases when she all but said that they would only get one if they were not represented, thus placing the blame on Union representation. Respondent Valley may argue that this was an objectively truthful and lawful statement,<sup>14</sup> but Schmid failed to acknowledge that employees could also receive wage increases through bargaining with the Union, even though the Union proposed an immediate increase shortly before Schmid’s meetings occurred. Thus, the ALJ should reject any proffered defenses and find Schmid unlawfully blamed the Union for employees not receiving wage increases.

With Schmid’s promise came an underlying threat. “[A]n employer violates Section 8(a)(1) when it threatens that benefits will not be available if the employees are represented by a union.” *Unifirst Corp.*, 346 NLRB 591, 593 (2006) (citing *Libbey-Owens-Ford Co.*, 285 NLRB 673 (1987)). Here, as discussed above, Schmid sent the message that if employees got rid of the

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<sup>14</sup> “Under extant Board law, employers may make truthful statements to employees concerning benefits available to their represented and unrepresented employees[.]” *Unifirst Corp.*, 346 NLRB 591, 593 (2006).

Union they would get a wage increase. A reasonable employee would also receive the message the employees would not get a wage increase if they kept supporting the Union. Thus, Schmid's statements signaled that Respondent Valley would withhold such benefits unless employees decertified the Union. The ALJ should, accordingly, find that Respondent Valley threatened to withhold wage increases if employees kept supporting the Union.

**b. Schmid's Statements about Bargaining Violated the Act**

Schmid also violated the Act when she told employees that in bargaining with the Union, Respondent Valley would not give anything unless it got everything it wanted and would just drag the bargaining out until the Union relented, while giving examples of other hospitals in extended negotiations.

Employer statements which signal to employees that their union representation is futile violate Section 8(a)(1) of the Act. *See, e.g. Hi-Tech Cable Corp.*, 318 NLRB 280, 282 (1995) (finding statement that employer would not give represented employees benefits that it did not give its unrepresented employees unlawful because it indicated the futility of union representation). Here, Schmid's statements each sent the message that it was Respondent Valley that held all the cards and that it was prepared to wear the Union down until it got everything it wanted in the end. This would signal to any reasonable employee that their Union representatives were powerless and that representation was futile. The ALJ should, respectfully, find Schmid's statements unlawful.

**c. Reyes Suggested to Employees That They Should Decertify the Union**

Respondent Valley violated the act when it, through Corona Regional's Unit Director Reyes, gave employees a roadmap to better working conditions by telling them what happened after she suggested to RNs working at her facility how to decertify their union.

The Board has found that Employer's statements suggesting to employees they decertify their union to be unlawful. In *Antonio's Restaurant*, 246 NLRB 833, 838 (1979), the Board affirmed an ALJ's finding that an employer's suggestion that they decertify their union was independently unlawful, in large part, because the employer made other statements of futility and implicitly promised better health benefits if they got rid of the union. *Id.* The ALJ reasoned that because the suggestion came in the context of the employer's other unlawful contemporaneous statements, even though it was made in response to questions from employees, that the suggestion would have a coercive effect on employees. *Id.*

During the meeting conducted by Schmid and Reyes, although Reyes did not explicitly say that Respondent Valley's RNs should petition to decertify the Union, her story of the decertification efforts of RNs at Corona Regional to decertify and their positive results, in the context of Schmid's message that Respondent Valley's RNs would be better off if not for the Union, was, clearly, not a mere recounting of historic facts, but a heavy-handed suggestion that Respondent Valley's RN's decertify. Accordingly, the ALJ should, respectfully, find Reyes' contribution to the meeting unlawful.

## **2. Respondent Desert's Statements and Conduct Violated the Act**

### **a. Dugan Confiscated Union Literature**

Nursing Director Dugan independently violated Section 8(a)(1) of the Act when she entered a break room at Respondent Desert's facility ripped Union literature off the Union's bulletin board and Union literature laying on a table within arms' reach of employees.

Confiscation of union literature, which employees have a well-established right to possess, is unlawful, even in areas where an employer could lawfully prohibit distribution of literature. *Manor Care of Easton, PA, LLC*, 356 NLRB 202, 2016 (2010). Similarly, while an

employer is allowed to enforce housekeeping rules, an employer may not do so in a way that would likely coerce employees in violation of Section 8(a)(1) of the Act. *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632, 1638 (2011); *Jennie-O Foods*, 301 NLRB 305, 227, 338 (1991) (tearing up union literature, in break room, in presence of employees violates Act). In *Ozburn-Hessey Logistics, LLC*, the Board upheld an ALJ's finding that the employer violated that Act by confiscating union literature from an employee break room, while employees were enjoying non-work time. In that case, even though on one occasion the employer only took union literature off a table next to a different table where employees were sitting, and did not take the union flyer from the possession of the employee, the ALJ found a violation because the employer's conduct indicated that its "purpose was confiscation, not cleaning." 357 NLRB at 1637-1638.

There can be no doubt that on October 11, 2016, Dugan's purpose was confiscation and not cleaning. Dugan was not responsible for cleaning Respondent's facility, but for managing employees, and, moreover, the manner in which the angrily stormed into the break room, confronted Union representatives, and tore away Union literature would certainly send the message that possession of Union literature was an offense to be avoided, for fear of provoking Dugan. Accordingly, the ALJ should find Respondent Desert violated Section 8(a)(1) of the Act by confiscating Union literature in the presence of employees.

**b. Respondent Desert Promised a Wage Increase While Threatening to Withhold One**

On March 7, 2017, Respondent Desert distributed "Bargaining Brief" flyers to employees in the break room. The flyers, just like Schmid's statements to Respondent Valley's RNs, were coercive. They said the Union had proposed to Respondent a wage increase similar to the one Respondent Valley had just implemented for its RNs, but reminded employees that Respondent Valley's RNs were no longer represented by the Union. They heralded the amount of the wage

increases granted to Respondent Valley's RNs and informed employees that the wage increases could be implemented because Valley Hospital was union-free.

In context, Respondent Desert's flyer sent the incendiary message that if employees got rid of the Union, their wages would increase, just like the wages of their counterparts at Valley Hospital. By reminding employees that the Union was seeking exactly what Respondent Valley's RNs received but that Respondent Valley's RNs only received the wage increase because the Union was no longer there, Respondent Desert not only threatened that if employees kept the Union, they would not receive similar wage adjustments, but also promised that if they followed the same path, they would be equally rewarded. In fact, as Bell testified, employees heard this message loud and clear. Accordingly, the ALJ should find that Respondent Desert's March 7 Bargaining Brief was unlawful in that it promised employees a wage increase if they disavowed the Union and threatened to withhold benefits if they did not.

**c. Mark Smith was Respondent Desert's Agent**

When Smith was soliciting employees of Respondent Desert to decertify their Union, he was acting as Respondent Desert's agent.

The Board uses common law agency principles in determining agency and does not require overt acts of authorization. *Serv. Employees Local 87 (West Bay Maint.)*, 291 NLRB 82, 82-83 (1988). Agency can be found based on either actual or apparent authority, and must be established with respect to the specific conduct at issue. *Elec. Workers Local 45*, 345 NLRB 7, 7 (2005). "Under agency law, the question of apparent authority is whether the principal engages in, or condones, conduct which is reasonably likely to create the belief that the employees were authorized to act on behalf of the principal." *NLRB v. Davies Med. Ctr.*, 991 F.2d 803, \*3 (9th Cir. 1993). Thus, to establish apparent authority, there must be manifestation by the principal to

a third party, and the third party must believe the extent of the authority granted to the agent encompasses the prospective activity. *West Bay Maintenance*, 291 NLRB at 82-83.

Examples of evidence that can make such a showing include: an employer's tolerance of an employee's use of working time and employer resources in circulating a decertification petition, *SKC Elec., Inc.*, 350 NLRB 857, 862 (2007); supervisors bringing employees to talk to employees circulating a decertification petition, *Davies Med. Ctr.*, 991 F.2d 803, \*2-3; and an employer's encouraging and sponsoring of employee travel from the facilities where they work to a facility where an election was being held to support the employer in an election, *Overnite Trans., Inc.*, 334 NLRB 1074, 1113 (2001).

The facts surrounding how Smith ended up coming to Respondent Desert's facility as part of the decertification campaign suggest that Respondent Desert, VHS, and UHS might have had a hand in arranging for or permitting his conduct. Smith is an employee of Corona Regional, which is owned by UHS. Reyes, who played a key role in Schmid's unlawful messaging to Respondent Valley's RNs, is also employed by Corona Regional. Smith did not provide Corona Regional with months of notice of his leave to come to Respondent Desert's facility, as he generally would be required to do. When Smith received a subpoena to appear at the instant hearing, a private attorney who Smith had never heard of called Smith unsolicited and represented Smith in attempting to revoke his subpoena. Smith never received a bill from this attorney for his services. Further, Respondent Desert made Smith its actual agent in soliciting employees to decertify. Respondent Desert explicitly permitted Smith to solicit inside Respondent's lobby and cafeteria, in violation of the VHS no-solicitation policy applicable to non-employees. Smith represented himself to employees as being there for UHS. When a Union representative came near him, Schmid, CNO McNutt, Nursing Director Dugan, and a security

guard intervened, telling the Union representative to stay away from Smith and stop harassing him, though there is no evidence the Union representative or the employee accompanying him did anything remotely harassing. Schmid's outsized reaction to the Union representative's so much as sitting near Smith in a cafeteria would convey to employees that Smith, a non-employee would otherwise would not ordinarily be permitted to solicit in the lobby and cafeteria, was authorized to solicit employees to decertify, leaving no doubt that Smith was an agent, acting on behalf of Respondent Desert. Finally, while Smith was in Respondent Desert's Cafeteria, soliciting for the decertification campaign, Respondent Desert was providing Smith with free lunch.

Respondents' claim that Smith was allowed to solicit as part of the decertification campaign pursuant to a Board settlement agreement is unpersuasive, as the agreement cited by Respondents says nothing about non-employees or off-duty employees soliciting in cafeterias and lobbies, and, instead, applies only to solicitation in parking lots and other outside non-working areas. Moreover, the record does not establish that, following approval of the Board settlement agreement, UHS or any affiliated company implemented any new policy permitting off-duty employees of UHS-affiliated entities to solicit at facilities operated by other UHS-affiliated entities, in lobbies, cafeterias, or elsewhere. Notably, Respondent Valley denied a request by the Union to solicit at its facility following the withdrawal of recognition. GCX 23.

Respondent Desert's excepting Smith from its no-solicitation policies, protecting Smith and his solicitation from the mere presence of Union representatives, and supporting Smith by providing him free lunch (and perhaps other support, such as leave from work and legal representation), Respondent Desert manifested that Smith had actual and apparent authority to solicit for decertification at Respondent Desert's facility as its agent.

