

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

<p>DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers</p> <p>and</p> <p>NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED</p>	<p>08-CA-167313, <i>et al.</i></p>
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**RESPONDENT HOSPITALS' OPPOSITIONS TO GENERAL  
COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL  
ORDER OF ADMINISTRATIVE LAW JUDGE**

As Respondents in the above-captioned cases, DHSC, LLC formerly d/b/a Affinity Medical Center, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center and Watsonville Hospital Corporation d/b/a Watsonville Community Hospital (hereafter, collectively at times, the "Hospitals")

hereby oppose, by and through the Undersigned Counsel, the General Counsel's Request for Special Permission to Appeal the Order Granting Renewed Motion for Consent Order and Partial Dismissal, which was issued by Geoffrey Carter, the Administrative Law Judge who presides over the above-captioned cases, on April 19, 2018.

### **BACKGROUND**

On September 26, 2016, based upon Unfair Labor Practice Charges filed by the Charging Party, the California Nurses Association (hereafter, the "Union"), the Regional Director for Region 8, Allen Binstock, acting on behalf of the agency's former General Counsel, Richard Griffin, issued a Third Consolidated Complaint and Notice of Complaint (hereafter, for ease of reference, the "Complaint"). The Complaint alleges that the Hospitals, together with CHSPSC, LLC and CHS, Inc. as an alleged "single employer" and / or "joint employer," violated the National Labor Relations Act, as amended (hereafter, the "Act") in a variety of ways. The Hospitals filed timely Answers in which they denied any violation of the Act and set forth a variety of affirmative defenses.<sup>1</sup>

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<sup>1</sup> The Complaint also included QHC, Inc. and QHCCS, LLC as Respondents. However, on July 19, 2017, Judge Carter issued an Order through which both entities were severed from the proceedings.

On March 1, 2018, as hearings on the alleged unfair labor practices continued before Judge Carter, CHSPSC, LLC and CHS, Inc. (hereafter, for ease of reference, collectively, “CHS”) filed with the Judge a Renewed and Modified Motion for Consent Order and for Partial Dismissal (hereafter, the “Motion”). The Motion followed the Board’s Decision in UPMC, 365 NLRB No. 153 (2017), where the Board reversed U.S. Postal Service, 364 NLRB No. 116 (2016), and held that the question of whether any settlement agreement, inclusive of any consent settlement agreement, should be approved by the agency would, once more, be governed by the “reasonableness” analysis set forth by Independent Stave, 287 NLRB 740 (1987). As part of the Motion, CHS essentially offered to guarantee any remedy that the Board might later award in the proceedings, and exchange, requested the dismissal of the “single employer” and “joint employer” allegations. The Motion was opposed by both the General Counsel and the Union.

On April 19, 2018, Judge Carter issued an Order (hereafter, the “Consent Order” or the “Order”) by which he granted the Motion and dismissed the single employer and joint employer allegations. Nearly three months later, on July 18, 2018, the General Counsel filed the Request for Special Permission to Appeal (hereafter, the “Appeal”) that is currently

before the Board. In response to the Appeal, CHS has filed an Opposition, which the Hospitals join in full. However, because some of the General Counsel's arguments focus upon the Hospitals, and given the fact the Appeal does affect the Hospitals' interests, the Hospitals respectfully offer this substantive, though relatively brief Opposition of their own.

### **ARGUMENT**

In the Appeal, the General Counsel urges the Board to vacate the Consent Order and restore the single employer / joint employer allegations based, in part, upon the Hospitals' supposed "recidivism." More specifically, the General Counsel contends that the Hospitals' previous violations of the Act support, if not compel the award of a corporate-wide cease and desist remedy against CHS, and the absence of the remedy from the Consent Order renders the Order unreasonable under Independent Stave. See Appeal, pages 17 – 18. The General Counsel also requests that the Board consider the Hospitals' alleged recidivism as part of the circumstances surrounding the litigation. Id., pages 19 – 20.

As shown below, the General Counsel has completely mischaracterized the effect of the 10(j) Orders referenced by the Appeal, and similarly, presented the Board with a shamelessly hyperbolic version of the Hospitals previous violations of the Act. Accordingly, the Board should

reject the General Counsel’s conjured arguments of the Hospitals’ alleged recidivism and deny the Appeal.

**1.) The 10(j) Orders Referenced by the Appeal Should Carry No Weight Under an Independent Stave Analysis**

The General Counsel’s contention that the Hospitals have engaged in a pattern of unlawful conduct, which supports a corporate-wide remedy, is largely based upon the Orders that some U.S. District Courts have issued under Section 10(j) of the Act. See Appeal, page 19, fn. 27; pages 20 – 21. Ironically enough, while the General Counsel now styles these Orders as clear and definitive proof of unlawful conduct on the part of the Hospitals, as part of the effort to obtain these Orders, the General Counsel emphasized that the role of the Court was **not** to adjudicate whether, in point of fact, any unfair labor practice actually took place. See Exhibit A, p. 10.<sup>2</sup> Instead, the General Counsel emphasized to the Court that, under applicable law, the General Counsel only needed to show whether there was “reasonable cause” for the General Counsel to believe that the given facility had violated the Act. Indeed, the General Counsel undertook every effort, ultimately with success, to persuade the Court to deprive the Hospitals of any opportunity, whether by discovery, an evidentiary hearing or otherwise, to confront and

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<sup>2</sup> Exhibit A is just one of many examples where the General Counsel proffered this argument.

challenge the General Counsel's proof in connection with the numerous, key factual disputes between the parties. The fact that the General Counsel previously urged the Courts to refrain from any review of the merits of the alleged unfair labor practices, but now presents the 10(j) Orders as effectively the final word on these disputes, exposes an argument that is far more contrived than convincing.

In addition, the Appeal conveniently omits the fact that the General Counsel's contention that the sky is falling on the Hospitals' employees has rung hollow before, specifically, in the case of Bluefield Regional Medical Center and Greenbrier Valley Medical Center, where both 10(j) petitions were denied by the U.S. District Court.<sup>3</sup> The Hospitals should also note that, even though the 10(j) Orders have covered a collective period of time of roughly four and a half years, and in spite of the notion that the Hospitals have engaged in seemingly perpetual violations of the Act, the General Counsel has not once returned to any of these Courts and alleged any failure or refusal of the given facility to comply with the Order. In fact, the 10(j) Orders that were entered in 2013 and 2014 against Barstow and Affinity, respectively, were dismissed at the request of the General Counsel upon the

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<sup>3</sup> The General Counsel responded to the dismissal of the 10(j) petitions with an appeal to the U.S. Court of Appeals for the Fourth Circuit, which has not yet issued its Decision.

issuance of the Board's Orders in 2014 and 2015, respectively. See Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB No. 34 (August 29, 2014); DHSC, LLC d/b/a Affinity Medical Center, 362 NLRB No. 78 (April 30, 2015). In the end, therefore, as much as anything else, the take away from the 10(j) proceedings is that the Hospitals respect and comply with the law.

## **2.) Previous Decisions and Orders Issued by the Board**

The Hospitals now turn to the Decisions and Orders previously issued by the Board, which do not provide any basis to characterize any of the Hospitals as a "recidivist."

### **A.) Affinity Medical Center ("Affinity")**

Affinity is the subject of one, and only one, Decision and Order in which the Board determined that the Hospital violated the Act. In DHSC, LLC d/b/a Affinity Medical Center, 362 NLRB No. 78 (April 30, 2015), the Board determined that Affinity violated Section 8(a)(1) of the Act by virtue of statements made and actions taken by one of the Hospital's (former) managers, and the exclusion of one of the Union's organizers from the facility. The Board also determined that Affinity's termination of one employee, and a related report to the Board of Nursing in the State of Ohio, violated Section 8(a)(3) of the Act. Lastly, the Board found that Affinity's

refusal to recognize and bargain with the Union, which was undertaken by the facility in order to challenge the Certification of Representative, violated Section 8(a)(5) of the Act. 362 NLRB No. 78, \*19. In response to the Board’s Decision and Order, on November 17, 2015, Affinity filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit, which remains pending before the Court. See D.C. Cir. Case No. 15-1426.<sup>4</sup>

**B.) Barstow Community Hospital (“Barstow”)**

Like Affinity, Barstow is the subject of one, and only one, Decision and Order in which the Board determined that the Hospital violated the Act. Unlike Affinity, Barstow’s violations were confined to Section 8(a)(5) of the Act. In Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB No. 34 (August 29, 2014), the Board determined that Barstow violated Section 8(a)(5) of the Act by the refusal to make any proposals before the presentation of the Union’s proposals, the declaration of an impasse because of the Union’s refusal to cease distribution of “Assignment Despite Objection” forms, and changes to a policy related to RN education.

