

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

1621 ROUTE 22 WEST OPERATING  
COMPANY, LLC D/B/A SOMERSET  
VALLEY REHABILITATION AND  
NURSING CENTER

AND

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NJ REGION

CASE NOS.: 22-CA-29599  
22-CA-29628  
22-CA-29868

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S  
REQUEST FOR SPECIAL PERMISSION TO APPEAL THE RULING OF THE  
ADMINISTRATIVE LAW JUDGE DENYING RESPONDENT'S PETITION TO  
PARTIALLY REVOKE SUBPOENA DUCES TECUM B-612019  
AS IT APPLIES TO ITEMS 35, 36 AND 38**

On April 6, 2011, a Second Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing was issued against 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, herein Respondent. The Complaint alleges, in essence, that Respondent committed certain violations of Section 8(a)(1) and (3) of the Act, including interrogating employees, soliciting their complaints, promising them increased benefits and improved terms of employment, issuing written warnings to employees, terminating five employees and reducing the hours of certain per diem employees. Respondent denies all of the material allegations.

Thereafter, on April 8, 2011, pursuant to Section 11(l) of the Act, Counsel for the Acting General Counsel issued a Subpoena *Duces Tecum* (No. B-612019), herein subpoena, for the production of documents relevant to the litigation of the above-captioned unfair labor practice cases. On April 19, 2011, Respondent filed a Petition to

Revoke Portions of the Subpoena, herein Petition, claiming that the Subpoena is substantively defective as insufficiently particular, irrelevant, overly broad and unduly burdensome and seeks confidential patient information, proprietary information and privileged attorney-client communication and work product. Counsel for the Acting General Counsel opposed Respondent's Petition, hereto annexed as Exhibit A.

By Order dated April 22, 2011, the ALJ denied Respondent's Petition with respect to paragraphs 35, 36 and 38 of the Subpoena, hereto annexed as Exhibit B. However, the ALJ reserved his decision as to any documents regarding Care One until evidence was presented establishing that Care One is Somerset Valley's parent company. At the unfair labor practice hearing on April 28, Counsel for the Acting General Counsel renewed their request for the production of documents relating to Care One requested in subpoena paragraphs 35, 36 and 38, hereto transcript pages annexed as Exhibit C. Regarding paragraphs 35, 36 and 38 which requested correspondence and/or communication between Somerset Valley and Care One and materials utilized by Respondent in mandatory meetings with employees, the ALJ found that Counsel for the Acting General Counsel had sufficiently shown that Care One was involved in Respondent's response to the organizing campaign and that the documents relating to it in paragraphs 35, 36 and 38 should be produced. On May 2, the ALJ denied Respondent's argument that the production of paragraphs 35, 36 and 38 were going to be cost-prohibitive, unduly burdensome and were irrelevant, hereto transcript pages annexed as Exhibit D.

At the May 2 hearing, Respondent stated that it would seek permission to take a special appeal to the ALJ's ruling by May 4. However, it did not properly file its special appeal until May 31, 2011. Respondent's delay in filing its request for special appeal has caused unnecessary disruption to the underlying proceedings and has impacted Counsel

for the Acting General Counsel's ability to properly prepare for the cross-examination of Respondent's witnesses.

## ARGUMENT

### **I. RESPONDENT'S GROUNDS FOR ITS REQUEST FOR PERMISSION TO SEEK A SPECIAL APPEAL IS UNSUPPORTED BY EVIDENCE AND IS UNWARRANTED.**

The Federal Rules of Evidence are the rules used to govern relevancy of evidence in Board proceedings. Rule 401 of those rules defines relevant evidence as "evidence having any tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." (Emphasis added). The Supreme Court has held that when the government or one of its agencies seeks documents by subpoena, production shall be ordered if the documents requested are not "plainly incompetent or irrelevant to any lawful purpose..." Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). Information is relevant if it is "not plainly incompetent or irrelevant to any lawful purpose." EEOC v. Children's Hospital, 719 F.2d 1426, 1429 (9th Cir. 1983) (en banc) (quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)); see also NLRB v. Frederick Cowan & Co., Inc., 522 F.2d 26, 28 (2d Cir. 1975). Relevance is broadly construed to give the agency access to material that might cast light on the allegations. See NLRB v. Rohlen, 385 F.2d 52, 55-56 (7th Cir. 1967); see also NLRB v. Dutch Boy, Inc., 606 F.2d 929, 932 (10th Cir. 1979).

Respondent opposes paragraphs 35, 36 and 38, claiming that the subpoenaed documents are irrelevant to allegations in the Complaint. Paragraphs 35 and 36 seeks records or documents gathered or generated by Somerset Valley and Care One regarding the Union's campaign to organize Somerset Valley's employees or correspondence

between the entities about the organizing drive or charges. Such documents are relevant to Respondent's motivation for its actions and the extent and timing of Respondent's knowledge of the protected activities of employees and the alleged discriminatees.

Paragraph 38 seeks summaries and materials utilized by Respondent during the numerous mandatory meetings with employees after the representation petition was filed. It is alleged that during these meetings, Respondent solicited grievances and expressed animus towards the Union. Indeed, a number of witnesses testified during the instant proceeding about the meetings Respondent held with employees concerning the union organizing effort and the election. Thus, the correspondence and/or communication between Somerset Valley and Care One regarding the organizing drive and the materials used by Respondent at the mandatory anti-Union meetings with employees are clearly relevant.

Additionally, Respondent's claim that the correspondence and/or communications between Somerset Valley and Care One sought by Subpoena paragraph 36 is unduly burdensome and cost-prohibitive is not valid. In this regard, Counsel for the Acting General Counsel narrowly tailored their request to seek information for a four-month period (July 1, 2010 to October 31, 2010) which includes the pre-petition period until the discharge of four of the five union supporters and the reduction of hours of certain per diem employees. Respondent's claims that the recovery of electronic mail previously deleted from the mail boxes of identified Respondent and Care One officials can take up to 9 months and cost thousands of dollars is totally unsupported by evidence. As such, Respondent's assertions are self-serving and must be rejected.

Moreover, Respondent's claim that the potential cost it will incur in recovering and producing the electronic mail messages requested by Subpoena paragraph 36 must be shared by Respondent and the Board is contrary to established law. Section 11 of the

National Labor Relations Act, 29 U.S.C. § 161, grants to the Board and its agents broad investigatory authority, including the power to subpoena any evidence "that relates to any matter under investigation or in question." 29 U.S.C. § 161 (1); *see also* NLRB v. Interstate Material Corp., 930 F.2d 4, 6 (7<sup>th</sup> Cir. 1991) (describing the Board's broad §11 powers); NLRB v. Steinerfilm, Inc., 702 F.2d 14, 15 (1<sup>st</sup> Cir. 1983) (same); NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 114 (5<sup>th</sup> Cir. 1982) (same). This broad subpoena power enables the Board "to get information from those who best can give it and who are most interested in not doing so." United States v. Morton Salt Co., 338 U.S. 632, 642 (1950). Thus, such subpoenas may be directed to any person having information relevant to an investigation. *See, e.g.*, Link v. NLRB, 330 F.2d 437, 440 (4<sup>th</sup> Cir. 1964).

The Supreme Court has long held that unless there is a specific federal statutory provision to the contrary, an individual or entity is generally not entitled to compensation or reimbursement for complying with a subpoena pursuant to a federal investigation. Blair v. United States, 250 U.S. 273 (1919)<sup>1</sup>; Hurtado v. United States, 410 U.S. 578, 589 (1973). The Court's reasoning is that such compliance is a public duty already owed to the Government, and thus for which the Government should not have to pay. *Id.* at 588.

