

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

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

**Case Nos. 34-CA-070823
34-CA-072875
34-CA-075226
34-CA-083335
34-CA-084717**

and

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

COUNSEL FOR ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' AND RELATED ENTITIES' REQUEST FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGES ORDER DENYING RESPONDENTS' PETITIONS TO REVOKE SUBPOENAS DUCES TECUM

Counsel for the Acting General Counsel respectfully request that Respondents' Request to Appeal the Administrative Law Judge's Order Denying Respondents' Petitions to Revoke Subpoena Duces Tecum ("Special Appeal") be denied in its entirety. On October 4, 2012, Respondents filed substantially identical Special Appeals. Counsel for the Acting General

Counsel files this one document in Opposition to each of the Special Appeals filed on behalf of all the named Respondents and its related entities.¹

I. Procedural and Factual Background

On August 14, 2012, identical Subpoena Duces Tecums (“Single and Joint Employer Subpoenas”) were served on ten entities, nine of which are named Respondents in the Third Consolidated Amended Complaint, as modified by the Notice of Intent to Amend, herein (“Complaint”). The tenth subpoenaed entity, Care One Management, LLC, is closely related to the named Respondents. The subpoenas were returnable on September 10, 2012, at the start of the administrative hearing. On August 23, 2012, Respondents, and its related Entities issued substantially identical Petitions to Revoke. On September 6, 2012, Counsel for Acting General Counsel filed its Opposition to Petitions to Revoke, attached hereto as Exhibit A. On September 13th the administrative hearing adjourned, and is scheduled to resume on October 17 through 25, 2012.

In the instant case, the Complaint is one of a series of complaints that allege the named Respondents and its related Entities are joint and single employers.² In HealthBridge Management, LLC, 34-CA-12175, et.al. (ALJD, August 1, 2012), the Respondents, except for

¹ HealthBridge Management, LLC, herein called Respondent HealthBridge (Subpoena B-612838); Care Realty, LLC herein called Respondent Care Realty (Subpoena B-612841); Care One, LLC, herein called Respondent Care (Subpoena B-612840); Care One Management, LLC, herein called Care Management (Subpoena B-612842); 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (Subpoena B-612854); 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford (Subpoena B-612844); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (Subpoena B-612848); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (Subpoena B-612851); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center, (Subpoena B-612849); 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (Subpoena B-612846). The Subpoenas also seek items from non-Respondents Care Ventures, Inc., the asset manager for Care Realty, LLC; THCI Company, THCI Holding Company, LLC and THCI Mortgage Holding Company, LLC, the direct and indirect owners of the six Health Care Centers, herein referred to as the related Entities.

² On March 21, 2011, a Consolidated Complaint issued in Cases 34-CA-12715, et. al., and on September 30, 2011 Consolidated Complaint in 34-CA-012964, et. al. each allege that Respondents HealthBridge, Care Realty, LLC a/k/a Care One and the Health Care Centers operated as a single integrated enterprise, and were joint and single employers.

CareOne, LLC³ were the subject of similar Subpoenas Duces Tecum and Petitions to Revoke. Those petitions to revoke in the prior case were considered, and denied, by Administrative Law Judge Steven Fish, attached hereto as Exhibit B. In the attached Decision and Order, the Board affirmed the ALJ's decision to deny those Petitions to Revoke. The Board ordered Respondents to produce similar documents sought in the instant case, and deferred decision to the ALJ a portion of the subpoena that required Respondents to analyze email backup tapes. The subpoena dispute was subsequently resolved as a result of Respondent Care Realty's agreement to guarantee the remedy in the case. In the instant case, for the substantially the same reasons as before, Respondents' request for a Special Appeal should be denied.

II. No Grounds to Overrule ALJ's Evidentiary Ruling

The Complaint alleges that the Respondents are joint and single employers, functioning as an integrated business enterprise. Respondents' Answers and Petitions to Revoke deny those allegations. On September 13, 2012 the ALJ denied Respondents' Petitions to Revoke the ten Subpoena duces tecums. The ALJ's Order correctly applied the Board's standard for subpoenas in finding that the subpoenaed documents were germane to the allegations in the Complaint and Respondent's anticipated defenses. GHR Energy Corp., 707 F.2d 110, 114 (5th Cir. 1982); NLRB v. United Aircraft Corp., 200 F. Supp. 48, 50 (D. Conn. 1961), aff'd 300 F.2d 442 (2nd Cir. 1962).

An administrative law judge's evidentiary rulings should be "affirm[ed] unless it constitutes an abuse of discretion." See Aladdin Gaming, LLC, 345 NLRB 585, 587 (2005), petition for review denied sub nom. Local Joint Executive Board of Las Vegas v. NLRB, 515

³In Case No. 34-CA-012715, Care One, LLC was plead as "Care Realty, aka Care One." In the instant case, a Notice of Intent to Amend the Third Amended Consolidated Complaint adds Care One, LLC as a named respondent. Care One was served with a joint and single employer subpoena, and responded with a Petition to Revoke. Care One, LLC is a named charged party in Case 34-CA-075226 incorporated in the Consolidated Complaint.

F.3d 942 (9th Cir. 2008); see also Consumers Distributing, 274 NLRB 346, 346 (1985) (denying interim appeal of a judge's ruling under Sec. 102.26 because “the judge did not act arbitrarily or capriciously or otherwise abuse his discretion”). Respondents’ have made no allegation that the Judge abused his discretion or engaged in any improper exercise of authority in denying the Petitions. Therefore, the Judge’s Order should be affirmed in its entirety, and Respondents’ request denied.

Notably, Respondents object to the production of all twenty-six individually numbered Subpoenaed items. The only documents Respondents have produced in response to the subpoenas cited herein have been petitions to revoke and special appeals. Yet, Respondents’ objections include those documents with obvious relevance to the Respondent’s status as a joint and single employer. Joint employer status is established by demonstrating that Respondents and its related Entities, share or co-determine matters governing the essential terms and conditions of employment. TLI, Inc., 271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985). The Board finds important whether an employer’s exercise of control is direct and immediate. TLI, Inc., 271 NLRB at 798-79; Airborne Freight Co., 338 NLRB 597 (2002). The Board and the Courts consider four factors to determine single employer status: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management, and (4) common ownership. Massey Energy Company and its subsidiary, Spartan Mining Company d/b/a Mammoth Coal Company (09-CA-0420577; 358 NLRB No. 159 (September 28, 2012); Silver Court Nursing Ctr., Inc. & Health Care Services Group, Inc., 313 NLRB 1141, 1142 (1994) (citing Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965)). None of the factors are controlling, and not all factors need to be present to establish single employer status. Flat Dog Productions, Inc., 347 NLRB 1180, 1181-1182 (2006).

Respondents failed to “promptly” file the Special Appeal pursuant to Section 102.26 Board’s Rules and Regulations. The Administrative Law Judge denied Respondents’ Petitions to Revoke on September 13, 2012, the same day the hearing adjourned. During the adjourned period, on September 20, Respondents’ Counsel represented that it was “working on” production. October 4, 2012, Respondents filed this special appeal. The trial is set to resume on October 17, 2012, at which time Counsel for the Acting General Counsel will be forced to continue the presentation of its case without the benefit of the subpoenaed documents. Such inordinate delay prejudices the Acting General Counsel’s case, but also the approximately 600 ULP strikers that, according to the Complaint, Respondents refuse to reinstate.