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<sup>4</sup> The proceedings before the Court of Appeals have been placed into abeyance, given the fact that the outcome of Affinity’s challenge to the Certification of Representative will likely be determined by the outcome of Barstow’s challenge to the Certification of Representative that covers its RNs, and is before the same Court. See footnote 4, *infra*.

361 NLRB No. 34, \*1-2. In response to the Board’s Decision and Order, Barstow filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit.<sup>5</sup>

**C.) Bluefield Regional Medical Center (“Bluefield”)**

Here also, Bluefield is the subject of one, and only one, Decision and Order, which arises from the Hospital’s challenge to the Certification of Representative that was issued in the Union’s favor. In Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, 361 NLRB No. 154 (December 16, 2014), the Board rejected Bluefield’s challenge to the Certification of Representative and the other grounds on which the Hospital had relied to decline to recognize and bargain with the Union.<sup>6</sup> Bluefield did not pursue any federal court review of the Board’s rulings. Instead, the

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<sup>5</sup> On April 29, 2016, the Court of Appeals vacated the Board’s Decision and Order due to the Board’s failure to review Barstow’s challenge to the Certification of Representative on the merits. Hospital of Barstow, Inc. d/b/a Barstow Community Hospital v. NLRB, 820 F.3d 440. On July 15, 2016, the Board issued a Supplemental Decision and Order in which the panel validated the Certification of Representative and re-adopted the findings and conclusions set forth by the Decision and Order vacated by the Court of Appeals. 364 NLRB No. 52. The Supplemental Decision and Order is currently before the Court of Appeals by virtue of a new Petition for Review filed by Barstow. D.C. Cir. Case No. 16-1343.

<sup>6</sup> Bluefield Hospital Company, LLC was a consolidated proceeding that also encompassed the challenges that Greenbrier Valley Medical Center had pursued in connection with the Certification of Representative issued in the Union’s favor.

Hospital recognized the Union and offered dates for the commencement of the parties' negotiations. In the meantime, the Board pursued an Application for Enforcement, which was later granted by the U.S. Court of Appeals for the Fourth Circuit. See NLRB v. Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, et al., 821 F.3d 534 (2016).<sup>7</sup>

**D.) Greenbrier Valley Medical Center (“Greenbrier”)**

As noted above (see fn. 5), Bluefield Hospital Company, LLC, 361 NLRB No. 154, also encompassed Greenbrier's challenge to the Certification of Representative issued in the Union's favor as to the RNs employed by Greenbrier. The Board rejected Greenbrier's challenge and other arguments. Like Bluefield, in response to the Decision and Order, Greenbrier recognized the Union and offered dates for the commencement

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<sup>7</sup> Once more, like the other Hospitals reviewed above, Fallbrook Hospital Corporation formerly d/b/a Fallbrook Hospital (hereafter, “Fallbrook”), which is referenced by the General Counsel in the context of other, related unfair labor practice proceedings (see Appeal, page 19, fn. 27), is the subject of one, and only one, Decision and Order issued by the Board. In Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, 360 NLRB No. 73 (April 14, 2014), the Board determined that Fallbrook had engaged in bad faith bargaining in connection with the parties' negotiations toward a collective bargaining agreement. The Board also determined that Fallbrook failed to bargain over, and failed to provide information related to, the termination of two employees. 360 NLRB No. 73, \*15. In response to the Decision and Order, Fallbrook filed a Petition for Review with the Court of Appeals (see D.C. Cir. Case No. 14-1056), but only as to the remedy awarded by the Board.

of the parties' negotiations. The Application for Enforcement referenced above, and the Decision later issued by the U.S. Court of Appeals for the Fourth Circuit, also covered Greenbrier.

Greenbrier was the subject of one other Decision and Order issued by the Board. In Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center, 360 NLRB No. 127 (May 29, 2014), the Board determined that Greenbrier violated Section 8(a)(3) of the Act by virtue of a performance improvement plan, written warning and schedule change related to a particular employee, namely Mr. James Blankenship. 360 NLRB No. 127, \*10. The Hospital did not pursue any federal court challenge, but rather, fully complied with the Board's Decision and Order. As confirmed by the Board's e-docket, the case was closed roughly three and a half years ago on account of the Hospital's compliance. See Case No. 10-CA-094646.

**E.) Watsonville Community Hospital ("Watsonville")**

Zero. That is the number of occasions on which the Board has found Watsonville, a facility with long-standing collective bargaining relationships with four (4) different labor organizations, in violation of the Act.<sup>8</sup>

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<sup>8</sup> Incidentally, though to a lesser degree, the same point should be made on behalf of Barstow in connection with the facility's collective bargaining relationship with SEIU United Healthcare Workers – West, which goes back to 2012. The Board has never found any unfair labor practices to have taken place as part of the relationship between Barstow and the SEIU.

### 3.) Summary

Any argument by the General Counsel that a sweeping corporate-wide remedy is necessary because of the Hospitals' avowed recidivism is, simply, a house of cards. Indeed, as noted just above, the argument is patently frivolous as to Watsonville. In the case of Bluefield, the argument borders upon the frivolous. As viewed through the fog of the General Counsel's advocacy, the action perceived by the General Counsel to violate the Act so egregiously was, in reality, merely the exercise of the Hospital's fundamental right to challenge the outcome of the election, which, of course, can only be pursued by a "technical" refusal to bargain. When the Board rejected the challenge, Bluefield recognized the Union and negotiations got underway. When, as part of the same case, the Board rejected the challenges pursued by Greenbrier, the Hospital responded in the very same way. Likewise, in response to the Board's findings related to Mr. Blankenship, the Hospital duly performed each and every remedy ordered by the Board.

In the case of Affinity and Barstow, the history of unfair labor practices is undeniably shallow.<sup>9</sup> These Hospitals are the subject of one, and

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<sup>9</sup> In the particular case of Fallbrook, given the closure of the facility several years ago, the General Counsel lacks a basis to put together any case of recidivism. Presumably, even the extremity of the General Counsel's position does not go so far as to imagine the ability of Fallbrook to violate the Act from the grave.

only one, Decision and Order issued by the Board, neither of which have been enforced by a Court of Appeals. Thus, aside from the fact that the Board does not follow a “one strike and you’re out” approach toward recidivism, the General Counsel should not be allowed to define recidivism in a way that calls for predictions of the future (*i.e.*, favorable outcomes before the Court of Appeals) on top of shamelessly revised versions of history.

### **CONCLUSION**

For all the reasons set forth above, the Hospitals respectfully urge the Board to deny the Special Appeal.