**d. Respondent Desert, by Smith, Engaged in Unlawful Surveillance**

Mark Smith, while acting as Respondent Desert's agent, engaged in actual surveillance of Union activities at Respondent Desert's facility.

Although an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance, photographing and videotaping of employees is unlawful, absent some reasonable basis to anticipate misconduct, because it creates fear among employees of future reprisals. *Kingsbridge Heights Rehab. & Care Ctr.*, 352 NLRB 6, 10 (2008); *Nat'l Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997); *F. W. Woolworth Co.*, 310 NLRB 1197, 1198 (1993). In order to establish a reasonable anticipation of misconduct so as to justify recording an employer could established past "evidence of [...] misconduct" or testimony that Respondent "honestly believed that there was misconduct going on". *Nat'l Steel & Shipbuilding Co.*, 324 NLRB at 502. An example of misconduct would be trespassing on an employer's facility, but it could be some other wrong doing. *Kingsbridge Heights Rehab. & Care Ctr.*, 352 NLRB at 11-12.

The testimony of witnesses including Smith himself establishes that Smith video recorded Union representatives and employees at the Union's tables. Smith's recording, including his pointing his camera to follow Union representatives as they communicated with employees, obviously intimidated employees, who asked Union representatives if Smith was recording them. Smith's claim that he only started recording because he subjectively felt the Union was "harassing" him is not the kind of evidence that could establish that Smith had a reasonable anticipation of misconduct that would justify his recording. Moreover, Smith's self-serving testimony about an intoxicated individual, who was admittedly not connected with the

Union, trying to fight Smith, is not justification for his recording of the Union, particularly when Smith did not testify that the interaction spurred his recording.

As Smith was acting as an agent of Respondent Desert at the time, Respondent Desert is responsible for Smith's unlawful surveillance.

**e. Security Guard Castro Gave the Impression of Surveillance in Respondent Desert's Cafeteria**

On March 6, 2017, when responding to the incident in the cafeteria with Mark Smith and Union representative Archer, Security Guard Castro created the impression of surveillance.

An employer's statement will be found to unlawfully create the impression of surveillance of employees' union activities if employees "would reasonably assume from the statement in question that their union activities had been placed under surveillance." *Heartshare Human Serv. of N.Y.*, 339 NLRB 842, 844 (2003). "The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaign without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993) (quotations omitted). By the nature of their role in an organization, security guards can interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. *Sunrise Healthcare Corp.*, 320 NLRB 510, 516 (1995).

When UHS VP of Labor Relations Schmid, CNO McNutt, Nursing Director Dugan, and Security Guard Castro approached Union representative Archer, Security Guard Castro Archer asked if he would have to "babysit" Archer and Smith. What precipitated this was Union representative Archer attempting to interact with bargaining-unit members, as was the Union's right under its expired collective-bargaining agreements. An inevitable consequence of this

statement by Security Guard Castro is that any reasonable employee or Union agent present, such as Archer or Bell, would assume Security Guard Castro intended to monitor employees protected activities. In sum, by asking if he had to “babysit” Union representative Archer and Mark Smith, Security Guard Castro gave the impression that he would be surveilling Union activities and thus violated Section 8(a)(1) of the Act.

**f. Schmid Unilaterally Implemented a New Rule or Directive in Respondent Desert’s Cafeteria**

When UHS VP of Labor Relations Schmid told Union representative Archer that he had to stay away from Smith, Schmid unilaterally implemented a new rule or directive in violation of the Act.

The imposition of new work rules is a mandatory subject of bargaining, so that the unilateral imposition of a work rule applying to employees without first notifying their collective-bargaining representative and affording it an opportunity to bargain violates Section 8(a)(1) and (5) of the Act. *Toledo Blade Co.*, 343 NLRB 385, 387 (2004); *Frontier Hotel & Casino*, 323 NLRB 815, 817-18 (1997); *Garney Morris, Inc.*, 313 NLRB 101,119-20 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995).

In Respondent Desert’s cafeteria on March 6, 2017, Schmid told Archer he had to stay away from Smith. Employee Bell was sitting with Archer at the time. The only thing Smith was doing in the cafeteria was soliciting employees of Respondent to decertify. Therefore, the unavoidable impact of this statement from Schmid was telling the Union, and Union supporters like Bell, they were not allowed to be near Smith or the employees he was engaging.

There Respondent Desert, through Schmid, implemented this new rule or directive without first providing notice or offering to bargain with the Union. In so doing, Respondent Desert violated Sections 8(a)(1) and (5) of the Act.

**g. Smith's Assistance to the Decertification Campaign was Unlawful**

Respondent Desert violated Section 8(a)(1) of the Act by soliciting signatures of decertification cards through its agent, Mark Smith.

An employer violates Section 8(a)(1) of the Act by “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of an employee petition seeking to decertify the bargaining representative.” *Wire Prods. Mfg. Co.*, 326 NLRB 625, 640 (1998). When making the determination about whether an employer’s assistance is unlawful, the appropriate inquiry is “whether the Respondent’s conduct constitutes more than ministerial aid.” *Times Herald*, 253 NLRB 524, 524 (1980). In that case, critical in the determination that the employer did not provide more than ministerial aid was the lack of “evidence that the [employer] encouraged, authorized, or ratified the conduct or that the supervisor acted in such a manner as to lead the employees to reasonably believe that he was acting on behalf of management.” *Id.* The supervisor in that case was also a part of the bargaining unit. *Id.*

Here, Respondent Desert rendered more than ministerial aid to Smith. First, Smith was given permission to solicit signatures, despite a VHS non-solicitation policy that would otherwise prohibit this conduct. When the Union requested permission to solicit following the withdrawal of recognition at Respondent Valley’s facility, the requests was denied pursuant to the same VHS non-solicitation policy, without making any exception for solicitation by employees of other UHS-affiliated hospitals. Second, Respondent Desert paid for Mark Smith’s lunch, thereby subsidizing his conduct. Third, and perhaps most importantly, when Smith requested assistance from Respondent Desert to keep the Union away from him in the cafeteria on March 6, 2017, Respondent Desert came to Smith’s assistance with high-level managers Schmid, McNutt, and Dugan, and with Security Guard Castro as an additional show of force.

Schmid informed Archer, in the presence of employees, that he was harassing Smith, that Smith was allowed to do what he was doing, and that Archer had to stay away from Smith.

Conspicuously affording Smith, a non-employee, these special protections not afforded non-employees, or, for that matter, other employees, certainly amounted to more than ministerial aid. Further, it is undisputed that Smith directly solicited employees to decertify, and, as discussed above, he did so as Respondent Desert's agent.

### **C. Respondents' Grant of Wage Increases Violated the Act**

The Supreme Court has recognized that, just as threats and domination can interfere with employees' selection of a bargaining representative, "favors bestowed by the employer" can also interfere with employees' choice. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944); *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964). This is because:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. *Id.*

Respondents' grant of benefits to Unit employees following their withdrawal of recognition of the Union amounted to an unlawful grant of benefits. When Respondent Valley granted its employees a wage increase following its withdrawal of recognition of the Union, it essentially tied this grant of benefits to its employees' decision to withdraw recognition of the Union in its communications with employees.

In their messaging to employees about bargaining, Respondents acknowledged that VHS had given wage increases to "union-free" employees at Respondents' facilities and other VHS facilities and suggested that that, by not engaging with Respondents' many collective bargaining proposals, the Union was "delaying what for many employees is the most important issue," meaning wages.

Then, months later, when withdrawing recognition of the Union, Respondent Valley suggested that the withdrawal of recognition would allow it to make changes by emphasizing that it looked forward to “working directly and collaboratively with our nurses.” Soon after, when announcing the wage increases, by explaining that Respondent Valley and the employees in the Valley RN Unit were “moving forward together” and promising that employees would “have the opportunity to participate in the decision-making” concerning many topics, Respondent Valley communicated to employees that their wage increase was made possible by the withdrawal of recognition of the Union.

Respondents undoubtedly were aware of the message Respondent Valley’s grant of benefits and the associated communications would send to Respondent Desert’s employees, who were in the midst of their own parallel decertification campaign. That message was demonstrably received. Someone, presumably employees of Respondent Desert who opposed the Union, publicized the wage increase and Respondent Valley’s communications about it as part of the decertification campaign among Respondent Desert’s employees.

When Respondent Desert granted its employees wage increases following its withdrawal of recognition of the Union as their bargaining representative, this action, coupled with Respondent’s prior communications blaming the Union for its inability to grant employees wage increases, ensured that employees will forever fear that union representation will result in withholding of benefits they otherwise would have received.

Accordingly, these grants of benefits violated Section 8(a)(1) of the Act.

## **D. Respondents' Withdrawals of Recognition Were Unlawful Under *Levitz***

### **1. Legal Standard**

Respondents withdrew recognition from the Union as the representative of employees in the Valley RN Unit, Desert RN Unit, and Desert Tech Unit on February 17, March 12 and 18, 2017, respectively. Under *Levitz Furniture Co.*, an “employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” 333 NLRB 717, 725 (2001). As the *Levitz* Board explained:

[A]n 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. 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. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

In sum, meeting this burden requires Respondents to show that, as of the operative date of each withdrawal, it possessed objective evidence that the Union lost support of the majority employees, which necessarily requires a showing of the total number of employees employed by either Respondent at the time of the withdrawal. See *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1284 (2006) (“The determining factor, therefore, is the number of unit employees at the time of withdrawal.”); *Alpha Assoc.*, 344 NLRB 782, 784-85 (2005) (“[A]n employer may withdraw recognition from the union only if it possesses evidence that the union has in fact lost majority support.”).

The Board’s decision in *Levitz*, and the precedent overruled by that decision casts light on the Board’s intent to impose strict evidentiary standards on employers before permitting them to withdraw recognition of their employees’ chosen collective-bargaining representative in the

absence of a Board election. Prior to *Levitz*, an employer was permitted to “withdraw recognition by showing either that the union has actually lost the support of a majority of the bargaining unit employees or that it has a good-faith doubt, based on objective considerations, of the union’s continued majority status.” *Id.* at 717 (citing *Celanese Corp.*, 95 NLRB 664 (1951)). Employers were also permitted to “test an incumbent union’s majority status by petitions for a Board-conducted (RM) election” based on “the same showing of good-faith doubt[.]” *Id.* (citing *United States Gypsum Co.*, 157 NLRB 652 (1966)). The *Levitz* Board, grounding its reasoning in policies and fundamental protections underpinning the Act, “adopt[ed] a more stringent standard for withdrawals of recognition,” (see above), while adopting a “more lenient standard for obtaining RM elections.” *Id.* at 23. As discussed below, Respondents have failed to meet the more stringent standard the Board has established for withdrawals of recognition in *Levitz*.