In line with the Supreme Court's holdings and more directly on point, the D.C. Circuit Court of Appeals has held that subpoenaed parties are required to absorb reasonable expenses of compliance with subpoenas issued by administrative agencies. SEC v. Arthur Young & Co., 584 F.2d 1018 (D.C. Cir. 1978) (denying request for reimbursement claim of \$100,000, including \$84,000 for duplication). The only noted

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<sup>1</sup> Although Blair involved compliance with a grand jury subpoena, the Board's pre-prosecution investigatory power "is not derived from the judicial function," but rather has been likened to that of a grand jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Morton Salt Co., 338 U.S. at 642-43; *see also*: NLRB v. Carolina Food Processors, Inc., 81 F.3d 507,

exception to this requirement is “when the financial burden of compliance exceeds that which the party ought to reasonably be made to shoulder. And what is reasonable will depend . . . upon the circumstances of each case.” Id. at 1033. However, “the burden of showing that an agency subpoena is unreasonable remains with the [resisting party], . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met.” FTC v. Rockefeller, 591 F.2d. 182, 190 (2<sup>nd</sup> Cir. 1979). The instant subpoena request is clearly specific and reasonably related to a lawful inquiry. In light of the nature and size of Respondent’s operation, it is highly unlikely that a court would find the subpoena unduly burdensome or that “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” Id. See also U.S. v. Dauphin Deposit Trust Co., 385 F.2d 129 (3<sup>rd</sup> Cir. 1967); SEC v. Blinder, Robinson & Co., 681 F. Supp. 1 (D.D.C. 1987). Therefore, Respondent’s assertion that reimbursement for the recovery and restoration of electronic mail files costs must be shared by the Board, is neither required nor appropriate in this matter.

Further, Respondent’s claim that the information sought in Subpoena paragraphs 35, 36 and 38 is unnecessary given that Counsel for the Acting General Counsel rested their case in chief must be rejected. Contrary to Respondent’s assertion, the information in Subpoena paragraphs 35, 36 and 38 are still obviously necessary, especially when the underlying proceedings are still on-going and such information is useful for the potential rebuttal to Respondent’s witnesses. Even moreso, the subpoenaed documents are essential to the Counsel for the Acting General Counsel’s preparation of cross-examination of Respondent’s witnesses. Thus, Respondent’s assertion is clearly invalid.

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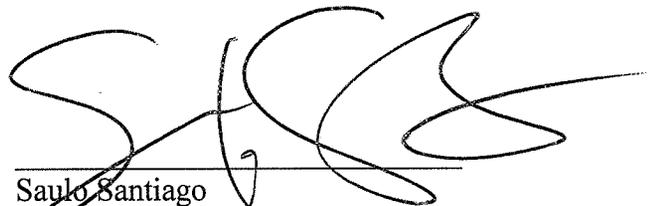
511 (4<sup>th</sup> Cir.1996); Link v. NLRB, 330 at 440 (4<sup>th</sup> Cir. 1964); NLRB v. Alaska Pulp Corp., 149 LRRM 2684, 2688 (D.D.C.1995).

Finally, Respondent's assertion that Counsel for the General Counsel subpoenaed the identical information during the investigation, but failed to seek enforcement of the subpoena is spurious. In this connection, due to the seriousness of the allegations and the Union's request for Section 10(j) injunctive relief, the Region determined not to seek enforcement of the investigative subpoena because of the potential for further delay in the completion of the investigation. That the Region chose not to enforce the investigative subpoena does not prevent Counsel for the Acting General Counsel from seeking such information in the instant matter. As such, Respondent's claim must be rejected.

**II. CONCLUSION**

Based on the foregoing, Respondent's request for special permission to appeal the ALJ's rulings should be immediately denied.

Dated at Newark, New Jersey this 8<sup>th</sup> day of June, 2011



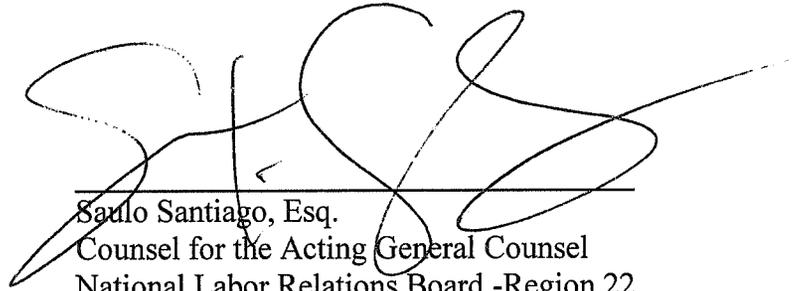
Saulo Santiago  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 22  
20 Washington Place, Fifth Floor  
Newark, New Jersey 07102

**CERTIFICATION OF SERVICE**

I certify that a copy of the Counsel for the Acting General Counsel's Memorandum in Opposition to Respondent's Request for Special Permission to Appeal the Ruling of the Administrative Law Judge Denying Respondent's Petition to Partially Revoke Subpoena Duces Tecum B-612019 As it Applies To Items 35, 36 and 38 in the above-captioned matters was served upon counsel for Respondent and the Union by electronic mail, today, June 8, 2011, in the following way:

Jay Kiesewetter, Esq.  
Kiesewetter Wise Kaplan Prather, PLC  
3725 Champion Hills Drive  
Suite 3000  
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[jkiesewetter@kiesewetterwise.com](mailto:jkiesewetter@kiesewetterwise.com)

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New York, NY 10003  
[edichner@grmny.com](mailto:edichner@grmny.com)

A large, stylized handwritten signature in black ink, appearing to read 'Saulo Santiago', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Saulo Santiago, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board -Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, NJ 07102  
(973) 645-3319

# Exhibit A

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

1621 ROUTE 22 WEST OPERATING  
COMPANY, LLC D/B/A SOMERSET  
VALLEY REHABILITATION AND  
NURSING CENTER

AND

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NJ REGION

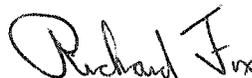
CASE NOS.: 22-CA-29599  
22-CA-29628  
22-CA-29868

**ORDER REFERRING MOTION TO REVOKE SUBPOENA DUCES TECUM  
TO THE NATIONAL LABOR RELATIONS BOARD**

On April 19, 2011, Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, filed with the Regional Director of Region 22 a Petition to Revoke the Subpoena *Duces Tecum* issued by Counsel for the Acting General Counsel on April 9, 2011 in connection with the unfair labor practice trial of the above-captioned matters. Pursuant to Section 102.31(b) of the Board's Rules and Regulations,

**IT IS HEREBY ORDERED** that Respondent's Motion to Revoke Subpoena *Duces Tecum* be, and the same hereby is, referred to Administrative Law Judge Steven Davis for ruling.

Issued at Newark, New Jersey this 22<sup>nd</sup> day of April, 2011



Richard Fox, Acting Regional Director  
National Labor Relations Board, Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

1621 ROUTE 22 WEST OPERATING :  
COMPANY, LLC D/B/A SOMERSET :  
VALLEY REHABILITATION AND :  
NURSING CENTER :

AND :

CASE NOS.: 22-CA-29599  
22-CA-29628  
22-CA-29868

1199 SEIU UNITED HEALTHCARE :  
WORKERS EAST, NJ REGION :

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S  
PETITION TO REVOKE SUBPOENA DUCES TECUM**

On April 8, 2011, pursuant to Section 11(l) of the Act, Counsel for the Acting General Counsel issued a Subpoena *Duces Tecum* (No. B-612019) for the production of documents relevant to the litigation of the above-captioned unfair labor practice cases.

