UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

QUEEN OF THE VALLEY MEDICAL CENTER and NATIONAL UNION OF HEALTHCARE WORKERS (NUHW)	Case Nos. 20-CA-191739, 20-CA-196271, 20-CA-197402, 20-CA-197403

RESPONDENT'S BRIEF IN REPLY TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE SHARON STECKLER'S DECISION

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RESPONDENT'S REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Respondent Queen of the Valley Medical Center ("Respondent") submits this Brief in Reply to Charging Party's Answering Brief to Respondent's Exceptions to Administrative Law Judge Steckler's Decision in the above-captioned matters.

I. ARGUMENT.[1]

A. Charging Party Admits That Totality Of Conduct Is The Appropriate Standard.

In its brief, Charging Party effectively admits that the totality of conduct standard is the appropriate standard for determining recognition and withdrawal of recognition, instead arguing that "the ALJ plainly considered Respondent's total conduct . . . ." C.P. Br. 25 fn.9. Charging Party's citation to the ALJ's decision does not support its claim that the ALJ properly applied the totality of conduct standard, however. (Notably, Charging Party's admission conflicts with General Counsel's legally unsupported claim that the totality of conduct standard does not apply.)

[1] Charging Party's Answering Brief is cited "C.P. Br. __"; the ALJ Decision is cited "Dec. [page]"; the transcript is cited "Tr. at [page]"; Respondent's exhibits are cited "R. Ex. __"; joint exhibits are cited "J. Ex. __"; Charging Party's exhibits are cited "C.P. Ex. __"; and subpoena exhibits are cited "Sub. Ex. __."

B. Charging Party's Position That It Had No Knowledge Of Respondent's Certification Challenge Is Disingenuous.

Throughout its brief, Charging Party repeatedly claims that Respondent did not provide it notice of Respondent's challenge to the Union's certification. Charging Party goes so far as to claim that Respondent never communicated to the Union "*in any manner*" that it was testing certification after Respondent filed its Request for Review and "hid that intention." C.P. Br. 6 (emphasis in original). What Charging Party conveniently leaves out is that it had actual notice of Respondent's certification challenge. First, Charging Party was served with copies of Respondent's Objections to Election and Respondent's Request for Review on November 22, 2016 and January 9, 2017, respectively, and thus had actual notice of Respondent's certification challenge. *See* J. Ex. 7, at QVMC – NUWH_0245 (proof of service). Second, the Union's internal and external communications from the time of the election through to at least May 16, 2018 demonstrate that the Union was aware that Respondent was unequivocally testing certification and therefore was not unconditionally bargaining. *See* R. Exs. 4–6, 9–14, 38–39, 41, 53, 55, 57–60. Thus, Charging Party's attempts to suggest that it had no knowledge of Respondent's testing certification must be rejected.

Charging Party's position that an employer seeking judicial review of the union's certification must include an express disclaimer with its interactions with the union is untenable. In essence, Charging Party is advocating for strict liability to be imposed on employers for every action or statement of a manager or low-level supervisor. If accepted, this theory of liability would undermine the Act's purpose of minimizing industrial strife and fostering cooperative labor-management operations (29 U.S.C. § 141(b), pmbl.), while simultaneously expanding the definition of collective bargaining to include virtually any post-election interaction with a union by any company manager or supervisor. The consequences of such an overbroad rule are severe: an employer would need to bar all of its supervisors from having any dialogue whatsoever with the union or its employees (about the union) for fear of waiving the employer's legal right to challenge certification even if it already has legal challenges pending.

This disclaimer rule is not just extreme, but serves no legitimate purpose. If the purpose is to provide notice to the Union, there is no reason why a clear statement of intent to challenge certification, such as filing and serving a Request for Review, is not sufficient. Requiring an employer to notify the Union again and again while its Request for Review is pending (and where it has not disavowed that request) only serves to make it difficult for the employer to avoid inadvertent waiver, obliterating the line between bargaining and not bargaining. Such a "gotcha" rule is inconsistent with Board law and undercuts the stabilizing purpose of the Act.