## **2. Respondents Failed to Show the Number of Employees in Each Unit on the Operative Date**

To determine whether there was an actual loss of majority support for the Union, relative to each of the withdrawals of recognition, there must be evidence showing the complement of employees that were employed in the Valley RN Unit on February 17, 2017; the Desert RN Unit on March 12, 2017; and the Desert Technical Unit on March 18, 2017. Respondent failed to establish the composition and size of each of those units on the operative dates. Respondents will point to the employee roster lists it offered in each instance, but Respondent failed to establish when each of those lists were generated or last updated. Furthermore, Respondents did not offer testimony shoring up the accuracy of the lists. Respondents have wholly failed, when they could have easily produced records from the operative dates of withdrawal, to establish their burden of proving how many unit employees were employed when they withdrew recognition from the Union on three separate occasions. Accordingly, the ALJ should find that Respondents

violated Section 8(a)(5) of the Act because they failed to show that the Union lost majority support, in each unit, when they withdrew recognition.

### **3. Respondents Relied on Unverifiable Statements**

Even if the ALJ finds that the employee lists provide sufficient evidence of the composition and size of each bargaining unit when Respondent Valley or Respondent Desert withdrew recognition, Respondents' withdrawals were unlawful because the email notifications provided by employees Farese and Burog did not establish employee disaffection.

Respondents will likely argue that because they reviewed the content of the email notifications and relied on notifications that contained either a phone number or email address maintained by the hospitals, the statements are sufficiently reliable or somehow otherwise verified statements. However, the only thing the record establishes is that there is no way to determine whether the person who filled out the online form is actually the person named in the form. Rather, the record shows that anyone in the general public could access the online forms. The only testimony from an individual with personal knowledge of how the online forms functioned, Farese, admitted that there was no way to determine whether the person who filled out the form was the person whose name was contained in the resulting email notifications that were sent to Farese and Burog. Thus, under Respondents' verification process, as long as Employee A knew Employee B's email address or phone number, and filled out an online form with that information, Respondents would have, and may have, relied on Employee A's statement about whether Employee B wished to be supported by the Union. In fact, under Respondents' verification process, even if Employee A did not know Employee B's email address, and made up a different email address, as long as Employee A knew Employee B's phone number, the email submission was counted.

This is likely why the Board sanctions the use of signed petitions and cards to prove majority status, or lack thereof. *See e.g., NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Signatures can actually be verified by hand writing comparisons; Employee A cannot easily forge Employee B's signature. Signatures, unlike the publicly available online forms, safeguard against not only unverified employee statements of other employees, but also from employers desperate to rid themselves of unionization. In this case, for example, there is no way of knowing whether a charge nurse or even the Vice President of Labor Relations filled out the online forms which ultimately sent Farese and Burog the email notifications that landed in Respondents' lap. While some may say that is far-fetched, the point is that we will never know and the Board is obligated to ensure that employees' right to choose representation is protected. Although Respondents may argue that General Counsel Memorandum GC 15-08 (Revised) (Oct. 26, 2015) (GC 15-08), which provide guidance on the use and acceptance of "electronic signatures" as part of a showing of interest for a Board election, shows that the General Counsel would view the email notifications as a sufficient to establish loss of the named employees' support for the Union, GC 15-08 relates to the submission of a showing of interest, a mechanism adopted for the purpose of "safeguard[ing] against potential . . . misuse of election procedures and wastes of Agency resources." GC Memo 15-08 at 2. Moreover, the submission of a showing of interest is followed by the conduct of a Board election, in which employees can, in laboratory conditions closely monitored by Board agents and election observers, cast secret ballots for or against union representation. Here, in contrast, Respondent seeks to rely on email notifications in withdrawing recognition in the absence of a Board election. Moreover, the electronic forms used in collecting the email notifications relied upon by Respondent do not even comply with the safeguards required for a showing of interest in GC 15-08, which provides that any electronic

showing of interest must use digital signatures that can be independently verified by a third party or must be supported by a showing that after the electronic signature was obtained, the submitting party promptly transmitted a “confirmation transmission” stating and confirming all the information listed in in the electronic showing of interest. Here, although there was testimony that some form of confirmation emails were sent to the email addresses listed on the online disaffection forms, the record does not reflect the contend of those confirmation emails. Moreover, Respondents counted email notifications, even if the email addresses listed in those notifications did not match those in Respondents’ records, so long as the phone numbers matched. Accordingly, the email notifications relied upon by Respondent did not even meet the standards for submission of an electronic showing of interest in support of a petition for a Board election.

Accordingly, the ALJ should not consider any of the email notifications provided to Respondents as evidence of loss of support for the Union.

#### **4. Respondents Relied on Signatures That Cannot be Authenticated**

Respondents provided testimonial evidence that they matched the signatures of all received cards with comparator signatures in their records, and cards were counted when it was determined the signatures matched. By not having card solicitors or signers authenticate the cards and by not calling a handwriting expert to authenticate the signatures, Respondent has left it to the ALJ to analyze the authenticity of signatures. While CGC does not concede that any of the signatures are authentic, and requests that the ALJ review and compare the signatures on the cards and Respondents’ proffered personnel records, CGC performed an independent review of the cards, and, based on that review, identified the following signatures which do not match Respondent’s comparators:

CGC Challenges the following cards related to the Valley RN Unit, based on signature

comparisons:

	<b>Name</b>	<b>Location of Card</b>	<b>Reason for Challenge</b>	<b>Location of Comparators</b>
1	Violeta Aguirre	RX 27(a) at A1	Signature on card varies from comparators	RX 21 at 2
2	Jamie Aldridge	RX 27(a) at A1	Last name on the comparator is different than Aldridge	RX 21 at 3
3	Cynthia Alvarez	RX 27(a) at A2	Last name on the comparator is different than Alvarez	RX 21 at 6
4	Arlene Angeles	RX 27(a) at A3	Only one comparator signature of with the last name "Angeles," which varies from signature on the card	RX 21 at 9
5	Meredith Barker	RX 27(a) at B1	Signature on card varies from comparators; additionally, the date on card is illegible	RX 21 at 17
6	Lyma Bernabe	RX 27(a) at B1	Signature on card varies from comparators	RX 21 at 18
7	Lakeesha Blair	RX 27(a) at B2	Signature on card varies from comparators	RX 21 at 21
8	Ser Bernard Bungubung	RX 27(a) at B4	Signature on card varies from comparators	RX 21 at 28
9	Chantel Byrd	RX 27(a) at B4	Signature on card varies from comparators	RX 21 at 30
10	Sheila Cabatu	RX 27(a) at C1	Signature on card varies from comparators	RX 21 at 32
11	Michelinne Camins	RX 27 at C2	Signature on card varies from comparators	RX 21 at 36
12	Erin Cane	RX 27(a) at C2	Signature on card varies from comparators	RX 21 at 38
13	Arthur Catubay	RX 27(a) at C4	Signature on card varies from comparators	RX 21 at 43
14	Savithri Chettiar	RX 27(a) at C4	Signature on card varies from comparators; Comparator signatures show hearts used to dot "i," whereas card does not	RX 21 at 44
15	Michelyn Claros	RX 27(a) at C5	Signature on card varies from comparators; additionally, the date on card is illegible	RX 21 at 48
16	Hong Kong Connolly	RX 27(a) at C6	Signature on card varies from comparators	RX 21 at 51
17	Jessica Cusio	RX 27(a) at C7	Signature on card varies from comparators	RX 21 at 58
18	Afifa Dastagir	RX 27(a) at D1	Signature on card varies from comparators	RX 21 at 60
19	Jessi Davis	RX 27(a) at D1	Signature on card varies from comparators	RX 21 at 62

20	Lori Davis	RX 27(a) at D2	Signature on card varies from comparators	RX 21 at 63
21	Leoncio Del Castillo	RX 27(a) at D3	Signature on card varies from comparators	RX 21 at 69
22	Pag-Asa Devera	RX 27(a) at D4	Signature on card varies from comparators	RX 21 at 71
23	Leslie Echols	RX 27(a) at E1	Signature on card varies from comparators	RX 21 at 77
24	Christine Edano	RX 27(a) at E1	Signature on card varies from comparators	RX 21 at 78
25	Michelle Elftman	RX 27(a) at E1	Signature on card varies from comparators	RX 21 at 79
26	D'Anne Eubank	RX 27(a) at E2	Signature on card varies from comparators	RX 21 at 81
27	Maria Fajardo	RX 27(a) at F1	Name on card does not match name on comparators	RX 21 at 82
28	Alfred Fonacier	RX 27(a) at F2	Signature on card varies from comparators	RX 21 at 88
29	Joanna Garcia	RX 27(a) at G1	Signature on card varies from comparators	RX 21 at 91
30	Ike Go	RX 27(a) at G3	Signature on card varies from comparators	RX 21 at 98
31	Myung Han	RX 27(a) at H1	Signature on card varies from comparators	RX 21 at 107
32	Farideh Harsini	RX 27(a) at H2	Signature on card varies from comparators	RX 21 at 109
33	Era Irlandes	RX 27(a) at I1	Signature on card varies from comparators	RX 21 at 117
34	Lisa Laurence	RX 27(a) at L1	Last name on the comparators is different than Laurence	RX 21 at 133
35	Kacie Leedham	RX 27(a) at L1	Last name on the comparators is different than Leedham	RX 21 at 135
36	Jessica Mackey	RX 27(a) at M1	Signature on card varies from comparators	RX 21 at 146
37	Nicole McKay	RX 27(a) at M3	Signature on card varies from comparators	RX 21 at 155
38	Easterlyn Mendoza	RX 27(a) at M5	Signature on card varies from comparators	RX 21 at 161
39	Genalyn Miranda	RX 27(a) at M6	Signature on card varies from comparators	RX 21 at 167
40	Caseylene Naguiat	RX 27(a) at N1	Signature on card varies from comparators	RX 21 at 171
41	Shellamie Nicolas	RX 27(a) at N2	Signature on card varies from comparators	RX 21 at 175
42	Edward Nyame	RX 27(a) at N3	Signature on card varies from comparators	RX 21 at 179