The Subpoena at issue was served on 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, herein ("Respondent") by certified mail on April 8, 2011. A copy was also faxed to Respondent's counsel the same day. On April 19, 2011, Respondent filed a Petition to revoke portions of the subpoena claiming that the subpoena is substantively defective as insufficiently particular, irrelevant, overly broad and unduly burdensome and seeks confidential patient information, proprietary information and privileged attorney-client communication and work product.

Counsel for the Acting General Counsel opposes Respondent's Petition on the following grounds: (1) the documents requested relate to issues being litigated; (2) the subpoena sufficiently describes the evidence being requested; (3) the subpoena is not

burdensome and does not seek confidential information; (4) Respondent failed to meet its burden to set forth specific evidence in support of its Petition.

### **STATEMENT OF THE FACTS**

1199 SEIU United Healthcare Workers East, New Jersey Region (“the Union”), filed the underlying unfair labor practice charges alleging that, during its organizing campaign, Respondent engaged in violations of Section 8(a)(1) and (3) of the National Labor Relations Act (“the Act”). Based on the investigation of the allegations, a Consolidated Complaint issued on February 28, 2011 and was amended on April 8, 2011 to include additional allegations. More specifically, the Complaint alleged that Respondent violated Section 8(a)(3) of the Act by unlawfully discharging Lynette Tyler, Valarie Wells, Shannon Napolitano, Sheena Claudio and Jillian Jacques; by unlawfully issuing discipline to Union supporters; by unlawfully terminating per diem employees; and Section 8(a)(1) of the Act by interrogating employees regarding their union activities and by soliciting employees’ complaints and grievances promised its employees increased benefits and improved terms and conditions of employment if employees refrained from union organizational activities.

Respondent filed an Answer to the Consolidated Complaint on March 14, 2011 and an Answer to the amended Consolidated Complaint on April 19, 2011 denying all of the allegations. Respondent’s Petition seeks to partially revoke paragraphs 1, 2, 3, 5, 6, 9 through 14, and 16 through 44 of the Subpoena’s Rider – each of which seeks the production of documents that directly relate to the matters and issues being litigated.

### **ARGUMENT**

#### **I. Legal Framework**

Section 102.31 of the Board’s Rules and Section 11(1) of the Act grant agents of the Board the authority to compel the production of evidence that relates to any matter

under investigation or in question. Under Section 11 of the Act and Section 102.31(b) of the Board's Rules and Regulations, the Board shall revoke the subpoena if:

- (1) The evidence required to be provided does not relate to any matter under investigation or in question in the instant proceeding.
- (2) The subpoena does not describe with sufficient particularity evidence of which production is required.
- (3) There is any other reason sufficient in law that renders the subpoena invalid.

It is by this standard of relevance and particularity that the instant subpoena must be judged.

**II. The Subpoena *Duces Tecum* Meets the Board's Standard of Relevance and Particularity**

**A. Respondent Fails to Meet its Burden to Set Forth Specific Evidence in Support of Its Objections**

It is well settled that a subpoena will not be revoked based on a party's mere assertions. On the contrary, the law requires that Respondent "point out which specific documents and records... exceed the bounds of relevancy," the "production of which would create an undue burden." NLRB v. Dutch Boy, Inc., 98 LLRM 2396, 2399 (W.D. Okla. 1978), *aff'd* 606 F.2d 929, 102 LLRM 2528, 2530 (10<sup>th</sup> Cir. 1979). Absent such specific evidence, the documents must be produced. Id.

Here, Respondent's Petition opposing paragraphs 1, 2, 3, 5, 6, 9 through 14, and 16 through 30, 32, 33, and 35 through 44 consists of little more than conclusory assertions. In this regard, Respondent merely declares that the information sought is irrelevant and overbroad and asserts, without legal authority, that the information is also confidential and proprietary, protected by attorney or work-product privileges.

Respondent further asserts that the information had been previously produced. However, Respondent fails to identify in any way the basis for its claims. The subpoena should not be revoked on these mere conclusory assertions. Even if Respondent's conclusory contentions are entertained, its Petition should not be granted because the information requested, as required, is narrowly tailored in time and geographic scope and clearly identify the nature and subjects or information sought.

In order to avoid further delays and unnecessary procedural discussions, Counsel for the Acting General Counsel rescinds its request for the production of Internet Protocol ("IP") addresses for several of Respondent's managers sought in paragraph 14. This clarification should satisfy Respondent's concerns regarding paragraph 14.

B. The Subpoenaed Information Relates Directly to the Issues Being Litigated.

The Federal Rules of Evidence are the rules used to govern relevancy of evidence in Board proceedings. Rule 401 of those rules defines relevant evidence as "evidence having any tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." (Emphasis added). The Supreme Court has held that when the government or one of its agencies seeks documents by subpoena, production shall be ordered if the documents requested are not "plainly incompetent or irrelevant to any lawful purpose..." Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). Information is relevant if it is "not plainly incompetent or irrelevant to any lawful purpose." EEOC v. Children's Hospital, 719 F.2d 1426, 1429 (9th Cir. 1983) (en banc) (quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)); see also NLRB v. Frederick Cowan & Co., Inc., 522 F.2d 26, 28 (2d Cir. 1975). Relevance is broadly construed to give the agency access to material that might cast light on the allegations. See NLRB v. Rohlen, 385 F.2d 52,

55-56 (7th Cir. 1967); see also NLRB v. Dutch Boy, Inc., 606 F.2d 929, 932 (10th Cir. 1979).

Respondent opposes paragraphs 2 through 6, 8 through 13, 16, and 35 through 40, claiming that the subpoenaed documents are irrelevant. Paragraphs 2 through 6 seek documentary evidence regarding the names and positions of part-time and per diem employees and payroll records before and after Respondent's decision to discontinue its extensive usage of such employees. This information will "shed light on" Respondent's decision regarding part-time and per diem employees and is relevant to the Complaint allegations that Respondent terminated part-time and per diem employees because of their support for the Union. Records showing the identity, position held, rates of pay, hours worked and dates of hire of part-time and per diem employees as well as full-time employees bear directly upon the allegations of disparate treatment. Although Respondent previously provided payroll, daily staffing sheets and schedules in response to paragraphs 5 and 6 those records failed to cover the remaining documents requested in paragraphs 2 through 6.

Paragraphs 9 through 13 seeking information regarding Respondent's payroll system including system history of audit trail of changes and additions and deletions made by authorized Respondent officials on the payroll system, is relevant to Respondent's decision to discharge Valerie Wells. Ms. Wells was Respondent's staffing coordinator until September 21, 2010. During the investigation, Respondent contended that it terminated Ms. Wells for making scheduling errors on the payroll system. As such, the subpoenaed documents relate directly to Respondent's knowledge and unlawful motivation in terminating Ms. Wells.

Paragraph 16 seeks the disciplinary action, including written and verbal warnings, suspensions or discharges issued to employees. The Complaint alleges that Respondent

issued disciplinary warnings to employees because of their support for the Union after the representation election on September 2, 2010. Thus, the documents are clearly relevant to the issue of whether Respondent treated Union supporters differently or in a disparate manner.

Paragraphs 17 through 30 and 32, 33 and 42, seeking the complete investigatory files for named discriminatees, including the reasons for the decision to terminate the employee, documents from all investigations and internal correspondence to the discharge, complete personnel files and other information, are clearly relevant. That Respondent previously produced some of the information does not obviate its obligation to produce the documents nor does it establish that the request is irrelevant and immaterial. If Respondent is willing to stipulate that the previously produced information is complete and the entirety of the records for the named discriminatees, in the interest of expediency, Acting General Counsel will accept such a representation. However, in regards to paragraphs 26 through 30, Acting General Counsel requests that Respondent produce the employee evaluations for the named discriminatees because such evaluations were incomplete when previously provided.