III. Respondents’ and its Related Entities’ Objections

The Special Appeal raises virtually identical arguments in Respondents’ Petitions to Revoke. For the reasons explained below, Counsel for the Acting General Counsel urges the Board to deny Respondents’ request and affirm the Administrative Law Judge’s September 13, 2012 Order in its entirety.⁴

1. Statutory Employer – Joint and Single Employer Status

In Paragraphs 3, 7, 8 and 9 of the Special Appeals, Respondents Care Realty, LLC, Care One LLC, HealthBridge Management LLC and its related entity CareOne Management, LLC contend that only the six Health Care Centers are “proper employers,” and that the Subpoenaed items concerning the non-Respondents are inappropriate. In addition, Respondents and its related entities argue the following: the joint and single employer status is only relevant to remedial matters and should be deferred, or rather delayed, until liability is established; the Subpoenas documents are “irrelevant and immaterial” to the Complaint allegations because they

⁴ Further details concerning Respondents and its related entities are set forth in Counsel for Acting General Counsel’s Opposition to Petitions to Revoke dated September 6, 2012.

concern the joint and single employer status which is only relevant for compliance. These arguments are mere tired repetition of those arguments asserted in Case No. 34-CA-012715, and should again be rejected by the Board.

Respondents and its related entities are statutory employers, pursuant to the plain language of the Act which defines an Employer as “any person acting as an agent of an employer, directly or indirectly,” and any person includes various types of business organizations. The Subpoenas seek items from non-Respondents because they are actively involved in an integrated business enterprise, along with the named Respondents: CareOne Management, LLC provides substantial employee benefits to employees of the six Health Care Centers; Care Ventures, Inc., is the asset manager for Care Realty, LLC, and Care Realty has 100% ownership interest in all six Health Care Centers through its various wholly-owned pass-through subsidiaries THCI Company, THCI Holding Company, LLC and THCI Mortgage Holding Company, LLC. Therefore, the non-Respondents are directly involved in the integrated business enterprise alleged in the Complaint, and the Subpoenaed records will likely disclose the full scope of the business relationships with the named Respondents.

The Board has previously rejected Respondents’ assertions that the joint and single employer status is solely remedial and thereby irrelevant to the proceeding, and should do so again here. Respondents simply ignore the Complaint, as amended, which specifically alleges that Respondents and its closely related Entities are a single and joint employer, and that the Respondents collectively committed the unfair labor practices alleged. In addition, litigating the issue during the administrative hearing will avoid subsequent due process issues. It is necessary to allow Respondents and its related entities to fully and fairly litigate the joint and single employer status plead in the Complaint during the unfair labor practice proceeding. See e.g.,

Associated General Contractors of Connecticut, Inc., 929 F.2d 910 (2d Cir.,1991) (rejecting Board decision finding derivative liability at the compliance hearing based on agency status, and remanding case for determination as to whether an entity was an alter ego or single employer); Viking Industrial Security, Inc. 225 F.3d 131, 135 (2d Cir., 2000) (court denied enforcement of Board order that found derivative liability in the compliance phase were the evidence failed to establish single employer status at the time of the unfair labor practice litigation). Therefore, it is appropriate to adjudicate the joint and single employer status during the initial unfair labor practice proceeding in response to the pleadings.

Litigating the joint and single employer issue with the unfair labor practices will allow the respective Respondents a full and fair opportunity to litigate the closeness of the relationship at the time of the unfair labor practices. This multi-entity issue is complex and entails considerable documentary evidence and testimony. Litigating the matter sooner, rather than later, will avoid the loss of documentary and testimonial evidence with the passage of time.

As a procedural matter, Respondents' request should be denied outright primarily because a significant portion of this case is the subject of a Section 10(j) Injunction proceeding in which irreparable harm is alleged as a result of the unfair labor practices. To delay such matters until the compliance phase of the case would further exacerbate the harm.

2. Relevance of Subpoenaed Information

Respondents baldly assert that the Subpoenaed evidence is irrelevant and immaterial to the proceeding. Subpoenaed information only needs to be "reasonably relevant" to the allegations in the complaint. Relevance is established if the evidence relates to any matter in question, or is likely to lead to potentially relevant evidence. Board's Rules and Regulations,

§102.31(b); Purdue Farms, 323 NLRB 345, 348 (1997), affd. in rel. pt. 144 F.3d 830, 833-834 (D.C. Cir. 1998).

In the instant case, Complaint Paragraphs 3 and 4, as amended, allege that the six Health Care Centers, HealthBridge Management, Care Realty and Care One⁵ are joint and single employers, and that they operate as an integrated business enterprise. The Subpoenaed documents seek information necessary to establish the numerous factors of joint and single employer status that was denied by Respondents. As such, the ALJ was well within his discretion, and the Board's standard applied to subpoenas, to deny Respondents' petitions. GHR Energy Corp., 707 F.2d 110, 114 (5th Cir. 1982); NLRB v. United Aircraft Corp., 200 F. Supp. 48, 50 (D. Conn. 1961), aff'd 300 F.2d 442 (2nd Cir. 1962).

Respondents even contend that Subpoenaed Items 23 and 24 are "irrelevant," even though those paragraphs seek such obviously relevant documents such as "employee manuals," "codes of conduct," "orientation handbook[s]," and other rules and procedures applied to employees at the six Health Care Centers.⁶ Respondents' assertion that such information is "irrelevant" abuses imagination.

3. Respondents' Fail to Establish Subpoenaed Information is Unduly Burdensome

Respondents in paragraphs 6, 10, 11, 12, 13, 21, 23 of its Special Appeal, generally dispute the breadth of the Subpoenas, and specifically contend that Items 4, 5, 15, 21, 23, 24 are unduly burdensome and "incredibly" broad. Respondents contend that the Subpoena is "extremely broad and seeks much more than needed to prove the single employer issue or the

⁵ Care One, LLC is named in the first amended charged in Case 34-CA-075226 consolidated in the Complaint.

⁶ Paragraph 23. Those documents, including employee manuals, code of conduct, and other rules and procedures, issued to newly hired or rehired employees at each of the Health Care Centers, for the period from January 1, 2009 to the present. Paragraph 24. The orientation handbook issued to newly hired or rehired employees at the Health Care Centers, for the period from January 1, 2009 to the present.

substantive allegations in the Complaint.” Despite this apparent admission that certain documents are needed to prove the single employer allegation, Respondents fail to produce any documents relevant to the issue, and further seek to quash the Subpoena in its entirety - all twenty-six individually numbered Subpoena items.

The party that seeks to avoid disclosure of the subpoenaed records by asserting that they are overbroad and/or unduly burdensome bear the burden of proof. The party must establish that the demand is “unreasonably” overbroad, FTC v. Texaco, 555 F.2d 862 (D.C. Cir. 1977) cert. denied, 431 U.S.974 (1977), and that production ““would seriously disrupt its normal business operations.”” NLRB v. Carolina Food Processors, Inc., 81 F.3d 507, 513 (4th Cir. 1996) (quoting EEOC v. Maryland Cup Corp., 785 F.2d 471, 477 (4th Cir. 1986)). Simply because a subpoena requires the production of a large amount of documents fails to establish that the subpoena is unduly burdensome. NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 115 (5th Cir. 1982). Furthermore, the Board has rejected a respondent’s reliance on mere assertions to meet its burden. Voith Industrial Services, Inc., 09-CA-075496, et. al. (August 27, 2012).

4. Respondents’ Arguments Regarding the Burden of Electronic Discovery

Respondents also contend that the Subpoenaed information should not be produced at all because of the burden of conducting a search for electronically stored information. In Paragraphs 13, 14, 15, 16, 17, 18, 19, 20 and 22 of the Special Appeals, Respondents specifically raise issue with the burden of restoring emails from backup tapes.

a. Respondents Failed to look first to active data sources which might be a less-expensive source of responsive electronically stored information.

In Paragraph 14 of the Special Appeals, Respondents assert that in order to respond to the subpoena, they must restore backup tapes, and the following paragraphs of the Special Appeals recite Respondents’ summary assertions regarding the burden of retrieving information from

those backup tapes and the burden associated with that process. Curiously, there is nothing in the record which suggests that backup tapes are the only source of the information subject to the subpoenas.