43	Trina Osborne	RX 27(a) at O2	Signature on card varies from comparators	RX 21 at 184
44	Hayley Peltz	RX 27(a) at P3	Signature on card varies from comparators	RX 21 at 195
45	Lucinda Peterson	RX 27(a) at P3	Signature on card varies from comparators	RX 21 at 198
46	Lauren Schweitzer	RX 27(a) at S1	Signature on card varies from comparators	RX 21 at 213
47	Douglas Sproul	RX 27(a) at S3	Signature on card varies from comparators	RX 21 at 221
48	Ebony Towels	RX 27(a) at T2	Signature on card varies from comparators	RX 21 at 232
49	Ana Venegas	RX 27(a) at V1	Last name on the comparators is different than Venegas	RX 21 at 235
50	Lorraine Wescott	RX 27(a) at W1	Signature on card varies from comparators	RX 21 at 241
51	Paula Williams	RX 27(a) at W1	Signature on card varies from comparators	RX 21 at 243
52	Carrissa Young	RX 27(a) at Y1	Signature on card varies from comparators	RX 21 at 250

CGC challenges the following cards related to the Desert RN Unit, based on signature comparisons:

	<b>Name</b>	<b>Location of Card</b>	<b>Reason for Challenge</b>	<b>Location of Comparators</b>
1	Hollie Cato	RX 37 at 2	Signature on card varies from comparators	RX 44 at 31
2	Brandon Dabu	RX 35 at 20	Signature on card varies from comparators	RX 44 at 36
3	Elizabeth Santos	RX 35 at 21	Last name on the comparator is different than Santos	RX 44 at 38
4	Rebecca Dimagiba	RX 35 at 24	Signature on card varies from comparators	RX 44 at 44
5	Jeffrey Dimasin	RX 35 at 24	Only one comparator signature provided	RX 44 at 45
6	Diana Ellingsworth	RX 35 at 27	Signature on card varies from comparators	RX 44 at 50
7	Lisa Genio	RX 35 at 32	Signature on card varies from comparators	RX 44 at 59
8	Matthew Gibson	RX 35 at 33	Signature on card varies from comparators	RX 44 at 61
9	Sarah Goblirsch	RX 35 at 34	Signature on card varies from comparators	RX 44 at 63
10	Jordan Henzlik	RX 35 at 37	Signature on card varies from comparators	RX 44 at 68
11	Margaret Kelso	RX 35 at 43	Signature on card varies from comparators	RX 44 at 77
12	Akeisha King	RX 35 at 44	Signature on card varies from comparators	RX 44 at 80
13	Jennifer Labre-Go	RX 35 at 46	Signature on card varies from comparators	RX 44 at 82
14	Maria Lazo	RX 35 at 49	Signature on card varies from comparators	RX 44 at 88
15	Johnell Maralit	RX 35 at 54	Signature on card varies from comparators	RX 44 at 97

16	Jibrán Miller	RX 35 at 57	Signature on card varies from comparators	RX 44 at 103
17	Edith Murray	RX 35 at 59	Signature on card varies from comparators	RX 44 at 107
18	Megan Nardi	RX 35 at 60	Signature on card varies from comparators	RX 44 at 108
19	Susan Phillips	RX 35 at 62	Signature on card varies from comparators which all contain her middle initial, 'C.'	RX 44 at 113
20	Sierra Pico	RX 35 at 62	Signature on card varies from comparators	RX 44 at 114
21	Benjamin Ritchie	RX 35 at 66	Signature on card varies from comparators	RX 44 at 118
22	Alyssa Robinson	RX 35 at 68	Signature on card varies from comparators	RX 44 at 121
23	Juan Rojas	RX 35 at 69	Signature on card varies from comparators	RX 44 at 124
24	Mirella Rosas	RX 35 at 71	Signature on card varies from comparators	RX 44 at 126
25	Deborah Roundy	RX 35 at 71	Signature on card varies from comparators	RX 44 at 127
26	Rose Salvador	RX 35 at 73	Signature on card varies from comparators	RX 44 at 129
27	Kelley Tuminaro	RX 35 at 80	Signature on card varies from comparators	RX 44 at 143
28	Maybenne Valenzuela	RX 35 at 81	Signature on card varies from comparators	RX 44 at 144
29	Kevin Virtusio	RX 35 at 82	Signature on card varies from comparators	RX 44 at 147
30	Julie Walton	RX 35 at 83	Signature on card varies from comparators	RX 44 at 148
31	Paola Watson	RX 35 at 84	Signature on card varies from comparators	RX 44 at 150

CGC challenges the following cards related to the Desert Tech Unit, based on signature comparisons:

	<b>Name</b>	<b>Location of Card</b>	<b>Reason for Challenge</b>	<b>Location of Comparators</b>
1	Alexis Coss	RX 36 at 4	Signature on card varies from comparators	RX 45 at 9
2	Kurtis Groseclose	RX 36 at 7	Signature on card varies from comparators	RX 45 at 14
3	Noureddin Mirsoltani	RX 36 at 12	Signature on card varies from comparators	RX 45 at 25

### **5. Respondent Valley Relied on a Card Dated in the Future**

Respondent Valley relied on one card, which was dated well after the withdrawal of recognition, which should not be counted for purposes of showing an actual loss of majority support.

	<b>Name</b>	<b>Location of Card</b>	<b>Date of Card</b>
1	Timothy Mansfield	RX 27(a) at M1	December 8, 2017

## 6. Respondents Relied on Cards with Stale Dates

The Board has held that a disaffection petition seven months old at the time of withdrawal of recognition is too old to support the withdrawal. In that case, the Board stated “Moreover, the petition was executed some 7 months before the December 3 withdrawal of recognition. Such stale evidence is not a reliable indicator of the employees’ union sentiments at the time recognition was withdrawn.” *Hospital Metropolitan* 334 NLRB 555, 556 (2001).

Respondents counted the following cards for their respective units which were dated well over seven months before the withdrawals of recognition which do not support a showing of an actual loss of majority support.

The following card is stale related to the Valley RN Unit:

	<b>Name</b>	<b>Location of Card</b>	<b>Date of Card</b>
1	Jacob Adsit	RX 27(a) at A1	January 27, 2016

The following cards are stale related to the Desert RN Unit:

	<b>Name</b>	<b>Location of Card</b>	<b>Date of Card</b>
1	Mayra Batista	RX 35 at 9	February 8, 2016
2	Christian Fernal	RX 35 at 29	February 27, 2015
3	Ashley Kim	RX 35 at 44	September 20, 2014

The following card is stale related to the Desert Tech Unit:

	<b>Name</b>	<b>Location of Card</b>	<b>Date of Card</b>
1	Andrew Hunt	RX 36 at 8	March 17, 2016

## 7. Respondents Relied on Cards with Illegible Dates

In withdrawing recognition of the Union, Respondents also relied on the following cards with illegible dates, so that it cannot be established that they were a reliable indicator of the employees' union sentiments at the time recognition was withdrawn.

CGC challenges the following cards related to the Valley RN Unit, based on illegible dates:

	<b>Name</b>	<b>Location of Card</b>
1	Marilyn Ayars	RX 27(a) at A4
2	Sherryl Borja	RX 27(a) at B3
3	Heather Brown	RX 27(a) at B3
4	Marilyn Caoagas	RX 27(a) at C3
5	Janell Neiman	RX 27(a) at N1
6	Chris Owen	RX 27(a) at O2
7	Wayne Seare	RX 27(a) at S2
8	Kayla Sullivan	RX 27(a) at S5

CGC challenges the following card related to the Desert Tech Unit, based on an illegible date:

	<b>Name</b>	<b>Location of Card</b>
1	Florence Kiama	RX 36 at 9

## 8. Respondent Valley Relied on Cards with Copy Quality Too Poor to Compare Signatures

In withdrawing recognition, Respondent Valley relied on a number of cards with such poor quality that the signatures on the cards could not be compared with comparator signatures from personnel files for authentication purposes. While it is unclear the extent to which this is the case, because GCG is not in possession of RX 27 (the originals, whether photocopy of inked original), CGC challenges the following cards, along with every other photocopied card

presented to Respondent Valley, because the quality of these cards presented to Respondent Valley is too poor to adequately verify.

	<b>Name</b>	<b>Location of Card</b>
1	Amber Anderson	RX 27(a) at A2
2	Louella Cabayao	RX 27(a) at C1
3	Ashley Guier	RX 27(a) at G4
4	Chelsee Henderson	RX 27(a) at H2
5	Nicholas Jackson	RX 27(a) at J1

**9. Respondents Relied on Emails Notifications for Which the Purported Signers’ Email Addresses Could Not Be Verified**

Even if the ALJ finds that the email notifications constitute verifiable, objective evidence sufficient for Respondents’ to base its decisions to withdraw recognition from the Union, numerous notifications should not counted for the purposes of showing a loss of majority support because the notifications cannot be verified against Respondents’ records showing the recorded email addresses for unit employees, or any other evidence offered at the hearing.

The following email notifications, compared against RX 48, cannot be verified related to the Valley RN Unit:

	<b>Name</b>	<b>Location of Email</b>	<b>Reason for Challenge</b>	<b>Location of Email in Records</b>
1	Carrieelee Carnicki	RX 28 at 11	Does not match email in records	RX 48 at 6
2	Janet Estrella	RX 28 at 23	No email in records	RX 48 at 10
3	Carlos Llamas	RX 28 at 2	Does not match email in records	RX 48 at 18
4	Danielle Lorico	RX 28 at 3	Does not match email in records	RX 48 at 18
5	Maranda Olguin	RX 28 at 8	Does not match email in records	RX 48 at 21
6	Gustavo Rocha	RX 28 at 24	Does not match email in records	RX 48 at 25
7	Lauren Tolentino	RX 28 at 37	Does not match email in records	RX 48 at 28

The following email notifications, compared against RX 49, cannot be verified related to the Desert RN Unit:

