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February 22, 2019

Via Electronic Filing

Associate Chief Judge
NLRB Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

RE: Motion Requesting Continuance of Hearing Date, Case No. 32-CA-220268

Dear Sir or Madam:

Pursuant to 29 Code of Federal Regulations sections 102.16(b) and 102.24, respondents The Southeast Permanente Medical Group, Inc., Kaiser Foundation Health Plan, Inc., The Permanente Medical Group, Inc. (“TPMG”), Mid-Atlantic Permanente Medical Group, P.C., The Permanente Federation LLC, Northwest Permanente, P.C.,¹ and Colorado Permanente Medical Group, P.C. (collectively, “Respondents”)² hereby move to reschedule the hearing in the above-referenced case, currently set for March 19, 2019.

The grounds for Respondents’ Motion are: (1) the unavailability of one of the anticipated principal witnesses, Executive Vice President and Group President Greg Adams, on the currently scheduled hearing date, and (2) the unavailability of counsel for respondents, Michael Lindsay and Alicia Anderson, owing to a conflict with another NLRB case involving respondent TPMG,³ that the Region knowingly set for hearing on March 18, the day *before* this hearing is scheduled to start. The Charging Party and the Region object to Respondents’ request for postponement.

A prehearing conference has not yet occurred in this matter, but is currently set for Tuesday, February 26, 2019.

¹ Erroneously named as “Northwest Permanente Medical Group.”

² The Complaint also names and identifies as respondents Kaiser Foundation Hospitals and Health Plan, Inc., Kaiser Permanente, and Kaiser Permanente Medical Care Program. As Respondents aver and allege in their Answer, no such legal entities exist under these names. “Kaiser Permanente” is solely a trade name and does not exist as a recognized legal entity.

³ The case that is set for hearing on March 18, 2019, is *The Permanente Medical Group, Inc., Northern California Region (National Union of Healthcare Workers)*, Case No. 32-CA-226909.

Background

The Complaint in this matter was issued between the Christmas and New Year holidays, on December 28, 2018. Nevertheless, Respondents timely filed an Answer on January 11, 2019. In connection with discussions regarding the issuance of the Complaint, Mr. Lindsay raised the possibility of a continuance of the hearing date with Christy Kwon, and was told that the Region might be willing to consider a short extension.

In speaking with anticipated witnesses about preparation for the hearing, Respondents learned that Mr. Adams – a high ranking Kaiser Foundation Health Plan Official who was specifically named in the Complaint and would presumably be a witness that would be requested by Counsel for the General Counsel – had a scheduling conflict during the week of the hearing, on account of a previously scheduled Kaiser Permanente board meeting and travel.⁴

Because requests for a continuance need to be accompanied by alternative dates, counsel for Respondents requested alternative dates from Mr. Adams. Although counsel had not yet received alternative dates, Respondents did not want to delay requesting the continuance and therefore reached out to the parties on February 11, 2019, to advise them that a continuance would be needed. Specifically, counsel for Respondents emailed Ms. Kwon and counsel for the Charging Party, Bruce Harland, on February 11, 2019, advising them of the anticipated conflicts and initiating discussion regarding possible alternate dates for the weeks following the hearing date (i.e. after March 25).⁵ Counsel for Respondents raised, as grounds for the request for continuance, Mr. Adams' unavailability on account of meetings and travel the week of the hearing, and their conflict in serving as counsel for TPMG in another matter pending before the board, which was set to go to hearing on the day before this hearing, and which counsel anticipated would last more than one day.

In response to Respondents' inquiry, Ms. Kwon stated that she believed that it would be difficult to convince the Regional Director to agree to reschedule, but nevertheless floated a potential date of March 26. She also stated that the Region *deliberately* scheduled the two "Kaiser cases" back-to-back.⁶ Ms. Kwon additionally floated the week of April 1st as a possibility, and asked the parties to check on their availability that week as well, so that she

⁴ Mr. Adams is the Executive Vice President and Group President of respondent Kaiser Foundation Health Plan, Inc. ("Health Plan"). He has direct responsibility for all eight Kaiser Permanente Regions, serving more than 11.3 million members and operating 38 hospitals and 651 medical office facilities. He is a member of the Board of Directors for Kaiser Foundation Health Plan of Washington, and is scheduled to attend a board meeting in Washington.