Paragraphs 35 and 36, seeking records or documents gathered or generated by Somerset Valley and Care One regarding the Union's campaign to organize Somerset Valley's employees or correspondence between the entities about the organizing drive or charges, are relevant to Respondent's motivation for its actions and the extent and timing of Respondent's knowledge of the protected activities of employees and the alleged discriminatees. Respondent's objection to the Acting General Counsel's request for information from Care One on the ground that Care One is not the employer must be rejected. Care One is Somerset Valley's parent company. It is undisputed that Care One's Senior Vice-President Richard Speas oversees Somerset Valley's facility,

providing operational and clinical support and that other Care One personnel actively participated in Respondent's organizing campaign. Thus, the correspondence and/or communication between Somerset Valley and Care One and by either entity regarding the organizing drive are clearly relevant.

It is undisputed that Respondent conducted mandatory meetings with employees. During those meetings, Respondent utilized written materials and those meetings were recorded. Paragraph 37, seeking videotapes, films, audio recordings, pictures or other mechanical recordings made by or provided to Respondent, and paragraph 38, seeking summaries and materials utilized by Respondent merely seeks such materials. Thus, this information is clearly relevant.

Paragraph 39 seeks documents regarding employee handbooks and other materials that reflect work rules and procedures applicable to employees, and paragraph 40 seeks a copy of Respondent's uniform policy applicable to employees. During the investigation, Respondent has asserted that it has disciplined employees consistent with its clinical practices; however, it now argues inexplicably that this information is irrelevant and cannot be produced. Contrary to Respondent's contentions, the information sought is relevant. Although Respondent has produced the employee handbook, it has failed to provide the remaining information requested in paragraph 39. Moreover, Respondent has asserted that it has an applicable uniform policy which it has enforced at its facility. Because Respondent has taken disciplinary actions against employees pursuant to such a policy, the production of the policy is clearly relevant.

C. The Subpoena Sufficiently Describes the Evidence Being Requested

Respondent further contends that the request made in paragraphs 1 through 6, 10, 11, 12, 13, and 16 of the subpoena is impermissibly overbroad and insufficiently particular. Such an argument is not valid. Contrary to Respondent's assertion, the

subpoena sufficiently describes what information is being sought in order to probe Respondent's contention that it has consistently disciplined employees in accordance with its policies and procedures; has legitimate business justifications for its decision to discontinue the usage of part-time and per diem employees; and was not motivated by animus or discriminatory motive when it took action against employees. The records sought in the subpoena are also limited in scope and are limited to the time period in question.

In this regard, Respondent makes self-serving assertions that the Acting General Counsel uses sweeping or generalized language, such as "other documents" or "other documents that refer or relate to" to establish its contention that the subpoena is overbroad and insufficiently particular. Contrary to Respondent's assertions, in no way may the Acting General Counsel's request be considered vague or ambiguous particularly when his subpoena clearly indicates which records it is seeking. Such assertion without further proof fails to meet Respondent's burden in the instant matter. Hence, this subpoena clearly satisfies the specificity requirement.

D. The Subpoena Is Not Burdensome And Does Not Seek Confidential Information

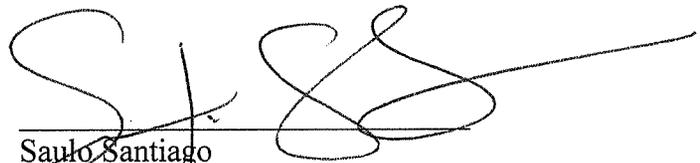
Respondent asserts that paragraphs 5, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 42 of the subpoena seek confidential, privileged and proprietary information and that compliance with paragraphs 5, 12, 13, 14, 35, 36, 37, 38, 39, and 40 would be unduly burdensome. The burden of proof is on Respondent to establish legitimate and substantial confidentiality interests and to specify the interests of its employees it seeks to protect. A claim of confidentiality is an insufficient defense to a relevant claim for information where, as here, no evidence is presented to support such a claim. Woodland Clinic, 331 NLRB 735, 736-37 (2000). Although Respondent claims

that the subpoena seeks information in violation of HIPAA, the subpoena specifically indicates in the “Definition and Instructions” section in paragraph 16 that it does not seek confidential patient information rather it seeks information relevant to the allegations in the Complaint. Further, contrary to Respondent’s assertion that the subpoena seeks information that infringes on the attorney-client and work product privileges, the subpoena specifically mentions in the “Definition and Instructions” section in paragraph 12 that such confidential attorney-client and work- product information is not being sought. Such self-serving assertions of confidentiality without proof do not obviate the obligation to furnish the information. Therefore, in the instant case, Respondent is obligated to provide such information. Hansen Aggregates BMC, Inc., 353 NLRB No. 28 (2008); Dynacorp/Dynair Services, Inc., 332 NLRB 602 (1996). Moreover, a party seeking to avoid compliance with a subpoena bears the burden of demonstrating that it is unduly burdensome or oppressive. CNN America, Inc., 352 NLRB 675, 676 (2008). A subpoena will not be revoked based on conclusory assertions. On the contrary, the law requires petitioners to “point out which specific documents and records... exceed the bounds of relevancy,” or the “productions of which would create an undue burden. NLRB v. Dutch Boy, Inc., 98 LRRM 2396, 2399 (W.D. Okla 1978), aff’d 606 F.2d 929, 102 LRRM 2528, 2530 (10<sup>th</sup> Cir. 1979). In addition, to demonstrate undue burden, the subpoenaed party must show that compliance with the subpoena “would seriously disrupt its normal business operations.” EEOC v. Maryland Cup Corp., 785 F.2d 471, 477 (4th Cir. 1986), cert. denied, 479 U.S. 815 (1986); Valley Industrial Services, Inc. v. EEOC, 570 F. Supp. 902, 907 (N.D. Cal. 1983) (disruption of business operations is the appropriate standard, since “[e]very employer investigated . . . may feel that compliance [with a subpoena] is burdensome”). Here, Respondent has failed to demonstrate undue burden. Thus, such arguments are not valid.

**III. Conclusion**

Based on the foregoing, it is evident that Respondent has not supported its burden of showing that the subpoenaed materials are not relevant, burdensome, overly broad or vague, confidential or that they are not described with sufficient particularity. Therefore, as the Subpoena *Duces Tecum* on its face meets the standard of specificity and relevancy of Section 11(1) of the Act, it should not be revoked. Accordingly, Counsel for the Acting General Counsel respectfully requests that the Respondent's Petition be denied in its entirety and that the subpoenaed document be produced.

Dated at Newark, New Jersey this 22<sup>nd</sup> day of April, 2011



Saulo Santiago  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 22  
20 Washington Place, Fifth Floor  
Newark, New Jersey 07102

# Exhibit B

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

**1621 ROUTE 22 WEST OPERATING  
COMPANY, LLC D/B/A SOMERSET  
VALLEY REHABILITATION AND  
NURSING CENTER**

and

**Cases 22-CA-29599  
22-CA-29628  
22-CA-29868**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NEW JERSEY  
REGION**

**ORDER ON PETITION TO PARTIALLY REVOKE SUBPOENA DUCES TECUM**

On April 6, 2011, a Second Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing was issued against 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center (Respondent), to which the Respondent filed an answer.