	<b>Name</b>	<b>Location of Email</b>	<b>Reason for Challenge</b>	<b>Location of Email in Records</b>
1	Ryan Aguilar	RX 33 at 2	Does not match email in records	RX 41 at 1
2	John Arciaga	RX 33 at 9	Does not match email in records	RX 41 at 1
3	Kayla Balecha	RX 33 at 15	No email in records	RX 41 at 1
4	Ruth Barias	RX 33 at 18	No email in records	RX 41 at 1
5	Lindsay Bylsma	RX 33 at 32	No email in records	RX 41 at 2
6	Sharon Cabinian	RX 33 at 33	Does not match email in records	RX 41 at 2
7	Christal Camama	RX 33 at 35	Does not match email in records	RX 41 at 2
8	Gregory Camp	RX 33 at 36	No email in records	RX 41 at 2
9	Christina Candoy	RX 33 at 37	Does not match email in records	RX 41 at 2
10	Luzelle Capalla	RX 33 at 38	No email in records	Not included in RX 41
11	Dusty Carlson	RX 33 at 41	No email in records	RX 41 at 2
12	Abenaa Collis	RX 33 at 45	No email in records	RX 41 at 2
13	Anna Corcino	RX 33 at 47	Does not match email in records	RX 41 at 2
14	Fe Espiritu	RX 33 at 54	Does not match email in records	RX 41 at 3
15	Queenie Galang	RX 33 at 59	No email in records	RX 41 at 3
16	Katherine Gullick	RX 33 at 67	Does not match email in records	RX 41 at 4
17	Sarah Hager	RX 33 at 69	No email in records	RX 41 at 4
18	Danielle Howarah	RX 33 at 73	No email in records	RX 41 at 4
19	Delores Hyland	RX 33 at 74	No email in records	RX 41 at 4
20	Jamala Jackson	RX 33 at 76	Does not match email in records	RX 41 at 4
21	Michelle King	RX 33 at 79	No email in records	RX 41 at 4
22	Maria Krueger	RX 33 at 80	No email in records	RX 41 at 4
23	Crystal Liles	RX 33 at 83	No email in records	RX 41 at 5
24	Tainky Malilay	RX 33 at 85	Does not match email in records	RX 41 at 5
25	Frannette Miller	RX 33 at 94	No email in records	RX 41 at 5
26	Marylou Nipal	RX 33 at 100	No email in records	RX 41 at 6
27	Jeanne Nomura	RX 33 at 102	No email in records	RX 41 at 6
28	Vy Ong	RX 33 at 105	No email in records	RX 41 at 6
29	Rose Paras	RX 33 at 109	No email in records	RX 41 at 6
30	Marcella Pomeranz	RX 33 at 115	Does not match email in records	RX 41 at 6
31	Maria Raines	RX 33 at 121	Does not match email in records	RX 41 at 6
32	Gina Rienzo	RX 33 at 123	No email in records	RX 41 at 7
33	Darlene Roberts-Prah	RX 33 at 127	Does not match email in records	RX 41 at 7
34	Anthony	RX 33 at	Does not match email in records	RX 41 at 7

	Rosales	130		
35	Amy Schoonover	RX 33 at 134	Does not match email in records	RX 41 at 7
36	Janet Swanson	RX 33 at 142	No email in records	RX 41 at 7
37	Jennifer Taylor	RX 33 at 146	No email in records	Not included in RX 41
38	Aaron Ubina	RX 33 at 148	No email in records	RX 41 at 8
39	Larmay Villa	RX 33 at 151	No email in records	RX 41 at 8
40	Juliea Ward	RX 33 at 152	No email in records	RX 41 at 8
41	Latisha Whitman	RX 33 at 154	No email in records	RX 41 at 8
42	Robert Williams	RX 33 at 156	No email in records	RX 41 at 8

The following email notifications, compared against RX 50, cannot be verified related to the Desert Tech Unit:

	Name	Location of Email	Reason for Challenge	Location of Email in Records
1	Lloyd Gauthier	RX 34 at 1	Does not match email in records	RX 50 at 1
2	Joseph McBride	Not included in RX 34	No way to compare because no email submission included in record	-
3	John McKenna	RX 34 at 8	Does not match email in records	RX 50 at 1
4	Dale Niebel	RX 34 at 14	Does not match email in records	RX 50 at 2
5	Holly Tecson	RX 34 at 26	Does not match email in records	Not included in RX 50
6	Joe Young	RX 34 at 29	Does not match email in records	RX 50 at 2

**10. Respondent Valley Counted Email Submissions Made Too Close in Time to When Recognition Was Withdrawn**

Even if the ALJ finds that the email notifications relied upon by Respondent Valley constitute verifiable evidence sufficient to base its decision to withdraw recognition from the Union, the ALJ should find that the opt-out process with regard to several submissions because they were received on the day of the withdrawal of recognition at the time indicated next to each email. Thus, if the individual listed did not fill out the form, there was no reasonable period of time for that individual to respond and disclaim the email submission prior to the withdrawal of

recognition. In short, the opt-out process was essentially nullified with the following submissions based on when the form was filled out.

	<b>Name</b>	<b>Location of Email</b>	<b>Date and Time of Submission</b>
1	Dennis Dimzon	RX 28 at 34-35	11:36 a.m. on February 17, 2017
2	Olive Ilagan	RX 28 at 35	11:37 a.m. on February 17, 2017
3	Carlos Lobrin	RX 28 at 34	11:35 a.m. on February 17, 2017
4	Rayna Toncheva	RX 28 at 36	11:43 a.m. on February 17, 2017

**11. When Discounting Cards and Emails Which Should not Have Been Counted, Respondents Were Below the Threshold for Withdrawal of Recognition in All Three Units**

**a. Valley RN Unit**

Including all of the challenges specified above, and all the of the email notifications, Respondent Valley counted 67 cards and 28 email notifications (95 total) that should not be included in determining whether there was an actual loss of majority support. The total unit size of RNs at the time recognition was withdrawn was 533 according to Keim’s testimony related to RX 29. If the unit was that size, Respondent Valley would need 267 valid, authenticated statements of disaffection to justify a withdrawal of recognition. According to Respondent Valley’s count sheets, it counted 286 cards and emails. Subtracting 95 from the 286 counted leaves Respondent Valley with 191, or 76 valid, authenticated statements of disaffection shy of the bare minimum required in order to justify their conduct.

Even if the ALJ determines that the email notifications are sufficient evidence, based on all the challenges to that evidence outlined above, Respondent Valley would still be unable to show an actual loss of majority support. Based on the above challenges, there are a total of 78 cards and emails notifications that cannot be verified for various reasons, including dates, unverifiable email addresses, and non-matching comparison signatures. Thus, even counting

some, but not all email notifications, Respondent Valley is still shy by 59. As Respondent Valley did not possess evidence that 50 percent or more of the bargaining-unit RNs no longer wished to be represented by the Union for the purposes of collective bargaining, Respondent Valley's withdrawal of recognition violated the Act.

**b. Desert RN Unit**

Including all of the challenges specified above, and all of the of the email notifications, Respondent Desert counted 35 RN cards and 78 email notifications (113 total) that should not be included in determining whether there was an actual loss of majority support. The total unit size of RNs at the time recognition was withdrawn was 439 according to RX 38. If the unit was that size, Respondent Desert would need 220 valid, authenticated statements of disaffection to justify a withdrawal of recognition. According to Respondent Desert's count sheets, it counted 280 cards, email notifications, and petition signatures. Subtracting 113 from the 280 counted leaves Respondent Valley with 167, or 53 valid, authenticated statements of disaffection shy of the bare minimum required in order to justify their conduct.

Even if the ALJ determines that the email notifications are sufficient evidence, based on all the challenges to that evidence outlined above, Respondent Desert would still be unable to show an actual loss of majority support. Based on the above challenges, there are a total of 76 cards and emails notifications that cannot be verified for various reasons, including dates, unverifiable email addresses, and non-matching comparison signatures. Thus, even counting some, but not all email notifications, Respondent Desert is still shy by 16. As Respondent Desert did not possess evidence that 50 percent or more of the bargaining-unit RNs no longer wished to be represented by the Union for the purposes of collective bargaining, Respondent Desert's withdrawal of recognition violated the Act.

**c. Desert Tech Unit**

Including all of the challenges specified above, and all of the of the email notifications, Respondent Desert counted 8 Tech Unit cards and 11 email notifications (19 total) that should not be included in determining whether there was an actual loss of majority support. The total unit size of Techs at the time recognition was withdrawn was 95 according to RX 40. If the unit was that size, Respondent Desert would need 48 valid, authenticated statements of disaffection to justify a withdrawal of recognition. According to Respondent Desert's count sheets, it counted 53 cards and email notifications. Subtracting 19 from the 53 counted leaves Respondent Desert with 34, or 14 valid, authenticated statements of disaffection shy of the bare minimum required in order to justify their conduct.

Even if the ALJ determines that the email notifications are sufficient evidence, based on all the challenges to that evidence outlined above, Respondent Desert would still be unable to show an actual loss of majority support. Based on the above challenges, there are a total of 12 cards and emails notifications that cannot be verified for various reasons, including dates, unverifiable email addresses, and non-matching comparison signatures. Thus, even counting some, but not all email notifications, Respondent Desert is still shy by 7. As Respondent Desert did not possess evidence that 50 percent or more of the employees in the Desert Tech Unit no longer wished to be represented by the Union for the purposes of collective bargaining, Respondent Desert's withdrawal of recognition violated the Act.

**E. Respondents' Unfair Labor Practices Caused Any Loss of Support Relied Upon in Withdrawing Recognition, and Respondent Desert's Conduct Directly Tainted Its Purported Evidence of Loss of Support**

Assuming every card and email is counted for the purposes of determining whether Respondents' withdrawals of recognition were lawful, Respondents' withdrawals of recognition were still unlawful because their own conduct caused any loss of support experienced by the Union.

An employer may not withdraw recognition where it has committed serious unremedied unfair labor practices that caused the employee disaffection on which the employer relies in withdrawing recognition. *Williams Enters.*, 312 NLRB 937, 939-40 (1993). To establish that an employee expression of disaffection was caused by an employer's unfair labor practices, the Board requires "specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177(1996 (footnote omitted), *affd. in part, remanded in part*, 117 F. 3d 1454 (D.C. Cir. 1997) (*Lee Lumber*). Further, the evidence in support of a withdrawal of recognition must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection or improperly affect the bargaining relationship itself. *Id.*

In *Master Slack Corp.*, 271 NLRB 78, 84 (1984) (*Master Slack*), the Board identified the following factors as relevant in evaluating the existence of a causal relationship as required in

*Lee Lumber*:

- (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 employee morale, organizational activities, and membership in the union.

The Board has also found that an employer cannot rely on evidence of loss of majority support to withdraw recognition, when that evidence is directly tainted by the employer's assistance or involvement in securing it. *Alamo Rent-A-Car*, 359 NLRB 1373, 1374-75 (2013), decision set aside in view of *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), adopted in relevant part 362 NLRB No. 135 (2015), enfd. 831 F.3d 534 (D.C. Cir. 2015); *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 270-79 (2008), enfd. 700 F.3d 1 (D.C. Cir. 2012); *Hearst Corp.*, 281 NLRB 764, 764-65 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988).

Here, Respondents' withdrawal of recognition of the Union was unlawful because Respondents' unfair labor practices caused the employee disaffection on which Respondents relied in withdrawing recognition, and because Respondent Desert's direct involvement in the campaign to remove the Union tainted the evidence upon which Respondent Desert relied in withdrawing recognition.

With respect to the question of causation of employee disaffection, applying the *Master Slack* factors.

First, with respect to the timing, the vast majority of cards employees signed to express disaffection with the Union were signed in the months after Respondents' cessation of dues checkoff and contemporaneously with Respondents' other unfair labor practices. As illustrated in Appendix A, the rate at which cards were signed increased dramatically following the dues checkoff cessation.