Dated: Glastonbury, CT  
July 30, 2018

Respectfully submitted,

/s/ \_\_\_\_\_

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

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**CERTIFICATE OF SERVICE**

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on July 30, 2018, the document above was served upon the following *via* email:

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# EXHIBIT A

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**ALLEN BINSTOCK,  
REGIONAL DIRECTOR OF REGION 8  
OF THE NATIONAL LABOR RELATIONS  
BOARD, FOR AND ON BEHALF OF THE  
NATIONAL LABOR RELATIONS BOARD,**

**PETITIONER**

**JUDGE BENITA Y. PEARSON**

**CASE NO. 5:16-CV-01060-BYP**

**v.**

**DHSC, LLC, D/B/A AFFINITY MEDICAL CENTER,**

**RESPONDENT**

**PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE  
NATIONAL LABOR RELATIONS ACT, AS AMENDED**

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## **I. STATEMENT OF THE ISSUE**

This proceeding is before the Court on a petition filed by the Regional Director for Region 8 (Petitioner) of the National Labor Relations Board, (the Board) pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160 (j)], (the Act) for an injunction until final disposition of the matters involved pending before the Board. The charges filed by the National Nurses Organizing Committee (the Union), in Cases 08-CA-166039 and 08-CA-167313, allege that DHSC, LLC d/b/a Affinity Medical Center (Respondent) has engaged in acts and conduct in violation of Section 8(a)(1) and (5) of the Act.<sup>1</sup> There is reasonable cause to believe Respondent has engaged in the unfair labor practices charged and that injunctive relief is just and proper in order to effectuate the purposes of the Act.

## **II. SUMMARY OF THE ARGUMENT**

This case involves Respondent's efforts to undermine a newly certified union as its employees' collective bargaining representative during negotiations. On January 24, 2014, this Court granted injunctive relief requiring Respondent to bargain in good faith with the Union.<sup>2</sup> After the injunction expired upon the issuance of a Board order, Respondent has continued to refuse and fail to bargain in good faith with the Union. This petition for injunctive relief should be granted because there is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) of the Act, and that interim relief is just and proper for the following reasons: to preserve the employees' choice of the Union as their exclusive bargaining representative; to preserve the

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<sup>1</sup> The Act provides, *inter alia*, Section 8(a) -- It shall be an unfair labor practice for an Employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a). (29 U.S.C. § 158(a)(1) and (5)).

<sup>2</sup> Calatrello v. DHSC, LLC d/b/a Affinity Medical Center, 2014 WL 296634 (N.D. Ohio Jan. 24, 2014).

Union's ability to bargain effectively on behalf of employees who have freely chosen it to represent them; to prevent irreparable loss of employee support for the Union and harm to its status as the employees' chosen bargaining representative; to prevent employees from losing the benefits of collective bargaining during Board litigation; and to prevent a final Board order from being meaningless. The Petitioner seeks an affirmative order requiring that Respondent: bargain with the Union in good faith; rescind, at the Union's request, any or all unilateral changes; provide the Union with all requested information; adhere to a broad cease and desist order; and that Respondent be required to post this Court's Order and publicly read it to its assembled employees.

### **III. PROCEDURAL BACKGROUND**

#### **A. The Court Grants 2014 Injunction against Respondent**

Respondent maintains an acute care hospital located in Massillon, Ohio, where it employs approximately 213 registered nurses. In 2012, the Union filed a representation petition. Pursuant to a consent election agreement approved by the Petitioner, an election was held on August 29, 2012, in which a majority of employees' ballots were cast in support of the Union. On October 5, 2012, the Petitioner certified the Union as the exclusive collective-bargaining representative of the employees. Thereafter, and in response to the organizing campaign and certification, Respondent committed a host of unfair labor practices which were the subject of a complaint issued on March 29, 2013 alleging numerous violations of Sections 8(a)(1), (3), and (5) of the Act. On July 1, 2013, Administrative Law Judge Arthur Amchan issued his Decision and Order sustaining the majority of the unfair labor practice violations. On January 22, 2014, this Court granted, *in toto*, the Petitioner's petition for interim injunctive relief ordering that

Respondent cease and desist from its unlawful conduct<sup>3</sup> and that Respondent reinstate the discriminatee Ann Wayt, and affirmatively recognize and bargain in good faith with the Union.<sup>4</sup> Thereafter, the Board found that Respondent violated the Act and ordered similar relief.<sup>5</sup> On November 17, 2015, Respondent filed a request for review of the Board's Decision and Order in the Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The Board cross-appealed for enforcement. The request for review and cross-appeal are pending before the D.C. Circuit.<sup>6</sup>

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<sup>3</sup> The Court ordered Respondent to cease and desist from *inter alia*: (a) Disciplining, discharging and reporting its employees to the State Board of Nursing because of their union activities, sympathies, or support; (b) Refusing to recognize and bargain with the Union; (c) Denying the Union and Union organizer Michelle Mahon access to those areas of its property to which such third-party, non-employees may be entitled access under the Act and federal labor policy; (d) Scrutinizing employees' work in view of other employees because the subject employee(s) exercised rights guaranteed them by Section 7 of the Act; (e) Telling employees that they would enjoy disciplining known union supporters; (f) Threatening to harm employees who submit Assignment Despite Objection Forms; (g) Imposing more onerous working conditions on employees because the employees engaged in protected concerted and/or union activities; and (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

<sup>4</sup> Calatrello v. DHSC, LLC d/b/a Affinity Medical Center, 2014 WL 296634 (N.D. Ohio Jan. 24, 2014) (Adams, J.) (order granting injunctive relief).

<sup>5</sup> See DHSC, LLC d/b/a Affinity Medical Center, 362 NLRB No. 78, *slip op.* (April 30, 2015). Respondent appealed the District Court's granting of the injunction to the Sixth Circuit. The injunction expired as a matter of law upon the entry of the Board order. After the Board's April 30, 2015 decision, the Board petitioned the Sixth Circuit to dismiss Respondent's appeal of the 10(j), and the Sixth Circuit granted the motion.

<sup>6</sup> In response to this Petition, it is anticipated that Respondent will challenge the Petitioner's authority to certify the Union as the exclusive collective-bargaining representative of bargaining unit employees by arguing that Petitioner lacked authority to certify results of a Board conducted election pursuant to a consent election agreement because it was done at a time when the Board lacked a statutory quorum. See, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (finding that President's three recess appointments to the five member Board unlawful). The Petitioner notes that this argument has been raised in the underlying certification of the Union in this matter, which is pending before the United States Court of Appeals for the D.C. Circuit. In this connection, in Hospital of Barstow v. NLRB, \_\_\_ F.3d \_\_\_, 2016 WL 2609605 (D.C. Cir. April 29, 2016), a case involving another hospital affiliated with the parent company of Respondent, the D.C. Circuit remanded the matter to the Board for further statutory interpretation as to whether a Regional Director possesses requisite authority to certify election results pursuant to a consent

**B. Unfair Labor Practice Charges in Cases 08-CA-166039 and 08-CA-167313**

On February 21, 2014, over a year and a half after the Union was certified, Respondent commenced bargaining with the Union upon this Court's Order granting injunctive relief. Despite going to the bargaining table, Respondent has nonetheless continued to evade its bargaining obligations under the Act. The parties are no closer to an agreement now than when bargaining commenced in February 2014, and Respondent's unlawful conduct has continued.

On October 19, 2015, the Petitioner issued a Consolidated Complaint alleging that Respondent committed additional bargaining violations, specifically, unilaterally imposing new employee work rules; unilaterally discontinuing annual employee merit wage increases; failing and refusing to bargain over discipline and terminations; failing and refusing to bargain in 2013 and 2014 over the effects of newly implemented technology processes and procedures; and failing to furnish the Union with requested information.<sup>7</sup>

After the issuance of the Consolidated Complaint, the Union filed the two additional unfair labor practice charges, which are the subject of the instant petition, alleging further bargaining violations.<sup>8</sup> On February 5, 2016, an Order Further Consolidating Cases, Amended Consolidated Complaint (Amended Consolidated Complaint) issued to include the allegations from Case 08-CA-166039 that Respondent: (1) engaged in surface and/or bad faith bargaining by

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election agreement at a time when the Board lacks a quorum. However, the same argument was rejected by the United States Court of Appeals for the Fourth Circuit Court of Appeals in NLRB v. Bluefield Hospital Co., LLC, \_\_ F.3d \_\_, 2016 WL 2609605 (4th Cir. May 6, 2016), a case involving two hospitals that also have the same parent company of Respondent. The Fourth Circuit determined that a Regional Director's authority to certify election results pursuant to a Board conducted consent election agreement does not lapse when the Board is without a statutory quorum.

