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5 Attorneys for Employer GOOD SAMARITAN HOSPITAL  
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9 UNITED STATES OF AMERICA  
10 BEFORE THE NATIONAL LABOR RELATIONS BOARD  
11 REGION 31

12 GOOD SAMARITAN HOSPITAL

13 Employer,

14 ALLEN V. SMITH

15 Petitioner,

16 and

17 SERVICE EMPLOYEES INTERNATIONAL  
18 UNION

19 Union.

CASE NO. 31-RD-1555

**GOOD SAMARITAN HOSPITAL'S  
OBJECTION TO SEIU, UNITED HEALTH  
CARE WORKERS -- WEST'S ANSWERING  
BRIEF IN OPPOSITION TO THE  
EMPLOYER'S EXCEPTIONS**

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23 Good Samaritan Hospital (the "Hospital" or the "Employer") hereby Objects to the filing  
24 and receipt by the National Labor Relations Board of SEIU, United HealthCare Workers -- West's  
25 ("SEIU") Answering Brief in Opposition to the Employer's Exceptions ("Answering Brief") which  
26 were filed on April 28, 2009, but were improperly and untimely served.  
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1 SEIU's deadline for filing an Answering Brief was April 28, 2009, pursuant to the  
2 provisions of Section 102.69 of the Board's Rules and Regulations. Pursuant to the NLRB's e-filing  
3 rules and Section 102.114(i) of the Board's Rules and Regulations, SEIU was required to serve all  
4 parties via e-mail on April 28, 2009, the deadline for filing. SEIU failed to do so.

5 Neither Marta Fernandez nor Barbra Arnold, counsel for the Employer, received service of  
6 SEIU's Answering Brief on April 28, 2009. On the morning of April 29, 2008, counsel for SEIU,  
7 Bruce Harland, called Ms. Arnold and informed her that SEIU had filed its Answering Brief, but  
8 had failed to serve the brief on the Employer via e-mail. In the conversation, Mr. Harland also told  
9 Ms. Arnold that all other parties had been served via e-mail, but that the Employer had not been  
10 served via e-mail. Mr. Harland did not provide any explanation for SEIU's failure to properly serve  
11 the Employer via e-mail. Mr. Harland's office then e-mailed the brief to Ms. Arnold and Ms.  
12 Fernandez at 10:01 a.m. on April 29, 2009. See SEIU's untimely e-mail service and the Employer's  
13 responsive e-mail attached hereto as Exhibit A.

14 Despite the conversation that Mr. Harland and Ms. Arnold had just had, the proof of service  
15 attached to the Answering Brief indicated that the Employer had been served via e-mail on April 28,  
16 2009. In addition, the proof of service indicated that the other parties, including the Petitioner,  
17 Allen V. Smith had not been served via e-mail in violation of Section 102.114(i) of the Board's  
18 Rules and Regulations. SEIU is well aware of Mr. Smith's e-mail address as the parties routinely  
19 communicate via e-mail. See, e.g., November 12, 2008 e-mail from Mr. Harland to Mr. Smith, Ms.  
20 Arnold and Ms. Fernandez attached hereto as Exhibit B.

21 SEIU failed to properly and timely serve the Employer and the Petitioner with its Answering  
22 Brief in violation of Section 102.114(i) of the Board's Rules and Regulations. As such, the

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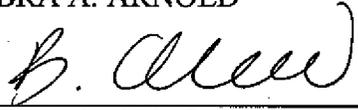
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1 Employer respectfully requests that SEIU's Answering Brief be rejected as untimely filed and  
2 served and be disregarded in the Board's consideration of the Employer's Exceptions.