⁵ A true and correct copy of email correspondence between the parties from February 11, 2019, through February 22, 2019, is attached hereto as Exhibit A.

⁶ The complaints in both cases were issued on the same day, although counsel for Respondents had not appeared in the second matter, Case No. 32-CA-226909, until January 10, 2019. At the time, it was unclear to counsel whether the hearing date in that matter was fixed, as counsel understood that there had been some discussions regarding corrections to the complaint. It now appears that the other matter will proceed as scheduled on March 18.

could “attempt to secure a new date.”⁷ Mr. Harland responded by indicating that he would check on the availability of his witnesses, but stated no further objections at that time. Respondents never heard back from Mr. Harland regarding his witnesses’ availability on the dates posed by Ms. Kwon.

After this initial email exchange, Respondents were notified that Amy Berbower had been appointed Counsel for the General Counsel for this matter. In a telephone conversation between Ms. Berbower and Mr. Lindsay on February 12, Mr. Lindsay raised the scheduling issue with her and the dates that Ms. Kwon had floated as potential alternate dates for the hearing. Ms. Berbower informed Mr. Lindsay that she was scheduled for a vacation on the week of April 1.

Taking into account Ms. Berbower’s representation as to her unavailability on account of her preplanned vacation, Respondents secured Mr. Adams’ next available date to testify in April, which was April 22.

On February 21, Respondents sent a follow-up email to the parties, and included Ms. Berbower. Accounting for the minimum anticipated length of the trial to be 4-5 days, and in light of Ms. Berbower’s unavailability on the week of April 1 and Mr. Adams’ availability on April 22, Respondent suggested that the hearing be rescheduled to dates **within the window of April 16 and 23**. Respondents also specifically corrected Ms. Kwon as to the Region’s estimate that the March 18 hearing would take one day, as counsel for Respondents believes that the anticipated number of witnesses and documents that will need to be presented in the March 18 case was not consistent with a one-day estimate. Moreover, counsel for Respondents noted that, “even in the unlikely event that the presentation of the matter were able to wrap in one day, our ability to prepare witnesses and documents for production in this case would certainly be impacted by our being tied up with a hearing in another matter the day before this hearing.” Counsel asked for the parties’ position on the request for continuance, as required by the Board.

Mr. Harland and Ms. Berbower have responded by stating, respectively, that the Charging Party and the Region object to Respondents’ request for continuance.⁸ **Neither party has stated any specific objection to the April 16-23 window or indicated a scheduling conflict on these dates.** Nor has either party identified any prejudice to agreeing to this short continuance. Respondents therefore propose these as alternate dates for the hearing in this matter.

Grounds for Requested Continuance

A request (or motion) to reschedule a hearing should be filed with the Regional Director when appropriate under 29 CFR § 102.16(a). In all other circumstances, such motions should be filed with the Division of Judges as set forth in 29 CFR § 102.24. *See* 29 CFR § 102.16(b); *see also*

⁷ In a February 22 email, Ms. Kwon confirmed that neither the March 26 date, nor the dates the first week of April are available, and that the Division of Judges is full until mid-April.

⁸ Mr. Harland’s response, dated February 21, and Ms. Berbower’s response, dated February 22, are included in the email chain attached as Exhibit A.

Form NLRB-4338; NLRB Case Handling Manual, Part 1 § 10294. On account of the objection of the parties, this motion is properly directed to the Division of Judges.

Good cause exists for a continuance of the hearing in this matter. First, one of the anticipated witnesses, Greg Adams, is not available to testify on the currently scheduled hearing date. He was named in the Complaint and is anticipated to be a principal witness for Respondents. As noted previously, Mr. Adams is the Executive Vice President and Group President of Health Plan. He has direct responsibility for all eight Kaiser Permanente Regions, serving more than 11.3 million members and operating 38 hospitals and 651 medical office facilities. He is a member of the Board of Directors for Kaiser Foundation Health Plan of Washington. Mr. Adams' conflict on the March 19 hearing date on account of a pre-scheduled board meetings in Washington and accompanying travel.