The complaint alleges, essentially, that the Respondent committed certain violations of Section 8(a)(1) and (3) of the Act, including interrogating employees, soliciting their complaints, promising them increased benefits and improved terms of employment, issuing written warnings to employees, suspending employee Jillian Jacques, terminating employees Lynette Tyler, Shannon Napolitano, Valarie Wells, Sheena Claudio, and Jillian Jacques, and reducing the hours of certain per diem employees. The Respondent filed an answer to the complaint denying the material allegations thereof.

Thereafter, the General Counsel issued a Subpoena Duces Tecum to the Respondent, directing that it produce at the hearing, numerous documents for the period January 1, 2010 to December 31, 2010, unless otherwise stated. The Respondent filed a Petition to Revoke, and the General Counsel filed an Opposition.

**I. The Respondent's General Objections**

The Petition generally states that certain information sought (a) is irrelevant, and immaterial to the issues raised in the complaint (b) is unreasonably broad and failed to describe the items and documents sought with sufficient particularity to permit the Respondent to determine the information or documents requested (c) had been previously produced by the Respondent (d) seeks confidential and propriety information (e) is not in the form of documents and (f) are protected from disclosure by the attorney-client privilege and/or attorney work-product doctrine.

## II. General Legal Principles

The Respondent argues that certain of the documents sought are irrelevant and immaterial to the issues set forth in the complaint. The Board's standard for determining whether a subpoena should be revoked is not high. A subpoena shall be revoked if the "evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." Board's Rules and Regulations, Section 102.31. The Board's subpoena power is "indispensable to the carrying out of [the Board's] functions." *Pedersen v. NLRB*, 234 F.2<sup>nd</sup> 417, 420 (2<sup>nd</sup> Cir. 1956).

The courts have decided that administrative agencies have broad authority to demand documents. In *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Supreme Court held that "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." That standard is the "accepted test for judicial enforcement of administrative subpoenas." *In Re McVane*, 44 F.3<sup>rd</sup> 1127, 1135 (2<sup>nd</sup> Cir. 1995).

In *NLRB v. American Medical Response, Inc.*, 438 F.3d 188, 192-193 (2006), the Second Circuit Court of Appeals stated that "an agency must show only "[1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within [its] possession, and [4] that the administrative steps required ... have been followed ....'" *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (emphasis added) quoting *United States v. Powell*, 379 U.S. 48, 57-58 (1964). A subpoena that satisfies these criteria will be enforced unless the party opposing enforcement demonstrates that the subpoena is unreasonable, or issued in bad faith or for other improper purposes, "or that compliance would be 'unnecessarily burdensome.'" *RNR Enters., Inc.*, 122 F.3d at 97, quoting *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973).

The Respondent also asserts that certain documents sought in paragraph 5 of the subpoena are burdensome to produce. "A subpoena is not unduly burdensome merely because it requires the production of a large number of documents." *NLRB v. Carolina Food Processors, Inc.*, 81 F.3<sup>rd</sup> 507, 513 (4<sup>th</sup> Cir. 1996). "The burden of proving that an administrative subpoena is unduly burdensome is not easily met. The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations." *EEOC v. Maryland Cup Corp.*, 785 F.2<sup>nd</sup> 471, 477 (4<sup>th</sup> Cir. 1986); *CNN America, Inc.*, 353 NLRB 891, 894 (2009). No such showing has been made by the Respondent.

I further find no merit to the Respondent's objections that the documents sought are unreasonably broad and that the subpoena fails to describe the items and documents sought with sufficient particularity to permit it to determine the information or documents requested. I find that the documents sought are precisely described and limited in duration to one year or less. In addition, the Respondent has not provided any specific information as to what documents it claims are confidential or constitute proprietary information.

### III. The Claim of Attorney-Client Privilege

The Petition asserts that certain documents sought may be covered by the attorney-client privilege and/or attorney work-product doctrine. The Respondent did not provide any specifics in support of this claim.

Since, at this point, I cannot determine which documents sought may be claimed to be protected by the privilege, the Respondent is directed to supply a privilege log as to the documents it asserts are covered by the privilege. *CNN America, Inc.*, 353 NLRB 891, 899 (2009).

The log shall include an index identifying the allegedly privileged documents and the parties to each of the communications and providing sufficient detail to permit an informed decision as to whether the document was at least potentially privileged. Specifically, the index must include (a) a description of the document, including its subject matter and the purpose for which it was created (b) the date the document was created (c) the name and job title of the author of the document and (d) if applicable, the name and job title of the recipient(s) of the document. *CNN America*, above.

The Respondent shall serve the privilege log on the other parties and me. It shall also present to me for my examination *in camera* the documents it claims are privileged. I will then rule on whether the privilege applies to the documents presented.

### IV. The Respondent's Specific Objections

What follows is a brief description of each numbered paragraph of the subpoena objected to, the Respondent's specific objection, the General Counsel's Opposition, and my ruling:

#### Paragraphs 1-6 of the Subpoena

1. The name of each per diem registered nurse, licensed practical nurse and certified nurses' aide employed by the Respondent.

Objection: Overly broad and seeks information previously produced.

2. For the period July 1, 2010 to December 1, 2010, documents showing the names and positions of all employees whose status was changed from per diem to part-time and/or full-time employment, or from part-time to per diem status.

Objection: Overly broad and seeks information previously produced. The Respondent will produce documents which show a change in employees' status from per diem to part-time and/or full-time employment or from part-time to per diem status to the extent not previously produced.

3. Documents that refer and/or relate in any way to the Respondent's elimination or reduction in the use of per diem employees.

Objection: Vague, ambiguous and overly broad. Respondent did not eliminate the use of per diem employees and it has previously produced the documents sought.

5. Payroll records, daily staffing sheets, schedules, and other documents which show who worked as per diem employees for each pay period including their name, dates employed, position held, rate of pay and hours worked, and personnel file.

Objection: Irrelevant, immaterial, overly broad as to "other documents"; seeks confidential employee records, and the records sought are burdensome to produce, and were previously produced. The Respondent will produce weekly payroll records, daily staffing sheets and daily schedules not previously produced.

6. The same documents are sought as in paragraph 5, but which show which employees are currently working the hours previously worked by per diem employees, including their names, dates employed, position held, rate of pay and hours worked, and for each shift, the name of the per diem employee who previously worked that shift.

Objection: Same objection as in paragraph 5, above.

#### **The General Counsel's Opposition to the Petition Paragraphs 1-6**

General Counsel states that the documents sought in paragraphs 1-6 are relevant because they seek information regarding the individuals who held the positions of part-time and per diem workers before and after Respondent's decision to discontinue its extensive use of such employees, and will "shed light" on the Respondent's decision regarding such employees. The documents are also claimed to be relevant to the allegations that Respondent discharged such employees because of their support for the Union. Further, he claims that such evidence is relevant to the issue of disparate treatment. General Counsel concedes that certain, but not all documents were provided by Respondent previously.

#### **Ruling**

The documents sought in paragraphs 1-6 are relevant to the issues in this proceeding. They are not vague, ambiguous or overly broad. To the extent not previously produced, they must be produced by the Respondent.

#### **Paragraphs 9-13 of the Subpoena**

9-12. For various periods of time set forth in the subpoena, all documents that reflect or concern SMTLX system history of audit trail of changes, etc., for Cabe Guerlin, Doreen Illis, Elizabeth Heedles, and Inez Konjoh.

Objection: Irrelevant, immaterial and immaterial.

13. For the period June 1, 2010 to December 31, 2010, the SMTLX system user names for all authorized personnel, including certain named individuals.

