

bargaining agreement was in effect from March 1, 2012, to June 30, 2016. *Id.* ¶ 3. On April 28, 2016, the Union had requested that Alaris Hamilton furnish it with the following information:

- (a) For each employee in a bargaining unit position from January 1, 2014, through date of production:
 - (i) Lists of all employees with their corresponding date of hire, job title, current hourly rate of pay, regular hours of work, and overtime hours quarterly.
 - (ii) Whether employee is no-frills or per diem.
 - (iii) Whether the employee has opted out of health insurance coverage, pursuant to the contract, upon proof of coverage.
- (b) Payroll registers for all individuals working in classifications covered by the collective-bargaining agreement from July 1, 2015, through the date of production.
- (c) Gross bargaining unit payroll for 2014, 2015, and through the date of production.
- (d) Gross bargaining unit payroll for 2014, 2015, and through the date of production excluding overtime.
- (e) Copies of work schedules for each department and shift from February 2016 through the date of production.

Notice of Mot., Ex. A., D.E. 1-1 at 2.¹

Alaris Hamilton's failure to respond resulted in a charge being filed with the Board, which in turn led to a settlement agreement requiring Alaris Hamilton to post at its facility a Board Notice to Employees and to furnish the requested information to the Union. *See id.*, Ex. A, D.E. 1-1 at

1. The settlement agreement also contained the following provision:

PERFORMANCE — . . . The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the Charged Party, the Regional Director will re-issue the Complaint that previously issued on October 26, 2016. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of

¹ The Court cites to the automatically generated ECF page number on the top of each page for ease of reference.

the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order *ex parte*, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

Id. Alaris Hamilton did not comply with the settlement agreement. Accordingly, the Regional Director reissued the complaint, and filed a motion for default judgment with the Board shortly thereafter. *See id.*

By way of a Decision and Order issued on May 14, 2018, the Board accepted the allegations in the reissued complaint as true, and granted the motion for default judgment. *Id.*, Ex. A., D.E. 1-1 at 2. The Board found that Alaris Hamilton violated Section 8(a)(5) and (1) of the NLRA by “fail[ing] and refus[ing] to furnish the Union with the information requested by it.” *Id.*, Ex. A., D.E. 1-1 at 3. The Board ordered that Alaris Hamilton to:

1. Furnish the Union in a timely manner the information requested by the Union on April 28, 2016, that is not already provided, specifically the information set forth above in paragraph 1 of [its] Decision.
2. Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Id. On May 8, 2019 the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board’s Decision and Order. *See id.*, Ex. B, D.E. 1-2.

Following Alaris Hamilton’s failure to respond to a letter requesting evidence of Alaris Hamilton’s compliance with the Third Circuit’s judgment, the Board determined that further investigation was warranted and issued the two subpoenas that are the subject of this motion. *See* Notice of Mot. ¶¶ 5-7. First, Subpoena *Duces Tecum* A-1-180SE2N requests copies of all non-privileged “correspondence among Alaris agents regarding compliance with the Third Circuit’s judgment.” Notice of Mot., Ex. D, D.E. 1-4 at 5. The Board also issued Subpoena *Ad Testificandum* B-1-180SDXD, which sought testimony on the following topics:

1. Alaris Hamilton’s receipt of the judgment of the United States Court of Appeals for the Third Circuit in *NLRB v. Alaris Health at Hamilton Park*, Case No. 18-3009;
2. Each of the specific steps taken to comply with that judgment, and the dates and details of what was done;
3. The nature of the organization of Alaris Hamilton, including its management structure;
4. The nature of particular individuals’ responsibilities in regard to compliance with the Third Circuit’s judgment, i.e. which individual was responsible for completing which task;
5. The manner in which those tasks were completed, including obstacles to completion, if any; and
6. Correspondence among Alaris Hamilton’s agents regarding compliance with the Third Circuit’s judgment.

Id., Ex. E, D.E. 1-5 at 3. The document subpoena requested production on or before February 21, 2020; the deposition was scheduled for February 28, 2020. *See* Notice of Mot. ¶ 8.