C. Charging Party's Claim That Respondent Waived Its Challenge Is Unsupported By Facts Or Law.

In addition to claiming that it had no notice of Respondent's certification challenge, Charging Party also argues that Respondent waived its right to challenge certification by negotiating with the Union despite Respondent having filed and served a Request for Review. However, Charging Party has not cited any Board decisions or case law for the proposition that an employer, whose Request for Review is pending and has not been withdrawn or disavowed, nonetheless waives its right to contest certification through the Request for Review process by communicating with the union regarding the terms and conditions of employment for the bargaining unit. Instead, Charging Party relies on a fundamental misreading of Board and federal court precedents. *See generally* C.P. Br. 27–30. The majority of the cases cited by Charging Party are discussed on pages 24–27 and footnote 7 of Respondent's opening brief and, as such, Respondent does not repeat here why Charging Party's misinterpretation of those cases is incorrect.

There are a few cases upon which Charging Party relies that have not already been discussed in Respondent's opening brief; however, these cases either support Respondent's position or are inapposite. Charging Party cites *MaxPak*, 362 NLRB No. 138 (2015), and *Michael Konig*, 318 NLRB 901 (1995), for the proposition that an employer must either follow the test-of-certification procedures or recognize the certified union. Respondent's decision to

challenge the Union's certification by first filing objections and then a Request for Review is consistent with the test-of-certification procedures outlined in *MaxPak* and *Michael Konig*.[2]

Charging Party also cites *Garcia ex rel. NLRB v. Fallbrook Hospital Corp.*, 952 F. Supp. 2d 937 (S.D. Cal. 2013), as a case where the district court found "that the employer's dilatory conduct waived its ability to test certification." C.P. Br. 30. But the very language Charging Party quotes from *Garcia* reveals that the case is inapposite. In *Garcia*, "Respondent did not object to the Certification and entered into negotiations with the Union following the election and certification." *Garcia*, 952 F. Supp. 2d at 954. Unlike the *Garcia* employer, who neither filed objections to the election nor filed a Request for Review, Respondent did both. Moreover, as Charging Party acknowledges, *Garcia* involved an employer's attempt to defend against a 10(j) injunction by asserting that the U.S. Supreme Court's *Noel Canning* decision invalidated the original certification. *Id.* at 953–54. This bears no resemblance to the case at hand.

D. Charging Party's Subpoena Noncompliance Warrants Further Sanctions.

In an apparent attempt to stave off further sanctions against it, Charging Party misconstrues both the facts of its failure to comply with Respondent's subpoenas and the law, and asserts, multiple times, that it acted in "good faith" in responding to Respondent's subpoenas. Unfortunately for Charging Party, the record demonstrates otherwise.

1. Charging Party ignores record evidence demonstrating that it intentionally ignored its subpoena obligations.

First, Charging Party ignores the fact that it made a strategic, but legally misguided, decision not to fully comply with the subpoenas pending its Petition to Revoke, which it filed

[2] In citing *MaxPak* and *Michael Konig*, Charging Party seems to argue that while an employer's Request for Review is pending, commencing bargaining with the union waives the employer's challenge to the union's certification. C.P. Br. 29. However, this is not what the cases say. Both cases envision the situation where an employer has not yet challenged the union's certification by filing a Request for Review before commencing negotiations. Thus, an employer who does not follow the test-of-certification procedure "waive[s] its *right to challenge* the validity of the certification" (not that the employer waives its pending certification challenge). *MaxPak*, 362 NLRB No. 138, slip op. at 1; *Michael Konig*, 318 NLRB at 902, 904.

just four days before the start of the hearing. Despite it being well-settled that "[t]he obligations imposed by the subpoenas do not depend on and are not lessened by the subpoenaed party filing a petition to revoke before the due date of the subpoenas," Charging Party deliberately ignored its obligations to comply with Respondent's subpoenas. *San Luis Trucking, Inc.*, 352 NLRB 211, 212 (2008). While Charging Party argues in its Answering Brief that there is no "evidence [of] any 'intentional' or 'deliberate' conduct" (C.P. Br. 45), Counsel for Charging Party asserted on the record multiple times that it believed it had no obligation to comply with the subpoenas. *See, e.g.*, Tr. at 751 ("I will not stipulate that we produced the documents pursuant to subpoena because we have a motion to quash pending which has never been ruled upon. *And my understanding of the law is that when there's a motion to quash pending we're not obligated to supply anything pursuant to subpoena.*" (emphasis added)); *id.* at 1051 ("[W]e supplied documents while our motion to quash was pending, which we're not obligated to do . . . ."); *id.* at 232 (explaining Charging Party's belief that Respondent is "actually not entitled to any documents until she commences her case" and because the ALJ "ha[s]n't ruled on our motion to quash"); *id.* at 229 ("We have turned over voluminous documents, and we have done so in good faith despite the fact that we have a motion to quash pending that's never been ruled upon."). Filing a motion to quash does not relieve a party of its obligation to timely produce documents responsive to a subpoena; "a party that simply ignores a subpoena pending a ruling on a petition to revoke does so at its peril." *McAllister Towing & Transp. Co*, 341 NLRB 394, 396–97 (2004).