Objection: Irrelevant, immaterial and overly broad.

14. In his Opposition, General Counsel withdrew his request for the documents set forth in paragraph 14.

#### **The General Counsel's Opposition to the Petition Paragraphs 9-13**

General Counsel states that the information sought relates to the Respondent's payroll system which is relevant to its decision to discharge Valerie Wells. According to the General Counsel, the Respondent's defense is that it fired Wells for making scheduling errors on the payroll system.

### **Ruling**

The documents sought in paragraph are relevant and not overly broad. They must be produced by the Respondent.

#### **Paragraph 16 of the Subpoena**

16. All notices of disciplinary action issued to the Respondent's employees, etc., and the reasons therefore. The personnel files of discharged employees.

Objection: Overly broad, irrelevant, immaterial, documents previously produced. Respondent will produce notices of disciplinary action not previously produced.

#### **The General Counsel's Opposition to the Petition Paragraph 16**

General Counsel argues that the documents sought relate to the alleged disparate treatment accorded supporters of the Union.

### **Ruling**

The documents sought are relevant. To the extent not previously produced they must be produced by the Respondent.

#### **Paragraphs 17-33, 42 of the Subpoena**

17-20, 42. Regarding Shannon Napolitano, Sheena Claudio, Valerie Wells, Lynette Tyler, and Jillian Jacques, various documents concerning their terminations.

Objection: Documents were previously produced. Respondent will produce responsive documents not previously produced.

21-25. All disciplinary actions issued to Napolitano, Claudio, Wells, Tyler and Jillian Jacques (Jacques through February, 2011).

Objection: Documents were previously produced. Respondent will produce responsive documents not previously produced.

26-30. All performance appraisals and/or evaluations issued to Napolitano (2009 and 2010), Claudio, Wells (2007-2010), Tyler, Jacques (2007-2010).

Objection: Documents were previously produced. Respondent will produce responsive documents not previously produced.

32-33. Documents relating to Tyler's resignation, including her resignation letter, Respondent's Personnel Action Form.

Objection: Documents previously produced.

#### **The General Counsel's Opposition to the Petition Paragraphs 17-33, 42**

The documents sought relate directly to the work history and the decision to terminate the alleged discriminatees. General Counsel offers to accept the documents previously submitted if the Respondent stipulates that such documentation is complete

and represents all of the records of the alleged discriminatees. However, despite any stipulation, the General Counsel demands the production of the employee evaluations set forth in paragraphs 26-30.

### **Ruling**

To the extent not previously produced, the Respondent shall produce the documents demanded.

### **Paragraphs 35-38 of the Subpoena**

35-38. For the period July 1, 2010 to October 31, 2010, documents gathered or generated by the Respondent which refer to the Union or the Union's campaign to organize the Respondent's employees; all correspondence and communication between and among the Respondent and Care One regarding the union organizing drive and the NLRB charges filed by the Union; all videotapes, etc., made by/or provided to the Respondent of meetings related to the Union's organizing drive; summaries or materials used by the Respondent during presentations at mandatory or individual meetings with unit employees regarding the Union's organizing drive, and contemporaneous notes taken by certain named persons as to the discussions at such meetings (period July 1, 2010 to September 2, 2010).

Objection: Somerset Valley is the Employer, not Care One; Irrelevant, overly broad.

### **The General Counsel's Opposition to the Petition Paragraphs 35-38**

The General Counsel states that the evidence establishes that Care One is the Respondent's parent company and that it oversees the Respondent's operations. Accordingly, he argues that communications between the Respondent and Care One is relevant. He further argues that materials relating to meetings concerning the Union are relevant.

### **Ruling**

At this point in the proceeding, there is no record evidence before me that Care One is the Respondent's parent company. At this time, the only Respondent before me is Somerset Valley Rehabilitation and Nursing Center.

I will reserve decision as to the documents demanded between Respondent and Care One. All other documents are relevant and must be produced.

### **Paragraphs 39-40 of the Complaint**

39. Documents which reflect work rules, policies, practices and procedures which are applicable to employees, including conversion of employment status of employees and date(s) of issuance.

Objection: Overly broad, oppressive, irrelevant and immaterial.

40. The Respondent's uniform policy applicable to its employees and the date(s) of issuance.

Objection: Irrelevant, immaterial.

**The General Counsel's Opposition to the Petition  
Paragraphs 39-40**

General Counsel states that the information demanded is relevant because the Respondent disciplined employees pursuant to its written policies.

**Ruling**

The documents sought are relevant and must be produced.

**Paragraphs 43 and 44 of the Subpoena**

43. A list specifying what documents are being produced pursuant to each paragraph of the subpoena.

Objection: Improper attempt at discovery, does not seek documents, and seeks information readily obtainable from the documents produced in response to the subpoena.

44. All of the above documents shall be segregated by the paragraph number set forth in the subpoena and shall not be commingled with documents that are responsive to other paragraphs of the Rider. Documents shall be arranged chronologically within each segregated packet.

Objection: Does not seek to require production of information, documents or other evidence, and therefore requires no response.

General Counsel filed no Opposition to the Petition.

**Ruling**

The Petition to Revoke is granted as to paragraphs 43 and 44 of the subpoena.

Dated: New York, NY  
April 22, 2011



Steven Davis  
Administrative Law Judge

# Exhibit C

1 Q I know but that's what I'm thinking. I only have four  
2 because I had route twice.

3 A Oh, right patient, right dose, right -

4 JUDGE DAVIS: Okay, I don't think this is a memory test.

5 MR. KIESEWETTER: All right. I have no further questions.

6 JUDGE DAVIS: Okay. Any Redirect?

7 MR. SANTIAGO: Give us one minute. No further questions,  
8 Your Honor.

9 JUDGE DAVIS: Thank you very much, ma'am, you're excused .

10 (Witness excused)

11 JUDGE DAVIS: So, we'll have additional witnesses tomorrow  
12 is that right?

13 MR. SANTIAGO: Your Honor, yes, we will have additional  
14 witnesses tomorrow. I just want to bring up on minor point. We  
15 did do some document review yesterday. We didn't completely go  
16 through it all, but what we did see, if you could, if you  
17 remember your ruling in regards to the Motion to Quash our  
18 subpoena, if you recall paragraph 35 to 38, there's - I'll just  
19 read it.

20 Page Six of your ruling, it says, "General Counsel states  
21 that the evidence establishes that Care One is the Respondent's  
22 parent company and it oversees Respondent's operations.  
23 Accordingly, he argues that communication between Respondent and  
24 Care One is relevant".

25 At this point and then your ruling was, "at this point in

1 proceedings there's no record evidence before me that Care One  
2 is Respondent's parent company. At this time the only  
3 Respondent before me is Somerset Valley Rehabilitation and  
4 Nursing Center". I believe that the evidence has been put forth  
5 from Sheena Claudio and also Shannon Napolitano it clearly shows  
6 that Care One acts as the parent company to Somerset Valley.

7 Care One operates the hot line. Care One sent when  
8 individuals made phone calls to the hot line it sent  
9 representatives, Andrea, to the, to the facility to talk to  
10 employees. She introduced herself as a Care One representative.  
11 When the campaign started both Jason Hutchens, and Andrea from  
12 Care One, responded at Respondent's facility.

13 Jessica Arroyo is also a Care One clinical consultant who  
14 also came. And there's testimony that not only did Jessica come  
15 during the campaign but she was there throughout the year giving  
16 inservices to LPNs and to the other nursing staff, to the RNs as  
17 well. I think that there's plenty of evidence that shows that  
18 Care One has acted and continues to act as the parent company.  
19 And I believe that the information that we requested as to Care  
20 One, what communications Care One had with Somerset Valley  
21 representatives is relevant.

