

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

HEALTHBRIDGE MANAGEMENT, LLC; CARE REALTY, LLC; CARE ONE, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC d/b/a DANBURY HCC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC d/b/a LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC d/b/a NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC d/b/a WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC d/b/a WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC d/b/a WETHERSFIELD HEALTH CARE CENTER

and

Cases 34-CA-070823 et al.

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU, AFL-CIO

**ORDER TO CLARIFY PRODUCTION OF DOCUMENTS
PURSUANT TO SUBPEONA**

On May 14, 2020, the counsel for the General Counsel (CGC) John A. McGrath request that I order the Respondents to produce all documents responsive to the subpoenas in my Order of March 6, 2014.¹ Subsequently, at a proceeding held on March 24, 2014, I verbally amended the date for the production of documents from March 24, 2014 to such time as when the joint/single employer phase would begin on these complaints. The CGC now seeks a June 15, 2020 deadline for the production of such documents.

The Respondents provided a response on May 20. The Respondent believed they were operating under the premise that my March 6, 2014 Order for the production of subpoenaed documents responsive to the joint/single employer status of the Respondents would not be required until the District and/or Bankruptcy Courts clarify or resolve the issue regarding the Released Parties' third-party releases, which has yet to occur. The Respondents object to CGC's request as premature and allegedly contrary to my March 6, 2014 Order. The Respondents also

¹ My March 6, 2014 Order was affirmed by Board Order dated October 31, 2012. Upon the General Counsel's request to vacate the Board's October 31, 2012 Order under *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board issued its March 2, 2020 *de novo* Order reaffirming that I did not abuse my discretion in denying the petitions to revoke the subpoenas and incorporated by reference the October 31 Order.

argued that the issue of joint/single employer status of the Respondents may never be litigated at a NLRB hearing depending upon the District Court's ruling on the Respondents' motion for injunctive relief and the Bankruptcy Court (or District Court) determination of the validity of the third-party release in regards to Care Realty (or with any Released Party).

On May 22, the CGC provided a reply to the Respondents' opposition to his May 14 request. Essentially, the CGC argues that I am not precluded from amending my March 6 Order or to issue a new order establishing a time frame for the production of documents. The CGC also maintains that a pending motion for injunctive relief in District Court does not bar the parties from litigating the joint/single employer status in the complaint.

On May 26, the Respondents provided a sur-response. The Respondents asked for the following

- 1- Confirmation of my March 6, 2014 Order to postpone the joint/single employer phase of the case and to postpone setting a return date on the subpoenas until such time the Released Parties' third-party releases are clarified or resolved.
- 2- Confirmation that resumption of the joint/single employer phase of the hearing will not proceed until the Released Parties' third-party releases have been resolved or clarified.
- 3- An order setting the date to begin the joint/single employer phase of the hearing and only if and after the effect of the Released Parties' third-party releases is resolved or clarified. The Respondents request in the order, a return date for the joint/single employer subpoenas and dates for witnesses to testify and the parties to provide evidence.

I have considered all arguments in the CGC's request, the response to the request, the sur-reply to the response and the Respondents' sur-response. I merely highlighted above the main arguments of the respective parties. As previously stated in my Hearing Resumption Order of January 29, 2020,

...it was and has been my intention to complete the liability stage of this hearing before having the parties to address the issue of joint/single employer status. If not clear before, I am now clarifying to the parties that I do not intend to hear or consider any allegations on the single/joint employer issue until all testimony, including Mr. Kaplan and any other witnesses are completed regarding the substance of the negotiations between the Union and the Respondents on the unfair labor practice allegations.

It is also worth restating from my January 29 Order that "I have not waiver from this position and as such, *whether or not there is a third-party release arranged for Care Realty under the Bankruptcy plan does not and should not impact on the resumption of the hearing...*"

While the Respondents seek to start the joint/single employer status phase after the District Court acts upon the motion for an injunction and clarifies or resolves the Released

Parties' third-party releases, I have not previously accepted this argument. There has been enough delays occasioned by both parties and especially, the more than a 6-year delay on the special appeal to the Board, to warrant going forward with the hearing. Hence, while postponing the hearing to later this fall might be sufficient time for the District Court to rule on the Respondents' motion, I am certainly not required to delay my hearing unless enjoined by the District Court. As I indicated in my January 29 Order, once the unfair labor practice allegations are fully litigated by the parties, we shall begin the joint/single employer status phase.