Almost a decade ago, in the first of a series of opinions widely regarded as the “Rosetta Stone” of early case law relating to backup tapes, Judge Shira Scheindlin of the Federal District Court for the Southern District of New York addressed a strikingly similar argument. See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (“Zubulake I”). The responding party in Zubulake asserted that the cost of producing any email from backup tapes would be prohibitive. It made that assertion after first conducting a search of more-accessible sources of information. The Zubulake respondent’s argument became the impetus for a series of opinions which eventually formed the basis for much of the framework under the Federal Rules of Civil Procedure litigants facing a search of electronically stored information now must deal with. Here, Respondents have failed to do even that, and instead have jumped immediately to arguments about the costs associated with backup tapes without looking first to more-accessible, less-burdensome alternatives.

In CNN America, Inc., 353 NLRB 891 (2009), the Board made its first foray into electronic discovery issues, and, as with numerous other issues relating to subpoenas, looked to the framework under the Federal Rules of Civil Procedure. Specifically, in CNN, the Board balanced the costs and burdens of producing large amounts of electronically stored information against the relevance and need for the documents, and applied the balancing tests in Fed.R.Civ.P. 26(b) and the well-settled guidance from The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Second Edition

(June 2007) (the “Sedona Principles”)⁷ to determine the scope of the subpoena and the best practices to retrieve the electronic information covered by the subpoena. Importantly, Principle 8 of the Sedona Principles states:

*The **primary source** of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.*

(Emphasis added.)

In seeking to revoke the subpoenas in whole, Respondents have jumped several steps ahead in the analysis. They have failed to identify the costs associated with searches from more accessible sources of information, and absent any discussion of what that search might entail or cost, there is an insufficient record to conduct a complete analysis.⁸ Thus, on that basis alone, the ALJ was correct in denying Respondents’ Petition to Revoke.

b. Respondents’ unsupported assertions regarding the costs associated with retrieving information presuppose a “leave-no-stone-untuned” response.

Even if Respondents’ backup tapes are, in fact, the sole source of responsive electronically stored information, the analysis does not stop there. Under Fed.R.Civ.P. 26(b)(2)(B), if the responding party asserts that a source of electronically stored information is “not reasonably accessible because of undue burden or cost,” the requesting party may still obtain discovery of the information upon a showing of good cause, considering the factors set forth in Rule 26(b)(2)(C).

⁷ A copy of the Sedona Principles is freely available online, at <https://thesedonaconference.org/download-pub/92>

⁸ Indeed, Respondents and their related Entities operate State licensed health care centers that likely receive Medicare funding. It stands to reason that the majority of the Subpoenaed records should be readily available to Respondents in the ordinary course of conducting its business operations, particularly because the health-care centers are regulated and must maintain detailed reporting and auditing requirements that required period filings or disclosures.

In making their assertions regarding the burden of retrieving information from their backup-tape system, Respondents also jump to a premature conclusion. In Paragraph 13 of the Special Appeals, Respondents assert that “20 or more” email accounts (and “potentially an unlimited number”) would have to be searched to respond to the Subpoena. In Paragraph 14 of the Special Appeals, Respondents contend that in order to access a single user’s email history “for the period January 1, 2009 to the present”, Respondent would have to access each and every monthly backup tape in Respondent’s possession. Respondent then extrapolates costs based on the purported need to restore each and every tape in its possession.

Counsel for the Acting General Counsel has significant reservations regarding whether the costs Respondents assert their IT consultants would incur to restore Respondents’ email are, in fact, reasonable. In discussing the framework established under the Federal Rules of Civil Procedure, the Federal Judicial Center’s publication, “Managing Discovery of Electronic Information: A Pocket Guide for Judges” (2d ed. 2012)⁹ notes that judges assessing these arguments “should not be content with generalized or conclusory statements about costs and burdens” (*id.* at 15) and that “The requesting party may need discovery to challenge the assertion that the information is not reasonably accessible” (*id.* at 16).

But in any event, Respondents’ argument fails as a matter of common sense. When it is on the receiving end of a subpoena or FOIA request, the NLRB does not conduct a comprehensive, leave-no-stone unturned search of the files of every single Regional office, nor does it begin the costly and laborious process of restoring email from every single day’s disaster-recovery backup on the equivalent of its backup tapes. Nor does counsel for the Acting General

⁹ A copy of this publication is available directly from the Federal Judicial Center’s website, at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/\\$file/eldscpkt2d_eb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf)

Counsel suggest that, absent truly exceptional and unusual circumstances, such heroic efforts would ever be warranted.

Such "leave-no-stone" unturned searches have never been required under the developing case law interpreting a party's obligation under the Federal Rules of Civil Procedure. In 2003, in Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) ("Zubulake IV"), Judge Scheindlin addressed this very issue in the context of a party's obligation to preserve backup tapes. She wrote,

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no." Such a rule would cripple large corporations, like [responding party], that are almost always involved in litigation.

And if a party would not have a duty to even preserve electronically stored information, it would neither have a duty to restore, process, reduplicate and index the data on them, either.

A recent case, Pippins v. KPMG LLP, 279 F.R.D. 256 (S.D.N.Y. 2012) is also instructive. The court in Pippins observed that in the electronic discovery context, (and the framework contemplated under the Federal Rules of Civil Procedure), "[p]reservation and production are necessarily interrelated". Id. at 255. The plaintiffs in Pippins sought broad-based discovery in a class action, and the employer brought a motion seeking a protective order to limit the scope of its preservation obligations. The District Judge agreed with the Magistrate's finding that information on hundreds of computer hard drives was likely to contain relevant information, and found that the record before him was "devoid of information necessary to conduct" a burden analysis. Id. at 256. Among other things, the employer, KPMG, had failed to allow the examination of further assessment of even a single one of the hundreds of hard drives at issue. Id.

The situation before the Board is much the same. Here, Respondents assert they must bear the burden of costs associated with a comprehensive, leave-no-stone-unturned search of their backup tapes, yet, as explained below, they have rebuffed the Acting General Counsel's efforts to enter into a discussion regarding the scope and nature of the electronically stored information present on those backup tapes. Likewise, Respondents' Petition to Revoke and this Special Appeal presupposes an "all or nothing" approach to the Subpoenas -- that because the cost of doing everything is unreasonable, then Respondents should be permitted to do nothing.

c. Respondents fail to disclose information relating to Respondents' information infrastructure.

Respondents failed to identify basic information about its information systems highlighted in Counsel for the Acting General Counsel' opposition to Respondents' petitions to revoke. For instance, Respondents' Special Appeals do not disclose what type of email system, backup tapes and software Respondents use, despite the need for such information as referenced in the Counsel for the General Counsel's Opposition the Petitions to Revoke. The cooperative exchange of this type of basic information is necessary for a reasonable and cost-effective resolution of disputes regarding the scope of a subpoena, and is entirely consistent with mandatory disclosures contemplated under the Federal Rules of Civil Procedures.¹⁰

In 2008, the Sedona Conference issued its "Cooperation Proclamation", see The Sedona Conference Cooperation Proclamation (2008), at <https://thesedonaconference.org/cooperation->

¹⁰ Indeed, the "Form 26(F) Report of Parties' Planning Meeting" for the United States District Court for the District of Connecticut, which is appended to that Court's local rules, specifically recites that during the parties' conference required under Fed.R.Civ.P. 26(f), the parties:

have discussed the disclosure and preservation of electronically stored information, including, but not limited to, the form in which such data shall be produced, search terms to be applied in connection with the retrieval and production of such information, the location and format of electronically stored information, appropriate steps to preserve electronically stored information, and the allocation of costs of assembling and producing such information.

(Emphasis added.)

proclamation, which asserts, among other things, that the realities of modern-day electronically stored information compel increased transparency, communication, and collaborative discovery and that the alternative to cooperation “is that litigation will become too expensive and protracted in a way that denies the parties an opportunity to resolve their disputes on the merits.” Thus, according to the Sedona Conference, “As a result, in order to preserve our legal system, cooperation has become imperative.” See “The Case for Cooperation”, 10 Sedona Conf. J. 339 (2009 Supp.) (linked above). Following the issuance of the “Cooperation Proclamation”, numerous judges endorsed it, and the list of endorsers includes several judges regarded as thought leaders in eDiscovery scholarship.