Second, counsel for respondents have a conflict on account of another NLRB case involving respondent TPMG, Case No. 32-CA-226909, which the Region has admitted it *deliberately* set on the day before this hearing was scheduled to proceed to trial. In preparing the two cases for hearing, it has recently become apparent to counsel for Respondents that the presentation of witnesses and documents in the March 18 proceeding will likely require more than one day of hearing. Counsel anticipates that this will therefore present an actual conflict with the start date in this case.

Despite the conflicts presented by Mr. Adams' unavailability, as well as the conflict of counsel created when the Region set another matter for hearing involving one of the Respondents in this matter on the day before this case was scheduled to proceed to hearing, the Region and the Charging Party have stated that they object to Respondents' request for continuance.

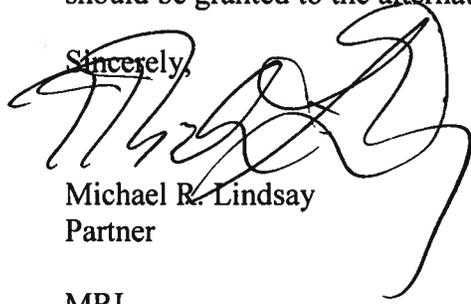
Respondents request for extension of the hearing date, and this Motion requesting same is timely. *See* 29 CFR § 101.16, 101.24. Respondents sought to promptly advise the parties as to the anticipated conflicts on February 11, once it became apparent to counsel for Respondents that there was no way to avoid the dual conflicts posed by witness unavailability and counsel's unavailability.⁹ This Motion is being filed promptly upon ascertaining the positions of the parties in response to the request for continuance, as required by the Board. The prehearing conference call has not yet occurred in this matter, subpoenas have not yet been issued, and Ms. Berbower was only recently appointed as Counsel for the General Counsel in this matter. Continuance of this matter will not prejudice the parties in any way; on the other hand, being prevented the benefit of competent counsel of their choosing and the presentation of all witnesses will operate to prejudice Respondents if this case is not continued.

⁹ In its objection, the Region noted that "the parties were advised of the March 19 trial date before complaint issued in this case and no party raised any conflict with the date at that time." However, Mr. Lindsay *did* specifically raise the issue of a continuance with Ms. Kwon in connection with discussions regarding the issuance of the Complaint. Moreover, the conflict of counsel could not have occurred *before* the complaint was issued in this case, as the complaint in Case No. 32-CA-226909 was issued on the same day as the complaint in this case, and counsel for Respondents was not aware that the two cases were being set back to back at the time those conversations occurred.

4828-6276-3913.2

For the foregoing reasons, good cause exists for a continuance of this hearing and a continuance should be granted to the alternative dates of April 16-23.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "MRL", is written over the typed name and extends upwards into the "Sincerely," line.

Michael R. Lindsay
Partner

MRL

Exhibit “A”

Anderson, Alicia

From: Kwon, Christy <Christy.Kwon@nlrb.gov>
Sent: Friday, February 22, 2019 2:52 PM
To: Lindsay, Michael R.; Berbower, Amy; Bruce Harland; Anderson, Alicia
Cc: Ventola, Catherine L.
Subject: RE: Kaiser, 32-CA-220268

At the time we issued the Complaint the Division of Judge's docket for March was not completely full and so a one week extension would have been easily granted assuming Charging Party did not object. However, the trial calendar is now completely full in March and also for most of April. I did ask if the Division of Judges if it had any open hearing dates in March (as indicated below) and it does not. If the request had come in shortly after the Complaint issued or even in January, it is likely that late March dates were available and we could have given a one week postponement. I hope this explains the current situation.