Second, with respect to the nature of Respondents' conduct, the cessation of Union dues sent employees the message that Respondents could act unilaterally and that the Union was

powerless to stop them, it publicized the cost of union dues to employees at a time when Respondents had led them to believe the bargaining process was impeding their ability to receive wage increases, it directly interfered with an important aspect of the relationship between the union and its members, and it conveyed to employees that their Union was so incompetent or corrupt that it could not, or would not, draft a lawful dues check-off authorization. Further, Respondents' new restrictions on the Union's access to bulletin boards and to employees at Respondents' facilities similarly served to make the Union appear powerless to maintain the *status quo* and directly interfered with the Union's communications with employees. Respondents' promises of wage increases, threats to withhold them, and blaming of the Union for employees not having received them would also certainly send employees the message that Union representation was not in their best interest, and Respondent Valley's corresponding suggestion that its employees decertify would reasonably translate that sentiment into further decertification efforts. Respondent Valley's grant of wage increases to the employees in the Valley RN unit also would be viewed by employees of Respondent Desert as an indication that they would receive a wage increase if they also got rid of the Union. Further, Respondent Desert's statements and conduct related to Smith's solicitation and Smith's video recording Union supporters also would tend to undermine employee support for the Union.

Third, with respect to the tendency to cause disaffection, because Respondents' cessation of dues check-off directly interfered with an important aspect of Union members' relationship with their Union, this action would reasonably tend to cause disaffection. Respondents' visible stifling of the Union's communications with employees would also tend to cause disaffection. Respondents' promises of wage increases, threats to withhold them, and blaming the Union for their being withheld, and Respondent Valley's corresponding suggestion of decertification, were

also certainly aimed at stirring disaffection with the Union. In addition, Respondent Valley's grant of wage increases to the employees in the Valley RN Unit clearly caused disaffection among employees employed by Respondent Desert, and Respondent Desert's direct assistance of, and involvement in, the decertification campaign would reasonably cause disaffection.

Finally, with respect to the effect of the unlawful conduct on employees, Respondent's conduct would naturally undermine the Union in the eyes of Unit employees by driving a wedge between the Union and employees over dues, interfering with the Union's ability to communicate with employees, signaling to employees that removing the Union would come with rewards, and putting employees on the spot to decide whether to sign cards indicating disaffection in front of an agent of Respondent Desert.

Accordingly, Respondents could not lawfully rely on evidence of loss of majority support among Unit employees in withdrawing recognition because they caused any loss of majority support. Their withdrawal of recognition of the Union therefore violated Sections 8(a)(1) and (5) of the Act.

Respondent Desert's withdrawals of recognition of the Union was additionally unlawful because its unlawful assistance of the decertification efforts and direct solicitation of employees to sign cards expressing disaffection through Smith directly tainted the evidence of loss of majority support on which Respondent Desert relied in withdrawing recognition.

**F. The Board Should Require That Employers Utilize Board Representation Procedures to Fairly and Efficiently Determine Whether Their Employees' Exclusive Bargaining Representative Has Lost Majority Support**

In *Levitz Furniture Co. of the Pacific*, 333 NLRB at 725-26, the Board stated that it would revisit the framework it established for when employers may unilaterally withdraw recognition from their employees' exclusive bargaining representative if experience showed that

it did not effectuate the purposes of the Act. Experience has shown that the *Levitz* framework has created peril for employers in determining whether there has been an actual loss of majority, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation.

Thus, the General Counsel urges the Board to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.<sup>15</sup> Such a rule would benefit employers, employees, and unions alike by fairly and efficiently determining whether a majority representative has lost majority support. It will also better effectuate the Act's goals of protecting employee choice and fostering industrial stability, and is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

**1. The Board in *Levitz* Sought to Create a Framework to Encourage Employer Use of RM Elections and Left Open Future Consideration of the General Counsel's Proposal to Require Exclusive Use of RM Elections to Resolve Questions of Majority Support**

In *Levitz*, the then-General Counsel proposed that employers should be prohibited from unilaterally withdrawing recognition. *Id.* at 719, 725. The Board acknowledged that its early case law supported the General Counsel's view. *Id.* at 721 & n.25. Specifically, it noted that in *United States Gypsum Co.*, 90 NLRB 964, 966 (1950), decided shortly after Congress amended the Act to provide for employer-filed petitions, the Board held that it was bad faith for an employer to unilaterally withdraw recognition rather than file a RM petition, which it described as "the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt." *Levitz*, 333 NLRB at 721. The *Levitz* Board

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<sup>15</sup> The General Counsel does not seek any change to the holding in *Levitz* that employers can obtain RM elections by demonstrating a good-faith reasonable uncertainty as to a representative's continuing majority status. *Levitz*, 333 NLRB at 717.

also acknowledged that the General Counsel’s proposed rule might minimize litigation and be more protective of employee choice. *Id.* at 725. In this context, the Board noted that elections are the preferred means of testing employee support, and that the proposed rule would be more consistent with *Linden Lumber Division v. NLRB*, 419 U.S. 301, 309-10 (1974), which allows an employer to insist that a union claiming majority support prove it through an election. *Levitz*, 333 NLRB at 725.

However, the Board rejected the General Counsel’s proposed rule and instead adopted a rule that it believed would effectively encourage employer use of RM petitions by elevating the evidentiary requirement for an employer’s unilateral withdrawal, while lowering the standard for an employer’s filing of an RM petition. *Id.* at 717. The Board then concluded that under its new framework, employers would be likely to unilaterally withdraw recognition only if the evidence before them “clearly indicate[d]” that a union had “lost majority support.” *Id.* at 725. It stated that if future experience proved otherwise, it could revisit the issue. *Id.* at 726.

**2. Experience under *Levitz* Has Failed to Result in Employers Acting Only Where the Evidence before Them “Clearly Indicates” a Loss of Majority Support and Has Caused Protracted Litigation Undermining the Core Purposes of the Act**

In the 15 years since *Levitz*, the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. In a number of cases involving unilateral withdrawal, employers have acted based on evidence that did not “clearly indicate[.]” a loss of majority, causing protracted litigation over the reliability of that evidence. This unnecessary litigation has resulted in significant liability for employers and substantial interference with employee free choice. It also encourages the disclosure and litigation of

individual employees' representational preferences, which can interfere with employees' Section 7 rights.

A fundamental flaw with the *Levitz* framework is that it fails to account for the difficulty of ascertaining whether evidence relied on by an employer actually indicates a loss of majority support, creating significant liability even for employers acting in good faith. For example, employers have unlawfully withdrawn recognition based on ambiguously worded disaffection petitions that did not clearly indicate that the signatory employees no longer desired union representation. *See, e.g., Anderson Lumber Co.*, 360 NLRB No. 67, slip op. at 1 n.1, 6-7 (2014) (written statements submitted by four employees that they did not want to be union members did not show they no longer desired union representation), *enforced sub nom., Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015). Employers have also unlawfully withdrawn recognition where they relied on untimely disaffection petitions. *Latino Express*, 360 NLRB No. 112, slip op. at 1 n.3, 13-15 (2014) (rejecting petition signed by employees during the certification year, when the union has an irrebutable presumption of majority status). In other cases, employers mistakenly relied on disaffection petitions that were invalid because they contained signatures that employees had revoked. *See, e.g., Scoma's of Sausalito, LLC*, 362 NLRB No. 174, slip op. at 3 (Aug. 21, 2015) (employees revoked signatures on disaffection petition before employer withdrew recognition). Additionally, questions have arisen regarding unit composition, creating confusion as to how many, and which employees would actually constitute a majority. *See, e.g., Vanguard Fire & Security Systems*, 345 NLRB 1016, 1018 (2005) (finding employer unlawfully withdrew recognition where signatures on disaffection petition were of non-unit employees), *enforced*, 458 F.3d 952 (6th Cir. 2006). Moreover, employers have unlawfully withdrawn recognition based on facially valid disaffection petitions

that did not actually constitute objective evidence of a loss of majority support because they were tainted by unfair labor practices. *See, e.g., Mesker Door, Inc.*, 357 NLRB 591, 596-98 (2011) (concluding that unlawful threats by employer's attorney and plant manager had a causal relationship with employees' disaffection petition and thus the employer's withdrawal of recognition based on it was unlawful).

Protracted litigation over these evidentiary issues also has interfered with the right of employees to choose a bargaining representative. It may take years of litigation before employees deprived of their chosen union obtain a Board order restoring the union's representational role, which completely undermines their Section 7 rights in the interim. *See, e.g., id.* (ordering employer to bargain with union five years after employer's unlawful withdrawal of recognition). Because a restorative bargaining order that operates prospectively fails to compensate employees for their lost representation, employees are irreparably deprived of what benefits their union could have obtained for them during the course of the employer's unlawful conduct. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011) (affirming Section 10(j) bargaining order in part because the Board's inability to order retroactive relief for a failure to bargain, partly due to an unlawful withdrawal of recognition, means employees will never be compensated for "the loss of economic benefits that might have been obtained had the employer bargained in good faith").

At the same time, such litigation under *Levitz* can also delay the process for employees who want to reject representation. For example, an unfair labor practice charge filed by an incumbent union can create the "collateral effect of precluding employees from filing a decertification election petition with the Board." *Scoma's of Sausalito, LLC*, 362 NLRB No. 174, slip op at 1 n.2 (Member Johnson, concurring). *See also Wurtland Nursing & Rehabilitation*

*Center*, 351 NLRB 817, 820-21 (2007) (Member Walsh, dissenting) (noting that if the employer had not unlawfully withdrawn recognition, the Board could have held an RM or RD election to determine the unit employees' true sentiments).

Finally, evidentiary disputes about the reliability of employee petitions have resulted in the disclosure of individual employees' union sympathies and litigation of their subjective motivations for signing a petition. *See, e.g., Scoma's of Sausalito*, 362 NLRB No. 174, slip op. at 4-5 (reviewing multiple petitions and employee testimony to determine whether employees' representative had majority support at the time of the withdrawal of recognition); *Johnson Controls, Inc.*, Case 10-CA-151843, JD-14-16 (NLRB Div. of Judges Feb. 16, 2016) (same). Such open questioning of employees regarding their union support can chill the future exercise of Section 7 rights. *See National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (confidentiality interests of employees have long been a concern to the Board and "it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed") (internal citations omitted). The courts have also noted that such inquiries are unreliable because of the pressure that employers may exert over their employees to give favorable testimony. *See Pacific Coast Supply*, 801 F.3d at 332 n.8; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

In short, the experience under *Levitz* has not yielded the results that the Board anticipated and intended. Consistent with the General Counsel's original recommendation in *Levitz*, the Board should hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

**3. A Rule Precluding Employers from Withdrawing Recognition Absent the Results of an RM or RD Election Will Best Effectuate the Policies of the Act and Better Accomplish What the Board Set Out to Do in *Levitz***

It is within the Board’s expertise and discretion to determine how a withdrawal of recognition can be accomplished. *See Linden Lumber*, 419 U.S. at 309-10 (relying on Board’s expertise in affirming rule that union must petition for an election after an employer has refused to recognize it based on a card majority); *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) (noting that matters “appropriately determined” by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain). The Board should exercise its discretion and adopt the rule proposed above to best effectuate the policies of the Act.