22 JUDGE DAVIS: Yes.

23 MR. KIESEWETTER: What we've had so far, we had testimony  
24 from a couple of employees who have, or they're not, they don't,  
25 they're not management. They, this is, we just had, sort of had

1 this discussion with regard to a supervisory issue of maybe it  
2 being kind of premature that we have testimony from employees  
3 who, who may not have the facts and may not be able to speak to  
4 this, so I would say it's a little bit premature for General  
5 Counsel to draw those conclusions based on the testimony that's  
6 in today.

7 JUDGE DAVIS: Well, I think based on the testimony  
8 particularly of the witnesses concerning, particularly  
9 concerning Jason Hutchens and Andrea both admitted officials of  
10 Care One, that they came to the facility, then Andrea addressed  
11 the nurses about the nurses alleged problems. And let's say  
12 that I believe those witnesses, but based on the evidence that  
13 we've heard so far, you know, it appears to me that Care One is  
14 involved or was involved in the response, company's response to  
15 the organizational efforts.

16 And therefore, I believe that paragraphs 35 to 38 of the  
17 subpoena are relevant as they relate to Care One's documents to  
18 Respondent Care One, as to all the documents set forth in  
19 paragraphs 35 to 38. So, I believe that they are relevant. I  
20 think a sufficient showing has been made that Care One was  
21 involved in the Respondent's response to the organizing  
22 campaign, and that those documents should also be produced.

23 Anything else?

24 MR. SANTIAGO: Not at this time, Your Honor.

25 JUDGE DAVIS: Okay. If there's nothing further -

1 MR. SANTIAGO: Could we get a time when those documents  
2 will be provided?

3 JUDGE DAVIS: Are you assembling additional documents at  
4 this point, Mr. Kieseletter?

5 MR. KIESEWETTER: No. I will have to inquire on this and  
6 find out. I can give you a time on this maybe tomorrow, but I,  
7 it's, this is a, this is going to be a very cumbersome and labor  
8 intensive process on this. And so I will have, I will do the  
9 best I can to figure out what's all involved in all of this, and  
10 then get back to you with a response.

11 MR. SANTIAGO: Your Honor, if I can just respond.  
12 Respondent has had the subpoena since April, early April, April  
13 8<sup>th</sup>. He, he's, he's had over three weeks to compile this  
14 information. And for him to say that he's made no effort to put  
15 this stuff together before today I think is, I think it  
16 prejudices us.

17 And, and if there's documents or e-mails or correspondence  
18 that is relevant to these proceedings I, I think that it's  
19 insufficient I believe for Respondent to say I'll see what I can  
20 do and I'll get back to you as to the time.

21 JUDGE DAVIS: I think he said more than that. So, I'm  
22 going to allow Mr. Kieseletter's representations, give me an  
23 update tomorrow.

24 MR. KIESEWETTER: Yes, Your Honor, right. We are, we  
25 have, we, just to be clear we currently have nothing going on

1 trying to collect these documents now. However, we have looked  
2 at what might be involved preliminarily and saw that it is going  
3 to be a massive time consuming process. I do not have anything  
4 more than that right now, but hopefully by tomorrow I'll be able  
5 to say this is what's going to be involved, this is the kind of  
6 cost that's going to be involved.

7 And we're going to have to make some sort of arrangements  
8 so that we, we would get paid for the documents or the  
9 government copies them themselves. So, this is, this is not a  
10 small, and when I say "small", currently we've produced probably  
11 six thousand documents in this case. And so what we're talking  
12 about producing here is going to dwarf what we've already  
13 produced, that's, that's the scope of this.

14 So, that's why, that's why this isn't a matter of just  
15 going to a couple of file drawers and pulling out a few things.  
16 So, we're looking at a very big project. And I will, I would, I  
17 will get you a better, a better estimate of this and the costs  
18 as soon as I can.

19 JUDGE DAVIS: Well, just look at the subpoena, it calls  
20 for only four months of documents relating to correspondence  
21 between Respondent and Care One. It's limited to be regarding  
22 the Union organizing drive, the charges, video tapes, summaries,  
23 et cetera.

24 Obviously I don't know what the scope of the documents are  
25 but you can look into that and let us know.

1 MR. KIESEWETTER: Yes, I will do that.

2 JUDGE DAVIS: All right. If there's nothing the hearing  
3 is adjourned until 9:30 tomorrow morning.

4 MR. SANTIAGO: Thank you, Your Honor.

5 JUDGE DAVIS: Off the record.

6

7 (Whereupon, the hearing was adjourned to reconvene at 9:30 a.m.,  
8 on Friday, April 29, 2011.)

9

# Exhibit D

1           **JUDGE DAVIS:** Back on the record.

2           Mr. Silverstein, in answer to the question about the  
3 CareOne. And Mr. Kiesewetter said you would look into their  
4 production.

5           MR. KIESEWETTER: I'm sorry. You're talking about the  
6 paragraph that we talked about?

7           MR. LIGHTNER: The session we had last week about the  
8 Judge had earlier reserved ruling on the CareOne paragraphs of  
9 the subpoena, and then he made a ruling last week. And you said  
10 that you'd get back to us an estimate for production.

11          MR. KIESEWETTER: The best we can calculate right now it's  
12 likely to take several weeks and it's likely to cost several  
13 tens of thousands of dollars to comply. And we will be filing a  
14 special appeal on that decision. So that is where that stands  
15 right now. We will have the special appeal filed let me say by  
16 Wednesday. It'll be filed immediately.

17          JUDGE DAVIS: Now I understand your position about the  
18 cost. I heard your position about the cost and the amount of  
19 time. But without looking at the subpoena, it just asks for  
20 those documents, as I recall, relating to the union campaign,  
21 passed between or communicated between CareOne and the  
22 Respondent for I think only a four-month period of time.  
23 Actually, I don't know what those documents consist of. But  
24 you're in a better position to know that. There are a very vast  
25 number of documents that have to be searched for that's involved

1 here?

2 MR. KIESEWETTER: Yes, Your Honor. The vast majority of  
3 these are going to have been electronically communicated. It  
4 appears that there is going to be at least 10 management  
5 mailboxes that will have to be reconstructed. We have to  
6 outsource that to reconstruct that. And getting some feel of  
7 one person's mailbox, if it was printed off, it would be two  
8 file boxes full of documents for one person. Now much of that  
9 is also going to be privileged. So once it is all reconstructed  
10 and we can identify it and figure out what it is, then we have  
11 to create the privilege log. So then we have to have paralegal,  
12 or lawyers, or both spend some time going through all the  
13 documents and compiling the privilege log, which adds to the  
14 expense of things.

15 And so we're looking at a quite cumbersome and expensive  
16 process. And that will be one of the bases of the special  
17 appeal that we are in the process of preparing right now and may  
18 have filed tomorrow. I just didn't want to put myself on a  
19 deadline because I don't know how late we'll go and everything  
20 else, what will happen today. But we will have it filed for  
21 sure by Wednesday.

22 MR. LIGHTNER: If there's any clarification to be made,  
23 we're not seeking attorney work product or anything of that  
24 nature.

25 MR. KIESEWETTER: We understand. We're not going to give

1 you that. But it's all going to have to come up through the --  
2 it'll be unfiltered when it comes up. And then we have to go  
3 through and sift through it, and identify which things are work  
4 product and privileged, and that has to be done one document at  
5 a time.