<sup>7</sup> The Consolidated Complaint alleges that Respondent among various other hospitals, its parent Community Health Systems, Inc. (CHSI) and the management company, Community Health Professional Services Corporation, LLC (CHSPSC) to be single and/or joint employers

<sup>8</sup> The charges and related amended charges filed in Cases 08-CA-166039 and 08-CA-167313 are attached to the Petition for Injunction as Exhibits Q, R and S.

negotiating without the intention of reaching agreement, making proposals aimed at depriving the Union of its representational role, displaying a repeated unwillingness to adjust differences with the Union, expressing an unwillingness to change its October 6, 2015 package proposal, and insisting to impasse on a non-mandatory subject of bargaining over discretionary discipline related to indemnification; (2) failed and refused to bargain over discretionary discipline and terminations and conditioned bargaining about those discharges upon whether the Union executes an indemnification agreement; and (3) refused to furnish the Union with requested information necessary and relevant to its collective-bargaining role.<sup>9</sup>

After a full investigation of Case 08-CA-167313, the Regional Director issued a Complaint and Notice of Hearing alleging that the Respondent: (1) failed to provide requested information; and (2) unilaterally changed employees' benefit options, including an employee discount program, long term-care insurance and 401(k) plans, and announced such changes without giving the Union notice and an opportunity to bargain.<sup>10</sup> An administrative hearing on the Complaint in Case 08-CA-167313 will be scheduled expeditiously.

### **C. Administrative Hearing**

On February 29, 2016, an unfair labor practice hearing on the Amended Consolidated Complaint commenced before the Honorable Administrative Law Judge (ALJ) Eleanor Laws in Cleveland, Ohio. The hearing recessed on March 11, 2016, without completion.<sup>11</sup> To date, ALJ Laws has not scheduled a resumption date for the hearing involving the Respondent which is pending the outcome of an administrative appeal before the Board.

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<sup>9</sup> See Petition for Injunction, Exhibit T.

<sup>10</sup> The Complaint and Notice of Hearing in Case 08-CA-167313 is attached to the Petition for Injunction as Exhibit U.

<sup>11</sup> The hearing on the Consolidated Complaint is scheduled to continue at intervals throughout the country for the next several months for other respondents.

#### IV. STATEMENT OF FACTS<sup>12</sup>

##### A. Respondent refused to provide information related to announced QHC spinoff.

On August 3, Respondent's parent entity, CHSI, announced through a press release, the creation of Quorum Health Corporation (QHC), a publicly traded portfolio of 38 hospitals affiliated with Respondent's parent company, Community Health Systems, Inc. (CHSI). On August 20, Respondent's Director of Human Resources Angela Boyle notified the Union that Respondent would be one of the 38 hospitals involved in the QHC spinoff.

By letter dated September 21, the Union requested that Respondent provide certain relevant information related to the spinoff as it pertains to unit employees, including the new company's address, a list of board members, names and contact information of the new CEO and HR directors, copies of the new company's work rules and employment manuals, staffing plans, descriptions of benefits received by nurses at the hospitals being transferred to QHC, and a list of the other hospitals being transferred.<sup>13</sup> On October 21 and 30, the Union repeated its request for the information. On November 5, during the course of bargaining, and in writing on November 6, November 23, December 21, and January 4, 2016, the Union reiterated its demand for the

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<sup>12</sup> Unless otherwise noted, all dates in the Statement of Facts are in 2015.

<sup>13</sup> The Union requested the following information concerning the QHC spinoff which Respondent refused to provide: (i) QHC's address; (ii) a list of QHC's current or proposed Board of Directors or Trustees; (iii) names and contact information of QHC's CEO, HR Director and Director of Labor Relations; (iv) an organizational chart showing the directors, officers and key employees of QHC; (v) copies of QHC work rules, employment manuals as well as other policies and/or codes of conduct that apply or will apply to bargaining unit members at QHC hospitals; (vi) a list of all persons with authority to review, modify or rescind the policies listed above, along with their job titles and office addresses; (vii) current and/or proposed staffing plans for QHC operated facilities; (viii) a list and contact information of all persons with authority to review, modify the staffing plans; (ix) a complete description of health, dental, short and long term disability and life insurance plans and benefits for nurses at those facilities that CHS intends to transfer to QHC; (x) a complete description of retirement benefits at those facilities that CHS intends to transfer to QHC; (xi) copies of any agreements for administrative services, including those related to the administration of payroll and benefits between QHC, and CHS; (xii) a list of all CHS hospitals that will be party of the proposed QHC spinoff, as well as a list of their directors, officers and key employees.

requested information. To date, Respondent has refused to provide the Union with the information pertaining to bargaining unit employees about the QHC spinoff.

**B. Respondent refused to bargain and provide information regarding the terminations of Hastings and Magrell without indemnification.**

On September 2, Respondent's HR Director Boyle notified the Union by e-mail that it intended to terminate bargaining unit nurse Michelle Hastings. The Union requested information related to the discharge and demanded bargaining over the decision to terminate. On September 3, Boyle stated that the Respondent would not bargain or provide the requested information unless it received suitable indemnification from the Union to protect Respondent against any possible defamation claims arising out of the termination process.

On August 31, Respondent informed the Union that it intended to suspend unit nurse Tara Magrell. Thereafter, on September 1, the Union demanded bargaining over the decision and requested information related to the suspension. On September 1, Respondent refused to bargain with the Union and to provide information unless it received suitable indemnification from the Union. On September 11, the Union rejected Respondent's demand for indemnification and requested that Respondent provide information before it suspends or terminates employees. On November 12, Respondent, by email, notified the Union that it intended to terminate Magrell. The following day the Union made the identical information requests on Respondent as it did with regard to Hastings' termination.<sup>14</sup> On November 16, Respondent responded that it would not provide the information without suitable indemnification.

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<sup>14</sup> On September 1, 2015, the Union requested information which included: (1) a copy of the suspension notice that the employer intended to issue to Magrell, (2) a copy of any prior disciplinary actions in Hastings' employment record, (3) all documents supporting the employer's allegations, (4) any applicable policies relevant to this matter, and (5) a copy of the assignment sheet for 2100 on the day(s) related to the matter. On November 13, 2015, the Union requested information which included: (1) a copy of the termination notice that the employer intended to issue to Magrell, (2) copies of any prior disciplinary actions in Magrell's

**C. Respondent's comprehensive package proposal**

At the October 6 bargaining session, Respondent made a comprehensive package proposal to the Union that included, *inter alia*, a broad management rights clause, provisions giving Respondent the unilateral ability to modify or eliminate health insurance and retirement benefits, and the right to nullify the collective-bargaining agreement and the Union's certification if the Supreme Court or Ninth Circuit found that neutrality agreements violate Section 302 of the Labor Management Relations Act.<sup>15</sup>

During the November 5 bargaining session, the Union objected to the package proposal because of the above-noted provisions. In response, Respondent's chief negotiator Don Carmody stated that Respondent was not going to change one word of the package proposal. The next bargaining session was scheduled for December 10, but was cancelled after Carmody was injured in an automobile accident. To date, no further bargaining has taken place.

**D. Respondent unilaterally changed employee benefits without notifying the Union.**

In November 2015, Respondent unilaterally changed bargaining unit employees' health and welfare plans. First, in anticipation of QHC taking over operations, Respondent implemented a new employee group discount program called "QHC Benefits Plus." Second, Respondent notified employees that effective January 1, 2016, retirement plan assets maintained in the 401(k) plan would transfer to a new retirement plan sponsored by a subsidiary of QHC. As a result of the change, the employees were subject to a blackout period from January 4, 2016 through January 18, 2016, when employees were restricted from changing investment allocations of new contributions, transferring retirement funds among investment options, requesting plan loan payouts, making distributions and taking withdrawals. Finally, in November 2015,

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employment record, (3) all documents supporting the employer's allegations, and (4) any applicable policies relevant to this matter.

<sup>15</sup> Respondent's October 6, 2015 package proposal is attached as Exhibit 1.