Alaris Hamilton was served with the subpoenas by certified mail on February 3, 2020. *See id.* Alaris Hamilton did not seek to revoke the subpoena with five days of its receipt of the subpoenas, as contemplated by 29 U.S.C. § 161(1). *See id.* ¶ 9. Over the next few weeks, the parties conferred via telephone regarding compliance with the subpoenas. *See id.* ¶ 10. On March 5, 2020, after having received no further contact from Alaris Hamilton, the Board emailed defense counsel to state its intention of filing the within application unless Alaris Hamilton came into compliance on or before March 12, 2020. *Id.* ¶ 11. Alaris Hamilton did not respond. *Id.*

As of the date of the motion, Alaris Hamilton had not produced any documents or signaled any intention to provide a witness for deposition. *Id.* ¶ 12. Accordingly, the Board submits that Alaris Hamilton’s “failure and refusal to produce any of the subpoenaed documents or agree to appear for a deposition has impeded and continues to impede the Board in its investigation of the matters before it and has prevented the Board from carrying out its duties and functions under the Act.” *Id.* ¶ 14. The Board now moves for an order: (1) “requiring Alaris Hamilton to, within fourteen calendar days, provide to the Board the documents requested in Subpoena Duces Tecum A-1-180SE2N”; (2) “requiring Alaris Hamilton to, on a date to be determined by the Board, appear and be deposed pursuant to Subpoena Ad Testificandum B-1-180SDXD”; (3) [a]ward[ing] the Board its costs and attorneys['] fees incurred in preparing the instant application”; and (4) “[p]roviding the Board such other and further relief as may be necessary and appropriate.” *Id.*, Wherefore Clause.

III. ANALYSIS²

1. Enforcement of the Subpoenas

The Court has subject matter jurisdiction to consider the Board's application pursuant to 29 U.S.C. § 161(2) because Alaris Hamilton is located within this judicial district. "[J]udicial review of administrative subpoenas is strictly limited." *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ECSI*, 747 F. App'x 44, 47 (3d Cir. 2018) (quoting *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003)). The Court should enforce the subpoena "if the agency can show 'that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by the statute have been followed.'" *Corrigan*, 347 F.3d at 64 (quoting *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995); accord *Frazier*, 966 F.3d at 815).

The Undersigned finds that the present investigation is being conducted for a legitimate purpose. The NLRA grants the Board "access to, for the purpose of examination, . . . any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1). Here, the Board seeks to ascertain what steps Alaris Hamilton has taken to comply with the Third Circuit's judgment, which arose from Alaris Hamilton's failure to furnish the requested information to the Union. See Notice of Mot. ¶ 4. Prior to issuing the two subpoenas, the Board informally requested evidence of Alaris Hamilton's compliance with the judgment but received no response. *Id.* ¶¶ 5-6.

² Because a motion to enforce an administrative subpoena is a dispositive matter, the Undersigned proceeds by way of Report and Recommendation. See *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017); *NLRB v. Frazier*, 966 F.2d 812, 818 (3d Cir. 1992)).

The Undersigned next concludes that the subject matter of the two subpoenas is relevant to the present investigation. “[T]he relevance of the sought-after information is measured against the general purposes of the agency’s investigation, which necessarily presupposes an inquiry into the permissible range of investigation under the statute.” *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (internal quotation marks omitted). Here, Subpoena Duces Tecum A-1-180SE2N seeks “[c]opies of all correspondence among Alaris agents regarding compliance with the Third Circuit’s judgment.” Notice of Mot., Ex. D., D.E. 1-4 at 5. Subpoena Ad Testificandum B-1-180SDXD seeks testimony regarding, *inter alia*, “the specific steps taken to comply with that judgment”; Alaris Hamilton’s management structure; the identity of the individuals responsible for taking steps to comply with the judgment; and “[t]he manner in which those tasks were completed, including obstacles to completion, if any[.]” *Id.*, Ex. E, D.E. 1-5 at 3. As the foregoing demonstrates, the two subpoenas seek narrowly defined and clearly identifiable information regarding Alaris Hamilton’s efforts to come into compliance with the Third Circuit’s judgment.

Finally, the Undersigned finds that the Board satisfied the statutory prerequisites to the filing of this application. The NLRA prescribes that the Board has the authority to “issue to such party [subpoenas] requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application.” 29 U.S.C. § 161(1). “Subpoenas must be served upon the recipient personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law.” 29 C.F.R. § 102.4; *see also* 29 U.S.C. § 161(4). Alaris Hamilton was served with the subpoenas by certified mail,

which were received on February 3, 2020. Notice of Removal ¶ 8. Accordingly, the Undersigned concludes that the Board meets all of the requirements required for judicial enforcement of an agency subpoena and respectfully recommends the District Court order compliance.³

