

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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SAN MIGUEL HOSPITAL CORP. d/b/a  
ALTA VISTA REGIONAL HOSPITAL

Case Nos. 28-CA-21896  
28-RC-6518

And

DISTRICT 1199NM, NATIONAL UNION OF  
HOSPITAL AND HEALTHCARE EMPLOYEES

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**RESPONDENT / EMPLOYER'S OPPOSITION TO ACTING GENERAL  
COUNSEL'S MOTION FOR SPECIAL PERMISSION TO AMEND  
COMPLAINT**

As the Respondent / Employer in the above-captioned cases, San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital (hereafter, "Alta Vista" or the "Hospital") hereby opposes, by and through the Hospital's Undersigned Counsel, the Acting General Counsel's Motion for Special Permission to Amend the Complaint issued in Case No. 28-CA-21896.

**BACKGROUND**

**1.) The Union's Petition**

On April 10, 2007, District 1199NM, National Union of Hospital and Healthcare Employees (hereafter, the "Union") filed with Region 28 of the National Labor Relations Board (hereafter, the "Board") a Petition for Certification of Representative, which was assigned Case No. 28-RC-6518. In the Petition, the

Union sought to represent a Bargaining Unit (hereafter, the “Unit”) which consisted of nearly the entirety of Alta Vista’s workforce. On June 21, 22 and 23, 2007, an Election (hereafter, the “Election”) was held at Alta Vista’s facility. The outcome of the Election was in the Union’s favor. Thereafter, the Hospital filed Objections to the Election (hereafter, the “Objections”). On March 4, 2008, the Board, acting through two Members, issued a Decision and Certification of Representative (hereafter, at times, the “2008 Certification”) in which the agency purported to overrule the Objections and certify the Union as the exclusive bargaining representative of the Unit.

**2. The Refusal to Bargain Proceedings**

In the wake of the Certification, Alta Vista refused to bargain with the Union. Consequently, the Union filed an Unfair Labor Practice Charge, which was assigned Case No. 28-CA-21896, alleging the Hospital’s refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”). On May 15, 2008, the General Counsel, *via* the Regional Director, issued a Complaint which incorporated the Union’s allegations (hereafter, the “Complaint”), and shortly thereafter, filed a Motion for Summary Judgment with the Board (hereafter, at times, the “Motion for Summary Judgment”). On June 30, 2008, the Board, once again acting through only two Members, issued a Decision and Order (hereafter, at times, the “Board’s 2008

Decision”) in which the Board purported to conclude that Alta Vista’s failure to bargain with the Union violated Sections 8(a)(1) and 8(a)(5) of the Act. See San Miguel Hospital Corp., 352 NLRB No. 100.

### 3.) The Proceedings Before the Court of Appeals

By a Petition for Review filed with the United States Court of Appeals for the District of Columbia Circuit on July 14, 2008, Alta Vista requested that the Court vacate the Board’s 2008 Decision. See Case No. 08-1245, Consolidated With Case No. 08-1300. On September 20, 2010, the Court granted Alta Vista’s Petition for Review, insofar as the Board’s Decision, along with the 2008 Certification, were issued by a two-Member Board. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). The Court remanded the case to the Board and the attendant mandate was issued on September 24, 2010.<sup>1</sup>

### 4.) The Proceedings Upon Remand

On September 30, 2010, the Board, now acting through three Members, issued a Decision, Certification of Representative and Notice to Show Cause (hereafter, generally at times, the “Board’s 2010 Decision”). See San Miguel Hospital Corp., 355 NLRB No. 212. In the Decision, the Board issued a Certification of Representative in the Union’s favor as to the Unit, but declined to

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<sup>1</sup> On September 27, 2010, Alta Vista filed six RM Petitions with Region 28 of the Board.

grant the Motion for Summary Judgment. Instead, due to the possibility that “events may have occurred during the pendency of the litigation that the parties may wish to bring to [the Board’s attention],” the Board (1) “granted [the General Counsel] leave to amend the complaint on or before October 10, 2010, to conform with the current state of the evidence,” and (2) issued a Notice to Show Cause, whereby Alta Vista was to submit any written opposition to the Motion for Summary Judgment by November 14, 2010, and the General Counsel was to submit any written support for the Motion for Summary Judgment by that same date.

The General Counsel did not file any Amended Complaint with the Board by October 10, 2010, nor did the General Counsel submit any statement in support of the Motion for Summary Judgment by November 14, 2010. Alta Vista, however, did file with the Board a Response to the Board’s Notice to Show Cause on November 15, 2010.<sup>2</sup> In the Response, Alta Vista argued that the Motion for Summary Judgment should be denied because (1) the 2010 Certification was issued in violation of the Hospital’s due process rights, (2) the General Counsel’s failure to file an Amended Complaint equated to an admission the Hospital had not unlawfully refused to bargain or a failure on the General Counsel’s part to

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<sup>2</sup> November 14, 2010 was a Sunday.

prosecute the Complaint, (3) the Complaint violated the Board's Jefferson Chemical doctrine, and (4) the issuance of the 2010 Certification was premature in light of the fact the Hospital filed RM Petitions before the issuance of the 2010 Certification. See fn. 1, *supra*.