The proposed rule is more consistent with the principle that “Board elections are the preferred means of testing employees’ support.” *Levitz*, 333 NLRB at 725. It is also more consistent with the Act’s statutory framework and the Board’s early interpretation of the Act’s provision providing for employer-filed petitions. As the Board held in *United States Gypsum Co.* and referenced in *Levitz*, RM petitions are “the method” provided in the Act by which employers may test a representative’s majority support. *Levitz*, 333 NLRB. at 721. Moreover, the interests of both employers and employees would be best served by processing this issue through representation cases, which are resolved more quickly than unfair labor practice cases.<sup>16</sup> Indeed, the Board’s new representation case rules, which have revised the Board’s blocking charge procedures, have made elections an even more efficient manner of resolving representation questions. In light of these considerations, requiring an RM or RD election before

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<sup>16</sup> In FY 2015, 87.1% of representation cases were resolved within 100 days while 80.4% of unfair labor practices were resolved within 365 days. See National Labor Relations Board Performance and Accountability Report (2015) at 25-26.

a withdrawal of recognition will best serve the purposes of protecting employee free choice and industrial stability, which are the statutory policies the Board sought to protect in *Levitz*.

In the past, the Board's blocking charge procedure had been the major concern regarding the use of RM elections as a prerequisite for withdrawing recognition because of the potential delay in proceeding to an election. *See, e.g., Levitz*, 333 NLRB at 732 (Member Hurtgen, concurring) ("Faced with an RM petition, unions can file charges to forestall or delay the election."); *B.A. Mullican Lumber & Mfg. Co.*, 350 NLRB 493, 495 (2007) (Chairman Battista, concurring) (stating that "an RM petition leading to an election is superior to an employer's unilateral withdrawal of recognition," but expressing concern about the potential delay caused by union-filed blocking charges), enforcement denied, 535 F.3d 271 (4th Cir. 2008). However, the Board's new election rules should allay this concern. For instance, the rules impose heightened evidentiary requirements; a party must now affirmatively request that its charge block an election petition, file a written offer of proof in support of its charge, include the names and anticipated testimony of its witnesses, and promptly make its witnesses available. *See* NLRB Rules and Regulations Sec. 103.20 (effective April 14, 2015). If the Region determines that the proffered evidence is insufficient to establish conduct interfering with employee free choice, it will continue to process the petition and conduct the election. *Id.*

Indeed, initial data shows that this change has significantly reduced the number of blocking charges. Between April 2014 and April 2015, in the year before the new election rules went into effect, unfair labor practice charges blocked 194 of 2,792 election petitions.<sup>17</sup> Between April 2015 and April 2016, in the year after the new election rules went into effect, charges

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<sup>17</sup> See NLRB News & Outreach, Fact Sheets, Annual Review of Revised R-Case Rules (Apr. 20, 2016), <https://www.nlr.gov/sites/default/files/attachments/news-story/node-4680/RCase%20Annual%20Review.pdf>.

blocked only 107 of 2,674 petitions, a decrease of just over 40%.<sup>18</sup> This data shows that the more efficient election procedures have largely resolved prior concerns regarding blocking charges.

Beyond the foregoing substantive and procedural reasons justifying the proposed rule, its adoption will not interfere with other methods of dissolving an existing bargaining relationship that do not involve unilateral action by an employer. Employees will still be able to exercise their choice to not be represented by their current union by filing an RD petition, and they will be able to do so without the threat of an employer's unlawful withdrawal blocking an RD election. In addition, the proposed rule will permit a voluntary agreement between the employees' bargaining representative and their employer for withdrawal, whether this involves a union's disclaimer of interest or a private agreement between the parties to resolve the question. Finally, if a bargaining representative, through its own egregious unfair labor practices creates an atmosphere of employee coercion that renders a fair RM election improbable, the Board could permit a unilateral withdrawal if an employer provided objective evidence of an actual loss of majority support.<sup>19</sup>

For the above reasons, the Board should exercise its discretion to modify its standard to hold that, absent an agreement between the parties, an employer may lawfully withdraw

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<sup>18</sup> Id. In addition, since the implementation of the Board's new election rules, RM petitions have increased from 49 in each of FY 2013 and FY 2014 to 61 in FY 2015, demonstrating increased employer confidence in the RM process. See Employer-Filed Petitions-RM, NLRB, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/employer-filedpetitions-rm> (last visited May 3, 2016).

<sup>19</sup> Cf. *Union Nacional de Trabajadores (Carborundum Co.)*, 219 NLRB 862, 863-64 (1975) (revoking union's certification based on its violent and threatening conduct and extensive record of similar aggravated misconduct in other recent cases), enforced on other grounds, 540 F.2d 1, 12-13 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963) (refusing to grant union bargaining order remedy based on card majority where union created atmosphere of coercion based on its agents physically assaulting employer officials who displayed unwillingness to recognize their employees' rights under the Act).

recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

## **V. CONCLUSION**

Beginning with their unilateral cessation of dues checkoffs for all employees represented by the Union, Respondents have engaged in a coordinated campaign with the intent of weakening the Union at every opportunity. From undermining the Union through such conduct as telling employees the Union's dues checkoff authorizations were illegal and ceasing dues checkoffs, to preventing the Union from communicating with employees, Respondents have engaged in this campaign with the end goal of causing the Union to lose support and getting rid of the Union, whether through an election or when that failed, withdrawing recognition. The charts of cards signed by date demonstrate just how effective Respondents were at achieving their goal.

During this campaign, Respondents committed a plethora of 8(a)(1) and (5) violations, but none greater than the withdrawals of recognition. First Respondent Valley withdrew recognition of the Union as bargaining representative for its RNs. Almost immediately following this, Respondent Valley made good on its promise to raise wages for employees. This pay raise was then communicated to Respondent Desert's RNs and Techs, where it had the predictable effect of increasing the numbers of cards signed, resulting in two more withdrawals of recognition. Respondent Desert used Respondent Valley's unfair labor practices to help justify its own unfair labor practices. The undersigned respectfully request the ALJ find Respondents violated the Act as alleged.

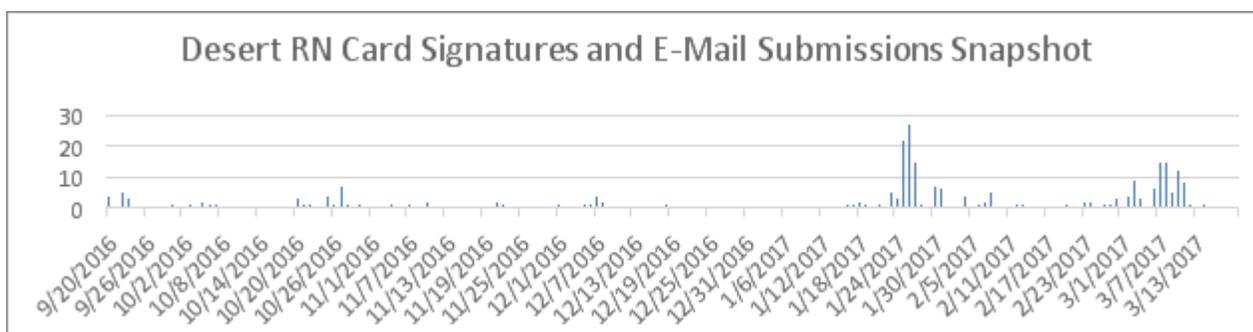
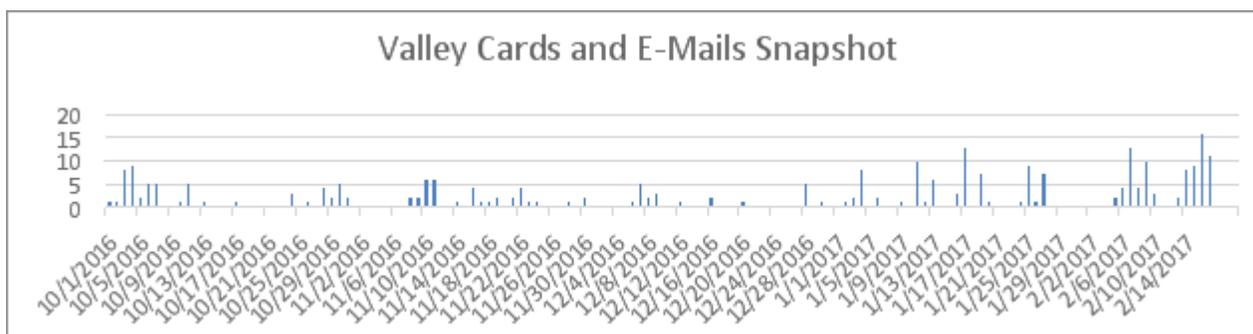
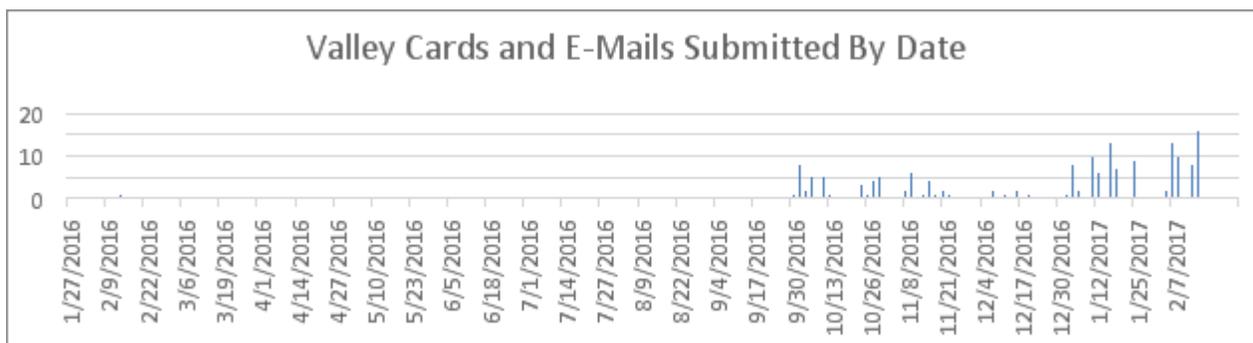
Respectfully submitted this 28<sup>th</sup> day of November 2017.