6 MR. SANTIAGO: Your Honor?

7 MR. KIESEWETTER: So that's the situation. And that's  
8 where we are.

9 MR. SANTIAGO: Your Honor, I mean it's very clear from the  
10 paragraph itself that the correspondence and communications  
11 between and among Somerset Valley and CareOne, not between  
12 CareOne, Somerset, and attorneys. These are communications that  
13 perhaps were going between Jason Hutchens and Doreen Illis or  
14 Inez Konjoh at the Somerset Valley facility, and back and forth.  
15 In those communications, I mean those individuals are well known  
16 at least at this point who may have been having these  
17 communications. We're not asking for communications between Mr.  
18 Kieseletter or anyone from his firm with these individuals.

19 So I understand his portion that it would take a long time  
20 and put together a privilege log and all that if we were asking  
21 for those lines of communication. But that's not what we're  
22 asking. I think the paragraph is specifically and narrowly  
23 tailored for only communication between CareOne officials and  
24 Somerset Valley officials.

25 MR. KIESEWETTER: But, Your Honor, I'm not an IT person.

1 And I struggle to keep up with where technology is today in our  
2 business. But we've been informed that we don't know how to  
3 pull up only the documents that Mr. Santiago is saying  
4 electronically. They will all come up. When we reconstruct  
5 these mailboxes, we will get people's emails to their wife about  
6 meet me at the restaurant. And we'll get emails between the  
7 lawyers. And we'll get all kinds of emails. And I understand  
8 the subpoena is limited to a certain group of emails, but then  
9 we have to fish those out manually after the documents are all  
10 -- after they are reconstructed.

11 When they are reconstructed, it's my understanding that  
12 when you go into these computer systems, it's not so easy to  
13 reconstruct the mailboxes and put all the data back. But the  
14 data initially comes back encrypted or somehow unreadable. And  
15 then it has to go through another process to be defragmented or  
16 whatever they call it to put it back into an email. And then  
17 once we have the documents, they have to be sorted manually by  
18 somebody who knows what is required to be produced and somebody  
19 who can pull out privilege and create a privilege log. So I'm  
20 explaining it the best I understand.

21 JUDGE DAVIS: Right, all right.

22 MR. KIESEWETTER: So if Mr. Santiago knows a better way to  
23 do this or can refer another IT outside person, we'll be glad to  
24 go call them and get another read on this.

25 MR. SANTIAGO: Your Honor, my major concern and our major

1 concern is as acting General Counsel that we had this discussion  
2 last week sometime. I believe the discussion was had on  
3 Thursday. Mr. Kieseletter was supposed to tell us on Friday how  
4 long it was going to take. That conversation didn't take place.  
5 And so were having this conversation five days after the point  
6 and still there is no indication as to when this stuff is going  
7 to be produced. There is no indication as to whether or not  
8 they have even begun the production or trying to compile this  
9 documentation. There's no representation when it will be  
10 completed.

11 And I'm not quite sure what system they use, but from  
12 looking at some of the documents, it looks like it's an Outlook  
13 system. In an Outlook system, if there is a find query and all  
14 you have to do is plug in, in the find query, who exactly you  
15 are looking for. Jason Huchens, emails that have come from  
16 Doreen to Jason Huchens, and it lists all of the Jason Huchens  
17 emails. And you go through as quickly as a few minutes to find  
18 which ones are relevant and which ones aren't. So you wouldn't  
19 be asking for a spouse's I can't meet you at a restaurant  
20 because you wouldn't be looking for that. The only way you  
21 would be looking for that is if you are looking for a timetable.

22 Obviously, there are quicker ways to process the request  
23 than what Mr. Kieseletter, and as to whether or not it was  
24 encrypted or defragged -- first of all, it wouldn't be  
25 encrypted. Encryption, I don't want to go into what encryption

1 would be. But these sort of emails would not be encrypted.

2 JUDGE DAVIS: So I'd like the wheels to begin, if they  
3 haven't already begun to go into these things or to generate  
4 these things as opposed to waiting for a special appeal to be  
5 ruled on by the Board. They haven't ruled on your first appeal,  
6 as far as I know, regarding the stay of the proceeding, etc. So  
7 I'd like those wheels to be begun. And if the Board says you  
8 are correct, they can stop. Otherwise, you say this can take  
9 several weeks, you know, we're on a schedule here and if and  
10 when we resume in May, the end of May, then we certainly should  
11 have these documents provided.

12 MR. KIESEWETTER: I don't know about if my client is  
13 willing to start spending the amount of money and time that it's  
14 going to take to do this. Now if the government will pay for  
15 this, then that may change their position. So the fact is we  
16 may, if we have to do this, we may want the government to pay  
17 for the reconstruction of the email files, if that's where we're  
18 going. But right now we are going to put a special appeal in  
19 front of the Board on that ruling.

20 JUDGE DAVIS: With respect to your first statement that  
21 your client may be unwilling to do that, I don't know that he  
22 has a choice. The documents are subpoenaed. I've ruled that  
23 they are relevant and should be produced. Sufficient showing  
24 has been made that there is an obvious connection between  
25 CareOne and Respondent particularly in CareOne's response to the

1 organizing campaign. And you can make a request that general  
2 counsel share the cost of this and see what happens. All right,  
3 that's as far as I'm concerned.

4 MR. SANTIAGO: Your Honor, there is another paragraph as  
5 well that information is not produced. In -- hold on one  
6 second.

7 MR. LIGHTNER: Off the record for a second?  
8 (Discussion off the record.)

9 JUDGE DAVIS: All right.

10 So there is a question about Paragraph 11 of the subpoena  
11 issued by general counsel for what?

12 MR. LIGHTNER: For Paragraph 11, for the period June 1,  
13 2010, to August 9, 2010, all documents that reflect or concern  
14 additions and/or deletions made on the Smartlink (ph.) system by  
15 Elizabeth Heedles.

16 JUDGE DAVIS: Your objection is irrelevant and immaterial.  
17 And what's the -- your opposition to the petition is what? Why  
18 did you need these documents?

19 MR. LIGHTNER: Your Honor, there was a motion to quash --

20 MR. KIESEWETTER: Well, Your Honor, if we could be heard  
21 on this?

22 MR. LIGHTNER: Respondent --

23 MR. KIESEWETTER: I'm sorry. If you want to finish, go  
24 ahead.

25 JUDGE DAVIS: Speak to the petition to revoke first.

1 MR. KIESEWETTER: I was just going to say that we are  
2 under a little bit of an awkward situation today because our  
3 partner who handled the subpoena issues and the production was  
4 in an accident last night and was in hospital last night. And I  
5 think is traveling. But I got a hold of her after I got this  
6 and she informs me that we do not have any of these documents.  
7 There are none. So the answer to that is we have complied  
8 because there are none.

9 MR. LIGHTNER: Your Honor, we find that very surprising  
10 since they provided those same documents for other individuals,  
11 namely Doreen Illis and Inez Konjoh. Same type of information  
12 they have given for Inez and Doreen, and yet the same  
13 information for a different period of time they are now saying  
14 can't be produced for Elizabeth Heedles.

15 MR. KIESEWETTER: My understanding of this, Your Honor, is  
16 that it has to do with the system, the way the system operates.  
17 It does not retain information after certain points in time. A  
18 lot of the information is gone, so we do not have this  
19 information. We would have more recent information. We'd have  
20 information from last week. I think it's six months that it  
21 cuts off.

22 JUDGE DAVIS: You're saying Heedles involved in an earlier  
23 period of time is no longer available?

24 MR. KIESEWETTER: Correct.

25 JUDGE DAVIS: All right. That's your answer, okay?