Respondent offered bargaining unit employees long-term care insurance for the first time. Respondent gave the Union no notice of these changes before announcing them to unit employees; nor did Respondent give the Union the opportunity to bargain over these benefits. Thereafter, the Union demanded bargaining over these changes. Respondent has refused.

## **V. STATUTORY SCHEME PURSUANT TO WHICH RELIEF IS SOUGHT**

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings.<sup>16</sup> Congress recognized that the Board's administrative proceedings are often protracted. In many instances, absent interim relief, a respondent can accomplish its unlawful objective before being placed under any legal restraint, thereby rendering a final Board order ineffectual.<sup>17</sup> Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation.<sup>18</sup> To resolve a Section 10(j) petition, a district court in the Sixth Circuit considers only two factors: (1) whether there is

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<sup>16</sup> Section 10(j) (29 U.S.C. Section 160(j)) provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

<sup>17</sup> See Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962, 970 (6th Cir. 2001); Levine v. C & W Mining Co., Inc., 610 F.2d 432, 436-437 (6th Cir. 1979), quoting S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947), reprinted in *I Legislative History of the Labor Management Relations Act of 1947*, 433 (1948); accord Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 28-29 (6th Cir. 1988).

<sup>18</sup> See Kobell v. United Paperworkers Intern., 965 F.2d 1401, 1406 (6th Cir. 1992).

"reasonable cause to believe" that a respondent has violated the Act, and (2) whether temporary injunctive relief is "just and proper."<sup>19</sup>

#### **A. The "Reasonable Cause" standard**

The Petitioner bears a "relatively insubstantial" burden in establishing "reasonable cause."<sup>20</sup> In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the underlying unfair labor practices.<sup>21</sup> Thus, the district court must accept the Petitioner's legal theory as long as it is "substantial and not frivolous."<sup>22</sup> Factually, the Petitioner need only "produce some evidence in support of the petition."<sup>23</sup> The district court should not resolve conflicts in the evidence or issues of witness credibility, and should accept the Petitioner's version of events as long as facts exist which could support the Board's theory of liability.<sup>24</sup>

#### **B. The "Just and Proper" standard**

Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA."<sup>25</sup> Thus, "[i]nterim relief is warranted whenever the

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<sup>19</sup> See Ahearn v. Jackson Hospital Corp., 351 F.3d 226, 234-235 (6th Cir. 2003); Schaub v. West Michigan Plumbing & Heating, 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987); Glasser v. ADT Security Systems, Inc., 379 F.App'x 483, 485 n.2 (6th Cir. 2010).

<sup>20</sup> Ahearn v. Jackson Hospital, 351 F.3d at 237.

<sup>21</sup> Id.; see also Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d at 493; Kobell v. United Paperworkers Intern., 965 F.2d at 1406; Levine v. C & W Mining Co., Inc., 610 F.2d at 435.

<sup>22</sup> Ahearn v. Jackson Hospital Corp., 351 F.3d at 237; Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 29; Kobell v. United Paperworkers Intern., 965 F.2d at 1407.

<sup>23</sup> Kobell v. United Paperworkers Intern., 965 F.2d at 1407.

<sup>24</sup> See Ahearn v. Jackson Hospital, 351 F.3d at 237; Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d at 493, 494.

<sup>25</sup> The "status quo" is that which existed before the charged unfair labor practices took place. See Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30 n.3. Kobell v. United Paperworkers Intern., 965 F.2d at 1410; accord Schaub v. West Michigan Plumbing, 250 F.3d at 970.

circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless.”<sup>26</sup>

**VI. THERE IS REASONABLE CAUSE TO BELIEVE THAT THE RESPONDENT VIOLATED SECTIONS 8(A)(1) AND (5) OF THE ACT**

There is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith with the Union through its conduct both at and away from the bargaining table. Respondent has engaged in bad faith surface bargaining with the intent to frustrate and avoid reaching an agreement. It has refused to provide requested information related to the announced QHC spinoff and employee terminations. It has refused to bargain over employee terminations and conditioned bargaining and furnishing information related to those terminations on indemnification from the Union. It has unilaterally changed the terms and conditions by adopting a new QHC benefit plan, offering employees a discounted long term care insurance, and transferring retirement plan assets to a new retirement plan without notice to or bargaining with the Union.

**A. There is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide relevant information related to the QHC spinoff.**

The Act, “obligates [an employer] to provide a labor union with relevant information necessary for the proper performance of the union's duties as the employees’ bargaining representative.”<sup>27</sup> In evaluating an employer’s obligation to fulfill the union’s information requests, the Board and courts apply a ‘discovery type standard,’ under which the requested information need only be relevant and useful to the union in fulfilling its statutory obligations in

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<sup>26</sup> Sheeran v. American Commercial Lines, Inc., 683 F.2d 970, 979 (6th Cir. 1982); *accord* Ahearn v. Jackson Hospital, 351 F.3d at 239; Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30-31.

<sup>27</sup> NLRB v. U.S. Postal Service, 841 F.2d 141, 144 (6th Cir. 1988), *citing* Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979).

order to be subject to disclosure.<sup>28</sup> When a union seeks information concerning the bargaining unit, that information is presumptively relevant and must be furnished without any additional showing of relevance by the union unless the employer is able to rebut the presumption of relevance.<sup>29</sup> The Board's determination concerning whether information is relevant to the collective bargaining process is entitled to deference from the courts.<sup>30</sup>

For non-bargaining unit information, “[t]he Board need only find a ‘probability that the desired information [is] relevant...and that it would be of use to the union in carrying out its statutory duties and responsibilities.’”<sup>31</sup> A union’s burden of proof is not a heavy one.<sup>32</sup> The burden is satisfied by some initial, but not overwhelming demonstration by the union.<sup>33</sup> The “broad discovery type standard” of probable relevance still applies.<sup>34</sup> To demonstrate reasonable or probable relevance regarding a request for non-unit information, the Union must show that it has a reasonable objective basis for the information.<sup>35</sup>

There is reasonable cause to believe that Respondent failed to provide to the Union presumptively relevant information pertaining to QHC. The Union’s repeated requests for items (v) through (xi) as fully described in note 13, *supra*, are presumptively relevant requests inasmuch as the Union seeks information relating to bargaining unit employees’ terms and

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<sup>28</sup>E. Tenn. Baptist Hosp. v. NLRB, 6 F.3d 1139, 1143 (6th Cir. 1993) *citing* NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967).

<sup>29</sup>E.I. Du Pont de Nemours & Co. v. NLRB, 744 F.2d 536, 538 (6th Cir.1984).

<sup>30</sup>Id.

<sup>31</sup>Id. (*quoting* NLRB v. Acme Industrial Co., 385 U.S. at 437).

<sup>32</sup>Public Service Electric and Gas Co., 323 NLRB 1182, 1186 (1997); Leland Stanford Junior University, 262 NLRB 136, 139 (1982).

<sup>33</sup>Leland Stanford, *supra*, at 139.

<sup>34</sup>United States Testing Co., 324 NLRB 854, 859 (1997), *rev. denied, enforcement granted* 160 F. 3d 14 (D.C. Cir. 1998), *rehearing en banc denied* (1999); *see* Saginaw General Hospital, 320 NLRB 748, 750 (1996).

<sup>35</sup>United States Testing, *supra*, at 858-859; Rochester Acoustical Corp., 298 NLRB 558, 562 (1990).

conditions of employment.<sup>36</sup> The Union has also demonstrated that items (i) through (iv) and (xii), as fully described in note 13, *supra*, request information that is relevant concerning QHC, its organizational and management structure and its key players. This information is integral for the Union to perform its duties as the exclusive collective bargaining representative of the employees.<sup>37</sup> Thus, there is sufficient evidence to support the reasonable cause standard that Respondent violated Section 8(a)(1) and (5) by its failure and refusal to furnish the Union with the requested information pertaining to QHC.

**B. There is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain and provide information related to terminations of unit employees.**

There is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union over the discharges of bargaining unit employees Hastings and Magrell and failing to furnish the Union with the requested information relative to those discharges. The Union's request for information related to their discharges is presumptively relevant, as such information is necessary for the Union to perform its function as the exclusive collective bargaining representative of the Unit in representing these employees.