Two weeks later, on December 1, 2010, the General Counsel filed an Opposition to Alta Vista's Response to the Notice to Show Cause. In the Opposition, the General Counsel opposed the arguments set forth by the Hospital's Response to the Notice to Show Cause. At the same time, the General Counsel alleged that "Respondent has refused and continues to refuse to bargain with the Union," and accordingly, requested that the Board grant the Motion for Summary Judgment. See General Counsel's Opposition, pages 2-3.

On December 7, 2010, Alta Vista filed a Motion to Strike, Alternatively, Reply to General Counsel's Opposition to Alta Vista's Response to Notice to Show Cause. In the Motion to Strike, Alta Vista observed that the General Counsel's Opposition to the Hospital's Response to Notice to Show Cause functioned as a de facto Amended Complaint, which, under the Notice to Show Cause, was due by October 10, 2010, as well as a de facto statement in support of the Motion for Summary Judgment, which was due by November 14, 2010. For these reasons, Alta Vista requested that the Board strike the General Counsel's Opposition.

Finally, on December 14, 2010, the General Counsel filed the Motion to which the Hospital now responds (and opposes), whereby the General Counsel seeks the Board's special permission to amend the Complaint to allege (1) the Board certified the Union as to the Unit on September 30, 2010, (2) the Union sent a request to bargain to Alta Vista on December 1, 2010, and (3) the Hospital failed to respond to the Union's letter and has been refusing to bargain with the Union. The General Counsel asserts the requested amendments are warranted because of "new evidence," to wit: the Union's December 1, 2010 request to bargain, which would provide the Board (and reviewing Courts, if any) with the benefit of a complete record.

### ARGUMENT

As explained below, the General Counsel's request for special permission to amend the Complaint is based upon self-engendered "new evidence" for the purpose of excusing the General Counsel's previous failure to amend the Complaint by the Board's deadline. Additionally, the General Counsel's request for special permission to amend the Complaint represents but an end point of a trail of due process violations committed by the General Counsel since the convenient arrival of the "new evidence."

1.) **The Motion Is Untimely**

As noted above, under the Board's 2010 Decision, the Board designated October 10, 2010 as the deadline by which the General Counsel needed to amend the Complaint to conform with the current state of the evidence. The General Counsel failed to amend the Complaint by the deadline. Instead, nearly two months later, the General Counsel belatedly unveiled the allegation that Alta Vista has remained in violation of the Act on account of the Hospital's continued refusal to bargain with the Union. Beyond that, the General Counsel's allegations were not set forth by an Amended Complaint, but rather, the General Counsel's Opposition to Alta Vista's Response to the Notice to Show Cause. Due to both the General Counsel's belated attempt to amend the Complaint and the inappropriate procedural machinery on which the General Counsel chose to rely, Alta Vista filed the Motion to Strike the General Counsel's Opposition.

The Hospital's Motion to Strike set off a flurry of activity from (and between) the General Counsel and the Union. On Friday, December 10, 2010, three days after the Hospital filed the Motion to Strike, the Union presented Alta Vista with a request to bargain. The next Monday, December 13, 2010, the Union's President, Ms. Fonda Osborn, provided the Board with an affidavit in which she attempted to summarize the Union's previous request to bargain and claimed the Union's present day desire to bargain with the Hospital. Twenty-four hours later,

on December 14, 2010, the General Counsel filed the Motion for Special Permission to Amend the Complaint, whereby the General Counsel asserts that the Union's December 10, 2010 request to bargain constitutes "new evidence," which warrants the amendments requested by the General Counsel.

Though styled by the General Counsel as "new evidence," the fact of the matter is that the Union's December 10, 2010 request to bargain is merely the byproduct of the Union and the General Counsel's collusive efforts to rescue what are plainly untimely allegations. As revealed by the Opposition to the Hospital's Response to the Notice to Show Cause, the General Counsel's position was that Alta Vista's unlawful refusal to bargain commenced upon the Board's 2008 Certification and has persisted to the present day. And yet, the General Counsel failed to set forth the allegations by (or even close to) October 10, 2010, as required by the Board. In response to the Hospital's Motion to Strike, whereby the General Counsel's slumber was brought into clear view, the General Counsel was suddenly presented with the serendipity of the Union's new request to bargain and now seeks the Board's permission to amend the Complaint under the pretense of "new evidence."<sup>3</sup>

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<sup>3</sup> Of course, the General Counsel also asks the Board to ignore the fact the allegations the General Counsel seeks to prosecute would be barred under Section 10(b) of the Act.

In summary, the General Counsel's request to amend the Complaint on account of "new evidence" is nothing more than a transparent sham designed to indirectly evade the Board's directive for timely amendments by the General Counsel.

2. **The Motion Violates Alta Vista's Due Process Rights**

Aside from the fact the General Counsel's request to amend the Complaint is patently untimely, the course of procedure charted by the General Counsel brazenly flouts Alta Vista's due process rights.