The ALJ, Counsel for Acting General Counsel or the Board should not be required to rely on Respondents unsupported assumptions of cost and burden, and Respondents should not be rewarded for their lack-of-cooperation in failing to provide basic information necessary to discuss the scope of the subpoena. Counsel for the Acting General Counsel respectfully submits that Respondents’ Special Appeal should be denied because the alternative would reward Respondents’ lack of disclosure which, in essence, insists that all parties involved “take their word for it.”

Finally, Counsel for the Acting General Counsel notes that in Paragraphs 13 through 23 of their respective Special Appeals, all nine Subpoenaed parties assert *verbatim* the exact same difficulty, time and expense to produce the subpoenaed documents. In this regard, one could reasonably infer that all nine Subpoenaed parties either have an identical system or share IT infrastructure, which itself is the same type of system or share the same system, email mailbox, third-party provider, and consulted the same IT consultant and vendor, all of which are indicative of a single integrated enterprise.

5. Respondents' fail to Establish Confidentiality and Injury to Warrant Protective Order

Respondents in Paragraph 24 of the Special Appeals, make a blanket assertion that “nearly all of the Subpoenaed items call for the production” of “Protected Information” which it defines as “documents, materials or information considered proprietary, confidential, private and/or sensitive.” It further seeks a protective order, with extensive notice requirements, for all of the documents including those available under the Freedom of Information Act (“FOIA”). Even more restrictive and prejudicial to Counsel for Acting General Counsel’s case, Respondents seeks to prohibit the Board from disclosing the Protected Information pending a final disposition of a lawsuit that it may file to enjoin disclosure of the records it claims are protected. The breath of the Protected Information, as defined by Respondents, would prohibit disclosure of substantially all of the subpoenaed documents, thereby possibly limiting the materials use at the administrative hearing.

A party seeking a protective order bears the burden of establishing that the information is confidential, and that “good cause” exists to protect the information from disclosure because such disclosure would result in “clearly defined and serious injury.” See Fed. R. Civ. P. 26(c); Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) citing Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994)(court rejected issuance of umbrella protective order where party failed to satisfy “good cause” requirement). Accord Lasher Service Corp., 332 NLRB 834 (2000).

The Board reversed the grant of a protective order where the material is “routine employment-related information.” Richmond Times Dispatch, Case 5-CA-29157 et. al. (August 1, 2002) (not reported in Board volumes). In Richmond Times, the protective order covered subpoenaed documents such as employee timesheets with hours of work and wages paid, among

other things. The Board found that the employer failed to demonstrate “good cause” to warrant a protective order for the wage and hour information.

In Cossentino Contracting Co., Case 5-CA-29607 (Dec. 20, 2001) (not reported in Board volumes), the Board again reversed an ALJ’s grant of a protective order precluding disclosure of “routine employment-related information.” The information included general personnel records such as documents showing salary and wage records, employment applications, and various other payroll and personnel records. Again the Board found that the employer failed to show “good cause” for a protective order for such information.

In the instant case, Respondents, in both its Special Appeals and Petitions to Revoke, make naked assertions that the documents are confidential and/or proprietary without any specific facts as to the proprietary or confidential nature of the documents or the harm asserted from the information’s disclosure. Respondents’ do not even contend that it would be harmed by the disclosure of the documents in seeking a protective order. Yet, it insists on detailed and extensive restrictions of the information which it concedes might be available under the Freedom of Information Act. Even if Respondents asserted that it would be harmed by the information’s disclosure, “[b]road allegations of harm, unsubstantiated by specific examples” is insufficient to establish good cause. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786. Respondents’ request for a protective order should be denied in its entirety

Because protective orders limit persons who may have access to information, the Board is careful not to unnecessarily restrict the rights of discriminatees and other interested parties to participate in the administrative hearing. Water World, 289 NLRB 808, 809 (1988).

Furthermore, in considering a protective order, the trier of fact should balance the potential injury to the party against the public’s rights to obtain information from judicial proceedings.

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786-789 (3rd Cir. 1994). Here, Respondents fail to identify any particular harm from disclosure however there is great public interest in this proceeding particularly from the estimated 700 families affected by the proceeding.

Proceeding without the Subpoenaed documents will unduly prejudice Counsel for Acting General Counsel's case. The most direct and substantive evidence establishing joint and single employer status is documentary evidence, and such evidence is primarily in the exclusive control of the named Respondents and its related entities. For example, to establish ownership of a limited liability company, there are documents such as the membership agreement that likely identified the company's members and their respective ownership interests. The General Counsel is further prejudiced without the subpoenaed material by requiring the examination or cross examination of adverse witnesses without the ability to contemporaneously compare the accuracy or veracity of such testimony against Respondents' records.

IV. CONCLUSION

Based upon the above, Respondents and it related Entities effort to nullify the subpoenas should be rejected and the Administrative Law Judge's Order affirmed in its entirety. The Judge's evidentiary ruling applied the correct standards in so much as the Subpoenas seek documents germane to the issues raised in the pleadings and Respondent's anticipated defenses, the relevant standards applied to Board subpoenas. NLRB v. GHR Energy Corp, supra and NLRB v. United Aircraft, supra. Furthermore, the Judge did not act arbitrarily, capriciously or in any way abuse his discretion. Aladdin Gaming, LLC, supra., Local Joint Executive Board of Las Vegas v. NLRB, 515 F.3d 942 (9th Cir. 2008); Consumers Distributing, supra. As such, the Judge's evidentiary ruling should be affirmed.

Accordingly, for the reasons above, Counsel for the Acting General Counsel respectfully request that the Board deny the Respondents and its related Entities' requests for special permission to appeal the Judge's September 13th Order denying their Petitions to Revoke.

Dated at Hartford, Connecticut this 15th day of October, 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "Nicole Roberts". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

Nicole Roberts,
Counsel for Acting General Counsel
National Labor Relations Board
Region 3
Niagara Center Building
130 S. Elmwood Ave., Suite 630
Buffalo, New York 14202

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

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

and

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

**Case Nos. 34-CA-070823
34-CA-072875
34-CA-075226
34-CA-083335
34-CA-084717**

**COUNSEL FOR ACTING GENERAL COUNSEL'S OPPOSITION
TO RESPONDENTS' AND RELATED ENTITIES' PETITIONS TO
REVOKE SUBPOENAS DUCES TECUM – JOINT AND SINGLE
EMPLOYER STATUS¹**

On August 14, 2012, identical Subpoenas Duces Tecum concerning the joint and single employer status ("Single and Joint Employer Subpoenas") were served on ten entities, nine of which are named Respondents in the Third Consolidated Amended Complaint, as modified by the Notice of Intent to Amend² (collectively, the Compliant). The tenth subpoenaed entity, Care One Management, LLC, is closely related to the named Respondents. The subpoenaed entities and their numbered subpoenas are as

¹Counsel for the Acting General Counsel's opposition to the subpoenas duces tecum regarding the individual unfair labor practice allegations will be addressed in a separate response.

² On August 29, 2012, Counsel for the Acting General Counsel filed a Notice of Intent to Amend the Third Amended Consolidated Amended Complaint, appended hereto as Exhibit A, to include Care One, LLC.

follows, with the last six listed entities, Respondent Health Care Centers, being the licensed operators of the health care facilities:

HealthBridge Management, LLC, herein called Respondent HealthBridge (Subpoena B-612838);

Care Realty, LLC herein called Respondent Care Realty (Subpoena B-612841);

Care One, LLC, herein called Respondent Care (Subpoena B-612840);

Care One Management, LLC, herein called Care Management (Subpoena B-612842);

107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (Subpoena B-612854);

710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford (Subpoena B-612844);

240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (Subpoena B-612848);

245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (Subpoena B-612851);

1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center, (Subpoena B-612849);

341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (Subpoena B-612846).

On August 23, 2012, the Respondents filed substantially identical Petitions to Revoke Subpoena Duces Tecum served on the ten Entities, appended hereto as Exhibits B through K. Because of the close similarity of the claims made in the Petitions, Counsel for Acting General Counsel files one document in Opposition to the Petitions to Revoke or Partially Revoke Subpoenas Duces Tecum filed by all ten Entities concerning the joint and single employer status, and urges the Administrative Law Judge to order all the Entities to comply.