From: Lindsay, Michael R. <mlindsay@nixonpeabody.com>
Sent: Friday, February 22, 2019 1:51 PM
To: Berbower, Amy <Amy.Berbower@nlrb.gov>; Bruce Harland <bharland@unioncounsel.net>; Anderson, Alicia <acanderson@nixonpeabody.com>
Cc: Ventola, Catherine L. <Catherine.Ventola@nlrb.gov>; Kwon, Christy <Christy.Kwon@nlrb.gov>
Subject: RE: Kaiser, 32-CA-220268

I note that at the time of those discussion, I specifically raised the issue of a continuance and was told that the Region would be willing to consider a one week extension. I also note that this was prior to the time of the issuance of the complaint in the other matter, which was then set for hearing the day before the hearing in this matter.



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From: Berbower, Amy <Amy.Berbower@nlrb.gov>
Sent: Friday, February 22, 2019 10:56 AM
To: Bruce Harland <bharland@unioncounsel.net>; Anderson, Alicia <acanderson@nixonpeabody.com>
Cc: Lindsay, Michael R. <mlindsay@nixonpeabody.com>; Ventola, Catherine L. <Catherine.Ventola@nlrb.gov>; Kwon, Christy <Christy.Kwon@nlrb.gov>
Subject: RE: Kaiser, 32-CA-220268

The Region also objects to a postponement. The Region notes that the parties were advised of the March 19 trial date before complaint issued in this case and no party raised any conflict with the date at that time.

From: Bruce Harland [<mailto:bharland@unioncounsel.net>]
Sent: Thursday, February 21, 2019 5:47 PM
To: 'Anderson, Alicia' <acanderson@nixonpeabody.com>; Berbower, Amy <Amy.Berbower@nlrb.gov>
Cc: Lindsay, Michael R. <mlindsay@nixonpeabody.com>; Ventola, Catherine L. <Catherine.Ventola@nlrb.gov>; Kwon, Christy <Christy.Kwon@nlrb.gov>
Subject: RE: Kaiser, 32-CA-220268

The Coalition objects to a postponement until mid-April. Our witnesses are definitely available on March 19, and cleared their calendars for that date. They did so when they received the notice of the hearing in late December 2018.

The parties were given notice of this hearing almost two months ago. While I can appreciate that Mr. Adams is a busy man, the trial should not be arranged around his work schedule.

With respect to Mr. Lindsey's and Ms. Anderson's "conflict," there does not appear to be any real conflict. Moreover, I can't imagine that either Mr. Lindsay or Ms. Anderson are waiting until the evening of March 18 to prepare for the trial in this matter, so the idea that they would be unable "to prepare witnesses and documents for production in this case" seems like a stretch. Both counsel are more than capable of attending more than one hearing in a week, even if they are back to back.

For these reasons, I do not see how there is good cause for a postponement.

Bruce

From: Anderson, Alicia [<mailto:acanderson@nixonpeabody.com>]
Sent: Thursday, February 21, 2019 1:37 PM
To: Amy.Berbower@nlrb.gov; Bruce Harland
Cc: Lindsay, Michael R.; Ventola, Catherine L.; Kwon, Christy
Subject: RE: Kaiser, 32-CA-220268

All,

I am following up on the email chain below, regarding Respondents' request for an extension of the hearing date based on the unavailability of counsel and anticipated witness Greg Adams on the currently scheduled hearing date of March 19. I am looping in Amy Berbower, as it is our understanding that she will be counsel for the general counsel in this matter.

With respect to the unavailability of myself and Mr. Lindsay owing to a conflict with another case whose hearing date is currently set for March 18: with all due respect to Ms. Kwon's representation to the contrary, we believe that the March 18 hearing poses a very real conflict for us in connection with our ability to prepare this case for hearing on March 19. In the March 18 matter, Mr. Lindsay and I anticipate that the number of witnesses and documents will take more than one day to cover. But, even in the unlikely event that the presentation of the matter were able to wrap in one day, our ability to prepare witnesses and documents for production in this case would certainly be impacted by our being tied up with a hearing in another matter the day before this hearing.

Moreover, as we previously represented, Mr. Adams was named in the complaint and will undoubtedly need be a witness; he is not available the week of the currently set hearing date.