3 DATED: April 30, 2009

JEFFER, MANGELS, BUTLER & MARMARO LLP  
MARTA M. FERNANDEZ  
BARBRA A. ARNOLD

5 By:   
6 \_\_\_\_\_  
BARBRA A. ARNOLD  
7 Attorneys for Employer GOOD SAMARITAN  
HOSPITAL

# **EXHIBIT A**

## Arnold, Barbra

---

**From:** Arnold, Barbra  
**Sent:** Wednesday, April 29, 2009 10:33 AM  
**To:** 'Rhonda Fortier-Bourne'; Fernandez, Marta M.  
**Cc:** Bruce Harland; Day, Tiffany  
**Subject:** RE: Good Samaritan Hospital - Case No. 31-RD-1555 - SEIU UHW's Brief in Opposition to Employer's Exceptions

Bruce,

As you know, pursuant to the NLRB's e-filing rules and NLRB Rule 102.114(i), you were required to serve Good Samaritan Hospital with a copy of SEIU's Answering Brief in Opposition to the Employer's Exceptions via e-mail yesterday. The proof of service attached to SEIU's Answering Brief inexplicably indicates that it was served on Good Samaritan Hospital by e-mail and lists both my e-mail address and Marta Fernandez's e-mail address, despite the fact that neither of us received the Answering Brief yesterday via e-mail and that you admitted in your telephone call to me this morning that you failed to e-mail the brief to us yesterday. During our phone call this morning, you provided no explanation for your failure to e-mail the brief to us. In addition, you claimed that we were the only party who was not served via e-mail. However, the proof of service indicates that none of the other parties were served via e-mail. We will be filing an objection to your Answering Brief on the grounds that it was not timely served and requesting that the Board disregard the brief.

Barbra Arnold for  
JMBM | Jeffer, Mangels, Butler & Marmaro LLP 1900 Avenue of the Stars, 7th Floor Los Angeles, California 90067

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Circular 230 Disclosure: To assure compliance with Treasury Department rules governing tax practice, we hereby inform you that any advice contained herein (including in any attachment) (1) was not written or intended to be used, and cannot be used, by you or any taxpayer for the purpose of avoiding any penalties that may be imposed on you or any taxpayer and (2) may not be used or referred to by you or any other person in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

-----Original Message-----

**From:** Rhonda Fortier-Bourne [mailto:Fortier-Bourne@unioncounsel.net]  
**Sent:** Wednesday, April 29, 2009 10:01 AM  
**To:** Fernandez, Marta M.; Arnold, Barbra  
**Cc:** Bruce Harland  
**Subject:** Good Samaritan Hospital - Case No. 31-RD-1555 - SEIU UHW's Brief in Opposition to Employer's Exceptions

<<SEIU UHW's Answering Brief in Opposition to the EMR's Exceptions.Good Sam.114020.PDF>>  
Attached hereto please find the Union's brief in opposition to the employer's exceptions in the above matter.

Rhonda Fortier-Bourne

Secretary to Bruce A. Harland  
Weinberg, Roger & Rosenfeld  
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1 BRUCE A. HARLAND, Bar No. 230477  
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2 A Professional Corporation  
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4 Fax 510.337.1023

5 Attorneys for Union  
SEIU, UNITED HEALTHCARE WORKERS – WEST  
6

7 UNITED STATES OF AMERICA  
8 NATIONAL LABOR RELATIONS BOARD  
9 REGION 31  
10

11 GOOD SAMARITAN HOSPITAL, ) Case No. 31-RD-1555  
12 Employer, )  
13 v. ) SEIU, UNITED HEALTHCARE  
ALLEN SMITH, ) WORKERS – WEST'S ANSWERING  
14 ) BRIEF IN OPPOSITION TO THE  
Petitioner, ) EMPLOYER'S EXCEPTIONS  
15 ) Judge: Lana H. Parke  
16 )  
17 and )  
18 SEIU, UNITED HEALTHCARE WORKERS – )  
WEST, )  
19 Union. )

20  
21 **I. INTRODUCTION**

22 On August 7, 2006, the petitioner, Allen Smith, filed a decertification petition in an effort  
23 to decertify the SEIU, United Healthcare Workers – West (the “Union”) in NLRB Case No. 31-  
24 RD-1555. An election was held on April 29 and March 30, 2008. Following the election, a Tally  
25 of Ballots was served on the parties, showing that the Union received a majority of the votes cast in  
26 the election. The Union won the election by 29 votes.