An employer has an obligation to bargain with a certified representative over mandatory subjects of bargaining, including terminations of employees. Section 8(d) of the Act specifies that mandatory subjects of bargaining cover "wages, hours and other terms and conditions of employment." Terminations are embraced within the language of Section 9(a) of the Act<sup>38</sup> and

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<sup>36</sup> Disneyland Park, 350 NLRB 1256, 1257-58 (2007); Bryant & Stratton Bus. Inst., 323 NLRB 410 (1996); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

<sup>37</sup> *See*, Shoppers Food Warehouse, 315 NLRB 258 (1994).

<sup>38</sup> Section 9(a) of the Act provides that an employees' bargaining representative, "shall be the exclusive representative of all the employees...for purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment."

are mandatory subjects of bargaining.<sup>39</sup> Respondent conditioned bargaining and furnishing the Union with requested information on the Union's agreement to indemnify it for consequential damages related to Respondent's decision to discharge these employees. On the Union's refusal to execute any indemnification agreement, the Respondent has refused to bargain and refused to provide information. Thus, there is sufficient evidence to support that Respondent violated Section 8(a)(1) and (5) of the Act.

**C. There is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in unlawful surface bargaining.**

Section 8(a)(5) requires employers "to bargain collectively with the representatives of [its] employees." The duty to bargain in good faith requires that the parties bargain with "an open and fair mind and a sincere purpose to find a basis of agreement."<sup>40</sup> The Act does not require that an employer agree to a union's bargaining proposals or forego hard bargaining.<sup>41</sup> However, "[c]ollective bargaining is a two-sided proposition; it does not exist unless both parties enter the negotiations in a good faith effort to reach a satisfactory agreement. Mere lip service to the obligation on the part of the employer has been condemned often by the Courts."<sup>42</sup>

In determining whether a party has violated its statutory duty to bargain in good faith and engaged in surface bargaining, the Board examines the totality of the party's conduct, both at and away from the bargaining table.<sup>43</sup> The Board considers such factors as delay tactics, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal

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<sup>39</sup> Garcia v. Fallbrook Hosp. Corp., 952 F. Supp. 2d 937, 946–947 (S.D. Cal. 2013) (citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964)); see also N.K. Parker Transport, Inc., 332 NLRB 547, 551 (2000).

<sup>40</sup> A-1 King Size Sandwiches, Inc., 265 NLRB 850, 858 (1982) *enfd.*, 732 F.2d 872 (11th Cir. 1984).

<sup>41</sup> Glomac Plastics, Inc. v. NLRB, 592 F.2d 94, 97 (2d Cir. 1979).

<sup>42</sup> NLRB v. Kentucky Utilities Co., 182 F.2d 810 (6th Cir. 1950).

<sup>43</sup> See, e.g., Public Service Co. of Oklahoma, 334 NLRB 487 (2001), *enfd.* 318 F.3d 1173 (10<sup>th</sup> Cir. 2003).

of already agreed-upon provisions, arbitrary scheduling of meetings, failure to provide relevant information, failure to give explanations for bargaining positions, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, and unlawful conduct away from the bargaining table.<sup>44</sup>

The Act does not require that a respondent engage in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith.<sup>45</sup> Rather, a party will be found to have violated the Act when the entirety of its conduct reflects an intention to avoid reaching an agreement, such as surface bargaining or merely going through the motions of bargaining.<sup>46</sup> The courts and the Board have found that where broad management rights proposals are coupled with an extensive course of conduct that demonstrates an intention to avoid agreement, such proposals manifest evidence of unlawful surface bargaining.<sup>47</sup> In particular, under Respondent's broad management rights proposal and other waiver proposals, employees would have fewer rights than without a contract.<sup>48</sup> The Board has further found unlawful surface bargaining where an employer's tactics demonstrate an intent to prevent the successful negotiation of a bargaining agreement by eviscerating the Union's representational role.<sup>49</sup>

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<sup>44</sup> See Mid-Continent Concrete, 336 NLRB 258, 259–260 (2001); Altorfer Machinery, 332 NLRB 130, 150 (2000); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

<sup>45</sup> Altorfer Machinery Co., 332 NLRB 130, 148 (2000).

<sup>46</sup> Regency Serv. Carts., Inc., 345 NLRB 671, 671-72 (2005); see also Altorfer Machinery Co., 332 NLRB 130, 149-150 (2000)

<sup>47</sup> Reichold Chemicals, 288 NLRB 69, 71 (1988), citing NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960); A-1 King Sized Sandwiches, *supra*; see also, Gratiot Community Hosp. v. NLRB, 51 F.3d 1255, 1259-60 (6th Cir. 1995); NLRB v. Mar-Len Cabinets, Inc., 659 F.2d 995, 999 (9th Cir. 1981), *enfg.*, 243 NLRB 523 (1979).

<sup>48</sup> Columbia College Chicago, 363 NLRB No. 154, *slip op.* at 5 (2016), citing A-1 King Size, *supra*, at 859-861.

<sup>49</sup> Altorfer Machinery, 332 NLRB at 130 n.2, 149-150.

Based upon the totality of the circumstances, the Petitioner believes there is sufficient evidence to demonstrate that Respondent has been engaged in surface bargaining in an effort to avoid reaching agreement, in violation of Section 8(a)(1) and (5) of the Act. Such evidence includes: Respondent's unreasonable bargaining proposals, its unilateral changes to mandatory subjects of bargaining, and its unlawful conduct away from the bargaining table.<sup>50</sup> Here, Respondent demonstrated its intent not to reach an agreement and to eliminate the Union's representational role by coupling its insistence on proposals that granted it unilateral control over extensive terms and conditions of employment, including a broad management rights clause and unfettered discretion to reduce or eliminate medical and retirement benefits, with the assertion that it would not change one word of its proposals. Respondent also demonstrated its intent not to reach agreement by its actions away from the bargaining table, including making unilateral changes to health benefits and refusing to provide information. Furthermore, since this Court's February 2014 Order requiring bargaining, Respondent has unilaterally discontinued the practice of granting annual merit wage increases, unilaterally imposed new work rules, and unilaterally implemented changes to its electronic health records system without bargaining with the Union about the effects of those changes on employees' terms and conditions of work.<sup>51</sup>

Further evidence of Respondent's bad faith is its insistence on an indemnification agreement as a condition precedent to furnishing information and bargaining over employee discipline and terminations.<sup>52</sup> A party commits an unfair labor practice by insisting upon a permissive subject matter outside the scope of wages, hours, and other terms and conditions of employment. Respondent's asserted need for indemnification is due to a jury verdict, involving

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<sup>50</sup> See Mid-Continent Concrete, 336 NLRB at 259–260; Atlanta Hilton, 271 NLRB at 1603.

<sup>51</sup> See Petition for Injunction, paragraph 11; See also Petition for Injunction, Exhibit T, paras. 73, 79 and 80.

<sup>52</sup> NLRB v. Davison, 318 F. 2d 550 (4th Cir. 1963) *enfg.* 136 NLRB 742, 745-747 (1962).

the discharge of Ann Wayt, finding it liable for damages for defamation. This admission demonstrates that the indemnification demand is a permissive subject of bargaining.<sup>53</sup>

Additionally, the package proposal's requirement that the Union agree to void its certification of representation in the event the Supreme Court or Ninth Circuit finds neutrality accords to be unlawful is unlikely to be acceptable to any labor organization.<sup>54</sup> Thus, there is sufficient evidence and legal precedent establishing reasonable cause to believe that Respondent engaged in surface bargaining in violation of Section 8(a)(1) and (5).