2. Charging Party ignores the extensive testimony showing that it failed to implement a litigation hold and that spoliation resulted.

Second, Charging Party also ignores the testimony of its union organizer, Custodian of Records and counsel demonstrating that Charging Party failed to implement a litigation hold and that, as a result, spoliation occurred. Charging Party bore the legal burden of preserving, searching for, collecting and producing potentially relevant documents and Charging Party failed to satisfy its burden. *See McDonald's USA, LLC*, 364 NLRB No. 144, slip op. at 6 (Nov. 10,

2016 (quoting *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)); *Fujitsu Ltd. V. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

Charging Party's Custodian of Records testified that he did not provide copies of the subpoenas to individuals who were identified as having potentially responsive materials, and that he did not tell those individuals specifically what to search for or what devices to search. Tr. at 1366–67. He testified that he did not know where Union-related documents are stored, whether Charging Party had a centralized computer system, or whether it had a data retention policy. Tr. at 1378, 1380, 1388. The Custodian of Records testified that he never reviewed potentially responsive documents other than those he collected himself. Tr. at 1388, 1390. He also testified that he did not receive any litigation hold notice related to the ULP charges filed against Respondent or the ULP proceedings. Tr. at 1369, 1405. Despite admitting that he has implemented litigation holds in other cases, he testified that he did not do so in this matter. Tr. at 1374. He also failed to contact Charging Party's IT department to place a hold on documents that were potentially responsive to Respondent's subpoenas. Tr. at 1370.

The testimony of Charging Party's counsel further exposed the depths of Charging Party's inadequate data retention and subpoena compliance. After testifying that she was familiar with the Board rules regarding e-discovery and subpoena production and somewhat familiar with the e-discovery obligations under the Federal Rules of Civil Procedure ("FRCP"), counsel admitted that she neglected to implement a written litigation hold notice in defiance of those Board and FRCP obligations. Tr. at 1682–93, 1685. She instead claimed she provided verbal instructions to individuals who identified as potentially having responsive documents, but did not recall providing instructions to the IT department or to anyone else to retain records pursuant to Charging Party's records retention policy. Tr. at 1685, 1704. Counsel also testified that in her conversations with individual custodians, "[w]e were very much focused on communications with the Employer, given the nature of the allegations." Tr. at 1700. However, such communications were responsive to only some, not all, of Respondent's initial subpoena requests. Her testimony further indicated that she neglected her duty to monitor preservation.

She testified that she did not recall providing written reminders to individual custodians of their obligations to maintain relevant electronic documents. Tr. at 1713. Other than providing initial verbal instructions, she did not take any other actions to preserve electronic data from any individual custodian. Tr. at 1722. Counsel also did not receive any confirmation from individual custodians that they understood or would comply with instructions to search for and preserve documents. Tr. at 1722–23.

The adverse effects of Charging Party's failure to implement a basic and fundamental litigation hold and to preserve documents are not merely theoretical. For example, key witness and lead Union organizer Hilda Poulson and Charging Party's Custodian of Records both testified that they deleted or otherwise destroyed documents (*see, e.g.*, Tr. at 1027, 1029, 1401), which would have been preserved and produced to Respondent prior to the hearing had Charging Party fulfilled its document preservation and litigation hold obligations. Unfortunately, because of the practical challenges of uncovering subpoena noncompliance by virtue of the fact that potentially responsive documents have either been destroyed or not preserved and searched for, only Charging Party knows the full extent of its dereliction of its discovery duties.[3] However, this is precisely why additional sanctions are required to deter similar conduct in the future. *McAllister*, 341 NLRB at 402; *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1192–93 (D.C. Cir. 2009). The ALJ's minimal sanctions do little to deter Charging Party from disregarding its discovery obligations in the future. *See id.* at 1192–93.