It is my understanding that Ms. Berbower has a prescheduled vacation the first week of April. Taking that into account, and based on Mr. Adams' next available date to testify (April 22), we would like to request that the hearing be rescheduled to dates within the window of **April 16 and 23**.

Ms. Berbower and Mr. Harland – please advise by COB tomorrow as to whether Counsel for the General Counsel and the Coalition have any objections to Respondents' Request for Extension. Please also advise as to any conflicts on your side with our proposed dates.

Regards,
Alicia Anderson



Alicia C. Anderson

Counsel

acanderson@nixonpeabody.com | T 213-629-6073 | F 866-445-4550

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From: Kwon, Christy <Christy.Kwon@nrlb.gov>

Sent: Tuesday, February 12, 2019 10:50 AM

To: Bruce Harland <bharland@unioncounsel.net>; Anderson, Alicia <acanderson@nixonpeabody.com>

Cc: Lindsay, Michael R. <mlindsay@nixonpeabody.com>; Ventola, Catherine L. <Catherine.Ventola@nrlb.gov>

Subject: RE: Kaiser, 32-CA-220268

[EXTERNAL E-MAIL]

Caroline and Bruce,

Please also check on the week of April 1st. It's not a guarantee I can get you that date but it's a possibility. Please get back to me as soon as possible so that I can attempt to secure a new date.

Christy

From: Bruce Harland [<mailto:bharland@unioncounsel.net>]

Sent: Tuesday, February 12, 2019 10:19 AM

To: Kwon, Christy <Christy.Kwon@nrlb.gov>; Anderson, Alicia <acanderson@nixonpeabody.com>

Cc: Lindsay, Michael R. <mlindsay@nixonpeabody.com>; Ventola, Catherine L. <Catherine.Ventola@nrlb.gov>

Subject: RE: Kaiser, 32-CA-220268

I need to check the availability of witnesses, and will get back to you today.

Bruce

From: Kwon, Christy [<mailto:Christy.Kwon@nrlb.gov>]

Sent: Monday, February 11, 2019 8:36 PM

To: Anderson, Alicia

Cc: Bruce Harland; Lindsay, Michael R.; Ventola, Catherine L.

Subject: Re: Kaiser, 32-CA-220268

Alicia,

Thank you for the advanced notice. I think it's going to be very difficult to convince the Regional Director to reschedule the hearing in this case because the complaint was issued quite some time ago. We scheduled the two Kaiser cases back to back because the first one is only an info allegation that should take not more than a day to litigate. The only

potential date I might be able to secure is March 26, a one week postponement, and that is contingent on getting approval from the Director and the Division or Judges' calendar having an opening. Also, it would help if it's an all-party agreement so we'll need to hear from Bruce as well.

I've copied Catherine Ventola, who is acting RA, while I am out.

Best regards,
Christy Kwon

Sent from my iPhone

On Feb 11, 2019, at 5:20 PM, Anderson, Alicia <acanderson@nixonpeabody.com> wrote:

Hi Christy,

Reaching out to you regarding the above-referenced matter. The complaint indicated a March 19 hearing date. However, that date poses several problems for respondents.

First, Mike Lindsay and I will be handling another board hearing on behalf of Kaiser in Oakland that is scheduled to begin March 18, the day before the hearing in this matter. We anticipate that the hearing for the prior matter is going to take more than one day.

Second, as we have begun investigating witness availability, one of the individuals named in the complaint (Greg Adams) has several conflicts with board meetings and pre-scheduled travel during the week of March 19. We have requested Mr. Adams' availability for the remainder of March through mid-April, and are awaiting his response.

We are therefore going to need to request that the hearing date be rescheduled. I understand that we will need to propose alternative dates in connection with a formal request for postponement, but we wanted to reach out as soon as possible to give you and Mr. Harland (who I am copying on this email) a heads up that this request would be forthcoming.

It would also be helpful to ascertain whether you or Mr. Harland have scheduling conflicts during the period that we are requesting Mr. Adams' availability (i.e. after March 25), as this will assist us in requesting an alternative date that works for all. Please let us know.

Best regards,
Alicia Anderson



Alicia C. Anderson

Counsel

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