I. Context of Subpoenas

Similar to the instant case, in HealthBridge Management, LLC, 34-CA-12175 (August 1, 2012), the joint and single employer status of the collective Respondent was the subject of similar Subpoenas Duces Tecum and Petitions to Revoke. The Petitions

to Revoke in the prior case was considered and denied by Administrative Law Judge Steven Fish, with Board approval pursuant to a special appeal of the judge's ruling. In HealthBridge Management, LLC, 34-CA-12175 (August 1, 2012), the same named Respondents were alleged as joint and single employers with the exception of Care One, LLC which was plead as Care Realty, LLC "aka Care One."³ ALJ Fish denied Respondents' Petitions to Revoke the Subpoenas Duces Tecum regarding the joint and single employer status. The Board issued a Decision and Order, in response to a Special Appeal, denying Respondents' Petitions to Revoke. The Board ordered Respondents to produce substantially the same documents sought in the instant case, and deferred decision to the administrative law judge regarding the portion of the subpoena that required Respondents to analyze email backup tapes. The subpoena dispute was subsequently resolved as a result of Respondent Care Realty's agreement to guarantee the remedy in the case.

In the instant case, the Complaint alleges that the nine entities are single and joint employers, namely Respondent HealthBridge, Respondent Care Realty, Respondent Care One, each Respondent Health Care Centers, and that they committed the alleged unlawful acts, described below, as a single- integrated business enterprise.

The Complaint further alleges since January 25, 2011, when negotiations for a successor collective-bargaining agreement (CBA) between Respondents and the Union began:

- Respondents bargained in bad-faith with the Union;
- Respondents threatened to lock out employees at the six facilities in support of their bad-faith bargaining position;
- Respondents locked out employees at West River Health Care Center in support of a bad-faith bargaining position;

³ In the instant case, a Notice of Intent to Amend the Third Amended Consolidated Complaint adds Care One, LLC as a named respondent. Care One was served with a joint and single employer subpoena, and responded with a Petition to Revoke. Care One, LLC is a named charged party in Case 34-CA-075226 which was incorporated into the consolidated complaint.

- Respondents threatened to close five of the six facilities unless the Union agreed to their bargaining demands, which were made and maintained in bad-faith;⁴
- Respondents threatened to implement, and on June 17, 2012, did implement, its last, best final offer, without having first bargained with the Union to a good-faith impasse;
- Respondents threatened to permanently replace Unfair Labor Practice (ULP) strikers; and
- Respondents refused to reinstate ULP strikers upon their unconditional offer to return to work.

II. Respondents' Objections

Respondents, and its related Entities, make the following general arguments to revoke the Single and Joint Employer Subpoenas: A. Only the Respondent Health Care Centers are statutory employers; B. They are not single and/or joint employers, alternatively, such status is only relevant to remedial matters in compliance; C. The subpoenaed information is confidential and/or proprietary, D. The subpoenaed information is protected by attorney-client privilege and attorney work product, E. The information is outside of the Respondents' custody and control, F. The subpoenas' instructions and cover letter are unauthorized by Board's Rules and Regulations, G. The form of the subpoena requests do not comport with the form of the documents, lack sufficient particularity, and a search for e-mails is unduly burdensome and expensive; H. Respondents' assert the subpoenaed documents are irrelevant, a "fishing expedition," unreasonably broad and lacked sufficient particularity.

A. Not Statutory Employers

Respondents Care Realty, Care One, HealthBridge and its related Entities all appear to argue that the subpoenas should be revoked simply because they are not statutory employers, but provide no supporting case law. In contrast, the Respondent Health Care Centers, in its Answer to the Complaint, admit it is a statutory employer under the Act. The assertion that they are not employers under the statute will fail if the evidence in litigation establishes that it is a single employer in conjunction with another

⁴ Respondents had already petitioned the State of Connecticut for permission to close Wethersfield Health Care Center by that time.

Entity which is a statutory employer. The subpoenaed documents will contribute evidence about whether Care Realty is a statutory employer in its own right, as well as whether it is a single employer with other Respondents. Further, an entity that is not a statutory employer is still subject to a Board Subpoena. In any case, where Care Realty may be a single employer along with an entity that is a statutory employer, the subpoena should not be revoked.

B. Respondents' Deny Single and/or Joint Employer Status and Contend that the Issue is Only Relevant to Compliance

Respondents and its related Entities' denial of its single and/or joint employer status as grounds to revoke the subpoenas in fact support the very need for the subpoenaed documents. According to the standard applied to Board subpoenas, the subpoenaed documents are relevant if they are germane to the issue(s) in the complaint and respondent's anticipated defenses. GHR Energy Corp., 707 F.2d 110, 114 (5th Cir. 1982); NLRB v. United Aircraft Corp., 200 F. Supp. 48, 50 (D. Conn. 1961), aff'd 300 F.2d 442 (2nd Cir. 1962). In the pleadings filed in the instant case, and in the Petitions to Revoke disputed herein, Respondents deny joint and single employer status as such the documents sought are germane to the precise issue raised in the pleadings and Respondent's anticipated defenses.

Respondents argue in the alternative that to the extent single and joint employer status is relevant, the issue only relates to remedial matters and should be delayed to compliance. They then argue that all the Joint and Single Employer Subpoenas should be revoked, but are particularly focused on the subpoenas of Care Realty, Care One, and HealthBridge. They argue that no subpoenas – and apparently no litigation -- should be pursued against Care Realty or Care One unless and until there is a finding of liability against the Health Care Centers and there is a compliance hearing. In contrast, Respondent Care Realty as well as Care One, and Care Management, in their Petitions, all deny that they are statutory employers and also deny that they are single employers with any entity. However, the Health Care Centers and HealthBridge do not deny that they are statutory employers. As to Care One Management LLC, it has been subpoenaed to supply documents bearing on the single employer issue and the responsibilities of the Respondents for the unfair labor practices alleged in the Complaint. This subpoena is valid even assuming *arguendo* that they are not statutory employers, contrary to their implied claim.

More importantly, the claim that single employer status could only pertain to the remedial phase is incorrect. The current policy of the NLRB cuts against putting off the single employer issue. In this regard, as expressed in the National Labor Relations Board Compliance Manual, at Section 10506:

Whenever possible, Regions should consider consolidating compliance issues (generally reserved for a subsequent compliance specification) with unfair labor practices in a complaint. Such consolidation may result in substantial conservation of time and resources. Sections 10508.3 and 10646.3 set forth the criteria for this determination.

The cited Manual provisions include as a factor favoring consolidation of compliance proceedings with the underlying unfair labor practice proceedings, situations "Where alter ego/derivative liability/successor or corporate veil piercing issues have arisen. (Section 10508.3)." Similarly, Regions are instructed to consider consolidated proceedings where "Alter ego or other derivative liability issues arise prior to the opening of the hearing" (Section 10646.6).

The Board has stated that a finding of derivative liability in a supplemental proceeding is only proper where the parties are "sufficiently closely related". See, Southeastern Envelope Co., 246 NLRB 423, 423 (1979) (involving an alter ego, and quoting Coast Delivery Service, Inc. 198 NLRB 1026, 1027 (1972) (an alter ego)).

While an entity that is alleged for the first time as a single employer with a charged entity may be found liable for an unfair labor practice in an NLRB remedial compliance proceeding, for the first time be alleged to be a single employer with a charged entity who has been found liable for an unfair labor practice, and then be found derivatively liable based on evidence adduced at the remedial hearing establishing that single employer status. Great Race Pizza Shoppes, 277 NLRB 1175 (1985); JMC Transport, 283 NLRB 554, 560 (1987) See discussion in Associated General Contractors of Connecticut, Inc., 929 F.2d 910 (2nd Cir., 1991) (rejecting Board decision finding derivative liability at the compliance hearing based on agency status, and remanding case for determination as to whether an entity was an alter ego or single employer). However, as stated by the Second Circuit in Associated General Contractors of Connecticut, Inc. supra, at 914:

We adhere to the view that derivative liability requires a showing of alter ego, successorship or single employer status. This heightened standard of liability is necessary to guarantee procedural fairness to a non-party to the original unfair labor practice proceeding. The exceedingly close

relationship of alter ego, successor, or single employer status provides assurance that the proceeding against the original party was equivalent to a proceeding against the newly added party. In those circumstances, the newly added party has had notice and opportunity to contest the charge through its control of the original party.