The General Counsel's desire to allege a present day unlawful refusal to bargain on Alta Vista's part is based solely upon the Union's December 10, 2010 request to bargain. Notably, the Union's request to bargain was not followed by any charge filed by the Union to the effect the Hospital violated the Act on account of a continued refusal to bargain. In spite of the absence of the predicate charge, the General Counsel was happy to pretend as though one existed, as the Board took (and no doubt solicited) an affidavit from Ms. Osborn, and the very next day, sought the Board's special permission to amend the Complaint. The General Counsel made no attempt to ascertain the Hospital's position, let alone afford the Hospital an opportunity to defend itself.<sup>4</sup>

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<sup>4</sup> Indeed, the Hospital's right to present a defense to the Region can even be gleaned from the affidavit submitted by Ms. Osborn, who explained that the Union

Though the impropriety of the General Counsel's prosecutorial methods are quite obvious on their own, a look back at the General Counsel's own history with the case makes the point with perfect clarity. On December 15, 2008, the Union filed an unfair labor practice charge in which the Union alleged that Alta Vista violated Section 8(a)(5) of the Act by, inter alia, the Hospital's refusal to negotiate with the Union. See Case No. 8-CA-22280. Based upon the Union's charge, on March 31, 2009, the General Counsel issued a Complaint, but did not incorporate the Union's refusal to negotiate allegations. Thus, the case now before the Board reveals the extraordinary lengths to which the General Counsel has reached for the sake of procuring the Board's permission to amend the Complaint. Previously, even in the presence of the Union's refusal to bargain allegation, the General Counsel elected not to pursue the allegation. Today, the General Counsel has elected to overlook the absence of a charge and chart a procedural course which could not be at greater odds with rudimentary tenets of due process.

### **CONCLUSION**

The General Counsel argues that the amendments sought by the General Counsel would provide the Board and the Courts of Appeal with a complete record. In a sense, Alta Vista does not disagree, though the Hospital has a much

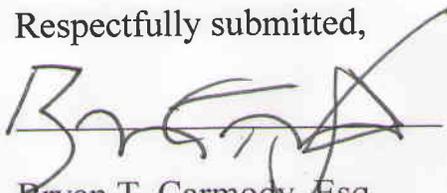
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did not submit an immediate request to bargain after the issuance of the 2010 Certification because the Union was unsure if the related issues had been fully litigated. See Affidavit of Fonda Osborn, page 4.

different view of what such a record would reflect. In the Hospital's view, the record envisioned by the General Counsel would show the agency's sanction or at countenance of collusive efforts between the agency's General Counsel and the Union and an utter lack of integrity for the Board's own procedures. Accordingly, Alta Vista requests that the Board deny the General Counsel's request for special permission to amend the Complaint.

Dated: December 23, 2010  
Glastonbury, Connecticut

Respectfully submitted,



Bryan T. Carmody, Esq.  
Attorney for Respondent  
134 Evergreen Lane  
Glastonbury, Connecticut 06033  
(203) 249-9287  
[bryancarmody@bellsouth.net](mailto:bryancarmody@bellsouth.net)

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SAN MIGUEL HOSPITAL CORP. d/b/a	:	Case Nos. 28-CA-21896
ALTA VISTA REGIONAL HOSPITAL	:	28-RC-6518
	:	
And	:	
	:	
DISTRICT 1199NM, NATIONAL UNION OF	:	
HOSPITAL AND HEALTHCARE EMPLOYEES	:	

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**CERTIFICATE OF SERVICE OF RESPONDENT / EMPLOYER’S  
OPPOSITION TO ACTING GENERAL COUNSEL’S MOTION FOR  
SPECIAL PERMISSION TO AMEND COMPLAINT**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the original of the Respondent / Employer’s Opposition to Acting General Counsel’s Motion for Special Permission to Amend Complaint (hereafter, the “Opposition”) is being filed this date by San Miguel Hospital Corporation in the above-captioned matter *via* e-filing at [www.nlr.gov](http://www.nlr.gov), being the website maintained by the National Labor Relations Board.

The Undersigned further does hereby certify that a copy of the Opposition is being provided this date to the following *via* e-mail:

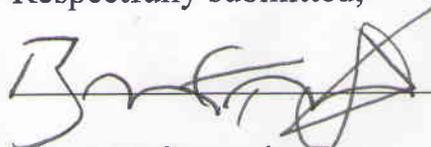
David Garza, Esq.  
Counsel for the General Counsel  
National Labor Relations Board, Resident Office 28  
421 Gold Avenue SW, Suite 310

Post Office Box 567  
Albuquerque, New Mexico 87103  
(505) 248-5132  
David.Garza@nlrb.gov

Shane C. Youtz, Esq.  
Youtz & Valdez, P.C.  
900 Gold Avenue, S.W.  
Albuquerque, New Mexico 87102  
(505) 244-1200  
Shane@youtzvaldez.com

Dated: December 23, 2010  
Glastonbury, Connecticut

Respectfully submitted,



Bryan T. Carmody, Esq.  
Attorney for Respondent  
134 Evergreen Lane  
Glastonbury, Connecticut 06033  
(203) 249-9287  
bryancarmody@bellsouth.net