**D. There is reasonable cause to believe that Respondent violated Section 8(a)(1) and (5) by instituting unilateral changes to terms and conditions of employment.**

It is well-settled that an employer may not unilaterally change its employees' working conditions when it is subject to a statutory duty to bargain.<sup>55</sup> Employee discount programs and 401(k) plans are mandatory subjects of bargaining.<sup>56</sup> An employer is obligated to provide a union with notice and a meaningful opportunity to bargain concerning changes in terms and conditions of employment that are mandatory subjects, including in the context of a newly-certified union.<sup>57</sup> A unilateral change does not violate the Act unless that change is material, substantial, and significant, and has a real impact on, or causes a significant detriment to, the employees or their working conditions.<sup>58</sup>

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<sup>53</sup> See, e.g., Arlington Asphalt, 136 NLRB 742, 746 (1962) (indemnification clause is a not a mandatory subject to bargain because it is related to security for employer rather than to a benefit or security for employees).

<sup>54</sup> The Board considers whether an employer's proposals would deprive the union of a significant representational role in bad faith bargaining cases. See, e.g., A-1 King Size Sandwiches, Inc., 265 NLRB 850, 858-859 (1982).

<sup>55</sup> Id. (citing NLRB v. Allied Products Corp., 548 F.2d 644, 652 (6th Cir.1977)).

<sup>56</sup> See, e.g., Convergent Communications, 339 NLRB 408, 412 (2003); Corning Fiberglass, 282 NLRB 609, 609 (1987); Gulf Refining and Marketing Co., 238 NLRB 129, 132 (1978).

<sup>57</sup> NLRB v. Katz, 369 U.S. 736, 742, 747 (1962); Whitesell Corp., 357 NLRB 1119, 1151 (2011). See, e.g., NLRB v. Talsol Corp., 155 F.3d 785, 794 (6th Cir. 1998). Flambeau Airmold Corp., 334 NLRB 165 (2001).

<sup>58</sup> Whitesell Corp., *supra*, at 1173; Bath Iron Works Corp., 302 NLRB 898, 901 (1991).

In November 2015, Respondent offered employees the group discount program “QHS Benefits Plus” and long-term care insurance, without providing a notice and opportunity to bargain about these benefits. Neither benefit had been previously available to employees. Respondent’s extension of these benefits constitutes material, substantial, and significant changes to its employees’ existing terms and conditions of employment. Respondent did not notify the Union of these new benefits before they were formally announced; nor did it give the Union the opportunity to bargain over these benefits. Even in circumstances involving beneficial changes, an employer must still provide notice and an opportunity to bargain.<sup>59</sup>

Respondent also changed the employees’ 401(k) plan resulting in a fourteen-day blackout period which prevented employees from accessing their funds and making loan payouts, withdrawals or distributions. As such, this change had a material, substantial and significant impact upon employees’ terms and conditions of employment. Respondent did not notify the Union, nor did it bargain over these changes prior to its announcement or implementation.

Therefore, there is sufficient evidence that Respondent violated the Act by unilaterally implementing the QHC Benefits Plus discount program and long-term care insurance, and by unilaterally transferring retirement plan assets to a new 401(k) retirement plan.<sup>60</sup> As such, there is reasonable cause to believe that Section 8(a)(1) and (5) of the Act has been violated.

## **VII. INTERIM RELIEF IS JUST AND PROPER**

### **A. General principles**

Injunctive relief is “just and proper” under Section 10(j) where it is “necessary to return the parties to the status quo pending the Board’s processes in order to protect the Board’s

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<sup>59</sup> See Plymouth Locomotive Works, 261 NLRB 595, 599 (1982).

<sup>60</sup> See Litton Fin. Printing v. NLRB, 501 U.S. 190, 198 (1991). See Bastian-Blessing v. NLRB, 474 F.2d 49 (6th Cir. 1973) (change in benefits provider); Master Slack Corp., 230 NLRB 1054 (1977) (change in carrier), *enfd.* 618 F.2d 6 (6th Cir. 1980).

remedial powers under the NLRA.”<sup>61</sup> Interim injunctive relief is particularly appropriate in bargaining cases such as this to ensure that legitimate rights “should not be lost or frittered away through the actions of persons violating the Act.”<sup>62</sup> As the Supreme Court has noted, “in the labor field, as in few others, time is crucially important in obtaining relief.”<sup>63</sup> Thus, “[i]nterim relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless.”<sup>64</sup>

**B. Interim relief is just and proper in this case.**

Section 10(j) relief is just and proper in this case to preserve the employees’ free choice of the Union as their collective-bargaining representative, to preserve the Union’s ability to bargain effectively on behalf of the employees it represents, to prevent the Respondent’s violations from irreparably eroding employee support for the Union, to prevent the employees from losing the benefits of good-faith bargaining pending the Board’s decision, and to prevent the final Board order from being rendered a nullity. Indeed, the need for interim relief is heightened because the Union was certified in 2012 and Respondent’s unfair labor practices have stymied any agreement on an initial collective-bargaining agreement. The Union is newly certified and is bargaining for a first contract. In such circumstances, the courts have found that employees are especially vulnerable to management resistance and highly susceptible to management misconduct, particularly an employer’s unfair labor practices.<sup>65</sup>

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<sup>61</sup> Kobell v. United Paperworkers Intern., 965 F.2d 1401, 1410 (6<sup>th</sup> Cir. 1992). The "status quo" is that which existed before the charged unfair labor practices took place. *See* Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 30 n.3 (6<sup>th</sup> Cir. 1988).

<sup>62</sup> Brown v. Pacific Telephone & Telegraph Co., 218 F.2d 542, 545 (9<sup>th</sup> Cir. 1955).

<sup>63</sup> NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1967); *see also* Fleischut, *supra*, at 30-31.

<sup>64</sup> Sheeran v. American Commercial Lines, Inc., 683 F.2d at 979.

<sup>65</sup> Ahearn v. Jackson Hosp. Corp., 351 F.3d at 239.

An interim order requiring the Respondent to bargain in good faith with the Union until the Board makes a final decision in the administrative case is crucial to protect the unit employees' statutory rights. The employees' support for their chosen representative will likely erode as the Union is unable either to adequately protect them or positively affect their working conditions through collective bargaining while the case is pending before the Board.<sup>66</sup>

By making the unilateral changes, an employer "minimizes the influence of bargaining" and "emphasize[s] to employees that there is no necessity for collective-bargaining."<sup>67</sup> All of these unilateral changes strike at the heart of employees' terms and conditions of work and further demonstrate the Union's inability to be the employees' representative. Now, the Union must secure its first contract from a position of disadvantage by having to bargain for the rescission of the unilateral changes.<sup>68</sup> An order requiring the Respondent to cease and desist from making unilateral changes and to rescind the unilateral changes to the benefit plans, is vital in these circumstances. From the employees' standpoint, unremedied unilateral changes can severely erode the "prestige and legitimacy" of the Union.<sup>69</sup> The erosion of Union support resulting from the Respondent's unilateral changes will predictably diminish the Union's strength at the bargaining table when the parties resume negotiations.<sup>70</sup> Indeed, unilateral changes "must of necessity obstruct bargaining, contrary to the congressional policy."<sup>71</sup>

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<sup>66</sup> See Asseo v. Pan American Grain Co., Inc., 805 F.2d 23, 26–27 (1st Cir. 1986).

<sup>67</sup> May Dept. Store Co. v. NLRB, 328 US 376, 385 (1945).

<sup>68</sup> See Silverman v. Major League Baseball Player Relations Committee, 880 F. Supp. 246, 259 (S.D.N.Y. 1995), *affd.*, 67 F.3d 1054 (2d Cir. 1995).

<sup>69</sup> Morio v. North American Soccer League, 632 F.2d 217, 218 (2d Cir. 1980).

<sup>70</sup> See NLRB v. Hardesty Co., Inc., 308 F.3d 859, 865 (8th Cir. 2002) ("unilateral action will also often send the message to the employees that their union is ineffectual, impotent, and unable to effectively represent them").

<sup>71</sup> NLRB v. Katz, 369 U.S. at 747.