27 Following the Tally of Ballots, the employer filed eleven objections to the election. The  
28 Regional Director determined that the employer’s objections raised material issues of fact and/or

1 law, and, accordingly, the Regional Director recommended that the employer's objections be  
2 resolved by a hearing. A hearing regarding the Employer's objections was conducted on March 2,  
3 4, and 5, 2009.

4 The employer did not submit a single shred of evidence on eight of their objections. (Tr.  
5 490:2-3). On April 7, 2009, the Administrative Law Judge ("ALJ"), Lana Parke, recommended  
6 that the employer's objections be overruled and that the matter be remanded to the Regional  
7 Director for appropriate action. (ALJ's Rep. at p. 17). On April 21, 2009, the employer filed  
8 exceptions to the ALJ's decision; the employer's exceptions are limited only to the ALJ's findings  
9 regarding "Objection Number 3 in its entirety and to her finding that 'Accordingly, I recommend  
10 number 3 be overruled.'" (Ers. Exceptions at p. 1 (quoting ALJ's Rep. at pp. 3-10)).

## 11 **II. ARGUMENT**

### 12 **A. THE ALJ'S CITATION OF AND RELIANCE ON *EFCO CORP.* DOES NOT 13 SUPPORT THE EMPLOYER'S EXCEPTIONS.**

14 In her decision, the ALJ cited *EFCO Corp.*, 185 NLRB 220 (1970) for two propositions.  
15 First, for the proposition that the "[p]ermissible and/or obligatory union action is not objectionable  
16 conduct 'simply because it is motivated by the union's desire to present itself as a more attractive  
17 candidate.'" (ALJ's Rep. at p. 8 (citing *EFCO Corp.*, 185 NLRB 220, 221 (1970))). The ALJ also  
18 cited the *EFCO* in a footnote for the proposition that the "Union has protected power to regulate its  
19 membership affair and to resolve grievances." (*Id.* at p. 9 (citing *EFCO Corp.*, 185 NLRB at  
20 221)). Contrary to the employer's assertion, the Board has never overruled these propositions, and,  
21 furthermore, were not primarily relied upon by the ALJ in recommending that Objection 3 be  
22 overruled.

23 Although the employer suggests that *EFCO* is no longer sound precedent, this is a complete  
24 misreading of the case law. The United States Supreme Court, in *NLRB v. Sayair Mfg. Co.*, 414  
25 U.S. 270 (1973) overruled *EFCO* only to the limited extent that the case stood for the proposition  
26 that a labor organization could condition a waiver of fees or dues on the results of the election.<sup>1</sup>

27 <sup>1</sup> The employer also cites *Children's Servs. Int'l, Inc.*, 2004 WL 1251834 (May 28, 2004) as  
28 standing for the proposition that *EFCO* was overruled. *Children's Servs.* does not state that *EFCO*  
was completely overruled, as suggested by the employer in its brief, nor does *Children's Servs.*  
overrule *EFCO*, especially since it is a decision from an ALJ, not the Board.

1 Here, the ALJ found that the Union did not condition the dues refund on the results of the election.  
2 The ALJ's citation to *EFCO* for propositions that still are good law in no way detracts from her  
3 conclusion there is no evidence that the refunds had a tendency to interfere with employee's free  
4 and uncoerced choice in the election; and, therefore, did not constitute objectionable conduct.  
5 Accordingly, the employer's exceptions should be dismissed.

6 **B. THE ALJ PROPERLY CONCLUDED THAT THE EMPLOYER FAILED TO**  
7 **SHOW THAT THE DUES REFUNDS HAD A REASONABLE TENDENCY TO**  
8 **INTERFERE WITH THE EMPLOYEE'S FREE AND UNCOERCED CHOICE IN**  
9 **THE ELECTION.**

10 The employer also takes exception to the ALJ's decision on the basis that she allegedly  
11 required the employer to "present direct evidence in changes in employee's votes." (Ers.  
12 Exceptions at p. 2). The employer completely misreads the ALJ's decision. Nothing in the ALJ's  
13 decision indicates that Objection 3 was overruled because the employer failed to present direct  
14 evidence in changes in employee's votes.