Thus there are due process considerations. Also, there may be issues concerning at what point in time the entity whose derivative liability is at stake had to constitute a single employer with the liable respondent. See discussion in Viking Industrial Security, Inc. 225 F.3d 131, 135 (2nd Cir., 2000) (denying enforcement of Board order finding derivative liability in the compliance phase, because the two companies were no longer single employers at the time the original unfair labor practice proceedings began).

As noted above, the Second Circuit case law concerning establishing derivative liability at the compliance stage pertains only to alter egos, successorship and single employers. Even if the Health Care Centers, HealthBridge, Care One and Care Realty are not single employers, they may be joint employers, and that issue must be litigated at the initial unfair labor practice hearing. It would be inefficient and illogical to litigate the joint employer status during the unfair labor practice proceeding only to later adduce evidence, potentially from the same witnesses, at a compliance hearing to establish single employer status. However, precluding Counsel for the Acting General Counsel to litigate single employer status in the initial case, as proposed by Counsel for the collective Respondent, would require such inefficiencies because joint employer status fails to establish derivative liability.

In the instant case, there are particularly strong reasons not to "put off" the single employer issue until the remedial phase. First, the Complaint, and its proposed amendments, specifically alleges that the multiple closely related business entities are a single and joint employer, and that the collective Respondent committed the unfair labor practices. Therefore it is appropriate to adjudicate the joint and single employer status during the initial unfair labor practice proceeding in response to the pleadings. Second, doing so will prevent potential due process issues and allow the respective Respondents a full and fair opportunity to litigate the closeness of the relationship at the time of the unfair labor practices. This multi-entity issue is complex and entails considerable documentary evidence. In the nursing home industry there is considerable turnover among entities that own the property, licensed operators, and manage the

facilities, as well as in the individuals who act on behalf of those entities. Such has been the history involving these Health Care Centers and the related Entities. Such is likely going forward as well. Thus, there is a real risk that the documentary and testamentary evidence as to single and joint employer status would disappear or be unavailable with the passage of time before any remedial stage.

Third, as a procedural matter, Respondents' request should be denied outright primarily because a significant portion of this case is the subject of a Section 10(J) Injunction proceeding in which irreparable harm is alleged as a result of the unfair labor practices. To delay such matters until the compliance phase of the case would further exacerbate the harm. Given the Respondent counsel's recent statements to the Counsel for Acting General Counsel indicating an intent to resist supplying at least some subpoenaed documents by resort to court appeals, bodes of a protracted dispute in the offing which could leave the liability issue unresolved for years.

C. Confidential and/or Proprietary Information

Respondents, and its related Entities, assert that the following Subpoenaed Items seek confidential and/or proprietary information: 2 a.-e., 4, 5, 6, 7a.-b., 8, 9, 10a.-e., 11, 12, 13, 16a., 16b., 17a.-e., 19a.-e., and 21a.-c. However, they fail to describe the general proprietary nature of the documents or the category of documents it claims are confidential. Notably, Respondents fail to assert that a protective order is necessary to preclude disclosure of its claimed confidential and proprietary information. Indeed, if the documents had been specified, Counsel for Acting General Counsel would have been able to consider this issue of confidentiality/proprietary information to see if there was any room for reaching a resolution of how documents should be handled. Moreover, rather than permit Respondents and the Entities to unilaterally determine what documents are producible, the proper method for addressing any such concerns is for Respondents to create a log or Vaughn Index. See, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

D. Attorney-Client Privilege and Attorney Work Product

Respondents, and it related Entities, assert that the following Subpoenaed Items seek documents protected by attorney-client privilege and attorney work product: 16a., 17a.-e., 19a.-e. and 26. However, such claims are wholly unsupported and should be summarily denied. The Board has found that where documents were "not shown to have been prepared by and attorney or with a attorney's assistance...[they do] not

...qualify for exemption from disclosure on the attorney client privilege or attorney-work product." ASARCO, Inc., 276 NRLB 1367, 1370 (1985). Respondents and the other Entities have failed to create a log identifying such documents and related key data, or otherwise anywhere identified any specific matter that implicates the privilege. Further, where attorney-client privilege is a genuine concern, Respondents should create a privilege log or Vaughn Index, similar to the procedures in civil discovery when matters are alleged to be protected by attorney-client privilege. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Also, inasmuch as Respondent and the Entities have numerous representatives in business capacities who happen to be attorneys, even if Respondents and the Entities identify and log the documents asserted to fall within the privilege, the log should contain the name and capacity of the representative involved to enable and inquiry about whether the material truly falls within the attorney client privilege.

Accordingly, given the absence of both a demonstration of an attorney-client relationship and evidence that the materials in question were prepared by or with the assistance of an attorney these arguments should be rejected.

E. Outside of Individual Respondent's Custody or Control

The Respondents assert that certain documents are outside their custody or control: however, again they have failed to be specific or to identify who has present custody. Because one substantive subpoena was issued to multiple Entities, it is understandable that there are many categories of information which only certain of the Entities would have in their control or custody. It was impossible for Counsel for the Acting General Counsel to know or predict where those documents reside and who controls them. If an Entity genuinely does not have custody or control of the document, or know what documents exists with the other Entities and where the documents reside, obviously it cannot supply them. The problem is that the Entities have not been specific, and have repeatedly made this claim to the degree that they make it sound like no one has custody or control. Thus this claim too should be rejected.

F. The Subpoenas' Instructions and Cover Letter are Unauthorized by Board's Rules and Regulations.

Respondents object to the subpoena instructions and cover letter, provided to assist with production, by simply stating that it is not compelled to follow the instructions under the Board Rules and Regulations. However, the instructions are part of the

Single and Joint Employer Subpoena and as such are incorporated therein. Respondents fail to state any reason sufficient in law that the subpoena instructions are otherwise invalid. The Instructions that assist and guide respondents in its compliance with subpoena requests is customary in Board proceedings. Here, Respondents provide no clear reason as to how it is harmed or burdened by accepting such assistance. In addition, Respondents have a general obligation to produce the documents in the order requested in an itemized format. Despite that the cover letter is not incorporated in the Subpoenas, the content of the cover letter seeks information needed to determine the best method to retrieve stored e-mails covered by the subpoena. In the event, Respondents are unwilling to produce such information in response to the subpoenas the information may be adduced at the hearing by the custodian of record under examination. Furthermore, Counsel for the Acting General Counsel's inquiry as to the steps taken to search and retrieve the e-mails is necessary to adduce whether retrieval of such information is in fact unduly burdensome and/or potentially expensive as claimed by Respondent, and addressed in more detail below.

G. The form of the subpoena requests do not comport with the form of the documents, and a search for e-mails is unduly burdensome and expensive.

Respondents do not raise an issue upon which subpoena revocation is warranted by simply asserting that the subpoenaed items fail to comport with the form of the existing documents. If the subpoena request generally relates to the subject matter of the document in its existing form, production is required.

Respondents seek to revoke the portion of the subpoena regarding the search and restoration of e-mails records on the basis that it is "burdensome, time-consuming and expensive." However, Respondents fail to explain the process for storing and searching its emails on backup tapes with information sufficiently specific for Counsel of the Acting General Counsel to evaluate and respond to its claims. Specifically, Respondents have not identified the following: 1. The Email system (i.e. Microsoft Outlook, Lotus Notes, etc.); 2. The type of backup tapes (i.e. DLT or LTO); 3. The backup software used or whether the software creates a "snapshot" backup or an "incremental" backup; 4.) Whether the backup systems are comingled with other backup systems, and to what extent they are comingled. Absent this basic information about Respondents' systems, its bald assertions that production is burdensome, time-consuming and expensive cannot be evaluated nor should it be relied on to revoke the

subpoenas. In addition, without Respondents knowledge of such information, it is unlikely Respondent could obtain a good faith estimate or cost evaluation from a third-party vendor to search and retrieve the subpoenaed records.