Indeed, when Respondent ceased bargaining about the termination of unit employees, the Union was removed from the one critical area where it was having a positive impact on employees, and the employees noticed. Employee attendance at union meetings, employee participation in union campaigns, and the number of employees willing to act as union leaders have all collapsed, and the Union's core supporters are either leaving or expressing fear of being targeted. One member of the Union's negotiating committee has quit her job because of the atmosphere. By the time the Board issues its order in these cases, it will be too late for the employees' choice to be preserved and for the Union to regain its lost support.<sup>72</sup> Over time, employees will shun the Union due to its inability to affect their working conditions, and they will have little or no reason to support the Union.<sup>73</sup> An incumbent union needs the support of the employees it represents in order to bargain effectively. Absent an interim bargaining order, there will be no meaningful collective bargaining as the Board's bargaining order will be a nullity.<sup>74</sup>

In addition to protecting the effectiveness of a final Board Order, interim bargaining will ensure that the unit employees are not deprived of the benefits of Union representation during this interim period, a loss that a final Board order cannot remedy.<sup>75</sup> Interim relief is also necessary to prevent Respondent from continuing to engage in unfair labor practices.

It is also necessary that Respondent be ordered to furnish the Union with the requested information pertaining to the QHC spinoff and the information relative to terminations of employees. The Union needs the requested information to bargain intelligently during the

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<sup>72</sup> International Union of Elec. Radio & Mach. Workers, AFL-CIO, 426 F.2d 1243, 1249 (D.C. Cir. 1970).

<sup>73</sup> Bloedorn v. Francisco Foods, Inc., 276 F.3d 270, 299 (7th Cir. 2001).

<sup>74</sup> Moore-Duncan v. Horizon House Developmental Services, 155 F.Supp. 2d 390, 396–97 (E.D. Pa. 2001).

<sup>75</sup> *See, e.g.*, Bloedorn v. Francisco Foods, Inc., 276 F.3d at 299; Scott v. Stephen Dunn & Assocs., 241 F.3d 652, 667 (9th Cir. 2001).

interim period, both about the effects of the QHC spinoff and about the terminations of employees.<sup>76</sup> Without having the requested information about QHC and the terminations, unit employees perceive the Union to be ignorant and ineffectual, further eroding the Union's support at the hands of the Respondent's unfair labor practices.

Finally, Respondent will suffer relatively little harm if injunctive relief is granted.<sup>77</sup> An interim bargaining order does not last forever and it would not compel agreement to any specific term or condition of employment advanced by the Union in negotiations.<sup>78</sup> Rather, it only requires bargaining with the Union in good faith to an agreement or a bona fide impasse.<sup>79</sup> An interim bargaining order will merely ensure that the Respondent continues to bargain in good faith, as was similarly required under the previous injunction granted by this Court against Respondent.

Temporary injunctive relief would also serve the public interest by protecting the employees' right to engage in Section 7 activity, safeguarding the parties' collective-bargaining process, and preserving the Board's remedial power.<sup>80</sup> The grant of temporary injunctive relief

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<sup>76</sup> See Frankl v. HTH Corp., 693 F.3d 1051, 1066 (9th Cir. 2012) (finding unilateral change and "refusal to provide necessary financial information similarly show a failure to bargain in good faith, which 'has long been understood as likely causing an irreparable injury to union representation'"); Pascarell v. Gitano Group, Inc., 730 F.Supp. 616, 625 (D.N.J. 1990); Mattina v. Chinatown Carting Corp., 290 F.Supp. 2d 386, 394–95 (S.D.N.Y. 2003).

<sup>77</sup> Rivera-Vega v. ConAgra, Inc., 70 F.3d 153, 164 (1st Cir. 1995); Paulsen v. All American School Bus Corp., 967 F.Supp. 2d 630, 646 (E.D.N.Y. 2013).

<sup>78</sup> See Seeler v. Trading Port, Inc., 517 F.2d 33, 40 (2d Cir. 1975).

<sup>79</sup> See Small v. Avanti Health Systems, Inc., 661 F.3d 1180, 1197 (9th Cir. 2011); Gottfried v. Mayo Plastics, Inc., 472 F.Supp. 1161, 1167 (E.D.Mich. 1979), *affd.* 615 F.2d 1360 (6th Cir. 1980).

<sup>80</sup> Bloedorn v. Francisco Foods, Inc., 276 F.3d at 300 ("[T]he interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process.' That interest is placed in jeopardy when the protracted nature of Board proceedings threatens to circumscribe the Board's ability to fully remediate unfair labor practices") (citations omitted).

in this case serves the public interest by ensuring that Respondent's unfair labor practices do not succeed or continue.<sup>81</sup>

**C. Evidence of chill and employee disaffection as a result of Respondent's unlawful conduct.**

To date, employee frustration with the lack of progress in bargaining is mounting. Following the unfair labor practices in the prior cases, the Union's organizing effort was led by a core group of twelve nurses. However, several of those nurses, have recently left Respondent's employ, citing frustration over the parties' inability to reach a contract. The core group of union leaders has been reduced to about four. Many employees have lost hope that the Union can reach a contract on their behalf. Attendance at union meetings is very low. At the February 2016 meeting, only three employees attended. Since October 2015, there has also been a sharp drop in the number of nurses who are completing Assignment Despite Objection forms, which the Union uses to protest unsafe working conditions. Finally, due to an increased employee turnover, there are several departments that lack any strong union supporters.

**D. Requested relief**

The Petitioner prays that Respondent be ordered to: post and read the Court's Order;<sup>82</sup> bargain with the Union on a schedule until they reach a complete collective-bargaining agreement or a good faith impasse; furnish the requested information; and rescind, upon request of the Union, the unilateral changes related to the employee discount program referred to as QHC Benefits plus, long term care insurance and transfer of retirement plan assets to the new

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<sup>81</sup> Frankl v. HTH Corp., 650 F.3d 1334, 1365-1366 (9th Cir. 2011).

<sup>82</sup> *See* Calatrello v. General Die Casters, 2011 WL 446685 (N.D. Ohio Jan. 11, 2011); Lund v. Case Farms Processing, Inc., 794 F.Supp.2d 809, 824-25 (N.D. Ohio 2011); Norelli v. HTH Corp., 699 F.Supp.2d 1176, 1206-07 (D.Haw. 2010), *affd.* 650 F.3d 1334 (9th Cir. 2011); Garcia v. Sacramento Coca-Cola Bottling Co., 733 F.Supp. 2d 1201, 1218 (E.D. Cal. 2010); Overstreet v. One Call Locators Ltd., 46 F.Supp. 3d 918, 932 (D. Ariz. 2014); Rubin v. Vista del Sol Health Services, Inc., 2015 WL 306292, at \*2 (C.D. Cal. 2015); Fernbach v. Sprain Brook Manor Rehab, LLC, 2015 WL 1029655, at \*15 (S.D.N.Y. 2015).

retirement plan. An order requiring Respondent to read the Court's Order, or at its option, to have a Board Agent read the Order in the presence of an agent of Respondent, assures employees that the Respondent will honor their rights during the period while the administrative case is litigated and that the Board has procured the assistance of the District Court judge to make sure Respondent does so. Respondent's assurances, backed by the District Court's Order, will help to ameliorate the natural erosion of employee support for the Union that has begun because of Respondent's unfair labor practices. The scheduled bargaining remedy, together with periodic reports, will provide the Board and the Court with an objective measure upon which to base Respondent's compliance with the Court's interim order. It further maximizes the possibility that if Respondent complies with the Court's requirement and bargains in good faith, the parties will reach an agreement or a good faith impasse in negotiations. Finally, the Board petitions that the Order include a broad cease and desist order to prevent further unlawful conduct. Taken together these measures will ensure that the Board's ultimate decision in this case is not a nullity.

### **VIII. CONCLUSION**

It is the Board's duty to provide resolution of the parties' private dispute by facilitating the fair and unimpeded operation of the collective-bargaining process. That process requires both parties to bargain in good faith and be restrained from taking actions that undermine the bargaining process. If the Union and the employees who selected the Union must wait until the administrative process is complete, an effective remedy will likely be impossible. Based on the foregoing, the Petitioner respectfully requests that this Court grant the relief sought.

Dated at Cleveland, Ohio on the 18<sup>th</sup> day of May, 2016.

Respectfully submitted,

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