15 On the contrary, the ALJ distinguished from the instant matter the cases cited by the  
16 employer, which involved labor organizations providing or promising to provide "employees with  
17 economic benefits in exchange for their support." (ALJ's Rep. at p. 8).

18 Moreover, even assuming for the sake of argument that the Union's "refund calculations  
19 were ill-founded," the ALJ concluded that the refunds did not have a tendency to interfere with  
20 employee's free and uncoerced choice in the election for several reasons. (*Id.* at p. 9). The ALJ  
21 found that there was "no evidence to suggest that the refunds were likely to cause fear among  
22 employees or to generate a feeling of moral indebtedness to the Union." (*Id.*). Second, the ALJ  
23 noted that employees anticipated dues refunds and the refund checks specified that they were  
24 refund checks. Finally, the ALJ noted that there was no reason for employees to suspect or to draw  
25 invidious inferences that the Union "cobbled together the refunds without regard to fiscal  
26 accuracy." (*Id.*). On this basis, the ALJ concluded that it was reasonable that employees inferred  
27 that the refund checks were simply an effort by the Union to "restore to employees erroneously  
28 deducted dues." (*Id.*).

After reviewing the evidence and arguments presented by the parties, the ALJ found that the

1 employer did not meet the burden of demonstrating that the refunds had a tendency to interfere  
2 with employees' free and uncoerced choice in the election. This conclusion was not based on the  
3 lack of direct evidence showing that employees changed their votes after receiving the refunds, but  
4 on the factors enumerated in *Taylor Wharton Div. Hrasco Corp.*, 336 NLRB 157, 158 (2001).  
5 Accordingly, the Board should dismiss the employer's exceptions and direct the Region to certify  
6 the election results.

7 **C. THE ALJ DID NOT IMPROPERLY EXCLUDE IRRELEVANT EVIDENCE, AND**  
8 **ALLOW THE EMPLOYER TO INTRODUCE RELEVANT EVIDENCE RELATED**  
9 **TO THE UNION DUES DISPUTE.**

10 The employer also suggests that the ALJ improperly excluded background evidence of the  
11 parties' dispute regarding the refunds and evidence that allegedly proved that the Union's refund  
12 checks were incorrect. The employer further claims that the ALJ relied heavily upon the  
13 "purported history between the parties and based her finding against the Employer upon this  
14 incomplete history." (Ers. Exceptions at p. 2). Again, the employer simply misreads the ALJ's  
15 decision.

16 The ALJ admitted relevant evidence related to the dues dispute, and properly rejected  
17 irrelevant evidence related to the bargaining history. Moreover, the ALJ even assumed for the sake  
18 of argument that the dues refund calculations were ill-founded. (ALJ's Rep. at p. 9). The ALJ  
19 found that employees were aware of the dues refund issue and, in fact, were expecting a dues  
20 refund. The ALJ assumed for the sake of argument that the Union's calculation of the dues refund  
21 amounts was ill-founded. Nevertheless, she concluded that the refunds did not have a tendency to  
22 interfere with employees' free and uncoerced choice in the election. The bargaining history that  
23 would have allegedly explained "the history of the communications" between the parties or "why it  
24 took the employer considerable time to prepare the payroll information and provide it to the  
25 Union,"<sup>2</sup> (Ers. Exceptions at p. 6), is simply irrelevant to the analysis; and, therefore, the ALJ  
26 properly excluded evidence that focused on the basis of the dues dispute.

27 <sup>2</sup> The employer was not prohibited from calling witnesses to explain why they wrote various  
28 communications or why it took so long to prepare the calculations. In fact, the employer  
introduced multiple e-mails related to the dues issue and called several witnesses related to why it  
took so longer to prepare payroll information.

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**III. CONCLUSION**

For all the foregoing reasons, the Union requests that the Board affirm the ALJ's decision and dismiss the employer's exceptions in their entirety, and certify the election results.