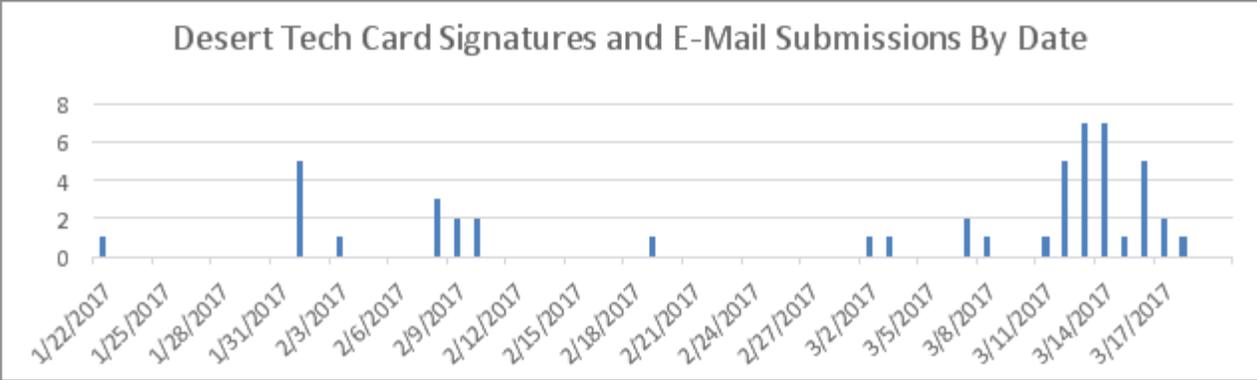
*/s/ Sara Demirok*  
*/s/ Stephen Kopstein*

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## APPENDIX A





## **PROPOSED NOTICE TO RESPONDENT VALLEY'S EMPLOYEES**

### **FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** interfere with the Union's access to the employees it represents at our facility, as permitted by the terms of our expired collective-bargaining agreements with the Union, including by prohibiting the Union from talking with more than two employees at a time or denying the Union access to new employees at our orientation programs.

**WE WILL NOT** promise employees benefits, such as wage increases, if they remove the Union as their collective-bargaining representative.

**WE WILL NOT** threaten to withhold benefits, such as wage increases, from employees, if they do not remove the Union as their collective-bargaining representative.

**WE WILL NOT** blame the Union for our withholding of benefits, such as wage increases, from employees.

**WE WILL NOT** suggest to employees that they should decertify the Union as their collective-bargaining representative.

**WE WILL NOT** grant you benefits, such as wage increases, to undermine your support for the Union.

**WE WILL NOT** refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit (the Valley RN Unit):

All Registered Nurses (RNs) employed by the hospital, but excluding all other employees, guards and supervisors as defined in the National Labor Relations Act (the Act).

**WE WILL NOT** make changes to the wages, hours, and other terms and conditions of employment of employees in the Valley RN Unit, including by changing rules or practices related to Union access to our facilities and ceasing to remit to the Union dues deducted pursuant to valid, unexpired, and unrevoked employee dues checkoff authorizations, and changing employees' rates of pay, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct

and the effects of this conduct and without first bargaining with the Union to an overall good-faith impasse for a collective-bargaining agreement.

**WE WILL NOT** refuse to provide the Union with information that is relevant and necessary to its role as the collective-bargaining representative of the Valley RN Unit.

**WE WILL NOT** engage in conduct undermining the Union's status as the collective-bargaining representative of the Valley RN Unit.

**WE WILL NOT** withdraw recognition from the Union as the exclusive collective-bargaining representative of the Valley RN Unit employees and thereafter fail and refuse to recognize the Union as the exclusive collective-bargaining representative of those unit employees, in the absence of a Board-conducted election, in the absence of a showing that the Union has lost majority support, or based on evidence of loss of majority support that was caused by our unfair labor practices..

**WE WILL NOT** threaten you with withholding benefits if you support the Union or promise to grant you benefits if you do not support the Union.

**WE WILL NOT** in any manner interfere with your rights under Section 7 of the Act.

**WE WILL**, upon request of the Union, bargain in good faith with the Union as the exclusive collective-bargaining representative of the Valley RN Unit employees.

**WE WILL**, upon request of the Union, rescind the changes we made to the wages, hours, and other terms and conditions of employment for the employees in the Valley RN Unit, including changes we made to rules and practices related to the posting of materials on the Union's bulletin boards at its facilities, changing rules or practices related to Union access to its facilities, promulgating new rules related to employee conduct or activities, failing to remit to the Union dues deducted pursuant to valid, unexpired, and unrevoked employee dues checkoff authorizations, and changing employees' rates of pay, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct and without first bargaining with the Union.

**WE WILL** provide the Union the following information it requested on January 31, 2017:

Employee job classification, name, address, telephone number(s), email or other electronic address, and department where employee works.

**WE WILL** reimburse the Union, with interest, at no expense to you, for all dues that we failed to deduct and remit pursuant to valid, unexpired, and unrevoked employee dues checkoff authorizations.

**Valley Hospital Medical Center, Inc., d/b/a Valley  
Hospital Medical Center**

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(Employer)

Dated: \_\_\_\_\_

By: \_\_\_\_\_

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(Representative)

(Title)

*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

300 Las Vegas Boulevard South,  
Suite 2-901  
Las Vegas, NV 89101

**Telephone:** (702) 388-6416

**Hours of Operation:** 8:30 a.m. to 5:00 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

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## **PROPOSED NOTICE TO RESPONDENT DESERT'S EMPLOYEES**

### **FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** remove union literature from bulletin boards maintained by Service Employees International Union, Local 1107 (the Union) at our facility.

**WE WILL NOT** confiscate union literature from employee break rooms in the presence of employees.

**WE WILL NOT** interfere with the Union's access to the employees it represents at our facility, as permitted by the terms of our expired collective-bargaining agreements with the Union, including by prohibiting the Union from talking with employees it represents in the presence of unrepresented employees.

**WE WILL NOT** prohibit employees who support the Union from being near other people soliciting in opposition to the Union.

**WE WILL NOT** watch out for or make it appear that we are watching out for your or other employees' union activity, including by recording employees speaking with Union representatives.

**WE WILL NOT** provide assistance to employees in soliciting employees to sign cards or a petition seeking to remove the Union as their collective-bargaining representative.

**WE WILL NOT** solicit employees to sign cards or a petition seeking to remove the Union as their collective-bargaining representative.

**WE WILL NOT** promise employees benefits, such as wage increases, if they remove the Union as their collective-bargaining representative.

**WE WILL NOT** threaten to withhold benefits, such as wage increases, from employees, if they do not remove the Union as their collective-bargaining representative.

**WE WILL NOT** grant employees benefits, such as wage increases, to undermine your support for the Union.

**WE WILL NOT** refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit (the Desert Springs RN Unit):

All Registered Nurses employed by the hospital, including all relief charge nurses, but excluding all other employees, guards and supervisors, including all charge nurses, as defined in the National Labor Relations Act the Act).

**WE WILL NOT** refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit (the Desert Springs Technical Unit)

All technicians and Licensed Practical Nurses (LPN) employed by the hospital, but excluding all other employees, guards and supervisors as defined in the Act.

**WE WILL NOT** make changes to the wages, hours, and other terms and conditions of employment of employees in the Desert Springs RN Unit or the Desert Springs Technical Unit, including by changing rules and practices related to the posting of materials on the Union's bulletin boards at our facilities, changing rules or practices related to Union access to our facilities, promulgating new rules related to employee conduct or activities, and ceasing to remit to the Union dues deducted pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct and without first bargaining with the Union to an overall good-faith impasse for successor collective-bargaining agreements.

**WE WILL NOT** engage in conduct undermining the Union's status as the collective-bargaining representative of the Desert Springs RN Unit and the Desert Springs Technical Unit.

**WE WILL NOT** withdraw recognition from the Union as the exclusive collective-bargaining representative of the employees in the Desert Springs RN Unit or the employees in the Desert Springs Technical Unit and thereafter fail and refuse to recognize the Union as the exclusive collective-bargaining representative of those unit employees, in the absence of a Board-conducted election, in the absence of a showing that the Union has lost majority support, or based on evidence of loss of majority support that was caused or directly tainted by our unfair labor practices.

**WE WILL NOT** in any manner interfere with your rights under Section 7 of the Act.

**WE WILL**, upon request of the Union, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the Desert Springs RN Unit and the employees in the Desert Springs Technical Unit.

**WE WILL**, upon request of the Union, rescind the changes we made to the wages, hours, and other terms and conditions of employment for employees in the Desert Springs RN Unit and the employees in the Desert Springs Technical Unit without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct and without first bargaining with the Union to an overall good-faith impasse for successor collective-bargaining agreements, including: changes we made to rules and practices related to the posting of materials on the Union’s bulletin boards at our facilities, changes to rules or practices related to Union access to our facilities, promulgation of new rules related to employee conduct or activities, and cessation of remission to the Union of dues deducted pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations.

**WE WILL** reimburse the Union, with interest, at no expense to you, for all dues that we failed to deduct and remit pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations.

**Valley Health System LLC, d/b/a Desert Springs  
Hospital Medical Center**

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(Employer)

Dated: \_\_\_\_\_ By: \_\_\_\_\_

(Representative)

(Title)

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**CERTIFICATE OF SERVICE**

I hereby certify that **GENERAL COUNSEL’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Valley Health System LLC, d/b/a Desert Springs Hospital Medical Center, and Valley Hospital Medical Center, Inc., d/b/a Valley Hospital Medical Center, Cases 28-CA-184993, 28-CA-185013, 28-CA-189709, 28-CA-189730, 28-CA-192354, 28-CA-193581, 28-CA-194185, 28-CA-194194, 28-CA-194450, 28-CA-194471, 28-CA-194790, 28-CA-195235, 28-CA-197426, and 28-CA-201519, was served via E-Gov, E-Filing, and E-Mail, on this 28<sup>th</sup> day of November 2017, on the following:

**Via E-Gov, E-Filing:**

Honorable Dickie Montemayor  
Administrative Law Judge  
NLRB – Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1735

**Via Electronic Mail:**

Tom Keim, Attorney at Law  
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100 Dunbar Street, Suite 300  
Spartanburg, SC 29306  
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Jonathan Cohen, Attorney at Law  
Rothner, Segall, & Greenstone  
510 South Marengo Ave  
Pasadena, CA 91101  
E-Mail: jcohen@rslabor.com

*/s/ Sara Demirok*

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Sara Demirok  
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National Labor Relations Board, Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602) 416-4761

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