H. Respondents' Assert the Subpoenaed Documents are Irrelevant to the Complaint, a "Fishing Expedition" and Unreasonably Broad in scope and Lack sufficient particularity.

As to the relevance and breadth of the subpoenas, a review of the Single and Joint Employer Subpoenaed Items measured against the allegations of the Complaint (Paragraphs 2(a),(b),(c), 3(a)(b), 4(a)(b)(c)(d)) establish that the requested documents are germane to the issues raised in the pleadings and Respondents' anticipated defenses, and thus the subpoenas are relevant under the standard applied to Board subpoenas. GHR Energy Corp., 707 F.2d 110, 114 (5th Cir. 1982); NLRB v. United Aircraft Corp., 200 F. Supp. 48, 50 (D. Conn. 1961), aff'd 300 F.2d 442 (2nd Cir. 1962). Respondents and the Entities have typically failed to identify the specific requested documents that are purportedly not relevant. In addition, the Subpoenas request documents with sufficient particularity to identify the document by name, i.e. Articles of Incorporation, Partnership Agreement, etc., or by subject matter, i.e. documents that will show the nature of the business relationship and/or ownership. Thus providing Respondents with sufficient particularity to enable them to identify, locate and produce the information.

Based on the legal framework of joint and single employer status, the relevance of the documents sought is quite clear. To establish joint employer status, the General Counsel must establish that Respondents and its related Entities, share or co-determine matters governing the essential terms and conditions of employment. TLI, Inc., 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985). In this regard, the Board finds important whether an employer's exercise of control is direct and immediate. TLI, Inc., 271 NLRB at 798-79; In Re Airborne Freight Co., 338 NLRB 597 (2002).

To establish single employer status, the Board looks at whether any of the following four factors are met: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management, and (4) common ownership. Silver Court Nursing Ctr., Inc. & Health Care Services Group, Inc., 313 NLRB 1141, 1142 (1994); referencing Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965). None of the factors are controlling, however, the Board emphasizes the

importance of centralized control of labor relations, and the first three factors generally establish a single integrated business enterprise. Hydrolines, Inc., 305 NLRB 416, 417 (1991), citing NLRB v. Al Bryant, Inc., 711 F.2d 543, 551 (3d Cir. 1983).

Contrary to Respondents' generalized assertion that the documents are irrelevant, the subpoenaed information directly relates to the legal framework of joint and single employer status referenced above. Respondents' objection to the breath of the subpoenas, particularly, that they are overly broad and unduly burdensome, is refuted by the documents direct relevance to the Complaint allegations of joint and single employer status. Where a party asserts that a subpoena is overbroad, the criteria is whether a demand is "unreasonably" overbroad. FTC v. Texaco, 555 F.2d 862 (D.C. Cir. 1977) cert denied, 431 U.S.974 (1977). The party that seeks to avoid disclosure of subpoenaed documents bear the burden of establishing that "it is unduly burdensome or oppressive," See FDIC v. Garner, 126 F.3d 1138, 1145 (9th Cir. 1997), and that production "would seriously disrupt its normal business operations." NLRB v. Carolina Food Processors, Inc., 81 F.3d 507, 513 (4th Cir. 1996) (quoting EEOC v. Maryland Cup Corp., 785 F.2d 471, 477 (4th Cir. 1986)).

The Respondents and its related Entities have failed to meet its burden. Particularly, given the complexity of the business structures, described in more detail below, the breath of the subpoenaed documents is not only reasonable but necessary to adjudicate the single and joint employer status of numerous interrelated business entities. In addition, the documents are likely to yield evidence concerning the different Respondents and their agents' actual participation in the unfair labor practices.

Subpoenaed Items 1 through 10

Production of these subpoenaed items should be compelled because they are necessary to provide a clear picture of the nature of the entities involved in this case such as the Respondents' ownership, any areas of functional integration of operations among Respondents including personnel, services or products and finances, among other factors. These Items also focus on the details of HealthBridge's structure and operations and which entities and individuals made the decisions to undertake actions whose unlawfulness is alleged in the Complaint. As such, the documents sought will provide critical evidence pertaining to the single and joint employer allegations of the Complaint, as well as the responsibility of entities and individuals for the actual alleged unfair labor practice as well as remedial aspects of the case.

In this regard, it is believed that the documents will show that Care One and Care One Management have a close relationship with Respondents as part of the integrated business enterprise. It appears undisputed that Care One is the sole member or "owner" of HealthBridge Management. It is further believed that Care One, is owned by Daniel Straus and members of the extended Straus family. HealthBridge Management has a management contract with each of the Respondent Health Care Centers. Further there is evidence, albeit disputed, that Care One is involved in the Health Care Centers. Care One shares the same principle place of business with Care One Management, and HealthBridge Management. In addition, it appears that the employees located at the Respondent Health Care Centers receive substantial employee benefits and services from Care One Management, and Care One.

Subpoenaed Items 11 through 18⁵

Production of these Subpoenaed Items should be compelled because they are necessary to establish Respondents and its related Entities functional integration of operations including the ownership of real property for the six health care centers, common management, and any shared use of professional services and utilities, among other factors.

It is believed that production of these records will establish that Care Realty is the indirect owner of the Health Care Centers' operating LLCs, which are named Respondents, through several wholly owned pass-through companies (THCI Company, LLC and THCI Holding Company, LLC).⁶ It is further believed that Care Realty owns the real property that houses the health care centers through separate LLCs. It also appears that THCI Mortgage Holding Company, LLC, whose exact relationship to Care Realty is unclear to Counsel for Acting General Counsel, is either the indirect or direct owner of the 710 Long Ridge Road Operating Company, LLC, which operates Long Ridge of Stamford.⁷

To the extent Respondents assert that it is unable to understand the term "operating plans" requested by the Subpoenas, such a claim is disingenuous given the

⁵ Respondents generalized objections to these subpoenaed items are addressed in paragraphs A through H herein. Particularly, the claim of attorney/client and work product privileges Respondents must take the approach referenced herein.

⁶ Care Realty is the sole member ("owner") of THCI Holding Company, LLC which in turn is the sole member of THCI Company, LLC, which is the sole member of five of the six Health Care Centers operating company LLCs.

⁷ No subpoenas have been issued to the property owner LLCs.

apparent complex nature of its business structure and ownership. Furthermore, the plans that guide the operation of these business structures are clearly identified by the subpoenaed item and should be produced.

Subpoenaed Items 19 through 26⁸

Production of these Subpoenaed Items should be compelled because they include the most basic data – the organizational structure, including supervisory and managerial structure, of the Health Care Centers. This is relevant not only to the single employer issue, but to subpoena paragraph 9.

These subpoena paragraphs also seek the identity of Respondents' bargaining teams and/or committees that developed Respondents' bargaining strategy executed at negotiations. In this regard, Respondents bargained with the Union as one, proposed identical bargaining proposals for each of the six Respondent Health Care Centers, issued identical or nearly identical threats to employees regarding lockouts and facility closures. Indeed, HealthBridge represented late in the investigation that there is a management team which has directed its labor relations and operations, and the team members include individuals associated with some of the other Entities.

In addition, the Subpoenaed Items seek documents showing certain information for businesses that provide oversight of HealthBridge and the Health Care Center's operations management or financial management. There is preliminary evidence that certain individuals and entities are associated with the extensive network of "Care" and Straus family members which do provide this oversight, although it is not clear in what capacity they are doing so. These documents are germane to the issue of which entities and individuals participate in control of activities (including labor relations) at the Health Care Centers and HealthBridge and go to the Complaint allegations naming a collective "Respondent" as responsible for certain events, as well as the single employer allegations.