2. Attorneys' Fees & Costs

The Board also requests an award of attorneys' fees and costs in connection with the instant application. The NLRA does not expressly provide for an award of attorneys' fees in connection with subpoena enforcement actions. *See generally* 29 U.S.C. §§ 161, 162. The Board nonetheless submits that Rule 37(d)(3) of the Federal Rules of Civil Procedure, made applicable by way of Rule 81(a)(5),⁴ "provide[s] for the *mandatory* award of attorney fees against a party which fails to respond to discovery without substantial justification for doing so." Bd.'s Brief in Supp. of Mot. at 12, D.E. 1-10. (emphasis in original). The Board also notes that other courts have authorized fee awards in this context. *Id.* (citing *NLRB v. D.N. Callahan, Inc.*, No. 18-879, 2018 WL 4190153, at *6 (E.D.N.Y. Aug. 7, 2018) (collecting cases), *report and recommendation adopted*, 2018 WL 4185704 (E.D.N.Y. Aug. 31, 2018)). Additionally, the Board suggests that

³ In light of Alaris Hamilton's failure to oppose the application, the Undersigned does not reach the Board's argument that Alaris Hamilton is estopped from challenging the validity of the subpoenas as a result of Alaris Hamilton's failure to petition the Board to revoke the subpoena within five days of its receipt. The Undersigned notes that the motion papers were emailed to defense counsel as well as served on counsel by overnight FedEx delivery service. *See* Certificate of Service, Mar. 19, 2020, D.E. 2; *see also Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 451 (6th Cir. 1941) (stating that enforcement applications "are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit").

⁴ "These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings." Fed. R. Civ. P. 81(a)(5).

attorneys' fees may be awarded pursuant to the Court's inherent powers as a sanction for Alaris Hamilton's bad-faith behavior. *Id.* at 13.

The Undersigned declines to recommend an award of attorneys' fees. First, the text of 29 U.S.C. § 161 seems to leave open the issue of whether Congress intended for district courts to award attorneys' fees to the Board for successfully obtaining court aid in compelling the production of evidence and attendance of witnesses. The statute provides that

[i]n case of contumacy or refusal to obey a subpoena issued to any person, any district court . . . shall have jurisdiction to issue to such person an order requiring such person . . . to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; *and any failure to obey such order of the court may be punished by said court as a contempt thereof.*

29 U.S.C. § 161(2) (emphasis added). The statutory text suggests that Congress envisioned district courts issuing an order requiring the recipient of the subpoenas to comply, and in the event that the subpoenaed party failed to do so, a subsequent order imposing sanctions for contempt. *See id.*; *N.L.R.B. v. Midwest Heating And Air Conditioning, Inc.*, 528 F. Supp. 2d 1172, 1180 (D. Kan. 2007) (“This [contempt] provision . . . applies only when the district court has already issued an order enforcing compliance to the subpoena and the party disobeys the order. It does not appear that the statute would cover costs incurred in filing a motion to enforce compliance.”), *objections overruled sub nom. N.L.R.B. v. Midwest Heating & Air Conditioning, Inc.*, 251 F.R.D. 622 (D. Kan. 2008). In light of Congress's explicit inclusion of the final clause that provides for contempt sanctions, there is no clear mandate requiring sanctions to be issued contemporaneous to any order compelling compliance with the subpoenas. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (“It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. To do so is not a construction of a statute, but, in effect, an

enlargement of it by the court.” (internal quotation marks and citation omitted) (brackets removed)).

Moreover, 29 U.S.C. § 161 lacks the clarity required to deviate from the well-recognized “American Rule” that parties are to bear their own legal costs irrespective of the outcome of the litigation. *See Fed. Trade Comm’n v. Penn State Hershey Med. Ctr.*, 914 F.3d 193, 195 (3d Cir. 2019). Courts “have recognized departures from the American Rule only in ‘specific and explicit provisions for the allowance of attorneys’ fees under selected statutes.’” *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975)). The qualifying language is absent here. *See id.* (noting that statutes that do deviate from the American Rule “authorize the award of ‘a reasonable attorney’s fee,’ ‘fees,’ or ‘litigation costs,’ and usually refer to a ‘prevailing party’ in the context of an adversarial ‘action’” (citation omitted)).