Dated: April 28, 2009

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By: Bruce A. Harland  
BRUCE A. HARLAND  
Attorneys for Union

114020/528665

**PROOF OF SERVICE**  
**(CCP 1013)**

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On April 28, 2009, I served upon the following parties in this action:

Marta M. Fernandez	Allen V. Smith
Barbra A. Arnold	23200 Orchard Avenue
Jeffer, Mangels, Butler & Marmaro LLP	Carson, CA 90145
1900 Avenue of the Stars, 7th Floor	<b>(By Mail)</b>
Los Angeles, CA 90067-4308	
Fax: (310) 203-0567	
Email: <a href="mailto:mfernandez@jmbm.com">mfernandez@jmbm.com</a>	
Email: <a href="mailto:barnold@jmbm.com">barnold@jmbm.com</a>	

Regional Director	Lana Park, ALJ
NLRB, Region 31	Division of Judges
11150 W. Olympic Blvd., Suite 700	901 Market Street, Suite 300
Los Angeles, CA 90064-1824	San Francisco, California 94103-1779
	<b>(By Mail)</b>

copies of the document(s) described as:

**SEIU, UNITED HEALTHCARE WORKERS --WEST'S ANSWERING  
BRIEF IN OPPOSITION TO THE EMPLOYER'S OBJECTIONS**

- BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.
- BY EMAIL** I caused to be transmitted each document listed herein via the email address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on April 28, 2009.

  
Rhonda Fortier Bourne

114020/528890

# **EXHIBIT B**

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**From:** Bruce Harland [mailto:bharland@unioncounsel.net]  
**Sent:** Wednesday, November 12, 2008 12:39 PM  
**To:** Alduenda, Steve; Fernandez, Marta M.; allen smith  
**Cc:** Arnold, Barbra; Barbara Lewis; Chang, Tom K.; Bisceglia, Tony; Ralph Cornejo; Jesse Smith  
**Subject:** RE: Good Samaritan Hospital 31-RD-1555

Steve, no one from the Union is available on Friday. It's taken seven months for these appeals to come back and then we are told to come to some dark alley on Friday, November 14 to open up and count the ballots. I am sure that a short continuance beyond November 14 will not be problematic, so that the Union can have a representative present.

Bruce

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**From:** Alduenda, Steve [mailto:Steve.Alduenda@nlrb.gov]  
**Sent:** Wednesday, November 12, 2008 12:19 PM  
**To:** Fernandez, Marta M.; Bruce Harland; allen smith  
**Cc:** Arnold, Barbra; Barbara Lewis; Chang, Tom K.; Bisceglia, Tony  
**Subject:** Good Samaritan Hospital 31-RD-1555

**The Board has advised the Region that all prior blocking charges have been addressed and resolved. Accordingly, the Region will open/count the impounded ballots cast on April 29-30, 2008 in Case 31-RD-1555. The ballot count will take place on Friday, November 14, 2008 at 1:00 p.m. in an available hearing room. At least one representative from each party should be present.**

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES**

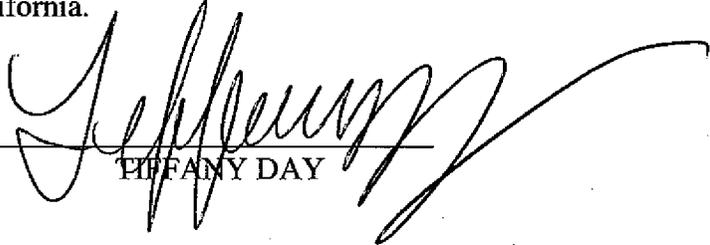
I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7<sup>th</sup> Floor, Los Angeles, California 90067.

On April 30, 2009 I served the document(s) described as **GOOD SAMARITAN HOSPITAL'S OBJECTION TO SEIU, UNITED HEALTH CARE WORKERS -- WEST'S ANSWERING BRIEF IN OPPOSITION OF THE EMPLOYER'S EXCEPTIONS** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

- (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (BY EMAIL) I caused to be transmitted each document listed herein via the email address(es) listed above.

Executed on April 30, 2009 at Los Angeles, California.

  
\_\_\_\_\_  
TIFFANY DAY

SERVICE LIST

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Regional Director: James J. McDermott  
Email: Steve.Alduenda@nlrb.gov