As such, the subpoenaed items directly relate to the joint and single employer status plead in Complaint Paragraphs 2(a),(b),(c), 3(a)(b), 4(a)(b)(c)(d) and bad-faith bargaining allegations plead in Paragraph 17.

⁸ Respondents generalized objections to these subpoenaed items are addressed in paragraphs A through H herein. Particularly, the claim of attorney/client and work product privileges Respondents must take the approach referenced herein.

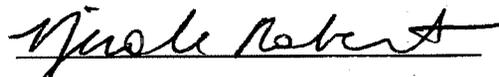
III. CONCLUSION

Based upon the above, Respondents and the Entities effort to nullify the subpoenas should be rejected. In this regard, the subpoena seeks documents that are germane to the issues raised in the pleadings and Respondent's anticipated defenses, the relevant standards applied to Board subpoenas. NLRB v. GHR Energy Corp, supra and NLRB v. United Aircraft, supra. Further, Respondents and the Entities have failed to provide a basis for application of the attorney client privilege or work product doctrines or confidentiality/proprietary informant exemption, or to otherwise provide a basis to revoke the subpoena.

For these and the reasons noted above, Counsel for the Acting General Counsel respectfully urges the Administrative Law Judge to deny Respondents' and the Entities Petitions to Revoke and Partially Revoke in their entirety.

Dated at Hartford, Connecticut this 6th day of September, 2012.

Respectfully submitted,



Nicole Roberts
Counsel for Acting General Counsel
National Labor Relations Board
Region 34

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

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

and

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

Case Nos. 34-CA-070823
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**AFFIDAVIT OF SERVICE OF COUNSEL FOR ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENTS' AND RELATED ENTITIES' PETITIONS TO
REVOKE SUBPOENAS DUCES TECUM – JOINT AND SINGLE EMPLOYER STATUS**

I, the undersigned employee of the National Labor Relations Board, state under oath that on September 6, 2012, I served the above-entitled document(s) by certified mail upon the following persons, addressed to them at the following addresses:

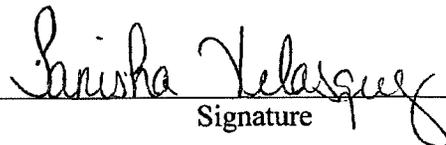
SEE ATTACHED

September 6, 2012

Date

Tanisha Velasquez, Designated Agent of
NLRB

Name


Signature

EDWARD REMILLARD, REGIONAL
HUMAN RESOURCES MANAGER
HEALTHBRIDGE MANAGEMENT
57 OLD ROAD TO NINE ACRE CORNER
CONCORD, MA 01742
Certified Mail
70103090000339331097

CARE ONE, LLC
173 BRIDGE PLZ N
FORT LEE, NJ 07024-7575
Certified Mail
70103090000339330816

JOANNE WALLAK, ADMINISTRATOR
245 ORANGE AVENUE OPERATING
COMPANY, II, LLC D/B/A WEST RIVER
HEALTH CARE
245 ORANGE AVE
MILFORD, CT 06461-2104
Certified Mail
70103090000339330960

CARE REALTY (A/K/A CAREONE)
173 BRIDGE PLZ N
FORT LEE, NJ 07024-7575
Certified Mail
70103090000339330946

107 OSBORNE STREET OPERATING
COMPANY II, LLC D/B/A DANBURY
HEALTH CARE CENTER
107 OSBORNE ST
DANBURY, CT 06810-6016
Certified Mail
70103090000339330922

SUZANNE CLARK, VICE PRESIDENT
NEW ENGLAND HEALTH CARE
EMPLOYEES UNION, DISTRICT 1199,
SEIU
77 HUYSHOPE AVE FL 1
HARTFORD, CT 06106-7000
Certified Mail
70103090000339330991

GEORGE W. LOVELAND II, ESQUIRE
LITTLER MENDELSON, P.C.
3725 CHAMPION HILLS DR
STE 3000
MEMPHIS, TN 38125-0500
Certified Mail
70103090000339330915

240 CHURCH ST OPERATING
COMPANY II, LLC D/B/A NEWINGTON
HEALTH CARE CENTER
240 CHURCH ST
NEWINGTON, CT 06111-4806
Certified Mail
70103090000339330977

1 BURR ROAD OPERATING CENTER II,
LLC D/B/A WESTPORT HEALTH CARE
CENTER
1 BURR RD
WESTPORT, CT 06880-4220
Certified Mail
70103090000339330953

WETHERSFIELD HEALTH CARE
57 OLD ROAD TO NINE ACRE CORNER
CONCORD, MA 01742
Certified Mail
70103090000339330939

710 LONG RIDGE OPERATING CO. II,
D/B/A LONG RIDGE OF STAMFORD
HEALTH CARE CENTER
710 LONG RIDGE RD
STAMFORD, CT 06902-1226
Certified Mail
70103090000339331004

KEVIN A. CREANE, ESQUIRE
LAW FIRM OF JOHN M. CREANE
92 CHERRY ST
P.O. BOX 170
MILFORD, CT 06460-3413
Certified Mail
70103090000339330984

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

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

and

**Cases 34-CA-12715
34-CA-12732
34-CA-12765
34-CA-12766
34-CA-12767
34-CA-12768
34-CA-12769
34-CA-12770
34-CA-12771**

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

ORDER

The Petitioners' Requests for Special Permission to Appeal Administrative Law Judge Steven Fish's ruling denying their petitions to revoke or partially revoke the Acting General Counsel's Subpoenas Duces Tecum¹ are denied in part and granted in part. The Respondent is directed to provide all responsive documents and communications available without resort to analysis of the email backup tapes, subject to the Acting General Counsel having the opportunity to persuade the judge that additional search is necessary and the Respondent

¹ As specified by the Acting General Counsel in his opposition to the petitions to revoke, the period covered by paragraph 27 in the subpoenas duces tecum is January 1, 2008 to present, not January 1, 2007 to present.

having the opportunity to demonstrate that it would be unduly burdensome.²

Dated, Washington, D.C., October 18, 2011.

MARK GASTON PEARCE ,	CHAIRMAN
CRAIG BECKER,	MEMBER
BRIAN E. HAYES,	MEMBER

² Member Hayes would grant the special appeals of the non-respondent entities, subject to the Acting General Counsel having the opportunity to persuade the judge that some or all of the subpoenaed material is necessary to prosecute the allegations of the complaint.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

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

and

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

**Case Nos. 34-CA-070823
34-CA-072875
34-CA-075226
34-CA-083335
34-CA-084717**

DATE OF MAILING October 15, 2012

COUNSEL FOR ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' AND RELATED ENTITIES' REQUEST FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGES ORDER DENYING RESPONDENTS' PETITIONS TO REVOKE SUBPOENAS DUCES TECUM

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by email upon the following persons, addressed to them at the following addresses:

LESTER A. HELTZER, EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET, N.W., SUITE 11100
WASHINGTON, DC 20570

KENNETH CHU, ADMINISTRATIVE LAW JUDGE
NATIONAL LABOR RELATIONS BOARD, DIVISION OF JUDGES
120 WEST 45TH STREET
NEW YORK, NEW YORK 10036

KEVIN A. CREANE, ESQ.
LAW FIRM OF JOHN M. CREANE
92 CHERRY STREET
P.O. BOX 170
MILFORD, CT 06460

JOHN DORAN, ESQ.
GEORGE W. LOVELAND II, ESQ.
LITTLER MENDELSON, P.C.
3725 CHAMPION HILLS DR.
STE 3000
MEMPHIS, TN 38125-0500

ROSEMARY ALITO
K&L GATES LLP
ONE NEWARK CENTER, 10TH FLOOR
NEWARK, NEW JERSEY 07102

Subscribed and sworn to before me this

15th day of October, 2012

DESIGNATED AGENT

Elizabeth C. Person /s/

NATIONAL LABOR RELATIONS BOARD