Additionally, the Board attempts to have it both ways with respect to its reliance on the Federal Rules of Civil Procedure. On one hand, the Board stresses that courts should not treat this application as a “pre-trial discovery matter,” Bd.’s Brief.at 5; yet, on the other hand, the Board seeks pre-trial discovery sanctions, *id.* at 12. The Board fails to reconcile those seemingly inconsistent positions beyond its statement that some courts have adopted its position. *Id.* at 12. But there is a well-recognized split of authority on whether the Board is entitled to attorneys’ fees under these circumstances. *See Nat’l Labor Relations Bd. v. Kava Holdings, Inc.*, No. 17-0071, 2017 WL 3841780, at *6 (C.D. Cal. Aug. 8, 2017) (collecting cases), *report and recommendation adopted sub nom. Nat’l Labor Relations Bd. v. Kava Holdings, LLC*, 2017 WL 3841797 (C.D. Cal. Aug. 31, 2017); *N.L.R.B. v. Durham Sch. Servs., L.P.*, No. 14-0052, 2015 WL 150898, at *2 (N.D.

Fla. Jan. 12, 2015) (holding that Rule 37 does not apply to administrative enforcement actions because “[b]y its terms, Rule 37 applies to discovery matters in a civil case and provides for an award of attorney's fees in some circumstances if a motion to compel a discovery response is granted,” and an “administrative enforcement action is not a ‘motion’ to compel ‘discovery’ within the meaning of the Federal Rules”).

The Undersigned need not resolve the uncertainty regarding whether Congress intended for district courts to award attorneys’ fees to the Board for compelling the production of evidence and witnesses, nor weigh in on the split of authority, in this case. Assuming *arguendo* that the pre-trial discovery sanctions are available in subpoena enforcement proceedings, the Undersigned finds that an award of attorneys’ fees is not warranted in this case. A fundamental prerequisite to discovery motions—particularly discovery motions seeking sanctions—is that the movant must exhaust its efforts to meet and confer with the opposing party to resolve the dispute prior to seeking court intervention. See Fed. R. Civ. P. 37(a)(1) (“The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”); Local Civ. R. 37.1(b)(1) (“Discovery motions must be accompanied by an affidavit . . . certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement.”).

The limited record reveals that the parties had two telephone conferences wherein defense counsel intimated that he would be follow up with the Board, prior to the Board sending a “final warning” email when it did not receive the anticipated response. See Notice of Mot. ¶¶ 10-11.

The record does not reveal whether Alaris Hamilton requested an extension of the deadlines set forth in the subpoenas during the telephone conferences, or whether the Board was amenable to any extensions. *See id.* ¶ 10. As for the demand letter, it is well-settled that “[s]imply sending a letter to opposing counsel complaining about outstanding discovery does not satisfy Rule 37’s good faith requirement.”⁵ *Locascio v. Balicki*, No. 07-4834, 2010 WL 5418906, at *3 (D.N.J. Dec.23, 2010); *see also Rhodes v. Marix Serv., LLC*, No. 12-1636, 2013 WL 6230609, at *2 (D.N.J. Dec. 2, 2013) (“The fact that Plaintiffs’ counsel wrote a single e-mail to Defendant EMC’s counsel before filing their Motion to Compel does not satisfy their duty to confer in a good faith effort to resolve discovery disputes.”). Accordingly, the Undersigned concludes that the Board is not entitled to an award of attorneys’ fees at this time. Should Alaris Hamilton fail to comply with any subsequently issued order requiring the production of documents or production of a witness to be deposed, the Board may seek appropriate sanctions pursuant to 29 U.S.C. § 161(2).

IV. CONCLUSION

For the reasons set forth above, the Undersigned respectfully recommends that the District Court grant in part the Board’s motion and issue an order requiring Alaris Hamilton to (1) provide to the Board the documents requested in Subpoena *Duces Tecum* A-1-180SE2N, and (2) appear and be deposed pursuant to Subpoena *Ad Testificandum* B-1-180SDXD. The parties have fourteen days to file and serve objections to this Report and Recommendation. *See* 28 U.S.C. §

⁵ The Undersigned also takes judicial notice of the fact that, during the one-week period between the sending of the final demand email and the filing of the instant application, the State of New Jersey declared both a Public Health Emergency and State of Emergency as a result of the burgeoning spread of COVID-19. *See* N.J. Exec. Order No. 2020-103 at 4 (Mar. 9, 2020). It is beyond cavil that the impact of the COVID-19 crisis on nursing homes and rehabilitation centers has been particularly acute.

636; L. Civ. R. 72.1(c)(2).

/s Michael A. Hammer
UNITED STATES MAGISTRATE JUDGE

Date: May 8, 2020