3. Charging Party ignores the fact that it misrepresented its compliance.

Third, while Charging Party insists that it complied "in good faith" with Respondent's subpoenas, it fails to address the fact that it deliberately misrepresented its compliance with the

[3] Knowing this, Charging Party attempts to saddle Respondent with the impossible task of identifying "with specificity" the documents that Charging Party failed to produce. C.P. Br. 37. It defies logic to have Respondent bear the burden of specifically identifying the documents in Charging Party's possession, custody or control that it either destroyed or failed to preserve, particularly where Charging Party had admitted under oath that it failed to implement a litigation hold.

subpoenas. At the start of the hearing, Charging Party's counsel represented that Charging Party had "produced all communications that either did not involve counsel . . . and any internal communications that didn't discuss bargaining unit strategies. She – I'm sorry but that's all there is. We have produced all there is." Tr. at 14. This was not true. After making this representation, Charging Party eventually produced hundreds of pages (in at least nine separate productions) that were responsive to the subpoena but were previously withheld for no acceptable reason. *See* Sub. Ex. 54 & 82.

4. Charging Party misrepresents the law regarding contumacious conduct.

Fourth, the authorities cited in Charging Party's brief regarding contumacious conduct are inapposite and do not buttress the ALJ's decision not to impose additional sanctions. Charging Party cites a series cases involving egregious behavior—e.g., attacking opposing counsel, ordering a witness not to take the stand in defiance of a trial examiner's order—to suggest that sanction are only appropriate upon a finding that Charging Party exhibited equally egregious, contumacious conduct. *See* G.C. Br. 40–41. However, this is a classic example of moving the goalposts, as contumacious conduct is not the legal standard for determining whether sanctions are warranted.[4]

Even if contumacious conduct was a prerequisite to sanctions, Charging Party's citation to *Howard Johnson Co.*, 242 NLRB 386 (1979) actually favors finding that Charging Party contumaciously failed to comply with Respondent's subpoenas. In light of the clear Board

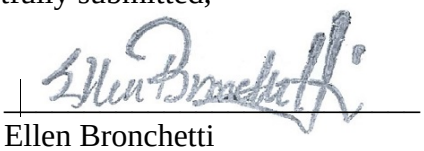
[4] Charging Party seems to conflate two of Respondent's arguments here: (1) that the ALJ erred in refusing to issue further sanctions against Charging Party for subpoena noncompliance (where a finding of contumaciousness is not a prerequisite to sanctions); and (2) that the ALJ erred by refusing to order General Counsel to seek subpoena enforcement. With regard to the latter argument, the Bench Book makes clear that "[i]f asked to rule on whether the subpoenaed party has contumaciously refused to comply with the subpoena within the meaning of Section 11(2) of the Act and Section 102.31(d) of the Rules, the ALJ should normally do so." *NLRB Division of Judges Bench Book* § 8-700 (2018) (citing *Stations Casinos, LLC*, 28-CA-22918, 2011 WL 828422 (Mar. 3, 2011)). As explained in Respondent's opening brief, the ALJ never expressly determined the contumaciousness issue, thereby allowing General Counsel to contravene its non-discretionary obligation to institute enforcement proceedings.

precedent imposing obligations on subpoenaed parties to respond notwithstanding a pending petition to revoke (*see, e.g.*, *San Luis Trucking, Inc.*, 352 NLRB at 212; *McAllister Towing & Transp. Co.*, 341 NLRB 394, 396–97 (2004) ("[A] party that simply ignores a subpoena pending a ruling on a petition to revoke does so at its peril.")), there is no plausible argument that Charging Party's refusal to acknowledge its legal obligations "was based upon an arguably valid interpretation of the rules." *Howard Johnson Co.*, 242 NLRB 386, 388 (1979).

II. CONCLUSION.

For the foregoing reasons, Respondent respectfully requests that the Board refuse to adopt the ALJ's findings and conclusions, and instead dismiss the ULP complaints against Respondent in Case Nos. 20-CA-191739, 20-CA-196271, 20-CA-197402 and 20-CA-197403.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within cause. My business address is McDermott Will & Emery, 275 Middlefield Road, Suite 100, Menlo Park, California 94025..

I served the below listed document(s) described as:

RESPONDENT'S BRIEF IN REPLY TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE SHARON STECKLER'S DECISION

on May 9, 2018, on the following parties to this cause by mailing a copy of the above document(s) as follows:

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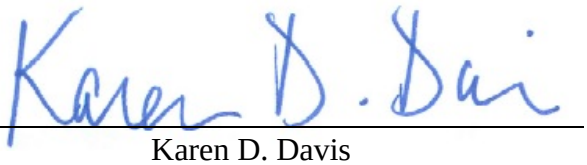
☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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

Executed on May 9, 2018, at San Francisco, California.



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