The CGC request that I order production of the subpoenaed documents by June 15, 2020. This was, of course, before the CGC also moved to delay the start of the in-person hearing until October/November 2020 due to the COVID-19 pandemic and the opposition from the parties to the resumption of the hearing by video. It is not a foregone conclusion that we can proceed with an in-person hearing in the fall and the parties should accept that video hearings will be the default rather than the exception. The delay in resuming the in-person hearing until the fall makes the urgency to have the subpoenaed documents returned by June 15 as unnecessary.

Therefore, I have decided the following:

- 1- As noted above, unless enjoined by District Court or Bankruptcy Court, I am not bound to delay the joint/single employer status phase of this hearing. Consistent with my previous rulings on this issue, the joint/single employer status phase will begin (based upon judicial efficiency and availability of the parties and witnesses) when the parties have fully litigated the unfair labor practice allegations.
- 2- It may well be that the effects of the third-party releases will be clarified or resolved when we convene in October, however, I need not wait for that determination by the District or Bankruptcy Courts. The joint/single employer status allegation is part of the complaint and to be litigated independent of the validity or effects of the third-party releases.
- 3- As noted in the hearing transcript (Tr 5412, 5413), it is clear that the CGC had requested that the joint/single employer status phase be postponed until the effect of the third-party releases is clarified or resolved. The CGC tactfully acknowledged this understanding by the parties when he argued in his May 22 reply that I am not precluded from amending my prior order or in issuing a new order. It is not necessary to amend my verbal acknowledgement of Mr. McGrath's restatement of the parties' understanding from the March 24, 2014 proceeding. I had ordered for the production of documents responsive to ten subpoenas. My verbal order at the March 24, 2014 proceeding stated "...I would amend the order (of March 6) on the subpoena to reflect the dates, when and if the resumption of the single employer status is—whatever that day is going to be." (TR. 5413). I did not preface in my verbal acknowledgement that the joint/single employer status is hinged on resolving the issues with the third-party releases.
- 4- Inasmuch as there has been numerous postponements and delays in this proceeding, I do not find any urgency to have the Respondents provide the subpoenaed documents at the moment, and certainly not by June 16, 2020. Our next scheduled resumption of the

hearing is October 21, 2020 as per the request of the General Counsel and in consent with the Respondents and charging party. It is anticipated that the parties will be completed with litigating the unfair labor practice allegations by the second week in November. Consequently, I will issue an order for the start of the joint/single employer status phase and for the production of subpoenaed documents after the completion of the unfair labor practice allegations. I do not anticipate starting the joint/single employer phase until after January 1, 2021. This should provide sufficient time for the Respondents to produce the subpoenaed documents and for the GC to review prior to the start of the joint/single employer phase of the hearing. My order shall set forth the return date for the subpoenaed documents and will inquire as to the availability of the parties and witnesses to begin the joint/single employer status phase in January 2021.

In summary: 1) The joint/single employer status phase will resume after completion of the unfair labor practice allegations; 2) I am not obligated to wait for a clarification or resolution by the District or Bankruptcy Courts on the effects of the Released Parties' third-party releases; 3) I will issue an order after the completion of the unfair labor practice allegations for an anticipated start date of January 2021 for the joint/single employer status litigation. I will inquire as to the parties' availability and set forth a time frame for the orderly production of subpoenaed documents; 4) I am amenable to either a zoom or telephonic conference call in September if necessary.

I would encourage the parties to continue working on a stipulation on the subpoenaed documents.

/s/ Kenneth W. Chu

Kenneth W. Chu
Administrative Law Judge

Date: June 12, 2020
New York, New York